
(2011) 10 DEL CK 0248
In the Delhi High Court
Case No : FAO No. 14 of 2004

Bitu Bhalla

APPELLANT

Vs

Rajesh Mohan Bhalla and Another

RESPONDENT

Date of Decision : 05-10-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 4
Evidence Act, 1872 — Section 47, 63, 68

Citation : (2011) 10 DEL CK 0248

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : S.S. Tripathi, for the Appellant; K.N. Rai, Advocate with Mr. S.N. Rai, for the Respondent

Final Decision : Dismissed

Judgement

Valmiki J Mehta, J.—These are two appeals filed against the impugned judgment of the Probate Court dated 13.10.2003. By the impugned judgment two petitions were disposed of. The Probate Court allowed the probate petition filed by Sh. Rajesh Mohan Bhalla, who is the Respondent No. 1 in FAO No. 14/2004 and the Respondent No. 2 in FAO No. 17/2004. Besides allowing the probate petition filed by Sh. Rajesh Mohan Bhalla, the impugned judgment dismissed the probate petition which was filed by the Appellant in these appeals. Whereas the Respondent/Sh. Rajesh Mohan Bhalla had claimed probate with respect to the Will dated 25.2.1986 of his father Sh. Munshi Ram Bhalla, the Appellant claimed probate with respect to the Will dated 21.4.1980 of the said Sh. Munshi Ram Bhalla and who was the grandfather of the Appellant. The two FAOs contain identical prayers, however basically one appeal is with respect to dismissal of the probate petition as filed by the Appellant and the other appeal is with respect to grant of the probate to Sh. Rajesh Mohan Bhalla.

2. The facts of the case are that Sh. Munshi Ram Bhalla was ordinarily a resident of Delhi and he died on 1.5.1986. Sh. Munshi Ram Bhalla was survived by his

three sons and three daughters as his legal heirs. Sh. Munshi Ram Bhalla owned the property bearing No. 8 - Jaipur Estate, Nizamuddin East, New Delhi. Sh. Rajesh Mohan Bhalla, Respondent No. 1 in FAO No. 14/2004 and Respondent No. 2 in FAO No. 17/2004, (herein after referred to as a Respondent) filed the probate petition No. 192/1986 (old) and 159/2001 (new) claiming probate with respect to the Will dated 25.2.1986 of his father late Sh. Munshi Ram Bhalla pleading that the said Will was the last Will of Sh. Munshi Ram Bhalla, and as per which Will the property at Nizamuddin East was bequeathed exclusively in favour of the Respondent. As per this Will dated 25.2.1986 the Respondent was to pay a sum of Rs. 3,00,000/- each to his brothers i.e. to the other two sons of Sh. Munshi Ram Bhalla and also certain insignificant amounts to an adopted sister and a servant. This Will is said to have been attested by Sh. Hans Raj Sood, a Chartered Accountant and Dr. Amar Jiwan who was a personal friend of the deceased testator and, who also on occasions attended to the medical requirements of the deceased testator.

3. The Appellant objected to the probate petition of the Respondent and alleged that the Will dated 25.2.1986 was a forged and fabricated document and that the same was brought into existence in collusion with the attesting witnesses. It was pleaded that the testator died leaving behind his last Will dated 21.4.1980 which was deposited with the Registrar, Delhi and which Will when was opened in the presence of the heirs of Sh. Munshi Ram Bhalla, and in the presence of Mr. Anil Chopra, Advocate for the Petitioner, there was no mention made of the subsequent Will dated 25.2.1986 as was later propounded by the Respondent. The Appellant alleged that the signatures of the deceased testator were obtained on the Will dated 25.2.1986 by mis-representation and fraud. It was also pleaded by the Appellant that the deceased testator was not in a sound state of mind on 25.2.1986 and had almost lost his eye-sight. It was pleaded that the testator was in fact admitted in a nursing home with a fracture of the hip bone on 23.2.1986 and therefore it was doubtful that the Will dated 25.2.1986 would be a valid Will of the deceased testator. Objections were also filed to the Will dated 25.2.1986 by the father of the Appellant, one Sh. Anand Mohan Bhalla on the same lines as the Appellant. The Appellant also filed a cross petition for granting of the probate of the Will dated 21.4.1980 stating that this Will dated 21.4.1980 was the last and genuine Will of the deceased testator. This petition was contested by the Respondent not only by challenging the legality and the validity of the Will, but by setting up the subsequent the aforesaid Will dated 25.2.1986, which was said to be the last and valid Will of the deceased Sh. Munshi Ram Bhalla.

4. The Probate Court has held that the Will dated 21.4.1980, Ex. RW1/1, propounded by the Appellant is not a valid Will of the deceased testator inasmuch as no attesting witness of the Will was examined and no attempt was made by the Appellant to find out the current addresses of either of the two attesting witnesses. It was also held that the scribe of the Will dated 21.4.1980 namely Sh. K.R. Chawla, Advocate was only a scribe and he had no animus

attestandi, i.e. an intention to attest the Will. Accordingly, the probate petition filed by the Appellant was dismissed. With respect to the Will dated 25.2.1986, Ex.P2, propounded by the Respondent, the Probate Court held the same to be validly executed and the last genuine Will of the deceased testator. It was held that both the other sons of the testator had a residential property in Delhi whereas the Respondent had no residential property in Delhi thereby giving the reason for the testator to bequeath the property at Nizamuddin in favour of the Respondent. It was also held that besides the fact that no details of the fraud and mis-representation were pleaded in the objections, in fact no evidence at all was led with respect to the Will dated 25.2.1986, Ex.P2, as having been executed because of fraud or that the same was a fabrication. It was held that genuineness can be said to be attached to the Will dated 25.2.1986. Ex.P2, inasmuch as the beneficiary, i.e. the Respondent was in fact abroad on the date of the execution and attestation of the Will. Credibility was held to exist in the deposition of the attesting witness Dr. Amar Jiwan, who was the friend of the testator for six years.

5. The relevant observations of the Probate Court to hold that the Will dated 21.4.1980, Ex.RW1/1, as propounded by the Appellant was not a valid Will of the deceased testator read as under:

21. I am however, unable to agree to the interpretation as is sought to be given by the Learned Counsel for the Objectors. In Seth Beni Chand (Since Dead) Now by L.Rs. Vs. Smt. Kamla Kunwar and Others, it was simply held that no particular form of attestation is required and that an attesting witness need not necessarily be labelled as an attesting witness. There is no dispute about the proposition of law that a scribe can also be an attesting witness. What has been further clarified in N. Kamalam (Dead) and Another Vs. Ayyasamy and Another, is that it has to be seen from the document as to what was the intention of the testator and under what circumstances and for what purpose a particular witness had put his mark to the Will. In that case, three persons viz. Veraj Gowder, B. Govind Raju and Arunachalam had signed at the foot of the Will as witnesses. It had not been mentioned as to who were the attesting witnesses and who was the scribe or otherwise to the said Will. A part of the statement of Arunachalam was extracted in Seth Beni Chand (Since Dead) Now by L.Rs. Vs. Smt. Kamla Kunwar and Others, and though it had been found that the Will was executed in presence of the three persons stated above, but it was held that Arunachalam had put his signatures at the time of execution of the Will with the intention of only a scribe to the Will with the intention of only a scribe to the Will. In the instant case, examination of Shri K.R. Chawla Advocate, coupled with the Will Ex.R-2/1, would reveal that he had signed the Will as a scribe only. In fact, if in N. Kamalam (AIR 2001 SC 2002), Shri Arunachalam cannot be treated as an attesting witness, Shri K.R. Chawla Advocate cannot be treated as an attesting witness by any stretch of imagination because in N. Kamalam (Dead) and Another Vs. Ayyasamy and Another, it had not even been mentioned beside the name of Arunachalam that he was the scribe of the Will. However, in the instant case, it has been

specifically mentioned:

drafted by

Sd/-

(K.R.CHAWLA) Advocate

Delhi

Applying the ratio of N. Kamalam (Dead) and Another Vs. Ayyasamy and Another, , it cannot be said that Shri K.R. Chawla had animus to attest the Will and thus, in my view, he was not an attesting witness.

22. The other two attesting witnesses have not been produced. It has been urged by the Learned Counsel for the Objectors that from a perusal of the address, as given in the Will Ex.RW2/1, it can be inferred that they were tenants in the property subject matter of the Will and they having left the given address, their present whereabouts were not known to the Objectors, who were resident of U.K. and thus, they being not available, evidence of Shri K.R. Chawla Advocate can be looked into to prove the Will as embargo placed by Section 63 of the Evidence Act is lifted if the attesting witnesses are not available.

23. Summons were got issued to the two attesting witnesses for their evidence in the court on 4f.2.1997 which were returned back with the report that they were not available at the given address. No attempt was made by the Objectors to find out the current address of either of the two attesting witnesses. Neither of the two objectors have come forward to say on oath as to when these two attesting witnesses had left the premises No. 8, Jaipur Estate, Nizamuddin East, New Delhi and what efforts were made by them to find out their current address. There is not even a whisper as to the efforts made by the objectors to find out the current address of the two attesting witnesses. Thus, in my view, the Will could not be proved by any person other than an attesting witness in view of the embargo placed by Section 68 of the Evidence Act. In this view of the matter, I have to come to the conclusion that the Will dated 21.4.1980 has not been proved in accordance with law.

(underlining added)

6. The reasons given by the Probate Court for accepting the Will dated 25.2.1986, Ex.P2, as validly proved and to be the last Will of the deceased testator are as under:

17. Now I turn to the Will dated 25.2.1986 propounded by the Petitioner. The testator was an aged person. He died just within three months of the alleged execution of the Will dated 25.2.1986. Thus, the initial onus was heavy on the Petitioner to prove the genuineness and validity of the Will propounded by him. It is not in dispute that all the three sons of the testator were settled abroad. The recital in the Will dated 25.2.1986 that Shri Rajesh Mohan Bhalla was not owning any residential property in Delhi; whereas other two sons were owning

residential properties, has not been disputed by the Objectors by denying the same. The Will dated 25.2.1986 has been attacked on the ground that signatures on the Will were obtained by mis-representation, fraud and that the testator was not knowing the details of the document, which he was signing. The particulars of fraud and mis-representation have not been disclosed in the objections filed by the Objectors as required under Order 6 Rule 4 Code of Civil Procedure. PW-2 Dr. Amar Jiwan deposed about the execution of the Will. No suggestion was given to him as to how the signatures of the testator were obtained by fraud or mis-representation. In the Objections, it was pleaded that the attesting witnesses were closely connected to the Petitioner. However, during cross-examination of the Petitioner of even the attesting witnesses, no such suggestion was given. of course, signatures of testator appears at three places on page 3 and two places on page 1 and there is some difference in the signatures inter-se but it is not very material in view of the fact that the Petitioner Rajesh Mohan Bhalla who is the major beneficiary under the Will, was abroad on the alleged date of execution of the Will. Dr. Amar Jiwan, was a government Doctor and a friend of testator for the last six years before the execution of the Will, and the testator at times, used to receive treatment from him. Why Dr. Amar Jiwan or for that matter Shri H.R. Soor, would become a party to the forgery of a Will or take signatures of the testator by fraud or mis-representation, has not been explained by the objectors. It was held by the Hon"ble Supreme Court in Surendra Pal and Others Vs. Dr. (Mrs.) Saraswati Arora and Another, that where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same and if the caveator does not discharge the burden which rests upon him, in establishing the circumstances which show that the Will had been obtained by fraud or undue influence, probate was liable to be granted.

18. In this particular case, the Objectors preferred not to enter the witness box at all to rebut the evidence of the Petitioner (PW-1) and Dr. Amar Jiwan (PW-2), an attesting to the Will dated 25.2.1986. Objectors also failed to discharge the onus of proving the fraud and mis-representation. In the circumstances of the case, I am of the considered opinion that the Will dated 25.2.1986 (Ex.P2) has been duly proved on the test of preponderance of probabilities.

(underlining added)

7. Learned Counsel for the Appellant argued that the Trial Court was not justified in holding that the Will dated 21.4.1980 was not a valid Will because besides an attesting witness, any other person who is conversant with the signatures of the deceased testator can prove the Will when the attesting witness is not available and which was so in this case. It was argued that once the tenants who had attested the Will had left the property, and their addresses were not available, it was not incumbent to examine the attesting witnesses to prove the Will which can be said to be proved by the deposition of the scribe of the Will who appeared as a witness and deposed that he was an attesting witness. It was also argued, and rightly, that the Will was deposited in the office of the sub-Registrar by the

deceased testator removing any doubt as to its validity.

I agree with the counsel for the Appellant that the Trial Court has fallen into an error in discarding the testimony of Sh. K.R. Chawla, Advocate. Sh. K.R. Chawla may not have been specifically stated to be an attesting witness to the Will but admittedly he is the scribe of Will. Mr. K.R. Chawla in detail has deposed of the deceased testator calling him a week before execution of the Will and also with respect to his making of a rough draft as per the instructions of the deceased testator. Sh. K.R. Chawla, Advocate has also deposed with respect to finalization of the Will on 20.4.1980 and informing to him by Sh. Munshi Ram Bhalla to come on 21.4.1980 along with witnesses and the fact that he in fact did come on 21.4.1980 to the office of Sh. K.R. Chawla, Advocate where the Will was executed and attested on 21.4.1980. This witness has referred to the deceased testator having first put his signatures on the Will, Ex.RW1/1, and thereafter his putting the signatures on the last page of the Will and the putting of the signatures by the attesting witnesses in the presence of Mr. K.R. Chawla, Advocate as also in the presence of the deceased testator. Sh. K.R. Chawla, Advocate has also deposed with respect to the deceased testator being in a sound state of mind at the time of execution of the Will and that said Sh. K.R. Chawla, Advocate was in fact a neighbour of the deceased testator in Nizamuddin East, New Delhi. To the aforesaid categorical examination-in-chief of Sh. K.R. Chawla, Advocate, there is hardly any cross-examination of any substance. The cross-examination is barely of but a few lines and Sh. K.R. Chawla has confirmed that the deceased was in a sound state of mind and there are no questions which have been asked to Sh. K.R. Chawla, Advocate that the signatures on the Will are not that of the testator and also not of the attesting witnesses. I therefore hold that since Sh. K.R. Chawla, Advocate has proved the execution and attestation of the Will especially because nothing of any substance was elucidated in cross-examination of Sh. K.R. Chawla as regards any alleged infirmities of the Will dated 21.4.1980, Ex.RW1/1. Thus the Will dated 21.4.1980 is held to have been proved to be validly executed and attested. I have also seen affirmative evidence led on behalf of the Respondent and I find that there is no statement in the examination-in-chief of any of the two witnesses on behalf of the Respondent that the Will dated 21.4.1980 has not been validly executed and attested. The aforesaid aspects taken with the fact that the Will was deposited with the sub-Registrar are sufficient reasons to hold that the Probate Court fell into an error in holding that there was no valid Will dated 21.4.1980 executed by the deceased testator. Accordingly, the impugned judgment is set aside to the extent of that it holds that the Will dated 21.4.1980 has not been validly executed and attested.

8. However, that is not the end of the matter because probate cannot be granted of the Will dated 21.4.1980, Ex.RW1/1, if the deceased testator had left behind a valid Will, Ex.P2 dated 25.2.1986.

In my opinion, the Trial Court has rightly held the Will dated 25.2.1986 to be

validly proved and exhibited. As already stated above, no affirmative evidence was led on behalf of the Appellant herein of their being any fraud in the execution and attestation of the Will dated 25.2.1986 and which is an aspect in addition to the fact that the points of fraud and mis-representation were not even pleaded in the Objection Petition as per the requirement of Order 6 Rule 4 Code of Civil Procedure. The Trial Court has rightly relied upon the evidence of the attesting witness Dr. Amar Jiwan. Dr. Amar Jiwan has specifically deposed that he went to the nursing home where the deceased testator, Munshi Ram Bhalla was admitted and the Will was executed and attested just before his operation. Dr. Amar Jiwan as PW2 deposed that the deceased testator was his friend and he had also attended the funeral ceremony of the deceased testator. Besides proving the due execution and attestation of the Will, the witness deposed about the sound state of mind of deceased testator at the time of the execution of the Will, Ex.P2. Surely, the witness, being a Doctor, was more competent than a layman to depose about the sound state of mind of the deceased testator. In his cross-examination this witness has clarified that though he is in Government service, and not allowed to practice medicine, yet he did give prescriptions to the deceased. I do not find anything unusual in this, because, surely a doctor friend can prescribe medicines to his friend. This attesting witness has specifically mentioned that though the deceased testator had weak eye-sight because of old age however, the deceased testator was in the position to see and read with specs. The attesting witness has also mentioned with respect to different number of signatures on the different pages of the Will dated 25.2.1986, Ex.P2, having been put in his presence. The most important aspect was that the beneficiary of the Will dated 25.2.1986 was abroad when the Will dated 25.2.1986 was executed and which therefore removes the alleged suspicious circumstances in the due execution and attestation of the Will.

9. Learned Counsel for the Appellant argued that the deceased testator was not in a sound state of mind and nor the Will dated 25.2.1986 was validly executed. This was argued on the basis that the deceased was admitted to a nursing home having a hip bone fracture and there are different numbers of signatures on each page of the Will, i.e. whereas there are two signatures on the first page, one signature on the second page, there are three signatures on the third/last page. It was also argued that the attesting witness, Dr. Amar Jiwan admitted that he could only identify the signatures of the deceased testator on the Will and in no other documents including on a Vakalatnama bearing signatures of the deceased testator. Emphasis has also been laid on the fact that actually the deceased testator was operated in Sen Nursing Home and not in Mahindra Nursing Home as was deposed by the attesting witness. It was argued that whereas PW1/ Respondent stated that the name of the nursing home was Sen nursing home, the attesting witness Dr. Amar Jiwan PW2 said that the name of the nursing home was Mahindra nursing home. Challenge is also laid to the testimony of the attesting witness on the ground that whereas the attesting witness said that he

normally puts a date below his signatures, however, in the Will, the signatures do not appear with a date. Great stress is laid on two aspects, i.e. Will dated 25.2.1986, Ex.P2 not containing any date of the earlier Will and also of no mention being made of this Will dated 25.2.1986 at the time of opening of the Will dated 21.4.1980, Ex.RW1/1 in the office of the Registrar on behalf of the Respondent.

10. In my opinion, the arguments as advanced on behalf of the counsel for the Appellant do not have such substance to dislodge the other evidence led with regard to execution and attestation of the Will dated 25.2.1986. Merely because a person is admitted in a nursing home on account of fracture of the hip bone for which he has to be operated, cannot mean that the said person is not in a sound state of mind for executing the Will, when the sound state of mind of the deceased testator has duly been deposed by none other than a Doctor and who was a friend of the deceased testator for six years and who also had no interest in the subject matter of the Will nor had any acrimonious relations with the Appellant to depose against him. The mere fact that the exact date of the earlier Will is not mentioned in the subsequent Will cannot be said to be such a strong ground to urge that the subsequent Will, which is otherwise validly executed, was not a valid Will inasmuch as one cannot deny the fact that the deceased was admitted in a nursing home for an operation, and therefore there would not have been readily available with him the date of the earlier Will. Further, it is not incumbent to necessarily make a mention of an earlier Will in a subsequent Will so as to give validity to the subsequent Will and this is only one out of the many factors which are examined by the Court to determine the suspicious circumstances with respect to a Will. The facts of the present case as stated above when taken in totality negate the possibility of suspicious circumstances in execution and attestation of the Will dated 25.2.1986. The great stress which was laid by Learned Counsel for the Appellant on the fact that there were two signatures appearing on the first page, one signature on the second page and three signatures on the third page to argue about the invalidity of the Will dated 25.2.1986 is really not of much strength. At first blush, this aspect appeared to be unusual, however, the same can well be explained by the fact that the deceased testator being of an advanced age, and having been admitted to a nursing home on account of the fracture of the hip bone, he would have been interested to ensure that there is no doubt about his signatures and which apprehension he sought to overcome by signing more than once on a particular page when he thought so. Such action of the deceased testator in being over-cautious cannot be said to be such so as to cause any doubt in the execution and attestation of the Will, especially considering the fact that no affirmative evidence whatsoever was led on behalf of the Appellant with respect to the alleged fraud or fabrication in making of the Will. There is absolutely no deposition of any witness on behalf of the Appellant of any fraud etc. in any manner qua the Will, Ex.P2 and therefore the arguments of the counsel for the Respondent carries weight that the necessary evidence which is required so as to

dis-lodge the affirmative evidence was not led and hence it should be held that there is no fraud or existence of suspicious circumstances with respect to the execution and attestation of the Will dated 25.2.1986. A civil case is decided on balance of probabilities and there is no case in which there would not be pros and cons in favour of each of the parties with respect to pleadings and evidences, and therefore, minor circumstances and discrepancies including in the name of the nursing home or that the attesting witness, Dr. Amar Jiwan had not put a date below his signatures cannot be said to be strong circumstances to hold the Will, Ex.P2 not to be a valid document. One cannot ignore the fact that the other two brothers of the Respondent each had an immovable property in Delhi whereas the Respondent had no immovable property in Delhi which was the reason for the Respondent to be the beneficiary under the Will dated 25.2.1986 and as already stated above the main beneficiary was out of the country when the Will, Ex.P2 was executed and registered. Further there is nothing so unnatural in the deposition of attesting witness only to admit to the signatures of the deceased testator in the Will and nowhere else because why should a witness depose about signatures which were not signed before him. The requirement of Sections 47 and 68 of the Evidence Act, 1872 are qua the disputed signatures which are required to be put in the presence of the attesting witness and which has been deposed to by the attesting witness Dr. Amar Jiwan. Taking a cautious approach by Dr. Amar Jiwan by admitting only the signatures on the disputed Will does not mean that his otherwise valid testimony has to be discarded.

11. I therefore, hold that the Trial Court was justified in holding that the deceased Sh. Munshi Ram Bhalla had validly executed the Will dated 25.2.1986, Ex.P2 and which was duly attested

12. Learned Counsel for the Appellant sought to place reliance upon decision of a learned single Judge of the Punjab and Haryana High Court in the case of Bant Ram v. Inder Devi 1989 (2) HLR 202, however, I fail to understand how the said decision has any application to the facts of the present case inasmuch as, as per the facts in the said decision it was held that the revocation deed on the basis of which the Will was sought to be proven to have been revoked, was not legally proved and hence the Will of the deceased testator in that case could not be said to be revoked. I do not find any ratio in this judgment which was sought to be culled out by the counsel for the Appellant that an earlier Will which is deposited before the Registrar cannot be revoked by an un-registered Will, and which in any case is not the legal position.

13. In view of the above, while upholding the validity of the Will dated 21.4.1980, I hold that the appeals are liable to be dismissed because the deceased testator had left behind a subsequently validly executed and attested Will dated 25.2.1986 and of which probate has been rightly granted by the Court below. Appeals are dismissed, leaving the parties to bear their own costs.