
(2013) 12 GUJ CK 0191
In the Gujarat High Court
Case No : First Appeal No. 1796 of 2012

Jayesh Damjibhai Gajjar

APPELLANT

Vs

Dineshbhai Damjibhai Gajjar

RESPONDENT

Date of Decision : 12-12-2013

Acts Referred:

Citation : (2013) 12 GUJ CK 0191

Hon'ble Judges : S.G. Shah, J

Bench : Single Bench

Advocate : Adil R. Mirza, No. 1, for the Appellant; Jal Soli Unwala, Advocate for the Defendant No. 1, for the Respondent

Final Decision : Dismissed

Judgement

S.G. Shah, J.—Admit. Notice of admission is waived by Mr. Jal Unwala, Ld. Advocate for the respondent. Heard Ld. Advocate Mr. Adil Mirza for the appellant and Mr. Jal Unwala, Ld. Advocate for the respondent.

2. The record shows that the appeal against the impugned order in Probate Application No. 5/2008 dated 29/2/2012, filed in the month of July 2012, is pending for admission since then. By an order dated 14/3/2013 this High Court has directed the appellant to place on record oral evidence of witnesses and copy of the will. In response, the appellant has produced paper book consisting of probate application, copy of Will and copies of deposition of witnesses to will. On demand, today Ld. Advocate for the appellant has placed on record certified copies of objections filed by the other-side before the trial Court. In addition to oral arguments of both the Ld. Advocates, record has been perused.

3. Considering the arguments of both the sides and perusal of available record as well as impugned judgment, makes it clear that prima-facie there is no substance in the First Appeal itself and application for probate preferred by the appellant deserves to be dismissed on several grounds in addition to grounds, for which it is dismissed by the Ld. 3rd Addl. Sr. Civil Judge, Valsad, vide impugned

judgment dated 29/2/2012.

4. On face of record, it becomes crystal clear that though the deceased Damjibhai Hirajibhai Gajjar has as many as eight legal heirs including present appellant, while filing the application for probate, the appellant has not failed to disclose their names in cause title and thereby to allow the Court to issue notice upon all legal heirs either to support the application or to oppose it. Copies of certified copies of all relevant documents are already on record. IN the application for probate, the appellant has categorically states against the title opponent, "nobody", though the Will at exh. 57 categorically confirms that the deceased has other legal heirs except the appellant. The same fact has been categorically disclosed by the respondent while filing an objection at exh. 7 that the deceased has left behind him respondent being real brother of the appellant and four other sisters. Surprisingly, the respondent has to object the application only after noticing the filing of probate application by the appellant through public notice. Therefore, prima-facie, when notices upon such legal heirs are not issued only because of the reason that the appellant has not joined them as party, the probate application cannot be allowed, as prayed for.

5. It is not disputed that the appellant and respondent are real brothers and they are fighting for a small part of the residential house which was in possession of the deceased. However, for disposing such part, basic requirement is to the effect that such property must be self acquired property. However, if we refer the will, it becomes clear that in the Will itself, execution of it is challenged, deceased has no option but to disclose that southern part of the residential bungalow "Shantikunj" was received by him during the partition with his brother in the year 1982. When one of the properties is received by the deceased from his ancestors and in partition with coparcener, he is not entitled to bequeath it by will. Therefore, to that extent, Will is not executable.

6. So far as some other properties are concerned, it seems that they are also not of absolute ownership of the deceased and probably they are in partnership with some other person and, therefore, also the deceased is not entitled to bequeath such property by will.

7. Unfortunately, even after such typical disputed facts, the appellant has failed to prove and clarify on record that how the deceased is entitled to bequeath this property under the Will as claimed by him.

8. However, the trial Court has instead of entering into such legality or technicality, solely relied upon the factual details to come to the conclusion that the execution of the Will itself is suspicious. There are catena of judgments that if execution of Will is suspicious, then probate cannot be issued in favour of the appellant only because he is beneficiary of such will. For the purpose, the trial Court has categorically observed in the impugned judgment that since Will has been registered on some later date than the date of execution and that when both the witnesses though supported execution of the will, there is material

contradiction in their deposition, not only amongst each other, but also with reference to the admitted fact like date of death of deceased Damjibhai, inasmuch as though said Damjibhai had expired in the year 1996 and that too at the age of about 84 years, at-least one of the witnesses has stated on oath before the Court that he met the deceased Damjibhai in the year 1997 when he retired and that he was aged about 90 years, though deceased Damjibhai was retired in the year 1996 and he was aged about 70 years while executing the will. We can understand that there may be error in recollecting the age of some other person, more particularly after couple of years, but in all such cases where particular thing is to be proved through the particular witness, though minor contradiction generally be avoided, it is the duty of the appellant as well as witnesses to be precise and clear about what they deposed and disclosed before the Court. So far as the age is concerned, one of the witnesses is claiming that deceased was 80 years; whereas other was claiming that he was about 90 years. The witness Batukbhai Desai has categorically confirmed at exh. 54 that nobody was present when he signed the will. It was not read either by him or by the deceased and that Will was signed in the office of Ramjibhai. Whereas other witness Ratilal Ramabhai Prajapati though confirms that he and deceased Damjibhai had not read the will, he states that when he signed the will, Batukbhai Desai and appellant were present; whereas as aforesaid other witness Batukbhai confirms that nobody was present at the time of signing the will. Therefore, version of witness Ratilal is also not trust worthy. He even does not know that when deceased expired, though he clarifies that Damjibhai had another daughter, namely Kanchanben, who was studying with him. As stated hereinabove, said Kanchanben was not joined as party by the appellant.

9. In addition to such contradiction, the trial Court has rightly explained the details regarding execution and registration of the will. For the purpose, recollecting the dates would be relevant. Deceased Damjibhai expired on 3/10/1996. Will is signed on 1/3/1994. It was registered on 16/11/1994 i.e. after more than 8 months and so far as history regarding illness of the deceased is concerned, as deposed by the appellant himself, it becomes clear that this registration was during the period when the deceased was bedridden. There is admission of the appellant himself that when deceased expired, he was only of the age 65 years, in October 1996 and before that, for one or two years, deceased was sick and ill, he was operated for the injuries on thigh and he was bedridden. Therefore, also it is unbelievable that bedridden person has went to the Registrar office for registration of the will.

10. The trial Court has also narrated all relevant aspects of entire evidence and relied upon the decision of the Hon'ble Apex Court rendered in the case of Bharpur Singh and Others Vs. Shamsheer Singh, and section 63[c] of the Indian Succession Act. It confirms that even if the Will is registered one, its execution must be proved and propounder must also prove the sound and disposing state of testator's mind and signature. It is, however, held in such reported case that when Will is surrounded by suspicious circumstances, it would not be treated as

the last testamentary disposition of testator and thereby propounder of the Will has to remove all suspicious circumstances and satisfy the Court that the Will was duly executed by the testator. Therefore, cogent and convincing explanation of suspicious circumstances shrouding the making of Will must be offered. The Hon''ble Apex Court has given list of probable suspicious circumstances in such judgment which includes-

- i. The signature of the testator may be very shaky and doubtful or not appear to be his usual signature.
- ii. The condition of the testator's mind may be very feeble and debilitated at the relevant time.
- iii. The disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or absence of adequate provisions for the natural heirs without any reason.
- iv. The dispositions may not appear to be the result of the testator's free will and mind.
- v. The propounder takes a prominent part in the execution of the Will.
- vi. The testator used to sign blank papers.
- vii. The Will did not see the light of the day for long.
- viii. Incorrect recitals of essential facts.

11. Mr. Jal Unwala, Ld. Advocate for the respondent has relied upon the following citations.

- I. H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others,
- II. Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and Others,
- III. Lalitaben Jayantilal Popat Vs. Pragnaben Jamnadas Kataria and Others,
- IV. K. Laxmanan Vs. Thekkayil Padmini and Others,
- V. S.R. Srinivasa and Others Vs. S. Padmavathamma,

12. The sum and substance of all above citations are to the effect that a propounder of the Will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the mind of the Court by cogent and satisfactory evidence.

In cases where the execution of a will is shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and the defendant. What, generally, is an adversary proceeding becomes in such cases a matter of the Court's conscience and then the true question which arises for consideration is whether the evidence led by the propounder of the will is such as to satisfy the conscience of the Court

that the will was duly executed by the testator. It is impossible to reach such satisfaction unless the party which sets up the will offers a cogent and convincing explanation of the suspicious circumstances surrounding the making of the Will.

Where the evidence of attesting witnesses is vague or doubtful or even conflicting, the Court may take into consideration the circumstances of the case and judge from them collectively whether the requirements of the Statute were complied with; in other words the Court may, on consideration of other evidence or of the whole circumstances of the case, come to the conclusion that their recollection is at fault, that their evidence is of a suspicious character, or that they were willfully misleading the Court, and accordingly disregard their testimony and pronounce in favour of the Will.

It is essential that the witness should have put his signature *animo attestandi*, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose e.g. to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness.

13. Rather respondent has proved that deceased testator was at the time of alleged execution of Deed of Will, was aged about 80 years and suffering from serious physical ailments and was bedridden.

14. Therefore, the law is well settled that when a Will is surrounded by suspicious circumstances, the person propounding the Will has a very heavy burden to discharge the onus of proof and onus of removing suspicious circumstances surrounding the execution of the Will.

15. Since there were suspicious circumstances, it was necessary for the defendants to explain the same. The registration of the Will by itself was not sufficient to remove the suspicion. Even non-examination of the Sub Registrar also creates suspicion about the genuineness of the Will. There is no evidence whether the Will was read over by the Sub Registrar or anybody else before it was registered. It is not explained as to how the Will came into possession of defendant No. 1. The trial Court had pointed out so many suspicious circumstances which could not have been brushed aside as being conjectural. The findings were based on documentary evidence. Therefore, it was necessary for the appellant to answer pertinent questions relating to the execution of the Will, more particularly when the appellant is the sole beneficiary under the Will and all other legal heirs are excluded from the inheritance for which there is no convincing reason as to why they were excluded from the inheritance.

16. Moreover, though the Will has appointed two executors, the appellant has failed to confirm that why they have failed to execute the Will. Therefore, there is no substance in the appeal so as to admit it and keep it pending for couple of years when copies of certified copies of relevant documents are produced and when both the sides have argued on merits of the case. Since there is no substance in the appeal, the same deserves to be dismissed and it is hereby

dismissed.