

(2018) 04 DEL CK 0138
In the Delhi High Court
Case No : TEST CAS.11 of 2003

R K AGGARWAL & ANR

APPELLANT

Vs

STATE OF DELHI & ORS

RESPONDENT

Date of Decision : 11-04-2018

Acts Referred:

Indian Succession Act, 1925 — Section 36(c), 63, 222
Indian Evidence Act, 1872 — Section 68, 71

Citation : (2018) 04 DEL CK 0138

Hon'ble Judges : VALMIKI J. MEHTA

Bench : Single Bench

Advocate : Rana Ranjit Singh, Vivek Kumar, Ravish Singh,

Final Decision : Disposed Of

Judgement

VALMIKI J. MEHTA, J (ORAL)

1.This probate petition is filed by two petitioners seeking probate of the Will dated 26.3.2002 executed by late Smt. Sudha Rani.Â

Petitioner no.1 Sh. Rajeev Kumar Aggarwal is the son of late Smt. Sudha Rani.Â
Original petitioner no.2 Sh. Hari Mohan Goel was the father of the

deceased testator Smt. Sudha Rani, and who expired pendente lite, and he is now substituted by his son Sh. Anil Goel and who as per the subject Will

was appointed as a guardian of the petitioner no.1 after the death of Sh. Hari Mohan Goel.

2.There are a total of two private respondents.Â Respondent no.2 is the daughter of late Smt. Sudha Rani and who has not contested the petition.Â

The fact that respondent no.2 was served but did not appear in spite of service with legal consequences flowing against respondent no.2 is noted in the

order of Joint Registrar of this Court dated 31.7.2003.

3. Respondent no.3, one another son of Smt. Sudha Rani, was the sole contesting respondent. In my opinion however the expression "contesting

respondent" qua respondent no.3 is misconceived because in the objections filed on 6.8.2003 by the respondent no.3/Sh. Sanjeev Kumar, he has not

disputed that the signatures appearing on the subject Will are not of Smt. Sudha Rani and that the signatures of the attesting witnesses are not the

signatures of the attesting witnesses who witnessed the Will and that Smt. Sudha Rani was not of sound disposing mind.

4. As per this testamentary case probate is sought with respect to the Will dated 26.3.2002 of Smt. Sudha Rani, and which Will is duly registered with

the concerned Sub-Registrar of Delhi.

Since the original petitioner no.2 was appointed as an executor has died, and because probate can only be granted to an executor of a Will in view of

Section 222 of the Indian Succession Act, 1925 in case this testamentary case will succeed then what will be granted will not be a probate but Letters

of Administration in favour of the present petitioner no.2/Sh. Anil Goel.

5. The following issues were framed in this case on 19.7.2004:-

1. Whether the deceased Smt. Sudha Rani executed a valid registered Will dated 26.3.2002 in favour of the petitioner no.1 while in sound state of mind? OPP

2. Whether Shri Hari Mohan Goel, petitioner no.2 was appointed executor under the will referred and is he entitled to letters of administration in respect of the estate of deceased?

3. Relief.

6. In support of his case, petitioner no. 1 examined himself and filed his affidavit by way of evidence. Petitioner no.1 was examined as PW-4.

Petitioner no.2 Sh. Hari Mohan Goel appeared as PW-1 in support of the testamentary case and he was duly cross-examined. It is noted that PW-1

Sh Hari Mohan Goel thus was examined-in-chief and cross-examined before he expired on 25.7.2007.

7. Petitioners have also examined two attesting witnesses of the Will as PW-2 and PW-3 namely Smt. Kunta Devi and Smt. Sushma Goel

respectively. These witnesses have also being cross-examined in detail on behalf of respondent no.3/objector.

8. Respondent no.3 thereafter stepped into the witness box and led his evidence-in-chief as RW-1. Respondent no.3/Sh. Sanjeev Kumar/RW-1 was

duly cross-examined on behalf of the petitioners.

9. The issue is that whether petitioners have succeeded in proving the Will dated 26.3.2002 of late Smt. Sudha Rani.

10. A Will is proved as per Section 63 of the Indian Succession Act when it is proved that the Will was executed by the testator in sound disposing

mind and the testator signed in the presence of the attesting witnesses and the attesting witnesses signed in the presence of the testator. As per

Section 68 of the Indian Evidence Act, 1872 a Will is proved by leading of evidence of at least one attesting witness.

11. A reading of the evidence-in-chief filed on behalf of the two attesting witnesses PW-2 and PW-3 Smt. Kunta Devi and Smt.

Sushma Geol shows that unfortunately there are no depositions by these witnesses that they signed the Will in the presence of the testator. It is also

not deposed by these witnesses that other attesting witness, i.e Smt. Sushma Geol so far as Smt. Kunta Devi and Smt. Kunta Devi so far Smt.

Sushma Geol is concerned, has signed in the presence of the testator.

12. Ordinarily therefore this petition will have to be dismissed because the petitioners have failed to prove the attestation of the subject Will by two

attesting witnesses. I am indeed surprised and a bit perturbed that counsel for the petitioners has not done a very basic fact of making the attesting

witnesses depose of they having signed the subject Will in the presence of the testator and that testator had signed the Will in the presence of both the

attesting witnesses.

Issue therefore is that what does the Court do in such a situation.

13. In my opinion petitioners are lucky because Supreme Court recently in the judgment in the case of M.B. Ramesh (Dead) by L.Rs. vs. K.M.

Veeraje Urs (Dead) by L.Rs. and Others (2013)7SCC 490 has held that when a Court before whom a Will is sought to be proved comes up for

decision, then Courts are entitled to take a holistic view of the situation, and that Courts can hold due execution and attestation of the Will by implied

statements and other facts which come out during deposition of witnesses. The relevant paras of the judgment of the Supreme Court in M.B.

Ramesh (Dead) by L.Rs.

(supra) are paras 19 to 25 and these paras read as under:-

19. The relevant provisions of these three sections read as follows:

Section 63 of the Succession Act

63. Execution of unprivileged wills. "Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules:-

(a)-(b)***

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other

person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature

or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be

necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

Section 68 of the Evidence Act

68. Proof of execution of document required by law to be attested. "If a document is required by law to be attested, it shall not be used as

evidence until 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:

Section 71 of the Evidence Act

71. Proof when attesting witness denies the execution. "If the attesting witness denies or does not recollect the execution of the document, its

execution may be proved by other evidence.

20. In the present matter, there is no dispute that the requirement of Section 68 of the Evidence Act is satisfied, since one attesting witness i.e. PW 2

was called for the purpose of proving the execution of the will, and he has deposed to that effect. The question, however, arises as to whether the will

itself could be said to have been executed in the manner required by law, namely, as per Section 63(c) of the Succession Act. PW 2 has stated that he

has signed the will in the presence of Smt Nagammanni, and she has also signed the will in his presence. It is however contended that his evidence is

silent on the issue as to whether Smt Nagammanni executed the will in the presence of M. Mallaraje Urs, and whether M. Mallaraje Urs also signed

as attesting witness in the presence of Smt Nagammanni. Section 63(c) of the Succession Act very much lays down the requirement of a valid and

enforceable will that it shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will, and each of

the witnesses has signed the will in the presence of the testator. As held by a Bench of three Judges of this Court (per Gajendragadkar, J., as he then

was) way back in H. Venkatachala Iyengar v. B.N. Thimmajamma [H. Venkatachala Iyengar v. B.N. Thimmajamma, AIR 1959 SC 443 : 1959 Supp

(1) SCR 426] , that a will has to be proved like any other document except that evidence tendered in proof of a will should additionally satisfy the

requirement of Section 63 of the Succession Act, apart from the one under Section 68 of the Evidence Act.

21.The propositions laid down in Venkatachala Iyengar [H. Venkatachala Iyengar v. B.N. Thimmajamma, AIR 1959 SC 443 : 1959 Supp (1) SCR

426] have been followed and explained in another judgment of a Bench of three Judges in Jaswant Kaur v. Amrit Kaur [Jaswant Kaur v. Amrit Kaur,

(1977) 1 SCC 369 : AIR 1977 SC 74] , wherein the law has been crystallised by Y.V. Chandrachud, J. (as he then was), into the following

propositions: (Jaswant Kaur case [Jaswant Kaur v. Amrit Kaur, (1977) 1 SCC 369 : AIR 1977 SC 74] , SCC pp. 373-74, para 10)

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 v. B.N. Thimmajamma [H. Venkatachala Iyengar v. B.N. Thimmajamma, AIR

1959 SC 443 : 1959 Supp (1) SCR 426] . 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 68 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 propounder 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

propounder 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 circumstances that the test of satisfaction of the judicial conscience

has been evolved. That test emphasises 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.â??

22. In *Janki Narayan Bhoir* [*Janki Narayan Bhoir v. Narayan Namdeo Kadam*, (2003) 2 SCC 91] , this Court has explained the inter-relation between

Section 63(c) of the Succession Act, 1925 and Sections 68 and 71 of the Evidence Act, 1872. In that matter only one attesting witness to the will was

examined to prove the will, but he had not stated in his deposition that the other attesting witness had attested the will in his presence. The other

attesting witness, though alive and available, was not examined. The Court noted the relevant facts in para 5 of the judgment as follows: (SCC p. 96)

â??5. â?| Prabhakar Sinkar, the attesting witness, in his deposition stated that he did not know whether the other attesting witness Ramkrishna Wagle

was present in the house of the respondent at the time of execution of the will. He also stated that he did not remember as to whether himself and

Raikaar were present when he put his signature. He did not see the witness Wagle at that time; he did not identify the person who had put the thumb

impression on the will. The scribe Raikaar in his evidence stated that he wrote the will and he also stated that he signed on the will deed as a scribe. He

further stated that the attesting witnesses, namely, Wagle and Prabhakar Sinkar are alive.â??

In this background, the Court held at the end of para 6 of the judgment that: (*Janki Narayan Bhoir* case [*Janki Narayan Bhoir v. Narayan Namdeo*

Kadam, (2003) 2 SCC 91] , SCC p. 97)

â??6. â?| It is true that although a will is required to be attested by two witnesses it could be proved by examining one of the attesting witnesses as

per Section 68 of the Evidence Act.â??

But it also noted in para 9 that: (*Janki Narayan Bhoir* case [*Janki Narayan Bhoir v. Narayan Namdeo Kadam*, (2003) 2 SCC 91] , SCC p. 98)

â??9. â?| that one of the requirements of due execution of a will is its attestation by two or more witnesses, which is mandatory.â??

23. In paras 11 and 12 of the judgment, the Court noted the relevance of Section 71 of the Evidence Act by stating that: (*Janki Narayan Bhoir* case

[*Janki Narayan Bhoir v. Narayan Namdeo Kadam*, (2003) 2 SCC 91], SCC pp. 99-100)

â??11â?| Aid of Section 71 can be taken only when the attesting witnesses, who

have been called, deny or fail to recollect the execution of the document to prove it by other evidence. â?|

12.â?| Section 71 has no application when the one attesting witness, who alone has been summoned, has failed to prove the execution of the will and the other attesting witness though available has not been examined.â??

In the facts of the case, therefore, the Court held that the attestation of the will as required by Section 63 of the Succession Act was not established which was equally necessary.

24. In the present case, we may note that in Para 21 of his cross-examination, P. Basavaraje Urs has in terms stated, â??Mr Mallaraje Urs and Smt

Nagammani, myself and one Sampat Iyenger were present while writing the willâ?. One Mr Narayanmurti was also present. In Para 22 he has

stated that Narayanmurti had written Ext. 3 (will) in his own handwriting continuously. The fact that M. Mallaraje Urs was present at the time of

execution of the will is not contested by the defendants by putting it to PW 2 that M. Mallaraje Urs was not present when the will was executed. As

held by a Division Bench of the Calcutta High Court in a matter concerning a will, in para 10 of A.E.G. Carapiet v. A.Y. Derderian [AIR 1961 Cal

359] : (AIR p. 362)

â??10. â?| Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must

follow that he believed that the testimony given could not be disputed at all. â?| It is a rule of essential justice.â??

As noted earlier the will was executed on 24-10-1943 in the office of Advocate Shri Subha Rao situated at Mysore, and was registered on the very

next day at Mysore. The fact that the will is signed by Smt Nagammani in the presence of PW 2 on 24-10-1943 has been proved, that PW 2 signed

in her presence has also been proved. Can the signing of the will by Smt Nagammani in the presence of M. Mallaraje Urs and his signing in her

presence as well not be inferred from the above facts on record? In our view, in the facts of the present case, the omission on the part of PW 2 to

specifically state that the signature of M. Mallaraje Urs on the will (which he identified) was placed in the presence of Smt Nagammani, and that her

signature (which he identified) was also placed in the presence of M. Mallaraje Urs, can be said to be a facet of not recollecting about the same. This

deficiency can be taken care of by looking to the other evidence of attendant circumstances placed on record, which is permissible under Section 71

of the Evidence Act.

25. The issue of validity of the will in the present case will have to be considered in the context of these facts. It is true that in the case at hand, there

is no specific statement by PW 2 that he had seen the other attesting witness sign the will in the presence of the testatrix, but he has stated that the

other witness had also signed the document. He has proved his signature, and on the top of it he has also stated in the cross-examination that the other

witness (Mr Mallaraje Urs), Smt Nagammani, himself and one Sampat Iyanger and the writer of the will were all present while writing the will on 24-

10-1943 which was registered on the very next day. This statement by implication and inference will have to be held as proving the required

attestation by the other witness. This statement along with the attendant circumstances placed on record would certainly constitute proving of the will

by other evidence as permitted by Section 71 of the Evidence Act.â??

14. In view of the ratio of the judgment of the Supreme Court in the case of M.B. Ramesh (D) by L.Rs. (supra), I have examined the affidavits by

way of evidence filed on behalf of the two attesting witnesses.Â No doubt in these affidavits by way of evidence none of the two attesting witnesses

have deposed that they have signed in presence of the executant/testator however thankfully in para 1 of the affidavit it is mentioned that they are the

attesting witnesses.Â This Court would therefore interpret the assertion of being an attesting witness as the Will being signed by the

executant/testator in the presence of the attesting witnesses. This Court has no option to do this otherwise because of technicality and the lack of

application on behalf of the petitioners? counsel orÂ petitioners themselves, this testamentary case would have had to be dismissed.Â In my opinion

also in the crossexamination of the two attesting witnesses who appeared as PW-2 and PW-3, and when these are read as a whole, it is found that

both the attesting witnesses were present when the executant/testator signed the Will and therefore this has to be read with the fact that both the

witnesses have also signed the Will as attesting witnesses in the presence of the executant/testator.

15. At this stage, I would also like to note that though both the attesting

witnesses PW-2 and PW-3 were extensively crossexamined on behalf of respondent no. 3, there is no cross-examination that the subject Will is not signed by the testator and that the signatures on the subject Will are not of the testator. Also, there is no cross-examination that the attesting witnesses did not sign as attesting witnesses to the subject Will and the signatures on the subject Will are not of the attesting witnesses.Â There is also no cross-examination that the deceased testator was not in sound disposing mind when the subject Will was executed and attested.Â I, therefore, hold that the subject Will will have to be held to have been proved in favour of the petitioners. Will is therefore held to have been and rightly exhibited as Ex.PW1/1.Â

16.At this stage I would like to note that respondent no. 3 filed his objections on 6.8.2003. These objections are objections/written statement is/are of two pages and there is not even a whisper in these objections that the testator Smt. Sudha Rani was not of sound disposing mind when the Will was executed or that the subject Will does not bear the signatures of Smt. Sudha Rani or the subject Will does not bear the signatures of the attesting witnesses Smt. Kunta Devi and Smt. Sushma Goel.Â There is no written statement/pleading that the Will has not been duly executed and attested.Â Therefore, in my opinion, the objections/written statement filed on 6.8.2003 cannot be a pleading for the respondent no. 3 to contend that the Will has not been duly executed and attested.

17.Even if we examine the affidavit by way of evidence filed on behalf of the respondent no.3 as RW-1, it is seen that even in this affidavit the respondent no.3 has not deposed that the signatures appearing on the subject Will are not of the deceased testator Smt. Sudha Rani and it is also not deposed by respondent no.3 that the signatures of the two attesting witnesses are not the signatures of the two attesting witnesses and that they have not signed as attesting witnesses in the presence of the deceased testator.Â Only in one paragraph, being paragraph no.7 of the affidavit by way of evidence, of respondent no.3 he has stated in a general manner that the Will is forged and conspired, however uttering this self-serving mantra is not sufficient for this Court to hold that the subject Will is not proved.

18.I may note that in the subject Will itself the deceased testator Smt. Sudha Rani had noted that her son being the petitioner no. 1 is not too strong

mentally, and therefore the deceased testator Smt. Sudha Rani had made her father the original petitioner no.2 Sh. Hari Mohan Goel as an executor of

the Will. In the Will it is specifically provided that petitioner no. 1 will be the absolute owner of all the properties which were of Smt. Sudha Rani,

but Sh. Hari Mohan Goel will be the executor of the Will and after the death of Sh. Hari Mohan Goel his son Sh. Anil Goel will become guardian of

all the properties of petitioner no.1 Sh. Rajeev Kumar Aggarwal and who is fully beneficiary of the subject Will. In fact, in the Will it is specifically

written that respondent no.3 will never act as an executor or guardian of the petitioner no.1 Sh. Rajeev Kumar Aggarwal. It is also noticed that the

attesting witness PW-3 Smt. Sushma Goel has deposed with respect to the bad relations between petitioner no.1 and the respondent no.3 who used to

physically assault the petitioner no.1.

19. In my opinion therefore in view of the aforesaid facts of the petitioner no.1 not being very strong mentally, and therefore his mother the deceased

Smt. Sudha Rani had a reason to bequeath her property in favour of Sh. Rajeev Kumar Aggarwal, so that Sh. Rajeev Kumar Aggarwal is taken care

of after the death of the deceased testator.

20. In view of the aforesaid discussion, this testamentary case is allowed. Present petitioner no.2 namely Sh. Anil Goel is granted Letters of

Administration with respect to the Will annexed dated 26.3.2002 of late Smt. Sudha Rani on filing the necessary Administration Bond and Surety

Bond, and the requisite court fees.

21. Petition is accordingly allowed and disposed of in terms of the aforesaid observations.