
(2008) 03 DEL CK 0038
In the Delhi High Court
Case No : FAO No. 221 of 1997

Net Ram Pal through his LRs" Smt. Raj Rani and Others APPELLANT
Vs
State and Others RESPONDENT

Date of Decision : 25-03-2008

Acts Referred:

Evidence Act, 1872 — Section 63
Succession Act, 1925 — Section 63

Citation : (2008) 03 DEL CK 0038

Hon'ble Judges : Pradeep Nandrajog, J

Bench : Single Bench

Advocate : Party in Perso, for the Appellant; Gita Dhingra, for respondent No. 4(b), Thakur Virender Pratap Singh Charak, for respondent No. 4(c) and Party-in-Person Respondent No. 3(ii), for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.

CM No. 13307/2007

1. Appellant died on 9.8.2007. His wife, daughter and son pray to be brought on record as his legal heirs. It is not in dispute that right to sue survives.
2. The application is allowed.
3. Amended memo of parties filed along with the application is taken on record.

FAO No. 221/1997

1. The matter had been called out for the first time when LR No. 1 and LR No. 2 of the appellant appeared and made a request to pass over the matters stating that their Counsel was on the way. The matter is shown at Serial No. 4 in the admission list. After exhausting the admission list the matter has been called out for a second time. It is still stated that the Counsel is still on the way.

2. Learned Counsel for the respondents points out that the instant appeal has remained pending for 11 years and a frivolous cause is being continued by the appellant. Learned Counsel for the respondents states that Counsel's absence is just a ploy to delay the matter.

3. It is unfortunate that the Counsel has not appeared in the matter even at the second call notwithstanding courtesy being extended to the Counsel to await his appearance. LR No. 1 of deceased appellant states that he has spoken twice with the lawyer and has explained to him the urgency of reaching the court.

4. With the assistance of the learned Counsel for the respondent I have gone through the impugned order passed by the learned Addl. District Judge dismissing Probate Petition No. 67/1995 (Old No. 164/1984).

5. Amar Pal Singh was a bachelor. He was the paternal uncle of Net Ram Pal. Dhan Singh and Puran Singh were his other two nephews. Amar Pal Singh died on 30.1.1984. Net Ram Pal predicated a will dated 28.6.1983 alleging that the said will was the legal and valid testament of his uncle. The will in question is purportedly registered with the Sub Registrar. The endorsements of the Registrar on the will evidences that it was presented for registration on 28.6.1983 and was returned by the Registrar on 29.6.1983.

6. 2 persons PW-2, Raj Pal and PW-3 Sh. Gandhi are the stated attesting witnesses to the will. PW-1, Dr. Ravi K. Sharma has ostensibly made an endorsement on the will certifying that the testamentary capacity of the testator who admittedly was aged approximately 90 years when the will was executed.

7. Following reasons have been given by the learned Probate Court to dismiss the probate petition:

(i) There are material contradictions in the testimony of PW-2 and PW-3 pertaining to the preparation and execution of the will.

(ii) Lack of credibility in the testimony of PW-1 in light of the testimony of PW-2 and PW-3.

(iii) An admitted earlier will dated 28.6.1983 making an equitable bequest in favor of all the nephews being altered by the will propounded which makes a disproportionate bequest coupled with an active participative role of Net Ram Pal in the execution of the will.

(iv) Lastly, there being no positive evidence that the testator, aged 90 years, was conscious of the contents of the documents.

8. Law relating to appreciation of evidence when a will is propounded is well crystallized. Where the testator is illiterate or is physically or mentally infirm, mere evidence of testator appending his signatures to the document is not enough. Positive evidence has to come on record to establish that the testator was conscious of the contents of the documents. Further, a disproportionate bequest is a cause enough for eye brows to be raised, but slightest evidence on

record to establish a conscious disposition is enough to drop the raised eye brows. The reason is obvious. A bequest is normally made by a person to alter the rule of ordinary succession. Lastly, where a will purportedly executed by an old or an infirm person is brought before the court, extra vigil has to be shown by the court to see and ensure that satisfactory evidence has been brought on record to establish due execution.

9. In this regard it is relevant to note the decision reported as Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and Others, wherein the Hon''ble Supreme Court has described the nature and standard of evidence required to prove a Will. In para 10 of the decision, the Supreme Court has observed as under:

10. There is a long line of decisions bearing on the nature and standard of evidence required to prove a will. Those decisions have been reviewed in an elaborate judgment of this Court in H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, . The Court, speaking through Gajendragadkar J., laid down in that case the following propositions:

1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

2. Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by Section 63 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the court and capable of giving evidence.

3. Unlike other documents, the will speaks from the death of the testator and Therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the pro-pounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the pro-pounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious

circumstances makes the initial onus heavier and Therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5. It is in connection with wills, the execution of which is surrounded by suspicious circumstance that the test of satisfaction of the judicial conscience has been evolved. That test emphasis that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter.

10. The will Ex.P-1 was introduced in the testimony for the first time when PW-1 Dr. Ravi Kr. Sharma entered the witness box. He stated that he was at his house on 28.6.1983 and that the endorsement on the will mark "X" was made by him after physically examining the testator and certifying his testamentary capacity. He categorically stated that the will Ex.P-1 had not been executed when the same was brought to him to append an endorsement on the will that the testator was in a sound state of mind. It would be relevant to note that PW-2 and PW-3 stated that both of them were present along with the testator in the office of the Sub Registrar. Whereas PW-2 stated that the will was drafted by a typist to whom instructions were given by the testator, PW-3 stated that a lawyer had drafted the will. But, both stated that immediately after the will was prepared it was got registered.

11. As noted above, the endorsement of the Registrar shows that the will was presented for registration on 28th June and remained with the Registrar on 29th June when post registration it was returned. The learned Trial Judge has opined and in my opinion correctly: "Where was the occasion for every body to go back to a doctor and obtain his endorsement on the will certifying that the testator was in a sound testamentary mind?"

12. This casts a serious doubt on the testimony of PW-1 when he deposed that when he appended the endorsement on the will on the point mark "X" the same was not executed. Obviously, the question of registration pre- execution does not arise.

13. It would also be relevant to note that PW-2, Raj Pal, in cross- examination stated that endorsement on mark "X" was not there when the will was executed and presented for registration. It is thus obvious that PW-1 had made the

endorsement after the will was got registered with the Sub-Registrar. He obviously did not speak the truth when he stated that he gave the certification on the point mark "X" before the will was executed.

14. As noted here-in-above, PW-2 and PW-3 have spoken with material contradictions in the manner in which the will was prepared. One states that a lawyer drafted the will. The other states that a typist typed the same on being instructed by the testator. Their testimony lacks credence.

15. I would be failing if I do not note that the testimony of the witnesses PW-2 and PW-3 evidenced a participative role of Net Ram Pal when the will was got registered. It is trite that where a beneficiary under a will has a major participative role to play in the execution of the will it is a suspicious circumstance and unless evidence is brought on record to dispel the suspicion, the same remains.

16. The evidence of the objectors has established that the testator was aged 90 years when the document was created. The fact that the creator of the document went to a doctor for a certification that the testator was in a sound mind itself is evidence to show that even the propounder was conscious that an issue pertaining to the mental health or the physical health of the testator could be raised and Therefore managed to obtain an endorsement from a doctor whose testimony has been found to be of no creditworthiness.

17. Before concluding, I may note that there is a confusion whether PW-3 was Sh. Gandhi or whether he was PW-4. Vice versa there is a confusion whether Net Ram Pal was PW-3 or PW-4. In the impugned judgments there are over writings. However, from the record it is obvious that Shri Gandhi was actually PW-4 and Shri Net Ram Pal was PW-3.

18. I find no infirmity in the view taken by the learned Trial Judge.

19. The appeal is dismissed.

20. Costs shall follow.