



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

Reserved on: 19th February, 2024

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Pronounced on: 31st May, 2024

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CS(OS) 270/2016

ASHA SRIVASTAVA

D/o Late Shri Kishan Gopal,
W/o Dr. Arun Kumar,
R/o 680, Indra Nagar Colony,
Dehradun, Uttranchal

..... Plaintiff

Through: Mr. Anil Sapra, Sr. Advocate, Mr.
Gagan Mathur, Mr. Varun Kumar &
Mr. Dipankar Madaan, Advocates.

versus

1. **ARUN SRIVASTAVA**

S/o Late Shri Kishan Gopal,
R/o 5, Shankracharya Marg,
Delhi

..... Defendant No. 1

2. **AJAY DEWAN**

S/o Late Shri Kishan Gopal,
R/o 5, Shankracharya Marg,
Delhi

..... Defendant No. 2

3. **ANUP DEWAN**

S/o Late Shri Kishan Gopal,
R/o 5, Shankracharya Marg,
Delhi

..... Defendant No. 4

4. **AMITA SHADEAO**

W/o Shri Sadashiv Shahdeo,
R/o 5, Shankracharya Marg,
Delhi

..... Defendant No. 4

5. **ANITA KOTPAL**



W/o Dr. Pradeep Kotpal,
R/o R-7, 47, Jawahar Quarters,
Civil Lines, Meerut, U.P.

..... Defendant No. 5

Through: Mr. Sanjay Poddar, Sr. Advocate with
Mr. Sandeep Bajaj, Mr. Govind
Chaudhary, Mr. Soayib Quereshi &
Mr. Harikesh Anirudhan, Advocates
for D-1 & D-3.
Mr. Jagdeep Kishore, Advocate for
D-2.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA
J U D G M E N T

NEENA BANSAL KRISHNA, J.

1. The *Suit for Partition* has been filed on behalf of the plaintiff against her three brothers, who are the defendant Nos. 1 to 3 and two sisters, who are the defendant Nos. 4 and 5.
2. Late Smt. Kaushalya Srivastava, mother of the parties to the Suit, was the owner of the following suit properties: -
 - (i) Property bearing (now known as 5, Shankracharya Marg, Civil Lines, Delhi), admeasuring about 2250 sq. yards,
 - (ii) Undivided 1/5th share in plot of land admeasuring 12500 sq. yards known as Ajanta Cinema Complex, Ajay Enclave, Najafgarh Road, New Delhi.
3. It is asserted that the property No. 5, Metcalf Road, Civil Lines, Delhi at was acquired by Late Smt. Kaushalya Srivastava in the year 1964 by virtue of a Sale Deed. The suit property described as Ajanta Cinema Complex was originally owned by Late Shri Dewan Sarup Lal, father-in-law



of Late Smt. Kaushalya Srivastava . On the demise of Shri Dewan Sarup Lal and the mother of Shri Kishan Gopal, the plaintiff became entitled to 1/6th share in the suit property. Her brother-in-law, Shri Raj Gopal, one of the sons of Late Shri Dewan Sarup Lal, executed the Relinquishment Deed dated 07.11.1988 in respect of his share in favour of Late Smt. Kaushalya Srivastava who became the owner of 1/5th share of the suit property mentioned above at serial No. 2, known as Ajanta Cinema Complex, Ajay Enclave, Najafgarh Road, New Delhi.

4. Late Smt. Kaushalya Srivastava died intestate on 14.04.2007, her husband (father of the parties to the Suit) also died on 16.11.2007. After the demise of the parents, the plaintiff and her five siblings/defendants herein have become entitled to 1/6th share each in the suit properties, for which the present Suit for Partition has been filed.

5. **The defendant Nos. 1 and 3 in their joint Written Statement** have taken the preliminary objection that the Suit is grossly undervalued and the requisite court fee has not been paid in respect of the suit properties. They have also taken a plea that the Suit is *barred by limitation* as the Wills of 2002 could have been challenged by her within three years

6. It is further asserted that the registered Will dated 02.02.2002 had been executed by Late Smt. Kaushalya Srivastava in favour of the defendant Nos. 1 to 3 to the exclusion of all the three daughters. Therefore, the Suit for Partition filed by the plaintiff, claiming her share in the suit properties, is not maintainable.

7. It is submitted that pursuant to the Will dated 02.02.2002, the defendant Nos. 1 to 3 have already got the properties mutated in their name *vide* Mutation Order dated 09.01.2009 and have been paying the property



tax, maintenance tax and other charges on the suit properties and are enjoying the properties to the exclusion of the plaintiff.

8. It is also submitted that the plaintiff had never raised any objection whatsoever and had ever claimed any share, but suddenly with *mala fide* intentions, illegal demands are being made by the plaintiff.

9. The defendant Nos. 1 and 3 have further explained that their father, Shri Kishan Gopal had also executed a registered Will dated 18.01.2002 by virtue of which he bequeathed his entire estate to defendant Nos. 1 to 3.

10. It has been further explained that prior to the Will dated 18.01.2002, Shri Kishan Gopal had earlier executed a Will dated 06.06.1989, to which the plaintiff and others were a witness.

11. It is submitted that the plaintiff is fully aware about the said two Wills since beginning as the answering defendants had handed over the copy of the same to all the siblings after the demise of the parents. The veracity of the Wills has never been challenged by the plaintiff. The plaintiff cannot deny the existence of the Will dated 6.06.1989 as it was admittedly in her knowledge. The plaintiff is making a false statement that their father, Shri Kishan Gopal had expired intestate when in fact, he has left a registered Will dated 18.01.2002.

12. The defendant Nos. 1 and 3 have further taken an objection that the plaintiff has wrongly claimed that the suit property at Ajanta Cinema Complex is an ancestral property. In fact, the plaintiff in her Notice dated 17.10.2016 had taken a contrary stand.

13. It has been explained that Late Shri Dewan Sarup Lal, father of Late Shri Kishan Gopal, had executed a registered Gift Deed dated 23.06.1959 thereby transferring 12,400 sq. yards of the suit property Ajanta Cinema



Complex. The two younger brothers, namely, Shri Raj Gopal and Shri Shyam Gopal of Late Shri Kishan Gopal, father of the parties, as a consequence of the Gift Deed dated 23.06.1959, became the owners of the said property. It is submitted that Shri Raj Gopal relinquished his share in favour of Late Shri Kishan Gopal and others.

14. It is further explained that Shri Raj Gopal and Shri Shyam Gopal formed a Partnership Firm in the name and style of 'Ambica & Co.' and bought some piece of land as their share of the capital in the Partnership Firm with other three partners, namely, Shri Shiv Gopal, son of Late Dewan Sarup Lal, Shri Arun Srivastava/ defendant No. 1, son of Late Dewan Sarup Lal and Shri Pawan Dewan, son of Shri Major Jai Gopal Srivastava. Thereafter, 'Ambica & Co.' took loans and gathered resources to build Ajanta Cinema on the said plot of land, which remained operational from 1966 to 1993. The building came to be known as Ajanta Cinema Complex and was the asset of 'M/s Ambica & Co.'.

15. It is asserted that in the year 1983, pursuant to a Memorandum of Family Partition, the division of M/s Ambica & Co. took place and became a part of the Decree dated 27.05.1991 passed in Suit No. 2803/1998. By virtue of the said Decree, the three partners i.e., Shri Raj Gopal, Shri Shiv Gopal and Shri Pawan Dewan retired from the partnership and the Ajanta Cinema Complex came to the share of two continuing partners i.e., Shri Shyam Gopal and his family and Dr. Arun Srivastava, defendant No. 1 and his parents.

16. Thereafter, in the year 1993, a further partition took place between Shri Shyam Gopal and his family and Dr. Arun Srivastava and his family, whereby the land and building of M/s Ambica & Co. was divided into two



equal shares, with each group owning 6200 sq. yards. This partition was also accepted and made into a Decree passed in Suit No. 2644/1993.

17. It is submitted that in view of the said division, in the group led by Dr. Arun Srivastava, there were five co-sharers, namely, defendant Nos. 1 to 3 and their parents who all became entitled to 1/5th share each. Both the parents have bequeathed their 1/5th share in the Ajanta Complex through their respective Wills dated 02.02.2002 and 18.02.2002 in favour of the defendant Nos. 1 to 3. The plaintiff thus, has no legal right and title in the suit properties.

18. It is specifically denied that the suit properties are HUF properties. It is explained that the suit property mentioned at serial No. 1 was the exclusive property of the mother. While the suit property mentioned above at serial No. 2 was jointly owned by the defendant Nos. 1 to 3 with their parents in their individual rights. It is, therefore, submitted that the present Suit for Partition is without merit and is liable to be dismissed.

19. It is claimed that the present Suit is an attempt by the plaintiff to usurp the suit properties thereby depriving the defendants of their legitimate claims. The plaintiff despite being aware that she has no right and title in the suit properties and she has also never raised any such demands on any occasion. The averments made in the Plaint are false and, therefore, the present Suit is not maintainable.

20. **The defendant No. 2 as well as defendant Nos. 4 and 5 in their respective Written Statements** have taken a similar defence as has been taken by the defendant Nos. 1 and 3.

21. **The plaintiff in her Replications to the respective Written Statements** has categorically denied that she was aware about the execution



of the Wills by her parents. The plaintiff has reiterated her right to a share in the properties of Late Smt. Kaushalya Srivastava .

22. The plaintiff has asserted that the Wills are forged and fabricated and Late Smt. Kaushalya Srivastava had not got her Will registered. At the alleged time of execution of the Will, she was neither physically nor mentally fit to execute the said alleged Will.

23. In April, 1999, the condition of Late Smt. Kaushalya Srivastava became worse and she went into a state of delirium. Late Smt. Kaushalya Srivastava was admitted in ICU of Tirath Ram Shah Memorial Hospital, Civil Lines, Delhi under the medical supervision of Dr. O.P. Aggarwal, MRCP. Her medical condition did not improve and she developed incoherent speech, mental agitation and loss of orientation of time and space. Dr. K.B. Hasti, Neurologist was also consulted but her condition did not improve. Finally, Dr. R.K. Gupta, M.D., Endocrinologist was invited from Sir Ganga Ram Hospital and on his advice, Late Smt. Kaushalya Srivastava was shifted to Sir Ganga Ram Hospital in May, 1999 under the supervision of Dr. R.K. Gupta. She was given specific hormone therapy with high doses of calcium. In order to administer drugs to Late Smt. Kaushalya Srivastava, an intravenous route was adopted by putting a permanent cannula in her neck blood vessel. She remained in Sir Ganga Ram Hospital for about 40 days and was discharged in June, 1999. Dr. R.K. Gupta advised her heavy doses of oral medication and to stay at home. However, the condition of Late Smt. Kaushalya Srivastava deteriorated over a period of time and she was hospitalised time and again after 1999 which continued till her demise.

24. The plaintiff has also explained that in March, 2007 before the demise



of Late Smt. Kaushalya Srivastava , she was again admitted in S.P.H. in poor physical and mental state. Late Smt. Kaushalya Srivastava developed severe skin infections, sleeplessness and became incoherent with hallucinations and mistaken identities. The plaintiff attended to Late Smt. Kaushalya Srivastava in the hospital. Moreover, Late Smt. Kaushalya Srivastava suffered from various conditions, including post-operative Hyperparathyroidism leading to Panhypopituitarism with mental depression, hypertension, heart problems, arthritis in both knee joints, severe calcium deficiency, hormonal disbalance etc., which severely affected her physical and mental health. The mental and physical condition of Late Smt. Kaushalya Srivastava kept on deteriorating progressively and she was not in sound mental and physical health and was unable to understand things.

25. While Late Smt. Kaushalya Srivastava was in such a poor and physical health, she remained in the custody of defendant No. 1 at the time when the alleged Will was executed. It is claimed that the defendant No. 1 being a Doctor, managed to procure false documents. The alleged Will of Late Smt. Kaushalya Srivastava is without her free will and consent and is inequitable inasmuch as it deprives the plaintiff of her valuable right, while benefitting the defendant Nos. 1 to 3. There is no logical cause for excluding the plaintiff from the suit properties or the Fixed Deposits.

26. Furthermore, the alleged Will was never acted upon. Also, the attesting witnesses to the alleged Will are employees and friends of defendant Nos. 1 to 3. Shri Sunil Gaur, the attesting witness No. 1, was in the employment of Dr. Arun Srivastava and was involved in manufacturing of shampoo with him. The second attesting witness was not known to Late Smt. Kaushalya Srivastava.



27. It is claimed that the attending circumstances to the execution of the alleged Will are not only suspicious, inequitable but also constitute sufficient grounds to establish that the alleged Will is a forged and fabricated document.

28. The plaintiff has further asserted that Late Smt. Kaushalya Srivastava was not having good and cordial relationship with her daughter-in-laws.

29. The plaintiff has further claimed that the mutation of the suit properties, if done in the name of defendant Nos. 1 to 3, is illegal. Moreover, mutation is only for the purpose of assessment of property tax and does not confer any right, title and interest in the suit properties. It is further asserted that the Municipal Authorities before doing mutation, take an undertaking and indemnity from the applicant applying for mutation and in case it is found that he is not the owner of the property, the mutation so effected, shall be cancelled. Therefore, the defendant Nos. 1 to 3 be put to strict proof of the allegations made in this regard.

30. The plaintiff has denied the allegations made by the defendants in their Written Statements and reaffirmed that she is entitled to share in the suit properties.

31. ***Issues on the pleadings*** were framed on 25.04.2017 as under: -

“(i) Whether the document dated 2nd February, 2002 is the validly executed last Will of the deceased Late Smt. Kaushalya Srivastava ? OPD-1 to 5.

(ii) Whether Smt. Kaushalya Shrivastava was the owner of 1/5th share in plot of land ad measuring 12500 sq. yds. known as Ajanta Cinema Complex, Ajay Enclave Najafgarh Road, New Delhi as claimed by the plaintiff or the owner of 1/5th of half share in the said land as contended by defendants no. 1 to 5? OPP



(iii) *Relief.*”

32. **The plaintiff examined herself as PW1** and tendered her evidence by way of affidavit, Ex.PW1/A.

33. **PW2/Anil Kumar**, Medical Record Officer, Tirath Ram Shah Hospital, Civil Lines, Delhi produced the Certificate of the Medical Superintendent of the hospital Ex. PW2/A and deposed that the medical records pertaining to Late Smt. Kaushalya Srivastava from the period 1999 to 2007 had since been destroyed.

34. **PW3 Dr. Ram Sharma, Tirath Ram Shah Hospital**, deposed about the line of treatment of Late Smt. Kaushalya Srivastava .

35. **PW4 Dr. Arun Kumar, husband of the plaintiff, who is also a Doctor**, deposed about the medical condition of Late Smt. Kaushalya Srivastava.

36. The defendants, in support of their case, examined **DW1/Vivek Yada, Lower Division Clerk**, Office of Sub-Registrar-II, Basai Darapur, New Delhi, produced the record pertaining to the registered Will dated 02.02.2002 of Late Smt. Kaushalya Srivastava . The certified copy of the said Will is Ex.DW1/1. The registered Will dated 02.02.2002 of Shri Kishan Gopal is Ex. DW1/2.

37. **DW2/Dr. Nandni Sharma**, Specialist in Gynaecology and Obstetrics, deposed that the family of Shri Kishan Gopal was known to her for the last more than two decades and she had been rendering her medical services to Late Smt. Kaushalya Srivastava till her death on 14.04.2007. She also deposed about the health of Late Smt. Kaushalya Srivastava and the treatment undergone by her.



38. **DW3 Sunil Kumar Gaur**, the attesting witness, deposed that he had attested the Wills both dated 02.02.2002 respectively of Late Shri Kishan Gopal and of Late Smt. Kaushalya Srivastava in the presence of Shri Vinod Rohilla and two officials from the Office of Sub-Registrar.

39. **DW4/Dr. Vimal Kumar Srivastava**, nephew of Late Shri Kishan Gopal, deposed that Late Shri Kishan Gopal and Late Smt. Kaushalya Srivastava were having good health and were in a happy state of mind.

40. **DW5/Dr. Arun Srivastava/defendant No. 1 and General Power of Attorney Holder of defendant No. 3** deposed in support of his assertions made in the Written Statement.

41. **DW6/Abhay Singh**, Advocate, deposed that he was the Advocate in Civil Suit bearing CS(OS) 2644/1993 filed by Shri Ashish Gopal against Shri Kishan Gopal which got compromised on an Application under Order XXIII Rule 3 of the Code of Civil Procedure, 1908 moved by him on behalf of Shri Kishan Gopal and others.

42. **DW/7/Dr. Om Prakash**, Cardiologist, Tirath Ram Shah Hospital, Civil Lines, Delhi, deposed that he knew Shri Kishan Gopal and also deposed about the medical health of Late Smt. Kaushalya Srivastava .

43. **Submissions heard and the documents as well as the evidence perused.**

44. My issue-wise findings are as under: -

Issue No. 1: Whether the document dated 2nd February, 2002 is the validly executed last Will of the deceased Smt. Late Smt. Kaushalya Srivastava ? OPD-1 to 5.



45. The plaintiff, who is the sister of the defendants, has claimed that their mother, Late Smt. Kaushalya Srivastava died intestate, whereby she has inherited 1/5th share in the property of mother, Late Smt. Kaushalya Srivastava . The plaintiff has deposed that there was no Will executed by Late Smt. Kaushalya Srivastava during her lifetime and the alleged registered Will dated 02.02.2002 is a forged and fabricated document. She has claimed that Late Smt. Kaushalya Srivastava was not in a sound and deposing mind at the time of the execution of the Will.

46. The defendants, however, have claimed that their mother, Late Smt. Kaushalya Srivastava and father, Late Shri Kishan Gopal had registered their respective Wills on the same date i.e., 02.02.2002, bequeathing their respective interest in the suit properties in a similar and identical manner. The Will of the father is not in dispute. The mother, Late Smt. Kaushalya Srivastava in her Will, had bequeathed her entire property to the three sons to the exclusion of the three daughters.

Execution of the Will dated 02.02.2002 of Smt. Late Smt. Kaushalya Srivastava :

47. *Section 63 (a) & (b) of the Indian Succession Act, 1925* provides the requisites for the execution of a valid Will. It states that the testator must affix his signature on the Will and it shall appear that it was intended thereby to give effect to the writing as a Will.

48. *Section 63(c) Act, 1925* further provides that a Will must be attested by two or more witnesses, each of whom should have seen the testator sign or put his mark on the Will. The Will must be signed by the witnesses in the presence of the testator, but it is not necessary that more than one witness



should be present at the same time. *Section 68 of the Indian Evidence Act, 1872* provides for manner of **proof of execution of a document** required by law to be attested, which provides that where a document is required by the law to be attested, it shall not be used as evidence until at least one attesting witness has been called for proving its execution (if the attesting witness is available).

49. To prove the execution of the Will, DW5 Mr. Arun Srivastava (who is also the General Power of Attorney of defendant No. 3/Anup Dewan), son of Late Smt. Kaushalya Srivastava has deposed that the testator had executed her last Will on 02.02.2002 in a sound and disposing mind, and was capable of understanding the contents of the Will. He identified the signatures of his mother on the Will and also of the two attesting witnesses. The Will of the mother is Ex.DW1/1 and is deposed to be the last, final and natural Will of Late Smt. Kaushalya Srivastava by virtue of which she bequeathed her entire estate in favour of defendant No.1, 2 and 3.

50. *The due execution of the Will* in terms of Section 68 of the Indian Evidence Act, by virtue of which she bequeathed her entire estate in favour of defendant No.1, 2 and 3, has been proved by **DW3 Sunil Kumar Gaur**, the attesting witness. He has deposed by way of his affidavit of evidence Ex.DW1/A, that he was the Clerk of defendant No.1 Arun Srivastava. He was called on 02.02.2002 by Late Shri Krishan Gopal to his room where Late Smt. Kaushalya Srivastava was also present. They told him that he has been called to be a witness to the Will. At that time, Shri Vinod Rohella and two officials from the office of Sub-Registrar were also present in the room. Late Krishan Gopal read out and explained the contents of the Will to Late Smt. Kaushalya Srivastava who after understanding the contents of the



Will, signed at point D1 – D5, and also put her thumb impression on all the pages, in his presence. He also signed the Will as an attesting witness at point E1 – E2. The Sub- Registrar also signed the Will in their presence.

51. ***DW3 Sunil Kumar Gaur*** in his cross-examination clarified that the Will was explained in Hindi to Late Smt. Kaushalya Srivastava by her husband. The officials from the office of Sub-Registrar also told Late Smt. Kaushalya Srivastava about the contents of the Will and asked her as to whether she was signing the Will on her own, to which she answered in the affirmative.

52. DW3 Shri Sunil Kumar Gaur in his cross-examination has further explained that he had been serving Dr. Arun Srivastava, son of Late Smt. Kaushalya Srivastava for about last 34 years. When he entered the room of Shri Krishan Gopal Srivastava for the purpose of being a signatory to the Will, it had already been typed and he was not aware about the person who had drafted the Wills. He had affixed his signatures as well as thumb impression on the Wills already prepared on the asking of Krishan Gopal Srivastava. Shri Vinod Rohella (the second attesting witness) also affixed his signatures as well as thumb impression on the Will in his presence. A suggestion was given to him that Late Smt. Kaushalya Srivastava was well versed in English and used to sign in English, but he denied the suggestion and stated that she used to write and sign in Hindi only.

53. There is no material discrepancy that has come forth in the testimony of DW3 in regard to the execution of the Will or it being signed by the Testator and the attesting witnesses.

Soundness of health of Late Smt Kaushalya Srivastava :



54. The plaintiff has challenged the genuineness of the Will on the ground that Late Smt. Kaushalya Srivastava was not having sound mental health at the time of the execution of alleged Will by her. She was admitted in ICU in 1999 and since then she has been in precarious health condition.

55. This brings us to the testimony of the plaintiff who as PW1 had deposed that the condition of Late Smt. Kaushalya Srivastava was deteriorating from 1999 and was in a state of delirium. She was not of sound mental and physical health and was not able to understand things and passed into the state of delirium on many occasions. She was intermittently hospitalized in Sant Parmanand Hospital and her husband and son, who were both Doctors, were fully aware about the medical condition.

56. Plaintiff had examined PW3 Dr. Ram Sharma who also deposed that Late Smt. Kaushalya Srivastava was a known case of hypothyroidism with hyperparathyroidism and hypertension and remained admit in Tirth Ram Shah Hospital in April, 1999. In his cross-examination, he has clarified that he had served Tirth Ram Shah Hospital from December, 1999 to 2000. The plaintiff was not known to him but Dr. Adarsh Kumar was known to him as he was his junior in Tirth Ram Shah Hospital. He further admitted that he does not have record of any of the patients while he was serving in Tirth Ram Shah Hospital. He also did not recollect how many patients were attended by him on the day when Late Smt. Kaushalya Srivastava was admitted in the hospital. He could also could not give the name of any patient to whom he attended. He further deposed that after the spell of her admission in the hospital, he never met Late Smt. Kaushalya Srivastava . Even prior to her admission, he had never met her. He has explained that in the stage of delirium, a patient may gain consciousness at once point and



lose it at another point of time. Stage of delirium is curable except when it is associated with alcohol, endocrinological disorder and neurological disorder.

57. He has further disposed that primarily she was diagnosed as neurological disorder case, but when final diagnosis came, she was not found to be a patient of neurological disorder but a patient of endocrinology. When a patient of hypothyroidism with hyperparathyroidism is brought to the hospital in early states, he can be cured completely by medication alone. In the case of hypothyroidism brain, heart and menstrual cycle growth are likely to be effected besides the patient reaching the stage of obesity. However, Hyperparathyroidism is a curable disease.

58. Though the plaintiff in order to prove the medical condition of her mother, had examined PW3 Dr. Ram Sharma, but it was of no assistance to the plaintiff. Rather his testimony has proved that Hyperparathyroidism can be cured by medication. Interestingly, though this Doctor had been examined, he neither had any medical record nor he remembered any patient who got admitted on the day Late Smt. Kaushalya Srivastava got admitted but surprisingly he remembered the ailments and the treatment given to Late Smt. Kaushalya Srivastava. Clearly this witness has given his evidence without any medical record.

59. The plaintiff had also examined *PW4 Dr. Arun Kumar* her husband who was a Doctor by profession. He deposed that Late Smt. Kaushalya Srivastava was operated for thyroid problem in the past and after her surgery, she was under treatment at INMAS, Timarpur, Delhi for hypothyroidism i.e. depressed thyroid function. During his visits to the house of his parents-in-law, they would discuss the health problems of Late



Smt. Kaushalya Srivastava . In the year 1992, during one of his visits, he was consulted and shown her medical prescription about recurrent infections, joint pains, twitching of muscles in the limbs, fluctuation in blood pressure and loss of memory and power of understanding. He, on examination, had found that she had developed slowness of intellectual capabilities, lack of memory, comprehension, understanding, etc. He also deposed about the admission of Late Smt. Kaushalya Srivastava in the year 1999.

60. He again deposed about Late Smt. Kaushalya Srivastava suffering from lack of understanding delirium, hallucination, progressive brain degeneration senility etc. because of hypothyroid and hyperparathyroid suspected Panhypopituitarism which led to her confinement to bed in the year 2001 and thereafter throughout the year 2002. Pertinently, in his cross-examination, he has clarified that while PW3 Ram Sharma has deposed about hyperparathyroidism, according to him Late Smt. Kaushalya Srivastava was suffering from hypoparathyroidism. He admitted that roka ceremony of her son Dr. Adarsh Kumar took place sometime in summer season in the year 1999 in Delhi and the same was attended by the father-in-law and all other family members, though he did not remember if it was also attended by Smt. Late Smt. Kaushalya Srivastava . He clarified that she was insisting on holding the roka ceremony of his son in her life time and that is the reason why it was performed at that time. She has expressed her wish of at least seeing the roka ceremony of the son in her life time. He has admitted that the mother-in-law had gone to Dehradun to attend the marriage of his son and that she was not taken to hospital during her visit.

61. He also deposed that in January, 2001 the mother-in-law was ill but



was not bed ridden at that time. Her condition started deteriorating from the middle of 2001 and slowly she became bed ridden.

62. Pertinently, he further deposed that Late Smt. Kaushalya Srivastava had attended the wedding of Akshay Diwan Son of Ajay Diwan which was solemnized in the winter of 2006 and she was not hospitalized during the marriage ceremony.

63. He was shown various photographs Mark B, C and D, which were taken on one day, wherein he identified the mother-in-law. He also identified his wife and mother-in-law in photographs Mark E, F and G. In photograph PW3/D1, his mother-in-law is visible standing at number 5 from the left while his wife was standing in the middle from the left, though he has stated that it was an old photograph.

64. PW-4 Dr. Arun Kumar has further admitted that Late Smt. Kaushalya Srivastava was under the treatment of Dr. O.P. Aggarwal at Tirth Ram Shah Hospital and he had discussed about the ailment and treatment of his mother-in-law with them. He admitted not seeing any medical sheet of the mother-in-law while discussing about her treatment with the Doctors. He also was unable to specify the discussions he had with Dr. Ram Sharma. He also stated that Dr. Aggarwal was treating his mother-in-law, taking it to be a case of cardiac problem, but she was not responding to the treatment. He further admitted that it was not within his knowledge if the mother-in-law was again admitted in Sir Ganga Ram Hospital in the year 1999-2000, though he was aware that she was admitted many a times in Sant Parmanand Hospital, though he was not able to give the exact date of hospitalization.

65. His testimony is countered by Defendant No. 1/Arun Srivastava who has deposed that both the parents were hale and hearty at the time of



execution of their respective Wills.

66. The defendant No. 1/Arun Srivastava has explained that in April, 1999, his mother, Late Smt. Kaushalya Srivastava got admitted, in Tirath Ram Shah Hospital, Delhi and was under the supervision of Dr. Om Prakash. She had incoherent speech, mental agitation and loss of orientation and her condition did not improve and she was shifted to Sir Ganga Ram Hospital for further management and treatment under the supervision of Dr. R.K. Gupta, where she remained admitted for about one week.

67. The defendant No. 1/Arun Srivastava has denied that Late Smt. Kaushalya Srivastava was under heavy medication or that she was suffering from various chronic conditions, including Hypoparathyroidism, Secondary Thyroidectomy as a result of which she developed complications of mental depression, severe calcium deficiency and hormonal disbalance which affected her physical and mental condition. The defendant No. 1/Arun Srivastava has also denied that Late Smt. Kaushalya Srivastava was having hallucinations and intellectual deterioration.

68. He deposed that Late Smt. Kaushalya Srivastava kept good health till her death i.e., on 14.04.2007 and had been leading a normal health. Late Smt. Kaushalya Srivastava even attended the wedding of her grandson in December, 2006.

69. The defendant No. 1/Arun Srivastava in his cross-examination has explained that DW2/Dr. Nandni Sharma had treated his mother for Urinary Tract Infection from the year 1999 onwards. Initially, defendant No. 1/Arun Srivastava had taken his mother once or twice to the Clinic of DW2/Dr. Nandni Sharma and thereafter, she used to visit 5, Shankracharya Marg, Civil Lines, Delhi for her treatment. The Urinary Tract Infection occurred



2-3 times in a year, though he was unable to produce any prescriptions.

70. The defendant No. 1/Arun Srivastava has denied that after 1999, Late Smt. Kaushalya Srivastava used to generally remain ill for which she had to be admitted in Tirath Ram Shah Hospital, Delhi and Parmanand Hospital. He has also denied that in December, 2001, a permanent cannula was fixed in the neck of Late Smt. Kaushalya Srivastava to administer the medicines. It is also denied that in January and February, 2002, Late Smt. Kaushalya Srivastava was having recurrent episodes of regular hallucinations and delirium and loss of orientation.

71. DW5 Dr. Arun Srivastava/defendant No. 1 was specifically questioned about the medical health of Late Smt. Kaushalya Srivastava in which he was consistent in deposing that aside from hospitalisation in the year 1999 on account of Hypoparathyroidism and calcium deficiency, Late Smt. Kaushalya Srivastava was in a fit state of mind and health.

72. To corroborate the medical health of Late Smt. Kaushalya Srivastava, DW2/Dr. Nandni Sharma was examined, who corroborated the testimony of DW5/Arun Srivastava that she had been visiting the house of Shri Kishan Gopal, husband of Late Smt. Kaushalya Srivastava, regularly and had been rendering her medical services till her death 14.04.2007. She has deposed that she found Late Smt. Kaushalya Srivastava both mentally alert, physically fit and in sound disposing mind. She clarified in her cross-examination that Late Smt. Kaushalya Srivastava had been her patient for the last about 20 years, prior to her demise in the year 2007. Though Late Smt. Kaushalya Srivastava used to remain unwell during the year 2001 till 2003, but she remained conscious and oriented and her health state was sound. She has explained that by *conscious*, she meant that Late Smt.



Kaushalya Srivastava was competent to write a Will and take her own decisions. She admitted that Late Smt. Kaushalya Srivastava got admitted in ICU, Tirath Ram Shah Hospital in April, 1999 and also in Sir Ganga Ram Hospital, but she did not visit her in the hospitals during her admission. DW2/Nandni Sharma was informed about her hospitalisation by DW5/Dr. Arun Srivastava/defendant No. 1.

73. DW2/Dr. Nandni Sharma has denied that while Late Smt. Kaushalya Srivastava was in the hospital, she was in the state of delirium and was having incoherent speech, mental agitation and loss of orientation in space and time, which continued till the time of her death on 14.04.2007. DW2/Dr. Nandni Sharma volunteered that she came to know that Late Smt. Kaushalya Srivastava was a patient of Hypoparathyrodism and severe calcium and Vitamin-D deficiency.

74. DW4/Dr. Vimal Kumar Srivastava, who is the nephew of Late Shri Kishan Gopal, was working as a Chief Medical Officer with Delhi Transport Corporation. He has deposed that he used to visit the house of Shri Kishan Gopal on regular basis and on his visits, he found Late Smt. Kaushalya Srivastava to be in good health and happy state of mind.

75. DW4/Dr. Vimal Kumar Srivastava in his cross-examination also confirmed that Late Smt. Kaushalya Srivastava was diagnosed with Hypoparathyrodism and she was admitted in the hospital in the year 1999. He has also deposed that after the discharge of Late Smt. Kaushalya Srivastava from the hospital, she was in good state of health and well-orientated.

76. The most relevant testimony in regard to the health and state of mind of Late Smt. Kaushalya Srivastava is DW7/Dr. Om Prakash under whose



supervision, the treatment of Late Smt. Kaushalya Srivastava was undertaken. He has reaffirmed that Late Smt. Kaushalya Srivastava who was admitted in Tirath Ram Shah Hospital for thyroid, electrolyte and mineral imbalance and she remained under his treatment about a week or so. He has stated that she was restless and having fever and breathlessness and her condition was not improving. In consultation with the family members, second opinion was taken from Dr. R.K. Gupta, Consultant at Sir Ganga Ram Hospital, who visited the Sant Parmanand Hospital to see her. Dr. R.K. Gupta advised certain changes in the treatment i.e. addition of thyroid medication, calcium and electrolytes, after which she started showing signs of improvement. Next day she was shifted to Sir Ganga Ram Hospital.

77. **DW3 Sunil Kumar Gaur**, the attesting witness, in his cross-examination has also deposed that the Will had been executed by Late Smt. Kaushalya Srivastava voluntarily, in a sound disposing mind to which there is no material cross-examination. In the cross-examination the witness has categorically stated that she was not suffering from any serious ailment from 1999 till 2002.

78. Aside from giving a bare suggestion in the cross-examination that she was not in proper frame of mind and was suffering from various ailments, there is no other cogent evident produced on behalf of the plaintiff in support of her assertions in regard to mental health of the testator.

79. To conclude, the testimony of defendant No.1 which is fully supported by the Doctors and other witnesses examined on their behalf, establishes that Late Smt. Kaushalya Srivastava had been taken ill in 1999 and was admitted in the hospital. Her condition became a matter of concern because she was detected of hypothyroidism which manifests itself in



delirium, breathlessness and incoherence. However, it is also on record that she was duly treated and thereafter got discharged. There is not a single document on record to show that thereafter, she was not in a fit mental condition or was mentally incapacitated. Her ailments may have impacted her physical health, but that cannot be a ground to question her mental capacities or that she was in a state where she could not comprehend of her surrounding or of happenings. There is not a single document produced to show that she was mentally incapable on 02.02.2002, on the date when the Will was executed by her.

Will was executed on a non-public dealing day

80. The plaintiff has sought to challenge the genuineness of the Will by claiming that it was registered at the residence on a non-public dealing day. *DW1 Shri Vivek Yadav*, LDC from the office of Sub-Registrar, Basai Darapur, New Delhi was examined who produced the summoned record pertaining to the Will of Late Smt. Kaushalya Srivastava dated 02.02.2002 and the certified copy of the same was exhibited Ex.DW1/1. He also deposed similarly in respect of the Will of Shri Krishan Gopal dated 18.01.2002 which was also registered on the same day, i.e. 02.02.2002. In the cross-examination, he has explained that the office of the Sub-Registrar remained open on Saturday without any public dealings. When he was unable to give the name of the Sub-Registrar before whom the Wills were registered, but he deposed that on 02.02.2002, 61 Wills were registered in the Office of Sub-Registrar.

81. From the testimony of this witness as well, it has amply proved that Late Smt. Kaushalya Srivastava as well her husband both had executed their



separate Wills which were registered on the same day i.e. 02.02.2002 by the Sub-Registrar, who had sent his officials to the house for the purpose of stamping and registration.

82. It has been argued on behalf of the plaintiff that DW1 has deposed that Saturdays are non-working day and therefore, there could not have been any registration of the Wills done on 02.02.2002.

83. The testimony of DW1 has been misinterpreted because what he clearly stated was that there was no public dealing on that day, which implies that the office of the Sub-Registrar is not closed and those Wills which are required to be registered at the residence of the concerned persons, are carried out on the said day. The figure of 61 Wills being registered in one day may seem incongruous, but it is the record produced which reflected that indeed 61 Wills had been registered on that day. It is an official record maintained in the course of office dealings and there is no suggestion that there was any manipulation in the Register of the Sub-Registrar.

84. Registration of document carries the presumption of valid execution under *Section 114(e) of the Indian Evidence Act, 1872* that in accordance with the law and the said presumption can be rebutted only by leading credible and tangible Evidence. The factum of registration of the Will in the present case creates a presumption that a registered document is validly executed as held in the case of *Prem Singh & Ors. vs. Birbal & Ors.*, 2006 (5) SCC 353.

85. The Will has not only been proved by DW5 Shri Arun Srivastava, but has in fact also been proved from the official from the office of Sub-Registrar. The plaintiff has not been able to establish any suspicion in



regard to the contents of the Will or its registration.

86. The plaintiff has raised an objection that the second attesting witness was not examined by the defendant. In this regard, it is pertinent to note that though, there were two attesting witnesses namely Shri Sunil Kumar Gaur and Mr. Vinod Rohella, Section 68 of the Indian Evidence Act mandates examination of at least one attesting witness as a mode to prove the execution of the Will. The attesting witness Mr. Sunil Kumar Gaur has stood the test of cross-examination and his testimony in regard to the execution and putting of signatures on the Will by the Testator as well as the witnesses has remained unimpeached. Non-examination of the second witness Mr. Vinod Rohella is neither mandated by law nor is it fatal to the proof of the execution of the Will.

87. The defendants have been able to prove the execution and the registration of the Will of the Testator and all conditions of Section 63 of Indian Succession Act stand satisfied. The Will is held to have been proved.

Exclusion of the daughters:

88. The plaintiff has also claimed that there was no reason for exclusion of the daughters from the Will, which creates a doubt about the genuineness of the Will.

89. Pertinently, in the case of Uma Devi Nambiar vs T.C. Sidhan, (2004) 2 SCC 321, Hon'ble Supreme Court has held that:

“16. A Will is executed to alter the ordinary mode of succession and by the very nature of things, it is bound to result in either reducing or depriving the share of natural heirs. If a person intends his property to pass to his natural heirs, there is no necessity at all of executing a



Will. It is true that a propounder of the Will has to remove all suspicious circumstances. Suspicion means doubt, conjecture or mistrust. But the fact that natural heirs have either been excluded or a lesser share has been given to them, by itself without anything more, cannot be held to be a suspicious circumstance especially in a case where the bequest has been made in favour of an offspring.”

90. While considering several suspicious circumstances such as old age of the testator and his death 15 days after the execution of the Will in the case of Sridevi and Others vs Jayaraja Shetty and Others (2005) 2 SCC 784, the Supreme Court observed that when reasons for unequal distribution have given in the Will itself, the same cannot be treated as a suspicious circumstance when the testamentary capacity of the testator has been established.

91. In the present case, the Testator in her Will has clearly stated that “*I have already performed the marriage of my three daughters and they are happy in their respective homes. My husband and I have also given residential plots to them and I do not wish to give any more to them from my properties*”. The reason for exclusion of the daughters, is therefore, mentioned in the Will itself. There is no serious challenge to the reason given in the Will for exclusion.

92. Pertinently, on the same day, i.e. 02.02.2002, the Will of the father Shri Krishan Gopal was also registered which contained identical clause excluding the three daughters. The plaintiff herself has mentioned that the Will of the father is admitted and the challenge is confined to the Will of the mother. The very fact that the father had also excluded the three daughters,



which has been graciously accepted by them, is an additional factor to reflect the intention of the mother of excluding the daughters from her Will as well. *The exclusion of the daughters has been duly explained and it does not create any suspicion in regard to the contents of the Will.*

93. It is also pertinent to note that based on the two Wills of the parents, the defendants had got the suit properties mutated in their names in 2009 and the suit properties are being enjoyed by the three sons. It is no doubt correctly agitated on behalf of the plaintiff that mutation is not a determination of the title in the suit property, but the fact remains that the mutation has been done on the basis of the Will and secondly, by getting the properties mutated, the defendants had declared themselves to be the owners. No explanation has been given about the silence of the plaintiff since 2009 when the properties got mutated. Only a bald assertion has been made that she came to know about the Wills upon the filing of the Written Statement on 15.11.2016 in the present suit. This argument again does not hold any water.

94. It is thus, concluded that any of the suspicious circumstances relied by the defendant, are not sustainable. The execution of the Will Ex.DW1/1 stands duly proved.

95. It is thus, held that the shares in the properties of the mother is devolved upon the three sons in the share of $1/3^{\text{rd}}$ each and the plaintiff and the other two sisters are not entitled to any share in the suit property.

96. Issue No.1 is decided in favour of defendant No.1, 2 and 3.

Issue No.2: Whether Smt. Kaushalya Shrivastava was the owner of $1/5^{\text{th}}$ share in plot of land ad measuring 12500 sq.



yds. known as Ajanta Cinema Complex, Ajay Enclave Najafgarh Road, New Delhi as claimed by the plaintiff or the owner of 1/5th of half share in the said land as contended by defendants no. 1 to 5? OPP

97. The plaintiff has claimed 1/5th share in the plot admeasuring 12400 sq. yards known as Ajanta Cinema Complex, Ajay Enclave, Najafgarh. Though, the defendants have explained that this property which was originally owned by the grandfather Dewan Swarup who had gifted it to his two sons Ram Gopal and Shyam Goal who had eventually formed the Partnership with three other people, namely, Arun Srivastava, Shiv Gopal and Pawan Dewan. The two owners had made the property an asset of the Partnership firm and upon the dissolution of the Partnership, this plot went equally to the family of Shyam Gopal and to the family of Shri Arun Srivastava and each of the two families got 6200 sq. yards.

98. While the plaintiff had asserted that the area of the plot was 12400 sq. yards, but she has admitted in her cross-examination that the share which came to their family was of 6200 sq. yards.

99. This 6200 sq. yards had five claimants namely Arun Srivastava, Ajay Dewan and Anup Dewan and their parents namely Shri Krishan Gopal Srivastava and Late Smt. Kaushalya Srivastava. Late Smt. Kaushalya Srivastava by virtue of the Will in question has bequeathed her share to the three sons. Likewise, the father had also executed the Will, which is not contested, in favour of the three sons thereby implying that the three sons got 1/3rd share each in the suit property.

100. It is, therefore, proved that Late Smt. Kaushalya Srivastava was having 1/5th share in the Ajanta Cinema Complex property.



101. *Issue No.2 is decided accordingly.*

Relief

102. In view of the finding in Issue No.1 and 2, it is hereby held that the plaintiff is not entitled to any share in the suit property. Consequently, her suit for Partition of the properties of Late Smt. Kaushalya Srivastava, is hereby dismissed.

103. Decree sheet be prepared.

**(NEENA BANSAL KRISHNA)
JUDGE**

MAY 31, 2024
S.Sharma/va