
(2018) 07 DEL CK 0552

In the Delhi High Court

Case No : Regular First Appeal Nos. 600, 606 OF 2018

Raj Prakash Nayyar & Anr

APPELLANT

Vs

Om Parkash Nayyar And Ors

RESPONDENT

Date of Decision : 31-07-2018

Acts Referred:

Code Of Civil Procedure, 1908 — Section 96
Indian Succession Act, 1925 — Section 63

Citation : (2018) 07 DEL CK 0552

Hon'ble Judges : VALMIKI J. MEHTA, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

VALMIKI J. MEHTA, J

Caveat No. 681/2018 in RFA 600/2018

Counsel appears for the caveator. Caveat accordingly stands discharged.

CM No. 2999/2018 (Exemption) in RFA 600/2018

CM No. 30347/2018 (Exemption) in RFA 606/2018

Exemptions allowed subject to just exceptions.

CMs stand disposed of.

RFA No.600/2018 & CM No.29990/2018 (stay)

RFA No.606/2018 & CM No. 30346/2018 (stay)

1. These two appeals filed under section 96 of the Code of Civil Procedure 1908, CPC are filed against the common judgment of the Trial Court dated

17.3.2018 by which the trial court has decreed the suit filed by Sh. Om Prakash Nayyar (since deceased) now represented by his maternal grand-son

Sh. Ajay Dhani in whose favour the subject registered Will dated 18.9.2004 Ex.PW-2/D2 was made by Sh. Om Prakash Nayyar. The suit filed by Sh.

Om Prakash Nayyar being the Suit No. 78374/2016 was a partition suit whereby the father Sh. Om Prakash Nayyar pleaded that he had 50%

ownership rights in the suit property alongwith his son/defendant being the second floor Flat No. A-2/54, Varun Apartments, Sector-9, Rohini, Delhi on

an area admeasuring 875 sq. ft. as shown in the site plan Ex.PW-1/10. The second suit being Suit No.78375/2016 was filed by Sh. Raj Kumar Nayyar

against Sh. Ajay Dhani seeking a declaration with respect to the invalidity of the registered Will Ex.PW-2/D2. The suit filed by Sh. Raj Kumar

Nayyar/appellant, has been dismissed by the impugned judgment. Therefore, the net effect is that the suit filed by the father Sh. Om Prakash Nayyar,

now represented through Sh.Ajay Dhani has been decreed for partition giving $\frac{1}{2}$ share to Sh. Ajay Dhani being the $\frac{1}{2}$ share of Sh. O.P. Nayyar

and the suit for declaration filed by the appellant herein Sh. Raj Kumar Nayyar was dismissed and thereby the Will Ex.PW-2/D2 has been held to be

valid.

2(i) The undisputed position which emerges on record is that the suit property was allotted in the joint names of the father Sh. Om Prakash Nayyar

and the son Sh. Raj Kumar Nayyar. The father Sh. Om Prakash Nayyar however had claimed that he had purchased the entire property by making

payment through cheques to the Varun Vihar Cooperative Group Housing Society and possession was given to the father Sh. Om Prakash Nayyar on

25.6.1991. I may note that the impugned judgment passes a decree for partition giving half share to the father Sh. Om Prakash Nayyar and half share

to the appellant herein Sh. Raj Kumar Nayyar in view of the fact that as per the record the suit property is in the joint names of the father Sh. Om

Prakash Nayyar and the appellant/Sh. Raj Kumar Nayyar.

(ii) The case of the father Sh. Om Prakash Nayyar when he filed the subject suit plaint for partition was that the since his wife, i.e the mother of the

appellant was suffering from old age ailments, the appellant/son was invited by him to live with them in the suit property. However, within two years

of shifting, the appellant/son and his family members started mistreating Sh. Om Prakash Nayyar and his wife (i.e the mother of the appellant) in

various ways and resultantly the parents had to shift away from their own house

to the house of their daughter Smt. Veena Dhani. The beneficiary of the subject registered Will dated 18.9.2004 Ex.PW-2/D2 is the son of the daughter Smt. Veena Dhani namely Sh. Ajay Dhani. Sh. Om Prakash Nayyar in his plaint pleaded that he was diagnosed with blood cancer in 2004. In the plaint, it is pleaded by Sh. Om Prakash Nayyar himself that the subject registered Will dated 18.9.2004 was executed by him in favour of Sh. Ajay Dhani. On the pleading of existence of misconduct of son/appellant/the defendant no.1 in the partition suit, the father Sh. O.P.Nayyar had applied for partition of the suit Flat.

3. The appellant contested the suit for partition filed by the father Sh. Om Prakash Nayyar and pleaded that actually he had paid all the monies with respect to the allotment and maintenance of the Flat. It was further pleaded by the appellant that he spent about Rs.70,000/- for renovation of the Flat between 1991 to 1999 and he had been paying electricity and water charges etc. It was also pleaded by the appellant that through cheques he repaid the loan of Rs.43,000/taken by his father from Varun Vihar Cooperative Group Housing Society. The registered Will Ex.PW-2/D2 in favour of Sh. Ajay Dhani was pleaded to be a forged and fabricated document.

4. Similar pleadings of the parties exist in the suit filed by the appellant Sh. Raj Kumar Nayyar pleading that the registered Will dated 18.9.2004 Ex.PW-2/D2 was a forged and fabricated document.

5. The relevant issue to be decided by the trial court was with respect to the validity or otherwise of the Will dated 18.9.2004 executed by Sh.

O.P.Nayyar in favour of Sh. Ajay Dhani, and this issue has been decided by the trial court in favour of Sh. Ajay Dhani and it has been held that the

Will dated 18.9.2004 Ex.PW-2/D2 was duly executed and attested, as also registered by the maternal grandfather Sh. Om Prakash Nayyar in favour

of Sh. Ajay Dhani. The main conclusions arrived at by the trial court in this regard, and with which conclusions I completely agree are as under:-

(i) The subject Will has been duly proved through the deposition of the attesting witness Sh. Sanjeev Chatrath who appeared as PW--3. Sh. Sanjeev

Chatrath duly deposed with respect to the due execution and attestation of the Will, and his testimony remained unshaken in spite of cross-examination

on behalf of the appellant.

(ii) There is a ring of truth with respect to the validity of the subject registered

Will dated 18.9.2004/Ex.PW-2/D2 inasmuch as the father Sh. Om

Prakash Nayyar himself had filed the subject suit for partition and in this very subject suit for partition the father Sh. Om Prakash Nayyar had

mentioned with respect to the fact that on account of mistreatment by the appellant of his father/Sh. Om Prakash Nayyar and his wife, he had

executed the subject Will in favour of Sh. Ajay Dhani. It may be noted that the suit plaint for partition was signed by Sh. Om Prakash Nayyar.

(iii) The Will is a registered Will, and therefore, the factum that the Will has been proved to be a registered Will gives some reasonable presumption

with respect to its genuineness and legality of its execution.

(iv) Minor discrepancies with respect to the signatures would not affect the due attestation and registration of the Will, and which is therefore to be

taken as proved in view of evidence led by Sh. Ajay Dhani. On behalf of the appellant no evidence was led that the Will did not bear the signatures of

Sh. Om Prakash Nayyar because the appellant did not file other admitted documents and a handwriting expert's report that the signatures on the

subject Will were not the same as per the other admitted documents containing the signatures of the father/Sh. Om Prakash Nayyar.

At this stage, I may note that the appellant had filed a report of handwriting expert Sh. Deepak Jain and who was summoned as DW2, however the

handwriting expert Sh. Deepak Jain only appeared for partial cross-examination resulting in closing of his right to be further cross-examined on

account of his absence and resultantly there was rejection of the entire testimony of the handwriting expert Sh. Deepak Jain. This order of the Trial

Court dated 23.8.2017 was challenged before this Court in CM (M) 1133/2017 but that challenge was dismissed by a learned Single Judge of this

Court vide order dated 13.10.2017, and which order has become final, and therefore there is no evidence on behalf of the appellant that the subject

Will does not bear the correct signatures of the father/Sh. Om Prakash Nayyar. The relevant observations of the trial court in this regard are

contained in paras 16 to 23 of the impugned judgment and these paras read as under:-

16. The onus to prove this issue was on PW-1 Ajay Dhani, who was the plaintiff in the lead suit.

In order to prove the validity and legality of the Will PW-2/D2 of his maternal

grandfather O. P. Nayyar, PW-1 Ajay Dhani apart from himself had examined his mother PW-2 Veena Rani and attesting witness PW-3 Sanjeev Chatharth.

PW-1 Ajay Dhani in his affidavit deposed that the Will was executed by O.P. Nayyar on 18.09.2004 in presence of the attesting witnesses, which

was then registered on 22.09.2004. He in his crossexamination stated that the age of his maternal grandfather O. P. Nayyar in the years 2000-2004

was 70-74 years ; that his maternal grandfather had told him about the Will having been typed in the office of his advocate Mr. Mahajan which was

then registered in the presence of the attesting witnesses. He also stated that O. P. Nayyar had signed and put his thumb impressions on each &

every page of the Will at the time of its execution. He further stated in his cross-examination that the Will after its registration on 22.09.2004 was

handed over by his maternal grandfather O. P. Nayyar to his father and it was his father, who gave him this Will after the death of O. P. Nayyar. He

further stated in the cross-examination that he along with the attesting witnesses were present before the Sub-Registrar for the registration of the Will

and that PW-2 Sanjeev Chatharth had attested the same in his presence before the Sub-Registrar. He also admitted in his crossexamination that he

was not present when O. P. Nayyar and another attesting witness Mr. Bhutani signed the Will before the Sub-Registrar.

17. On the above material particulars, the deposition of PW-2 Ajay Dhani received substantial support from the testimony of the attesting witness

PW-3 Sanjeev Chatharth. He by his uncluttered testimony proved the legal & valid execution of the Will by O. P. Nayyar. He also identified the

signatures and thumb impression of O. P. Nayyar on the Will having seen him signing and writing. He held his ground even during the cross-

examination. In the cross-examination, he categorically deposed that that the Will was prepared in his presence on 18.09.2004 & the presence of O.

P. Nayyar, another attesting witness Subhash Bhutani and Advocate Desh Raj Mahajan ; that the Will was prepared by advocate Mahajan on the

instructions of O. P. Nayyar and that O.P. Nayyar had signed at four places after reading it after which it was signed by him & another attesting

witness Subhash Bhutani. In respect of the registration of the Will, he stated in his cross-examination that he along with O. P. Nayyar, PW-1 Ajay

Dhani, Ranjeet Singh Dhani, T. P. Dhani and other attesting witness Subhash Bhutani reached the Sub-Registrar office on 22.09.2004 ; that O. P.

Nayyar signed the same in the presence of the Sub-Registrar and that he also had signed at the time of the registration. Nothing could be elicited from

this witness during his cross-examination by defendant No. 1 Raj Kumar Nayyar so as to impeach his credibility. There are no material contradictions

between the testimonies of PW-1 Ajay Dhani and PW-3 Sanjeev Chatharth on the aspects of the execution and registration of this Will. Their

testimonies, if read together, proves that the Will was executed on 18.09.2004 in the office of Advocate Desh Raj Mahajan in the presence of O. P.

Nayyar, who signed the same at points A1 to A4 ; that the contents of the Will were understood by the Testator O. P. Nayyar before signing it ; that

it was then signed by the attesting witnesses at point B & C ; that the Will was registered on 22.09.2004 ; that the Testator O.P. Nayyar had signed at

A5 and A6 during registration and that the attesting witnesses had signed at points A & B during registration.

The registration of this Will is otherwise not disputed between the parties. The registered Will brings about the presumption of its genuineness and the legality of its execution.

18. The record shows that the plaint though was presented through PW-1 Ajay Dhani as AR but it also bears the signatures of O. P. Nayyar. No

evidence was led by the defendant No. 1 Raj Kumar Nayyar or defendant No. 2 Mukesh Nayyar to prove that the signatures on the plaint were not

of O. P. Nayyar. It is thus to be accepted that the plaint bore the signatures of O. P. Nayyar. This fact assumes significance because the plaint

contains an admission by O. P. Nayyar himself (who filed the suit initially through AR PW-1 Ajay Dhani) that he had executed the Will in favour of

PW-1 Ajay Dhani. This admission nails the case for PW-1 Ajay Dhani regarding the voluntary and valid execution of the Will by O. P. Nayyar.

19. Nothing was produced by defendant No.1 Raj Kumar Nayyar or defendant No. 2 Mukesh Nayyar to dislodge the aforesaid plethora of evidence

produced by PW-1 Ajay Dhani qua the valid execution of the Will. The evidence of their handwriting expert DW2 Deepak Jain was discarded

whereby his report on the alleged forgery of signatures of O. P. Nayyar on the Will is of no significance.

20. During his cross-examination, PW-1 Ajay Dhani admitted that there were few discrepancies between the various signatures of O. P. Nayyar

appearing on the Will. He admitted that signatures at point A1 & A4 had a dot between the letters 'O' & 'P' while there is no such

dot in the signatures at point A2, A3, A5 and A6.

He also admitted that the letter 'Y' is separate in the letter 'Nayyar' in the signatures at point A1 & A4 while it is connected at point

A2, A3, A5 and A6.

All these are minor discrepancies keeping in view the fact that the Testator O. P. Nayyar was aged 74 years at the time of the execution &

registration of the Will whereby such discrepancies in his handwriting were bound to exist. The execution and registration of the Will has otherwise

been proved by the impeccable testimonies of PW-1 Ajay Dhani and PW-3 Sanjeev Chatharth. These discrepancies in the signatures of O.P. Nayyar

are otherwise also insignificant, particularly when O. P. Nayyar himself admitted about the execution of the Will in the plaint signed by him in the lead

CS No. 78374/16.

21. It is pleaded by defendant No. 1 Raj Kumar Nayyar and defendant No. 2 Mukesh Nayyar in their pleadings that the Will is invalid and forged

because O. P. Nayyar had executed the same qua the entire flat instead of his half share. This plea is not sustainable because the Will shall only be

read qua the extent of the half share of O. P. Nayyar in the flat.

22. The testimonies of PW-1 Ajay Dhani and PW-3 Sanjeev Chatharth on the point that O.P. Nayyar was in sound and disposing mind at the time of

the execution and registration of the Will have corroborated each other on material aspects. The contesting parties basically PW-1 Ajay Dhani and

defendant No. 1 Raj Kumar Nayyar are at loggerheads with regard to the nature of the Cancer suffered by O. P. Nayyar.

PW-1 Ajay Dhani stated that O. P. Nayyar suffered from blood cancer in 2004 while the defendant No. 1 Raj Kumar Nayyar stated that he was

suffering from lung cancer.

Nature of these cancers, be that lung or blood, is inconsequential when it is well known that none of them effects the mental faculties of the patient

23. In view of my discussion as above, PW-1 Ajay Dhani has proved that the share of O. P. Nayyar in the flat in question was bequeathed to him vide

legal & valid Will PW-2/D2. Accordingly this issue is decided in favour of PW-1 Ajay Dhani.â??

6. Learned counsel for the appellant has argued that the trial court ought to have held the Will not to be validly proved and for this purpose firstly

reliance has been placed by the counsel for the appellant upon the cross-examination of the attesting witness Sh. Sanjeev Chatrath on 11.4.2012 and

where Sh. Sanjeev Chatrath stated that the testator was not present at the time of drafting of the Will in the office of the Advocate Mr. Desh Raj

Mahajan. I cannot agree with the argument urged on behalf of the appellant because a testator even if he is not present at the time of drafting of the

Will would not mean that the Will is not duly executed and attested. In the very same crossexamination dated 11.4.2012 the attesting witness has

specifically deposed with respect to the Will being prepared by Sh. Desh Raj Mahajan, Advocate on instructions of Sh. Om Prakash Nayyar and the

Will was signed by Sh. Om Prakash Nayyar only after reading the said Will. The Will was read by Sh. Om Prakash Nayyar on his own and it was not

read over to him by anyone. Sh. Sanjeev Chatrath further deposed with respect to the testator signing the Will in his presence inasmuch as at four

places and thereafter all the attesting witnesses including Sh. Sanjeev Chatrath signing the Will in the presence of the testator. The following portion of

the cross-examination of Sh. Sanjeev Chatrath shows that the Will has been duly proved to have been executed and attested.

â??On 15.10.2004, only power of attorney was registered. The WILL was registered on 22.09.2004. The WILL was executed at about 5:30 PM or

6:00 PM on 18.09.2004. It is correct that the power of attorney Ex.PW-1/5 does not bear the date of execution on any page including below my

signatures. Myself, Mr. O.P. Nayyar, Mr. Subhash Bhutani, Mr. Deshraj Mahajan and his staff were present on 18.09.2004 at the time of execution

of WILL. As far as I remember his staff consisted of two persons, who were present there. The WILL was prepared by Mr. Mahajan on instructions

of Mr. O.P. Nayyar. The draft prepared by Mr. Mahajan was typed in the adjoining cabin. First of all, the WILL was signed by Mr. O.P. Nayyar,

who had signed after reading it. Mr. O.P. Nayyar had read the WIL on his own and it was not read over to him by anyone. He signed the WILL in

my presence. He signed at four places on the WILL. Thereafter, I put my signature on the WILL. Thereafter, Mr. Subhash Bhutani put his signature

on the WILL. We all had signed on the WILL with the same pen lying there. I had signed only on the last page of the WILL.

On 22.9.2004, we all i.e. Myself, Mr. O.P. Nayyar, Mr. Ajay Dhani, Ms. Ranjeet Singh Dhani, Mr. T.P. Dhani and Mr. Subhash Bhutani had together

gone to the office of Sub Registrar. Nobody else had signed the WILL after our reaching the office of Sub Registrar and before the WILL was

submitted for registration. We remained in the office of Sub Registrar for about 1 or 1½ hours.?? ?

xxxxxxx

??On 15.10.2004, we had reached the office of Sub Registrar at about 10:30 AM or 11:00 AM. On 11.09.2004, we had reached the office of Sub

Registrar at about 11:00 AM or 11:15 AM. I do not know how many copies of the WILL were submitted in the office of Sub Registrar alongwith

original WILL. The signature of Mr. O.P. Nayyar was taken on the WILL in the presence of the Registrar. I had also signed in the presence of the

Registrar. The signature of Mr. O.P. Nayyar on page no. 1, 2 & 2 marked as A1, A2 and A 3 were done by him in the chamber of Mr. Mahajan,

Advocate. It is correct that there is only one signature of Mr. O.M. Nayyar on each of the front pages of the WILL. I do not know who had put the

fluid on the reverse of the page no.1 of the WILL and for what purpose. After registration, the original WILL was not returned in my presence. It is

wrong to suggest that Mr. Bhutani was not present with me on that day at the office of Sub Registrar. Mr. O.P. Nayyar did not affix his thumb

impressions on the WILL in the office of Mr. Mahajan, Advocate. I do not know whether the copies submitted with the original WILL in the office of

sub Registrar were photocopies or the duplicate/carbon copies.??

7. I may note that Sh. Sanjeev Chatrath has very strenuously denied in his cross-examination that the Will is a forged and fabricated document or that

the Will was not duly executed and attested in that it does not bear the signatures of the testator Sh. Om Prakash Nayyar or the signatures of the

attesting witnesses.

8. I therefore reject the argument urged on behalf of the appellant that the Will has to be held to be not proved because the testator was not present

when Will was drafted.

9. The next argument urged on behalf of the appellant was that the substituted

plaintiff Sh. Ajay Dhani when he appeared as PW-1 conceded in his cross-examination on 16.8.2010 that the testator Sh. Om Prakash Nayyar had not signed the Will in the presence of Sh. Ajay Dhani. This argument also of the appellant in my opinion has no substance because the Will besides being proved through Sh. Ajay Dhani has been directly proved through the attesting witness Sh. Sanjeev Chatrath who appeared as PW--3. Also, it is not necessary that a testator must sign in the presence of the attesting witness because Section 63 of the Indian Succession Act,1925 clearly provides that the signatures of the testator can be proved when the testator himself gives an acknowledgment that he had put his signatures on the Will. Accordingly, even this argument urged on behalf of the appellant has no merits and is accordingly rejected.

10. The fact of the matter is that the appellant/son drove away his own parents from their own house. Parents were thereafter forced to live with their daughter. This is an admitted position on record that the parents were not living with the appellant/son in the property of the father which is the suit property, and which can only be if the parents were harassed to such an extent by the appellant and his family members that they had to give up their own house and had to stay with their daughter's family. Therefore, it is nothing unusual if the father Sh. Om Prakash Nayyar in such circumstances executed the subject Will Ex.PW-2/D2 in favour of the son of his daughter Sh. Ajay Dhani being the son of the daughter Smt. Veena Dhani and with whom the parents lived till they breathed their last.

11. In view of the above facts, the entire litigation initiated by the appellant either with respect to seeking declaration with respect to the invalidity of the subject registered Will dated 18.9.2004 Ex.PW-2/D2 and also falsely contesting the suit of the father for partition is false to the knowledge of the appellant, and therefore these appeals being absolutely meritless are dismissed with costs of Rs.2 lacs. Costs shall be paid by the appellant to respondent no.1/Sh. Ajay Dhani within a period of six weeks from today.