

IN THE COURT OF THE FINANCIAL COMMISSIONER, DELHI

Case No.253/2015 and

Case No. 254/2015

**Appeal under Section 64 & 66
of Delhi Land Revenue
Act,1954**

In the matter of:-

- 1. M/s. D.S.S. Hotel Pvt. Ltd.
Through Its Director
Office at-
N-1, BMC House Middle Circle
Connaught Place,
New Delhi**

**....Appellant
(Represented by Shri
Rajender Dutt, Counsel for
Appellant)**

VERSUS

- 1. Shri Yogesh Jain
S/o Late Shri Gian Chand Jain
R/o 1, Maulsari Avenue
Westend Greens, Village Rangpuri
New Delhi**
- 2. Sh. Satish Kumar Dhankar
S/o Sh. Raj Singh
R/o H.NO. 193 Civil Lines,
Rohtak (Haryana)**
- 3. Sh. Om Parkash
S/o Sh. Balwant Singh
R/o H.NO. 651, Sector-17,
Gurgaon (Haryana)**

.... Respondents

**(Represented by Shri Mukesh
Bhardwaj Counsel for R-1,)**

JITENDRA NARAIN, FINANCIAL COMMISSIONER

Order dated 09th February, 2016

1. The both appeal no. 253/15 and 254/15 under Section 64 and 66 of Delhi Land Revenue Act, 1954 is filed against the impugned order dated 30.06.2015 passed by Addl. Collector(New Delhi) in Appeal No. 16/2011 and 16-A/2011 respectively. Vide impugned order dated 30.06.2015 Addl. Collector (New Delhi) condoned the delay in appeal no 16-A/2011 and set aside the order of mutation dated 24.01.2011

and allowed the mutation in favor of appellant (respondent no. 1 herein) in appeal no 16/2011.

2. The pleadings of the parties are read over and perused. However, at the cost of brevity the same are reproduced here.

3. That Late Shri Gian Chand Jain, father of respondent No.1 was the owner of the land measuring 1 Bigha bearing Khasra Nos. 430 M (0-4), 431 M (0-11) and 427 M (0-5) situated within the revenue estate of Village Malikpur Kohi @ Rangpuri, New Delhi.

4. It is stated by the appellant that the respondent No.1 filed suit bearing No.2/02 against his father Shri Gian Chand Jain in respect of the aforesaid property for permanent injunction re: "Yogesh Jain Vs. Gian Chand Jain" and Shri Gian Chand Jain filed written statement supported by affidavit stating therein that he has already disposed of the property aforesaid on 9.8.2002 to respondents No. 2 & 3.

5. Shri Gian Chand Jain expired on 10.12.2003 and the respondent No.1 filed application for bringing him as legal representative of Gian Chand Jain on the record of the above case but the said application was also dismissed by the Civil Court holding that the father of the respondent No.1 Late Shri Gian Chand Jain sold the property in suit prior to the filing of the suit to respondents No. 2 & 3. The suit was dismissed on 22.1.2005 having been abated holding that right to sue does not survive on respondent No.1 herein.

6. The appellant further stated that the respondent No.1 filed another suit bearing CS(OS) No.50/2009 re: "Yogesh Jain Vs. Satish Kumar Dhankar & Ors." in the Court of Additional District Judge (Central-13), Delhi, in respect of aforesaid land which was also dismissed on 9.11.2010.

7. It is stated by the appellant that the plaintiff in the above suit (respondent No.1 herein) had sought relief of declaration that the Registered Will dated 13.08.2002 executed by Late Shri Gian Chand Jain father of respondent No.1 herein in respect of the aforesaid land measuring 1 Bigha in favour of respondents No. 2 & 3 is forged,

fabricated and null and void and further declaring the appellant-plaintiff (respondent No.1 herein) to be owner in possession of the said land and also for mandatory injunction directing the Tehsildar to carry out mutation thereof in the name of the respondent No.1 and for restraining the Tehsildar from carrying out mutation in favour of the respondents No.2 & 3 on the basis of the aforesaid Will and further for injunction restraining the respondents No.2 & 3 from interfering with the possession of the respondent No.1. It was alleged that the factum of Shri Gian Chand Jain being owner of the land aforesaid and the respondent No.1 being his son are not in dispute. The said Suit No. 50/2009 was dismissed on 9.11.2010.

8. Thereafter the respondent No.1 Yogesh Jain filed C.M.(M) petition under Article 227 of the Constitution of India against the judgment and decree being CM (M) No.806/12 which was withdrawn on 24.9.2013.

9. It is further stated by the appellant that the respondents No.2 & 3 had applied for mutation of the aforesaid land before Tehsildar, Vasant Vihar, New Delhi, on the basis of Registered Deed of Will executed by Shri Gian Chand Jain on 9.8.2002 being document No.33714 in Book No.III, Vol.No.5667 registered on pages 182-183 under Section 22 of Delhi Land Revenue Act and the Tehsildar forwarded the mutation matter being disputed to the Court of Revenue Assistant, Vasant Vihar, New Delhi. The Revenue Assistant passed order dated 24.1.2011 directing the Tehsildar Vasant Vihar, New Delhi to carry out the mutation of the aforesaid land in favour of respondents No. 2 & 3.

10. The appellant stated that the respondent No.1 filed appeal against the order dated 24.1.2011 before Collector, New Delhi alongwith an application under Section 5 of Limitation Act for condonation of delay in filing appeal which was allowed by the Ld. Appellate Court of Additional Collector, New Delhi.

11. The appellant filed application under Order 1 Rule 10 CPC for impleadment the appellant as a party to the above appeal.

12. It is stated by the appellant that the respondent No.1 concealed and suppressed the facts relating to the filing of the aforesaid suit No.50/09 in respect of land in dispute against respondents No. 2 & 3 and others and dismissal thereof by the civil court on 9.11.2010. He also concealed and suppressed the fact of filing of CM (M) No.806/12 re: "Yogesh Jai Vs. Satish Kumar Dhankar & Ors." in Hon'ble Delhi High Court which was withdrawn vide order dated 24.9.2013.

13. It is further stated by the appellant that the respondent No.1 suppressed the factum of filing of RFA No.537/13 re: "Yogesh Jain Vs. Satish Kumar Dhankar & Ors" in the Hon'ble Delhi High Court challenging the judgment/decreed dated 9.11.2010 passed by the Court of Additional District Judge, (Central-13), Delhi, regarding dismissal of suit No.50/09 in the Hon'ble Delhi High Court which was dismissed on 2.12.2013 and held that the respondent No.1 has no right to maintain the suit. The respondent No.1 (herein) filed objections to the said Will, while the objections were pending before the Revenue Assistant for adjudication, notice of the suit and interim orders therein were received. However, the Hon'ble Delhi High Court after taking a note of the entire facts and background held that the order of Additional District Judge, dismissing the suit of the respondent No.1 (herein) was absolutely justified.

14. The said appeal was filed by the respondent No.1 (herein) seeking relief regarding the Will which was dismissed by the Hon'ble Delhi High Court. It is contended by the appellant that this order was neither placed on the record nor the arguments in this regard were considered by the Lower Appellate Court. The Ld. Additional Collector, New Delhi, ignored the principle point of controversy in holding in the case whether possession of the land aforesaid was delivered to respondents No.2 & 3 by Late Shri Gian Chand Jain and ignored the material evidence on record. Despite the fact it was argued before the Appellate Court that the respondent No.1 suppressed the material facts relating to the filing of the suit, dismissal thereof, filing of another suit, filing of CM (M) and then RFA in Hon'ble Delhi High Court

and thereby playing fraud on the court as well as on the appellant herein.

15. Hence, by present appeal the appellant prayed that the impugned order dated 30.6.2015 passed by Ld. Additional Collector, New Delhi be set-aside and order dated 24.1.2011 passed by Revenue Assistant, Vasant Vihar, New Delhi, to be restored on the grounds inter-alia:

16. Notice were issued to the parties. None appeared on behalf of respondent no. 2 & 3. Respondent no. 1 had contended that as per Hon'ble Supreme Court Judgment in Case Chhater Pal Vs. Mandir Thakurji & Ors.(2003) 10 SCC 360 that pre-requisite condition of mutation is possession of the land. In the said judgment Hon'ble Supreme while setting aside an order granting mutation solely on the basis of findings of Civil Court held that for granting mutation it is required to be determined as to who was holding possession on the date of making of application for mutation.

17. It is further contended by the respondent no.1 that Ld. Lower Appellate Court has rightly held the possession of the land in question was continue to be with R-1. It is also contended by the respondent that as regards to the previous judgment of Civil Courts none of the court has returned any findings with respect to the possession of the land. The possession of R-1 has been shown in the reports of Halka Patwari dated 06.09.2003 and 09.04.2012. The mutation was carried out by the SDM/RA on the basis of WILL. Whereas the case of appellant is that predecessor in interest of R-1 had sold the land to R-2 and R-3. It is further stated by R-1 that main ground on which the RA granted the mutation that a registered WILL existed relying upon FCs judgment but as stated by R-1 that because a WILL is registered, its genuineness cannot be proved as held by Hon'ble High Court of Kerala in AIR 1955 Kerala 2008.

18. It is stated by the respondent no. 1 that the present appeal under Section 66 is not maintainable as right of appeal is not an inherent right, but, is statutory right which is available only to the

extent and manner as prescribed by law. As Section 66 of Delhi Land Revenue Act provides for a Second Appeal, but Rule 417 of Delhi Land Revenue Rules provides that unless otherwise expressly provided, the provisions of CPC shall apply to the proceedings under the Delhi Land Revenue Act. The respondent no. 1 also cited reference of Section 100 of CPC which provides for Second Appeal and Order 41 of CPC which contains other procedural provisions to appeal. In support of his claim counsel for R-1 filed following three judgments:-

- I. AIR 2014 STPL(LE) 48640 SC titled Bishwanath Ghosh(Dead) Vs. Govinda Ghosh @ Govinda Chandra Ghosh.
- II. AIR 2014 STPL(LE) 49093 SC titled Amar Nath Vs. Kewla Devi
- III. AIR 2014 STPL (LE) 49326 SC titled Balwinder Singh Vs. National Fertilizers Ltd.

It is further stated by the respondent no. 1 that provisions of Section 100 of CPC are pari-materia to the provisions contained in Section 66 as both the sections provides for second appeal on the limited grounds and contended that since appellants have not pleaded or highlighted any ground provided by Section 66 nor any such question has been formulated hence the present appeal is not maintainable.

19. It is further stated by R-1 that he has not concealed the factum of past litigation before Addl. Collector and said that these disclosures were made by him before Addl. Collector during the course of final arguments. However, on the date of filing of appeals the order passed by the Hon'ble High Court of Delhi was not in existence, as such there was no reason or occasion for disclosure of the same. The respondent contended that he have not suppressed the High Court order before the ADM/ Lower Appellate Court has its reference is made on page no. 315/C to 313/C or the recording of argument over there is no doubt that since the WILL is not transfer inter-vivos para 22 of the Surya Lamp Case.

20. It is further contended by the R-1 that R-2 and R-3 sought mutation of the suit land in their favor on the basis of Registered WILL dated 09.08.2002 and in support of plea of Sale the only document produced is alleged WILL dated 09.08.2002. But it is contended by R-1 that as per Section 5 of Transfer of Property Act the transfer of property is an act between living persons and admittedly, a WILL comes into operation only upon death of the testator i.e. executant. Hence, a WILL does not and can not satisfy definition of transfer of property as held by Hon'ble High Court of Delhi in case Lalita Sharma Vs Sumitra Sharma 2011 STPL 12324 Delhi held : "a holograph WILL is a WILL written out entirely by a testator in his own handwriting-it like any other Will requires attestation as per the mandate of Section 63 of the Act, 1925-Unless the Holograph WILL like any other WILL fulfils the legal requirement of its attestation by two witnesses, the WILL cannot be said to be validly executed."

21. It is also stated by R-1 that in terms of Section 54 of Transfer of Property Act, an immovable property can be sold only by way of a registered sale deed, whereas no sale deed existed in favor of R-2 and R-3. It is further contended by R-1 that in Sale consideration is a relevant factor, but in the instant case there is no document available on records that any consideration has ever been passed to Sh. Gyan Chand Jain. Hence, it is not a case of Sale.

22. It is further contended by R-1 that the alleged WILL dated 09.08.2002 on the basis of which R-2 and R-3 claimed mutation was never proved as per provisions of Section 63 (C) of the Indian Succession Act and Section 68 of the Indian Evidence Act. It is stated further by R-1 that merely because a WILL is registered its genuineness can't be presumed as held by Hon'ble High Court of Kerala in AIR 1955 Kerala 2008. So it contested by R-1 that without having been proved, the title of the land cannot be conveyed.

23. It is also contended by R-1 that all other legal heirs of Sh. Gyan Chand Jain have executed a registered Relinquishment Deeds in favor of R-1, hence R-1 is the solely entitled for the mutation of land in his favor.

24. I have heard the arguments of both the parties and perused the materials placed on record.

25. Admittedly, Sh. Gyan Chand Jain had acquired property in the year 1992 through Sale deed no. 7201 after having NOC no. 5029 dtd. 29.06.1992 under Delhi Lands (Restrictions on Transfer) Act, 1972 from competent authority.

26. Admittedly, Sh. Gyan Chand Jain disposed of the said property on 9.8.2002 to respondents No. 2 & 3 through a Registered WILL. It is also a matter of record that Shri Gian Chand Jain filed written statement supported by affidavit in Suit No. 02/2002 stating therein that he had already disposed of the property aforesaid on 9.8.2002 to respondents No. 2 & 3 herein it is also an admitted fact that R-2 and R-3 had applied for mutation on the basis of said WILL dated 13.08.2002 and no registered sale deed was there with R-2 and R-3. It is also not disputed that R-2 and R-3 did not have the NOC from competent authority at the time of filing application for mutation before Tehsildar.

27. It is also not disputed that R-2 and R-3 transferred the suit land to appellant herein in the year 2011 through a Release Deed but no NOC was obtained from competent authority before execution of Release Deed. It is also not denied that there was no sale deed. It is also not disputed that no stamp duty was paid and no consideration was paid by R-2 & R-3 to Sh. Gyan Chand Jain and the WILL was executed by Sh. Gyan Chand Jain without consideration. It is also not disputed that a registered WILL also needs to be acted upon only after due process by deposition of witnesses.

28. The Hon'ble Supreme Court of India in its judgment dated 11.10.2011 in Suraj Lamp and Industries Pvt. Ltd. Vs. State of Haryana and Another (2012) 1 SCC 656 in para 18 to 22 and para 26 held-

18. It is thus clear that a transfer of immovable property by way of sale can only be by way a deed of conveyance(sale deed). In the absence of a deed of conveyance(duly stamped and

registered as required by law), no right, title or interest in an immovable property can be transferred.

19. Any contract of sale (agreement to sale) which is not a registered deed of conveyance (deed of sale) would fall short of the requirements of Sections 54 and 55 of the TP Act and will not confer any title nor transfer any interest in an immovable property (except to the limited right granted under Section 53-A of the TP Act). According to the TP Act, an agreement of sale, whether with possession or without possession, is not a conveyance. Section 54 of the TP Act enacts that sale of immovable property can be made only be a registered instrument and an agreement of sale does not create any interest or charge on its subject matter.

20. A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The power of attorney is creation of an agency whereby the grantor, which when executed will be binding on the grantor as if done by him (see Section 1-A and Section 2 of the powers of Attorney Act, 1882). It is revocable or terminable at any time unless it is made irrevocable in a manner known to law. Even an irrevocable attorney does not have the effect of transferring title to the grantee.

22. A will is the testament of the testator. It is a posthumous disposition of the estate of the testator directing distribution of his estate upon his death. It is not a transfer inter vivos. The two essential characteristics of a will are that it is intended to come into effect only after the death of the testator and is revocable at any time during the lifetime of the testator. It is said that so long as the testator is alive, a will is not worth the paper on which it is written, as the testator can at any time revoke it. If the testator, who is not married, marries after making the will, by operation of law, the will stands revoked. (See Sections 69 and 70 of the Succession Act, 1925.) Registration of a WILL does not make it any more effective.

26. We have merely drawn attention to and reiterated the well-settled legal position that SA/GPA/Will transactions are not "transfers" or "sales" and that such transactions cannot be treated as completed transfers or conveyances. They can continue to be treated as existing agreements of sale. Nothing prevents the affected parties from getting registered deeds of conveyance to complete their title. The said "SA/GPA/Will transaction" may also be used to obtain specific performance or to defend possession under Section 53-A of the TP Act. If they

are entered before this day, they may be relied upon to apply for regularization of allotments/leases by development authorities. We make it clear that if the documents relating to "SA/GPA/Will transactions" have been accepted/acted upon by DDA or other developmental authorities or by the municipal or Revenue Authorities to effect mutation, they need not be disturbed, merely on account of this decision.

29. Admittedly the mutation disputes are continuing till date. The Ld. Addl. Collector has rightly held in the order assailed herein that the WILL in question has not been proved during the course of mutation proceedings as required as per Section 63 of Indian Succession Act that WILL to be attested by two witnesses each of whom must have seen the testator signing the WILL in his presence. Ld. Addl. Collector in para 39 & 40 of impugned order has observed that the WILL was not proved which is required to be proved by at least one attesting witness. Para 39 onwards of impugned order:-

"39. The Ld. Counsel for the appellant has also argued that, even otherwise, the respondents have failed to prove the WILL. It is stated that a WILL is required to be proved at least one attesting witness. The WILL in question is witnessed by Sh. Vijesh Jain and S.K. Srivastava, Advocate. Referring to the records of the mutation proceedings, it has been pointed out that the Ld. Tehsildar had issued notice to Sh. Vijesh Jain, however, he never appeared during the course of proceedings. No statement or evidence of Vijesh Jain has been found in the entire case file. However, even in the absence of any notice, in the order sheet it has been recorded that Sh. S.K. Srivastava had appeared and verified his signatures on the WILL. In this respect, he has argued that the order sheet has been manipulated and the portion regarding appearance of Sh. S.K. Srivastava has been interpolated in the order sheet. He has referred to the proceeding dated 10.06.2008 to show that on the said date the matter was adjourned to 20.06.2008. Thereafter, he has referred to the proceeding dated 22.02.2010 which records that the statement of applicants has been recorded 20.06.2008, however, there is no mention about statement of Sh. S.K. Srivastava. He has also pointed out that the portion of the order sheet where there is mention about Sh. S.K. Srivastava does not bear any date.

40. *The Ld. Counsel for the appellant has further argued that even if it presumed that Sh. S.K. Srivastava had indeed appeared, even then it can't be taken that he has proved the WILL in as much neither he has made any statement on oath nor he has been offered for cross-examination.*

41. *In this respect, the reliance has been placed on the judgment of the Hon'ble High Court of Delhi in the matter titled as Ripen Kumar Vs Department of Customs 2001 (1) JCC (Delhi) 47 wherein it has been held that the statement on witness who has not been offered for cross-examination or whose cross examination has not been completed, can not be read in evidence. He has also contended that even the alleged statement of Sh. S.K. Srivastava does not have the effect of proving the WILL in as much as said Sh. S.K.K Srivastava has not stated that the testator namely Sh. Gyan Chand Jain had signed in his presence, but, has merely verified his own signatures on the WILL. In this respect, the reliance has been placed on section 63 of Indian Stamp Act read with Section 68 of Indian Evidence Act."*

30. It is also observed by Ld. Addl. Collector in Appeal No. 16-A/2011 that as per Rule 145(C) of Delhi Land Revenue Rules which inter-alia provides that the proclamation shall specify the date (being not less than 15 days from the date of proclamation) upto which objection will be entertained, however in the instant case the said procedure has not been followed.

31. It is therefore, an admitted fact that Late Gyan Chand Jain acquired the suit property through registered sale deed on 22.07.1992 and NOC under DLRT Act, 1972 and he had disposed the said property in favour of R-2 and R-3 through a registered WILL on 09.08.2002. There is no doubt that the appellant or R-2/R-3 have no sale deed.

32. That further in such a case a Registered unproved Will is being used to substitute a registered and stamped sale deed to attempt to transfer complete title and interest.

33. That moreover in this case "a deed of release" is being used to substitute a registered and stamped sale deed.

34. That further, the NOC requirement as per Section 4 of the DLRT Act, 1972 is being sought be overlooked.

35. In view of the above, I find no ground to interfere with the order of Addl. Collector (New Delhi) dated 30.06.2015. However in view of the specific statement of Gyan Chand Jain before the Civil Court in suit no. 02/2002 on 23.08.2002 that he had already disposed off the property to R-2 and R-3, the implementation of the orders of Addl. Collector/ADM dated 30.06.2015 are stayed for a period of six months.

36. This is to enable the affected parties to get an extra opportunity and approach the appropriate authorities to complete the process such as paying stamp duty etc. in order to get a duly stamped and registered sale deed etc. to complete the right and transfer of interest and title in the immovable property and over come the short falls in the requirements of Section 53, 54 and 55 of Transfer of Property Act as directed by the Hon'ble Supreme Court in 2012 1 SCC 656. That further this period of stay should also be utilized by the parties to take all other requirements. they deemed necessary/or required whether it be NOC, LOA, Probate, Registration etc. because these mutation proceedings cannot be used as a proxy battle ground to over reach the substantive provisions of the specific laws.

37. With above terms, the present appeal is disposed off.

(JITENDRA NARAIN)
FINANCIAL COMMISSIONER, DELHI
Dated 09th February, 2016