

(2013) 04 DEL CK 0215
In the Delhi High Court
Case No : FAO (OS) 328 of 2010

Deepak Kumar Mendiratta

APPELLANT

Vs

Surender Kumar

RESPONDENT

Date of Decision : 04-04-2013

Acts Referred:

Evidence Act, 1872 — Section 68

Citation : (2013) 7 AD 451 : (2013) 201 DLT 588 : (2013) 136 DRJ 642

Hon'ble Judges : Sanjay Kishan Kaul, J; Indermeet Kaur, J

Bench : Division Bench

Advocate : V.P. Dewan and Mr. Sanjay Dewan, for the Appellant; S.K. Sharma, Milan Deep Singh and Mr. Rahul Sharma, for the Respondent

Final Decision : Dismissed

Judgement

Indermeet Kaur, J.—The appellant is aggrieved by the impugned order dated 18.01.2010 vide which the probate petition No. 44/1990 filed by the appellant seeking probate of the will dated 30.5.1985 of the testator Tehl Ram Tuteja (hereinafter referred to as "the testator") had been dismissed; simultaneously probate petition No. 5/1989 filed by the respondent seeking probate of the will dated 29.1.1988 had been granted. Record shows that the testator had three daughters; he had no male child. The subject matter of the probate petition was half undivided share in immovable property i.e. Plot No. A-294, Derawal Nagar, Azadpur, Delhi admeasuring 268.22 yq. yards which was in the joint names of the testator and the respondent (Surender Kumar). It was a joint allotment which was made in their joint names on 11.7.1978 and a joint construction was accordingly made by them on the aforementioned plot; till the date of the death of the testator this property had not been mutated in their individual names. Besides this property, certain movable assets of the testator were also the subject matter of the dispute.

2. Appellant had set up a will dated 30.5.1985. This document was proved as Ex. R-1; it was a registered document. Vide this testament the testator had

bequeathed his immovable property upon his youngest daughter Sudesh Kumari and her two sons Devender Kumar and Deepak Kumar in equal shares; Sudesh Kumari and Devender Kumar have since expired; Deepak Kumar is the appellant before this Court. This will was attested by two witnesses and was signed by the testator both in the English language and also in Urdu.

3. The subsequent will dated 29.01.1988 has been propounded by the respondent. It was proved as Ex. PW-1/1. In terms of Ex. PW-1/1 half share of the testator in his immovable property was to devolve upon the respondent whom the testator treated as his son and who had looked after him in his old age. Movable assets valued at Rs. 30,000/- besides some gold ornaments were to be distributed amongst all his three daughters and the respondent/Surender Kumar has been appointed as the executor to administer these movable assets after deducting the funeral expenses. This will was attested by two persons namely Jagdish Chander and Surender Kumar Arora and was signed by the testator both in English and in Urdu. It was not registered.

4. Both the Test Cases have been consolidated and the evidence led in Test Case No. 5/1989 was to be read as evidence in the second case as well. A common judgment was pronounced.

5. The appellant in order to prove Ex. R-1 had produced three witnesses. Correspondingly respondent in order to prove Ex. PW-1/1 had produced eleven witnesses. Their respective testimonies were appreciated in great depth and detail by the learned single Judge who returned the aforementioned finding upholding the later will dated 29.01.1988 which was directed to be probated; the earlier will dated 20.5.1985 had been discarded.

6. At the outset, it has been put to the learned counsel for the appellant as to on what ground he is laying a challenge to the Ex. PW-1/1 as admittedly once a valid will has been executed later in time it will supersede the earlier will. Learned counsels for the parties also concede to this settled legal position.

7. On behalf of the appellant it has been pointed out that the later will could not have been probated as no executor has been appointed; at best letters of administration alone could have been granted and not a probate as has been done so by the impugned order. Attention has been drawn to Ex. PW-1/1; submission being that there is an overlapping of the signatures of Tehl Ram and the alphabet "R" is written over the typed material clearly suggesting that the signatures of the testator had been obtained on a blank paper and the typed material was added to the blank sheet later on. Further submission being that there was no reason for the testator to have disinherited the natural legal heirs as the whole case set up by the respondent is that he is the adopted son of the testator but in the entire body of Ex. PW-1/1 there is no mention of the status of the respondent as his adopted son; in fact Para 3 of Ex. PW-1/1 recites that the respondent was the son of Thakur Dass. Further submission being that there was no reason for the learned single Judge to have discarded the earlier will dated

30.5.1985 which was an admitted document and whose authenticity was further fortified by the fact that it was a registered document. Ex. PW-1/1 smacked of suspicion and the impugned order granting a probate of this will has committed an illegality; impugned order is liable to be set aside.

8. Learned counsel for the respondent has refuted these submissions. Argument being that there is no dispute about the signatures of the testator on Ex. PW-1/1; further submission being that in these circumstances, it was incumbent upon the appellant to have produced cogent evidence to dislodge his argument that there was an overlapping of the signatures of the testator on the typed written format; he had not produced any such evidence; in fact the respondent had produced a handwriting expert (Kamal Kant Khandelwal-PW11) who had given his report testifying that the signatures of the testator appeared on Ex. PW-1/1 after the document had been typed. The attesting witness to the will (Surender Kumar Arora -PW-10) has also not been dislodged. On no count does Ex. PW-1/1 suffer from any infirmity.

9. Legal position is settled. The later will if validly executed and proved in accordance with law would supersede the earlier testament of the testator. Ex, PW-1/1 has been perused. Para one clearly recites that this is the last will of the testator; this will cancels the earlier will made by him in favour of his daughter Sudesh Kumari and her two sons. Para 3 describes relationship of the respondent with the testator and reads as under:

3. It is well known to everybody that Shri Surender Kumar son of my daughter Smt. Sita Rani wife of Shri Thakur Dass lived with me since his childhood and I brought him up as my son. He served me with devotion and looked after me well in my old age as a son.

10. Para 4 of Ex. PW-1/1 is also relevant. It reads as under:

Plot No. A-294 in Derawal Nagar, Delhi measuring 268.22 sq. yds was conveyed to me and said Shri Surender Kumar Jointly each having one half undefined share therein by the Dera Ismail Khan Co-operative House Building Society Limited by conveyance deed registered as Sl. No. 2520 in Addl. Book No. 1, Volume No. 3607 pages 108-110 on 11.7.1978 with S.R. Distt. I and on this plot we jointly constructed the building each contributing equally towards the cost of its construction, House at Plot No. A-294, Derawal Nagar is jointly owned by me and said Shri Surender Kumar each having one half undefined share therein. I hereby bequeath all my one half undefined share in the said plot No. A-294 Derawal Nagar and building constructed thereat to said Shri Surender Kumar absolutely. After my death my one half share in the said plot and the house constructed thereat shall go and devolve upon said Shri Surender Kumar absolutely to the exclusion of all my heirs.

11. Both these aforementioned positions are factually correct. It is an admitted fact that Surender Kumar is the maternal grandson of the testator and lived with him since his childhood; he had lived with him in his growing years and was in fact

the only family member present at the time when the testator expired. It is also an admitted fact that Plot No. A-294, Derawal Nagar (half of which is the subject matter of the present dispute) was in the joint names of the testator and the respondent; it was a joint allotment of the year 1978 and a joint construction of a building was made thereupon. The respondent is present in the court. He has been queried on this aspect. He submits that at the time of the death of testator there were four rooms on the ground floor comprising of three bedrooms and one living room besides a kitchen. The testator as also the respondent were all living on the ground floor and they had a common kitchen. On the first floor there were two rooms; a third room has been added subsequently and the barsati floor had also been constructed after the death of the testator. Learned counsel for the appellant who represents is the other maternal grandson of the testator does not dispute this factual position.

12. Ex. PW-1/1 has been attested by Jagdish Chander and Surender Kumar Arora. Surender Kumar Arora had come into witness box as PW-10. He had on oath deposed that Ex. PW-1/1 was attested by him; on that day i.e. on 29.01.1988 he had gone to see Tehl Ram who was alone at that time; he took out a typed sheet of paper and explained to PW-10 that this was his last will and it had been drafted by his counsel under his instructions. The second attesting witness Jagdish Chander (PW-9) had also reached the spot. PW-10 identified the signatures of PW-9 on Ex. PW-1/1 as also those of the testator; he further testified that the testator had signed in his presence and in the presence of PW-9. Testimony of PW-10 has not in any manner been discredited. In his cross-examination a specific query put to him as to how his signatures on Ex. PW-1/1 are in a different ink as that of the testator; he had explained by stating that different pens had been used by the testator and by him and that is why there was a difference in the ink. No counter suggestion has been given to this witness which could dislodge his version.

13. Submission of the learned counsel for the appellant that the testimony of PW-10 is contrary to the version of second attesting witness i.e. PW-9 who had in his cross-examination stated that when he had reached the spot the testator was not alone which is the version of PW-10, is an argument bereft of force as admittedly Jagdish Chander had only filed his evidence in chief and he not having been cross-examined the testimony of this witness cannot be read in evidence.

14. Credible testimony of one attesting witness is sufficient to satisfy the test of proof of a will as mandated u/s 68 of the Indian Evidence Act, 1872. Section 68 of the said Act is couched in a mandatory language; only one of the two attesting witnesses is necessary for proving the execution of the document which is required in law to be attested.

15. The other cumulative circumstances which had persuaded the learned single Judge to opine in favour of the validity of this later will are also relevant and need to be adverted to.

16. Apart from the fact that it is an admitted position that the testator had a half share in the suit property (House No. A-294, Derawal Nagar, Azadpur) being jointly owned with the respondent; the joint owners had also constructed a common house on the said plot. It was a single unit; the plot was also assessed to house tax as a single unit. Husband of the appellant Gobind Lal (DW-3) had himself admitted that there was one entrance and a common staircase. Ex. PW-1/2 was a photocopy of the school certificate issued by the Central Board of Secondary Education; a copy of the graduation certificate issued by the University of Delhi in favour of the respondent was proved as Ex. PW-1/3. Both these documents make a reference to the name of the petitioner as Surender Kumar Tuteja, the surname "Tuteja" not being the natural surname of the respondent yet the same was appearing in both these documents substantiating this submission of the learned counsel for the respondent that the respondent was for all purposes treated as the son of the testator. In the marriage ceremony of the respondent "Sehara"(Ex. PW-6/1) the name of Gobind Lal (DW-3 and husband of Sudesh Kumari) and Jaman Lal Khurana (husband of Raj Rani another sister) were depicted as "Peshkarta" indicating that the respondent was treated as the brother of Sudesh Kumari and Raj Rani. Sita Rani and Raj Kumari had entered into witness box as PW-4 and PW-6 respectively; they had not refuted this impression. They had further testified that the earlier will of 30.5.1985 had been executed by their father at the instance of Sudesh Kumari and when realization dawned upon him he repented and cancelled this will and executed his second will Ex. PW-1/1 which was his last will. The last rites of the testator had also been performed by the respondent which position stood admitted by DW-3 (Gobind Lal). In this factual background as emanating from the evidence on record, it was rightly concluded by the learned single Judge that the submission of the respondent that he was looking after the deceased during his lifetime and in fact performing all duties of a dutiful son stood satisfied.

17. The law is well settled; the onus to prove a will is upon the party who propounds it. Respondent had discharged the onus. It was the defence of the appellant that Ex. PW-1/1 contained an overlapping and the signatures of the testator appeared to be over-written. Admittedly no witness had been brought forth by the appellant on this count. The respondent had in fact produced PW-11 a handwriting expert, who had proved his report as Ex. PW-6/A. This report had been prepared on the basis of the enlarged photographs which were the admitted and disputed signatures of the testator. After a comparison the handwriting expert had concluded as follows:

In this case I examined the above mentioned Will with the help of magnifying lenses and with the help of other measuring devices. After careful and minute examination of the above mentioned Will my opinion is that the Will is typed at first and the Testator Tehl Ram signed after typed matter and after examination I found that the curve of "R" is written after on the typed matter.

18. No suggestion was given to this witness that the signatures of the testator

were forged or in fact were not his signatures. The categorical deposition of PW-11 on this count remained unassailed. As noted supra no contrary evidence on this count was brought on record by the appellant.

19. The defence of the objector that the testator was not of a sound disposing mind at the time of the execution of Ex. PW-1/1 was based on no evidence. Dr. V.P. Soota (PW-7) the family doctor of the parties was a witness of the respondent. His deposition was to the effect that the testator was suffering from bleeding piles but he was otherwise physically fit and normal; he was mobile and was attending to his social commitments even till the last. He denied the suggestion that the testator was suffering from any paralytic problem. Although in June, 1985 the testator had suffered a mild attack on the right side of his body but he had improved his health over the passage of time and was mobile with a stick. The photographs Ex. PW-5/1 and Ex. PW-5/2 which were of the year 1986 taken on the engagement ceremony of his grandson in fact depicted the testator in a sound health. Learned single Judge in this scenario had rightly concluded that the mental faculties of the testator were intact and in no manner affected.

20. The cumulative evidence both oral and documentary thus established that the testator was in a sound disposing mind and in the presence of two attesting witnesses had executed his last testament Ex. PW-1/1. This was a typed document prepared by an advocate; it had been read over and explained to the testator as also to the witnesses and it was signed by the executor in the presence of the attesting witnesses; the attesting witnesses had also signed in the presence of the testator; this is clear from the categorical deposition of PW-10. Ex. PW-1/1 had also revoked the earlier will of 30.5.1985. The factual scenario as built up on the basis of the evidence collected, in fact, reflects the unambiguous intent of the testator. The unambiguous intent being to bequeath his half share in the immovable property of A-294, Derawal Nagar, Azadpur in favour of the respondent Surender Kumar who lived with the testator through thick and thin and had spent all his growing years with him. In fact undisputedly even on the date of the death of the testator he was the only family member who was present in the house; they were also sharing a common kitchen. The testimony of the expert witness (PW-6) also additionally weighed in favour of the validity of Ex. PW-1/1.

21. The appellant having failed to dislodge Ex. PW-1/1 it was really not necessary for the learned single Judge to have opined upon the validity of the earlier will Ex. R-1 as the settled legal position is that if the will later in time has been validly executed and proved in accordance with law it would be the last testament of the deceased, automatically revoking any other earlier testament. The objection of the appellant that a probate could not be granted and at best only letters of administration could have been issued is a misplaced objection; Ex. PW1/1 clearly recites that Surender Kumar is appointed as the executor of the will; he could distribute the moveable assets of the testator amongst the three daughters of the testator after deducting the funeral expenses. Even

presuming; for the sake of argument that an executor was not appointed and a probate has been granted; when only letters of administration could have been issued; it could only be a procedural defect which can be cured and would not otherwise affect the validity of the will. [See: Shri Prem Prakash Vs. State and Others,] On no count does the appellant deserve any relief. Appeal is without any merit. Dismissed.