

(2008) 03 DEL CK 0050
In the Delhi High Court
Case No : FAO No. 139 of 1999

Sh. Asha Sehgal and Others	Vs	APPELLANT
State and Others		RESPONDENT

Date of Decision : 19-03-2008

Acts Referred:

Citation : (2008) 102 DRJ 172

Hon'ble Judges : Pradeep Nandrajog, J

Bench : Single Bench

Advocate : J.R. Goel, for the Appellant; Rohit Kumar, for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Nandrajog, J.

CM No. 478/01

1. Present application under Order XXII Rule 4 CPC has been filed by the appellants seeking impleadment of legal heirs of the respondent No. 2 Smt. Agya Wati Sehgal who died on 22.02.2001.

2. The application is allowed.

3. Amended memo of parties be filed within a week from today.

CM No. 941/02

1. In the present application under Order XXII Rule 4 CPC filed by the appellants it has been stated that one Smt. Phool Chopra who is one of the legal heirs of the deceased respondent No. 2 has also died. Impleadment of the legal heirs Smt. Phool Chopra is prayed for.

2. The application is allowed.

3. Amended memo of parties be filed within a week from today.

CM No. 1010/02

1. In the present application under Order XXII Rule 4 CPC filed by the appellants it has been stated that one Smt. Gargi Puri who is one of the legal heirs of the deceased respondent No. 2 has also died. Impleadment of the legal heirs Smt. Gargi Puri is prayed for.

2. The application is allowed.

3. Amended memo of parties be filed within a week from today.

FAO. No. 139/1999

1. The question involved in the present appeal is whether the finding recorded vide impugned judgment and order dated 2.12.1988 that the will dated 15.4.1968 is the last legal and valid testament executed by Late Sh. Maya Ram Sehgal (hereinafter referred to as the testator) is incorrect.

2. Maya Ram Sehgal died on 11.10.1968 leaving behind his widow Smt. Agya Wati Sehgal (respondent No. 2) as the only class I heir. He was the owner of the property bearing Municipal No. B-10/19, Rajouri Garden, New Delhi (hereinafter referred to as the property).

3. The will dated 15.4.1968, Ex. PW-2/1, allegedly executed by the testator and propounded by the appellants after 25 years of the death of the testator is a hand written document and consists of a single sheet of a paper. It has been penned in Urdu language.

4. The will is an unregistered document.

5. The will has been purportedly witnessed by one Sh. Chaudhary Ram Sharma and one Mr. Amrik Chand Sehgal.

6. As per the will the testator had created life interest in respect of his property in favor of his wife i.e. respondent No. 2 and one Mr. Surender Kumar Sehgal and has bequeathed the corpus in favor of the wife and children of Surender Kumar Sehgal. It records that the testator treated Surender Kumar Sehgal, who is the grand son of his real brother, as his own son and that is why he is bequeathing his property in favor of wife and children of Surender Kumar Sehgal.

7. Surender Kumar Sehgal left the world of living on 3.9.1988.

8. On 7.5.1993, the appellants who are wife and children of Mr. Surender Kumar Sehgal filed a petition u/s 276 of the Indian Succession Act 1925 seeking probate of the will in question purported to have been executed by the testator in their favor.

9. From the aforementioned facts one thing stands out; that the will has been propounded 25 years after the death of the testator.

10. The widow of the testator i.e. respondent No. 2 and one Mr. Sanjiv Kakkar,

respondent No. 3, who claims to have purchased the ground floor of the property from respondent No. 2 had opposed the petition.

11. defense set up by the widow of the testator was that the testator never executed the will Ex. PW-2/1. That the will is a forged and fabricated document. That a will dated 10.1.1965 was the last and legal testament executed by the testator under which the testator had bequeathed the property in her favor. That the testator neither adopted nor treated Mr. Surender Kumar Sehgal as his own son. That the petition was an attempt by the petitioners to illegally usurp the property of the testator.

12. Respondent No. 3 also pleaded that will is a forged and fabricated document and that he is a bona fide purchaser of the ground floor of the property.

13. On behalf of the petitioners/appellants, 3 witnesses i.e. Amrik Chand Sehgal, PW-1, Mr. Baldev Kumar, PW-2 and Asha Sehgal (appellant No. 1), PW-3 were examined.

14. In his examination in chief Amrik Chand Sehgal, PW-1, who was the cousin brother of the testator claimed to have witnessed the preparation, execution and attestation of the will. He deposed that the second attesting witness has not attested the Will in his presence but stated that the testator had told him about the attestation of the Will by a person who was the friend of the testator and a halwai by profession.

15. It be noted that before he could be cross-examined, PW-1 died.

16. Baldev Kumar Talwar, PW-2, who is the brother in law of appellant No. 1 deposed that the testator was the adoptive father of Mr. Surender Kumar Sehgal. That in April 1968 the testator came to his house and made a request to him that he should accompany him to get the will attested by a witness. That thereafter they went to the shop of Chaudhary Ram Sharma who was a halwai by profession and that the testator requested Chaudhary Ram Sharma to append his signatures on the will.

17. Asha Sehgal, PW-3, who is the wife of Surender Kumar Sehgal deposed that the will was handed over to her by Sh. Amrik Chand Sehgal in October/November in 1993-94.

18. Besides examining herself as RW-1, the widow of the testator examined one Mr. Rajender Kumar Sehgal as RW-2.

19. The widow of the testator, in her testimony as RW-1, reiterated the stand taken in her objections.

20. Rajender Kumar Sehgal, RW-2, the brother of Surender Kumar Sehgal deposed that Surender Kumar Sehgal was never adopted by the testator. That the will, Ex. PW-2/1, is not in the handwriting nor bears the signatures of the testator.

21. After noting respective pleadings and evidence of the parties, vide order dated 2.12.1998, learned Trial Judge has held that the will dated 15.4.1968 Ex. PW-2/1 is not the last legal and valid testament executed by the testator. The decision of the learned Trial Judge is based on the following three reasons:

A. Even the untested testimony of Amrik Chand Sehgal PW-1 is not credit worthy.

B. The petitioners/appellants have failed to establish that Mr. Surender Kumar Sehgal was adopted by the testator.

C. The fact that the will, Ex. PW-2/1, was propounded 25 years after the death of the testator is a circumstance throwing grave suspicion regarding the due execution of the will Ex. PW-2/1 by the testator and that the petitioners have failed to repel said suspicious circumstance.

22. As noted hereinabove the petitioners have filed the present appeal against the order dated 2.12.1998 passed by the learned Trial Judge dismissing the probate petition filed by them.

23. Mr. Amrik Chand Sehgal, PW-1, has deposed that the will, Ex. PW-2/1, was executed in April, 1968. It be noted that the exact date on which the Will Ex. PW-2/1 was executed has not been disclosed by him. He has next deposed that the Will was scribed by a person aged 70 years old upon the instructions of the testator but stated that he did not remember the name of said person. PW-1 initially deposed that he cannot identify the signatures of the testator and that of the other attesting witness but later on deposed that he can identify the same. He further deposed that he had never met the other attesting witness.

24. The testimony of PW-1 makes an interesting reading. After initially identifying the signatures of second attesting witness and additionally stating that the second attesting witness did not affix his signatures on the will in his presence and that testator had told him that the signatures of the other attesting witness were of Chaudhary Ram Sharma went on to identify the signatures of second attesting witness. This shows that PW-1 is a tutored witness and is not stating the truth. How could he identify the signature of Chaudhary Ram Sharma whom he never met and even did not see him signing as an attesting witness.

25. It is relevant to note that PW-1 died before he could be cross-examined and the fate of his credibility could have been completely shattered had he been cross-examined.

26. It is settled law that the evidentiary value of a witness who dies before he could be cross-examined though admissible but is weak for the reason testimony of the witness is not tested on the anvil of cross-examination.

27. In the instant case the self inflicted wounds by PW-1 on his testimony renders his testimony not even worth the paper on which it is penned.

28. At this stage it is relevant to note that it is not the case of the appellants that the other stated attesting witness i.e. Chaudhary Ram Sharma is not in the world

of living or not subject to process of court or incapable of giving evidence.

29. As noted hereinabove, Balraj Kumar Tanwar PW-2, was produced by the appellants to prove the due execution of the will. He had merely deposed that Chaudhary Ram Sharma affixed his signatures on the will in the presence of the testator. He did not depose that the testator had affixed his signatures on the will in the presence of Chaudhary Ram Sharma.

30. A will is validly executed when after understanding the contents of the will the testator affixes his signatures on the will in the presence of the attesting witnesses and thereafter the attesting witnesses affix their signatures on the will in the presence of the testator.

31. Therefore even the testimony of PW-2 fails to establish the due execution of the Will Ex.PW2/1.

32. It is most relevant to note that none of the witnesses of the appellants have deposed that the testator was in a state of sound disposing mind at the time when the will Ex.PW-2/1 was executed.

33. Pertaining to the finding recorded by the learned Trial Judge that the appellants have failed to establish that Mr. Surender Kumar Sehgal was the adopted son of the testator suffice would it be to note the testimonies of RW-1 and RW-2.

34. RW-1 and RW-2 in their respective testimonies have categorically deposed that Mr. Surender Kumar Sehgal was not the adopted son of the testator. No suggestion was given to them in their cross examination by the appellants that Mr. Surender Kumar Sehgal was the adopted son of the testator.

35. In such circumstances learned Trial Judge has correctly opined that the appellants have failed to establish that Mr. Surender Kumar Sehgal was the adopted son of the testator. It is thus apparent that false recitals have been incorporated in the Will to give legitimacy to the Will.

36. The fact that the will Ex. PW-2/1 was propounded after 25 years of the death of the testator was a suspicious circumstance and there was a very heavy onus upon the appellant to dispel the said suspicious circumstance.

37. Asha Sehgal (appellant No. 1) PW-3 has deposed that the will Ex. PW-2/1 was handed over to her by Amrik Chand Sehgal in October/November 1993-94.

38. As noted herein above Amrik Chand Sehgal PW-1 in his examination in chief has not even uttered a word regarding the fact that the will Ex. PW-2/1 was in his custody and that he handed over the same to appellant No. 1 in October/November 1993-94.

39. At this juncture I note that a suit for permanent injunction was filed by the present appellants against the widow of the testator. An application was moved by the present appellants during the trial of the said suit seeking to amend the

plaint filed by them. Vide order dated 23.3.1992 said application was rejected by a court of Sub Judge Delhi. Copy of the said order is exhibited as RW-2/1.

40. A perusal of the order dated 23.3.1992 Ex.RW-2/1 shows that the amendment sought by the appellants was that the testator had executed the will Ex.PW-2/1 in their favor.

41. Appellant No. 1 in her testimony as PW-3 had deposed that the Will Ex.PW-2/1 was handed over to her by Amrik Chand Sehgal in October/November 1993-94. But contrary to her testimony, the amendment pertaining to the Will Ex.PW2/1 was moved in much before year 1993-94 as evident from order dated 23.03.92 Ex.RW-2/1.

42. Appellant No. 1 had further deposed that she was aware about the existence of the will Ex. PW-2/1 even before her marriage to Mr. Surender Kumar Sehgal in the year 1969 but did not make any efforts to trace the will Ex. PW-2/1. She had also deposed that she never questioned Amrik Chand Sehgal as to why he did not hand over will Ex. PW-2/1 for a period of nearly 25 years.

43. Baldev Kumar Talwar PW-2 had deposed that though he was aware that the testator by virtue of the will Ex. PW-2/1 had bequeathed his property in favor of Mr. Surender Kumar Sehgal, his wife and children yet he never informed his sister in law i.e. appellant No. 1 or Mr. Surender Kumar Sehgal regarding the same. I find it strange.

44. The aforementioned unnatural conduct of appellant No. 1 and Baldev Kumar Tanwar and reading of the testimony of PW-1 in conjunction with the order dated 23.03.92 Ex.RW-2/1 further deepens the suspicion surrounding the due execution of the will Ex. PW-2/1.

45. In view of above discussion I find no infirmity in the judgment and order 2.12.1988 passed by the learned Trial Judge.

46. Impugned order dated 2.12.1998 is affirmed.

47. The appeal is dismissed.

48. No costs.

C.M. No. 314/01

1. Above-captioned application under Order I Rule 10 CPC has been filed by one Mr.Rajinder Kumar Sehgal seeking his impleadment as a respondent in the present appeal.

2. Impleadment has been sought on the ground that the respondent No. 2 who died on 22.02.01 by virtue of a will dated 19.03.1999 had bequeathed the property bearing Municipal No. B-10/19, Rajouri Garden, New Delhi in his favor. That the present appeal relates to the said property. That since he would be affected by the decision of the appeal it is necessary to allow him to defend the present appeal.

3. Since the present appeal is dismissed the application has become infructuous and is thus dismissed.