

(2001) 03 DEL CK 0043

In the Delhi High Court

Case No : L.A. 11632/98 in Pr. C. No. 16/92

Ms. Radhika Khanna

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 22-03-2001

Acts Referred:

Citation : (2002) 2 CivCC 543 : (2001) 91 DLT 96 : (2002) 1 RCR(Civil) 448

Hon'ble Judges : Kripa Shankar Gupta, J

Bench : Single Bench

Advocate : Sh. Y.P. Chandna, for the Appellant; Sh. J.P. Sengh, for the Respondent

Judgement

K.S. Gupta, J.—Nand Lal Aggarwal, applicant filed this application on 17th December 1998 alleging that the case set up by Ms. Radhika Khanna (hereinafter referred to as "petitioner") in the petition filed under sections 276 and 278 of the Indian Succession Act, 1925 which was allowed by the other dated 7th March 1994, is that Smt. Kamla Khanna, her mother and wife of S.D.Khanna died on 12th June 1983 leaving behind a will dated 6th March 1981 in her favor. It is further alleged that petitioner's father S.D.Khanna filed a petition for grant of probate before the District Judge, Delhi and her interest in that petition was not properly looked after by him. In response to petition, S.D.Khanna filed "No Objection/reply" wherein it has been stated that he is in possession of will dated 26th March 1979 left behind by his wife under which he is the beneficiary of her estate. He was further stated that he did not know about the will dated 6th March 1981 and existence thereof was disclosed to him by his brother T.D.Khanna towards the end of 1987. He withdraw the petition filed for grant of probate before the District Judge, Delhi as one of the assets was located outside Delhi and petitioner was nearing attainment of majority and he did not want to deprive her of the legal rights accruing to her under the will dated 6th March 1981.

2. It is alleged that sometime in March 1987 said S.D.Khanna applied to Haryana

Urban Development Authority for transfer of Plot No.64-P, Sector 6, Panchkula in his name on the strength of will dated 26th March 1979. Thereafter on 14th October 1987 S.D.Khanna entered into an agreement of sale with the applicant agreeing to sell the said plot for a sum of Rs.4 lakhs and received Rs.40,000/- towards part payment. Date of execution of transfer papers was fixed as 31st December 1987. Inspire of repeated requests S.D.Khanna did not pursue the application for transfer of said plot in his name as price thereof had risen. Instead a notice was got set through Sh. S.K.Khanna, Advocate on 25th January 1988 on behalf of petitioner stating that said plot had been inherited by two legal heirs of Smt. Kamla Khanna, i.e. the petitioner and S.D.Khanna and under the agreement of sale the interest of petitioner, then minor was being jeopardised. In the notice there was no mention of alleged will dated 6th March 1981. It is further stated that after S.D.Khanna did not execute/complete the documents for transfer of plot, the applicant was left with no alternative but to file a suit for specific performance being Suit No. 266/90 on 5th March 1990 against him in the court of Senior Sub Judge, Ambala having jurisdiction in the matter. S.D.Khanna avoided to receive the summons and finally appeared in court on 30th January 1992 but did not file written statement till 22nd August 1994. During the pendency of suit, the petitioner applied to Estate Officer, Panchkula for transfer of said plot in her name on 16th August 1991. She filed her affidavit stating that she Along with S.D.Khanna were the legal heirs of Smt. Kamla Khanna, deceased. S.D.Khanna also filed affidavit stating that Smt. Kamla Khanna had left behind him and the petitioner as her legal heirs. In the affidavit he further stated that he had no objection if the allotment/ownership of plot was transferred in the name of petitioner. Accordingly, transfer of said plot was permitted in the name of petitioner. It is pointed out that neither in the application seeking transfer of plot in the name of petitioner nor in documents filed therewith or two affidavits of petitioner and S.D.Khanna, there was any reference to the will dated 6th March 1981. It is alleged that on coming to know about transfer of plot in the name of petitioner, the applicant moved the senior Sub Judge, Ambala on 31st January 1992 an order of status quo was granted. The petitioner was also allowed to be impleaded as defendant No.3 in the suit on 25th March 1992. Probate Case No. 16/92 was filed in April 1992 by the petitioner in connivance with S.D.Khanna without disclosing the above facts and propounding a fabricated will dated 6th March 1981 alleged to have been executed by Smt. Kamla Khanna in Nigeria. The petitioner who avoided service of summons was served by publication in Tribune for 25th April 1994. Written statement was thereafter filed by the petitioner after the plot was transferred in her name by HUDA and order dated 7th March 1994 granting probate on the basis of said fabricated will made in her favor. In para No.13 of the application, the circumstances on the basis whereof will dated 6th March 1981 is alleged to be fabricated, have been set out. It is asserted that applicant has interest in the estate of deceased and he is entitled to apply for revocation of the order dated 7th March 1994. It was prayed that the order dated 7th March 1994 may be revoked/recalled.

3. Ms. Radha Khanna contested the application by filing reply. By way of preliminary objections, it is alleged that Nand Lal Aggarwal, applicant has no right, title or interest in the properties of Smt. Kamla Khanna, deceased. It is alleged that assuming that any agreement to sell was executed by S.D.Khanna, the same is not binding upon her as she had not attained majority on 14th October 1987. Otherwise also S.D.Khanna could have sold the plot which had been bequeathed by virtue of will dated 6th March 1981 in her favor. It is further alleged that applicant had come to know on 22nd August 1994 itself on which dated written statement filed by her, that she had been granted probate vide order dated 7th March 1994 by the court and this application is not maintainable having been filed at a very belated stage. On merits, it is further alleged that will dated 6th March, it is further alleged that Will dated 6th March 1981 was executed by Smt. Kamla Khanna at Kaduna, Nigeria and was duly attested by two witnesses. She through Sh. S.K.Khanna, Advocate had informed the applicant that she is her legal heir and agreement to sell which was against her interest, was not binding on her. She after attaining the age of majority applied for mutation of Plot No. 64-P to the Estate Officer and got it transferred in her name after filing suitable documents. Applicant has no right whatsoever to challenge the will dated 6th March 1981. It is emphatically denied that the will dated 6th March 1981 is fabricated one, as alleged.

4. I have heard the parties' counsel.

5. Applicant alleges in Para No.7 of the application that petitioner got a notice sent on 25th January 1988 through Sh. S.K.Khanna, Advocate stating that said Plot No.64-P was inherited by her and S.D.Khanna being heirs of deceased Kamal Khanna and there was no mention in the notice of the alleged will dated 6th March 1981. Applicant further alleges in Para 9 of the application that during the pendency of Suit No.266/90 the petitioner applied to the Estate Officer, Panchkula for transfer of said Plot in her name and in those proceedings the petitioner and S.D.Khanna filed affidavits and in those affidavits and the documents filed before Estate Officer there was further no mention about the said will by the deceased. In corresponding Para No.7 on merits as also Para (v) of the preliminary objections of reply, the petitioner has admitted the issuance of notice dated 25th January 1988 on her behalf by Sh.S.K.Khanna, Advocate. However, in both these paras as also remaining paras of reply it has not been denied that said notice was silent about Smt. Kamla Khanna having left behind the Will dated 6th March 1981. Further, in response to Para No.9 of the application it was not been specifically denied that two affidavits filed before Estate Officer, Panchkula did not talk about the execution of said will by the deceased. In the "reply/no objection" filed by S.D.Khanna in Probate Case No. 16/92 filed by the petitioner, it is alleged that existence of said will dated 6th March 1981 was disclosed to him by his brother T.D.Khanna towards the end of 1987. Issuance of aforesaid notice dated 25th January 1988 clearly suggests that petitioner was aware about the agreement of sale dated 14th October 1987 executed between her father and the applicant. In all probabilities, the petitioner

may have come to know from her father and/or uncle - T.D.Khanna about the existence of will dated 6th march 1981 before issue of said notice or atleast before filing of the two affidavits before Estate Officer, panchkula in connection with transfer of plot in her name. Therefore, in ordinary course of human conduct, the petitioner would not have omitted to mention in regard to existence of will dated 6th March 1981 in the notice dated 25th January 1988 nor S.D.Khanna and petitioner could have left out to aver in respect thereto atleast in the two affidavits filed by them before Estate Officer, Panchkula.

6. Further, during the course of hearing copies of petition in Probate Case No.33/89 filed by S.D.Khanna before District Judge, Delhi and application moved therein under Order 23 Rule 1 read with section 151 CPC had been filed in court on behalf of petitioner. Said petition is conspicuously silent about execution of aforesaid agreement of sale dated 14th October 1987 between S.D.Khanna and the applicant. A bare perusal of said application dated 25th October 1989 pursuant to which probate case No.33/89 was dismissed as withdrawn, reveals that at the time it was filed case was ripe for final argument and the ground seeking withdrawal of petition was that S.D.Khanna had been advised not to further proceed with it. Obviously, the stand taken by S.D.Khanna in the reply/no objection filed in Probate case no.16/92 wherein aforesaid order dated 7th March 1994 came to be passed, that previous probate case was withdrawn as one of the assets was situated outside Delhi and he did not want to interfere with petitioner's rights as she was nearing attainment of majority, is an afterthought. Evidently, said probate case No.33/89 was withdrawn to cover up the factum of non-disclosure of execution of agreement to sell dated 14th October 1987 which S.D.Khanna was supposed to disclose in the petition being a material fact. Thus, the submission advanced on behalf of applicant that will dated 6th March 1981 is surrounded by suspicious circumstances cannot be brushed aside as having no merit. Definite finding in regard to this will being genuine for forged can only be recorded after the attesting witnesses to the Will are cross-examined on behalf of applicant after recalling of the order dated 7th March 1994. In *Mutukdhari Singh Vs. Smt. Prem Debi and Others*, , relied on behalf of petitioner, in Para 48 on Page 576 of the report it was held if a person complains that he has been defrauded, he is one of the persons who is injured by the fraud alleged and is entitled to have his redress by applying to revoke the probate or grant of letters of administration and thereby cause the fraud to become inoperative. Even otherwise also the applicant who agree to purchase said plot No.64-P under the agreement dated 14th October 1987 and paid Rs.40,000/- towards part payment of sale price to S.D.Khanna, certainly has the locus standi to file this application.

7. This brings me to the objection taken on behalf of petitioner in regard to present application being barred by limitation. It was pointed out that applicant admittedly had learnt about the existence of Will dated 6th March 1981 and also the order dated 7th March 1994 granting probate in favor of petitioner based on that Will, on 22nd August 1994 when the written statement was filed by the petitioner and this application filed on 17th December 1998 after more than 4

years of the knowledge, is barred by time. Reliance was placed on the decision in Hari Narain and Others Vs. Subhash Chander and Others, . On the other hand, relying on the decisions in Gram Panchayat of village Naulakha vs. Ujagar Singh and others 2000 VII AD (SC) 492; S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, and United India Insurance Co. Ltd. Vs. Rajendra Singh and Others, , submission advanced on behalf of applicant was that as the order dated 7th march 1994 was prime facie obtained by playing fraud on the court, the same was nullity and could be challenged at any state and court could recall it even under its inherent powers. It is pertinent to note that in Hari Narain's case (supra) question of fraud was not considered. Considering the ratio in aforesaid three decisions rendered by Supreme Court, to my mind, bar of limitation will not be attracted in this case.

8. For the foregoing discussion, the application is allowed and order dated 7th March 1994 is revoked.