

(2001) 11 DEL CK 0007

In the Delhi High Court

Case No : Pr. No's. 33 and 58 of 1979

Smt. Lakshmi Devi and etc.

APPELLANT

Vs

State of Delhi and Others

RESPONDENT

Date of Decision : 05-11-2001

Acts Referred:

Succession Act, 1925 — Section 276, 74

Citation : AIR 2002 Delhi 147

Hon'ble Judges : Jiwan Dass Kapoor, J

Bench : Single Bench

Advocate : A.P.S. Ahluwalia and Hemant Malhotra, for the Appellant; H.N. Choudhary, for the Respondent

Judgement

1. These are two probate petitions. One probate petition has been filed on the basis of Will dated 11-12-1968 executed by petitioners' mother Smt. Lakhmi Devi, who admittedly was the absolute owner of the property bequeathed by her. Another probate has been filed on the basis of Will executed by their father on 28-11-1978 on the assumption that after the death of Smt. Lakhmi Devi, he had become the absolute owner by virtue of Para 5 of the Will.

2. Admittedly, Gulshan Kumar, petitioner in probate No. 58/79 did not challenge the execution of the Will by Smt. Lakhmi Devi. Rather he accepted the same having been validly and legally executed by Smt. Lakhmi Devi. The relevant paras of the Will executed by Smt. Lakhmi Devi are as under :--

"4. That I am the exclusive owner of these properties and by virtue of the Will, I divide the said properties amongst my sons. As long as I am alive no one has any right in the said properties.

5. That after my death, my husband Sri Boota Mal will be owner of the properties cited above and my sons and daughters will have no right in the said properties.

6. That after my death as well as the death of my husband the properties noted above will go amongst my sons as under :--

Plot Nos. 37 and 38, Vishasnagar. Shahdara Delhi will go half and half in the names of my sons Shri Gulshan Kumar and Shri Peshori Lal.

House No. 34-E/3, situated at East Patel Nagar. New Delhi will go to my sons in the following manner.

Lower PortionGulshan Kumar.

upper portionPeshori Lal and the third floor combined in the names of Gulshan Kumar and Peshori Lal.

I hereby declare that the above cited persons will become full fledged owners of the aforesaid property after my death as well as death of my husband. My other heirs grand son, sons Shri Jagdish Lal and Harikishan Lal and daughters have no concerned at all with the said properties."

3. It is pertinent to mention that in spite of the fact that Gulshan Kumar accepted the validity and legality of the Will, this Court insisted the petitioner to prove the Will in accordance with the provisions of law and rightly so as the other brothers and sisters of the petitioner were excluded from the property owned by Smt. Lakhmi Devi.

4. The very fact that none of the remaining L.Rs. of Smt. Lakhmi Devi came forward to contest and challenge the validity and legality of the Will executed by her coupled with the fact that Gulshan Kumar has not disputed the validity and execution of the said Will shows that the Will as set up by the petitioner Pishori Lal in Pr. No. 33/79 was executed by Smt. Lakhmi Devi when she was in sound and disposing state of mind and also that she was absolute owner of the property mentioned therein.

5. Vide judgment dated 23-4-1985. probate was granted in favor of Pishori Lal with direction to furnish security for due administration of the Will in terms of the bequest. While dealing with the petition of Gulshan Kumar, the learned Single Judge after discussing and dealing with the contentions of learned counsel appearing for Gulshan Kumar made the following observations :--

"I am, Therefore, of the considered view that the overall effect of the Will of Smt. Lakhmi Devi was that a life estate was created in favor of Boota Mal and after his death as the house property remained in his hand, it had to go to the two sons Gulshan Kumar and Pishori Lal in shares as mentioned in Para 6 of the Will, Consequently the Will later executed by Boota Mal on 28-7-1978 which was to take effect after his death has to be ignored as not within his competence with regard to the property left in his hands by Smt. Lakhmi Devi."

6. However, the said judgment was challenged by way of appeal. Vide order dated 11-12-1985, the said judgment was set aside by the Division Bench with the following observations :--

The fact of the matter is, as it appears to us, that the probate Court had really to decide the validity of the Will and the question as to what title is conveyed by the

Wills has to be left to other proceedings. Hence, it may be that Boota Mal got life estate or it may be that he got full estate but this has to be decided by the appropriate Court. At the stage of probate, all that had to be seen was what was the Will and whether it was valid? The Judgment of the probate Court operates in rem. Once probate is granted, the same is effective qua the whole world.

5. As far as the other case is concerned i.e. probate case No. 58/79 that has failed on the short ground that on the interpretation of Lakshmi Devi's will Boota Mal only life estate. We may say that we express no opinion as to what estate was actually received by Boota Mal. It is now for the Probate Court to decide whether the Will made by Boota Mal was a valid Will. The decision of the probate Court regarding validity of the Will does not mean that the estate of Boota Mal is changed or altered. Whatever rights Boota Mal may have had in this house, Will still operate and the estate passed in accordance with the Will, Will depend on the nature of the estate which Boota Mal held. The probate Court is only concerned with decision whether the Will is valid. Assuming that on trial the Will is upheld and letters of administration are granted, it will still remain to be seen whether the person concerned gets an estate or not because Boota Mal's estate was only a life estate, and no estate will pass if the letters of administration are granted. However, this question as to what estate Boota Mal had has to be decided in a regular civil suit, which we are told are already pending. The result will be that this appeal will also be accepted and this case will be remanded for fresh decision.

6. We also make it clear that any decision reached in the probate case regarding nature of the estate has no binding effect on the civil Court's decision. The binding force is limited to the validity of the Will and no other question."

7. In spite of respondent having not contested the Will nor other L.Rs. of deceased Lakhmi Devi having come forward to challenge the Will, the petitioner examined Mr. K. D. Gupta who identified signature of his father who was one of the attesting witnesses of the Will as none of the attesting witnesses was available and his father had since expired. In these circumstances, there is no other conclusion than to return the finding that Lakhmi Devi was in sound and disposing state of mind at the time of execution of the Will and as such the Will is a validly executed document.

8. It is settled law that allegations or averments of a party if not denied by the respondent are deemed to have been admitted and proved. If uncontroversial or unmarred evidence is also adduced by the said party to prove those allegations or averments, it provides a touch of concreteness. In matters where the Will is involved, the Courts are required to exercise extra care and caution to see its validity and genuineness to rule out collusion between the beneficiaries and give effect to the last wish of a person bequeathing his properties or his assets.

9. Though the learned counsel for the respondent has no objection nor can he have any such objection if the Will executed by Lakhmi Devi is probated and

given effect to, yet his only concern is that it is not within the power of the Court granting probate to give meaning or interpret the Will. The function of the Court probating the Will is only to confine itself as to its validity and if found legally and validly executed grant probate and letters of administration.

10. However, when confronted with the meaning and effect of Paras 5 and 6 of the Will. Mr. H. N. Chaudhary, learned counsel for petitioner Mr. Gulshan Kumar who has sought probate of the Will executed by his father has contended that petitioner Gulshan Kumar is concerned with his Will and not the Will executed by Smt. Lakhmi Devi and as such probate be granted in respect of the Will executed by Lakhmi Devi.

11. On the one hand, learned counsel for the respondent is contending that the Will of Lakhmi Devi be given effect to while on the other hand is challenging the power of the Court to interpret Will in respect of which letters of administration are sought to be granted as according to him, the power of Lakhmi Devi to bequeath the property in favor of the petitioners was rendered redundant and infructuous when Lakhmi Devi bequeathed property in the name of her husband and excluded her sons and daughters by virtue of Para 5. I am afraid the contention of Mr. Chaudhary is not only self-contradictory but self-defeating as letters of administration of the Will have to be granted in clear, unambiguous and operable terms. On the one hand, learned counsel is contending that there is no scope to interpret such a Will while on the other hand, he contends that Para 6 of the Will is redundant in view of Para 5 whereby Boota Mal became absolute owner of the property after the death of Lakhmi Devi.

12. As is apparent from the contentions of learned counsel, Boota Mal derived his right of ownership from the Will executed by Lakhmi Devi. Now to segregate the said right from the right granted to both the parties by virtue of Para 6 by the person who was absolute owner of the property and by virtue of whose Will Boota Mal claims the right of the absolute ownership *prima facie* sounds fallacious and difficult to ram down the throat. Neither probate nor letter of administration can be granted unless the ultimate intention of Lakhmi Devi is culled out by way of reading Paras 5 and 6 conjointly i.e. conjunctively and not disjunctively as is sought by Mr. Chaudhary.

13. The Full Bench of this Court in *Maj. Gen Rajinder Singh Chowdhary Vs. S. Manjit Singh Chowdhary and Others*, was confronted almost with identical proposition of law and took the view that it is the intention of the testator that has to be found out on a reading of the Will and there cannot be any hard and fast rule of uniform application to find out as to whether the grant was absolute or it was subject to any condition or stipulation.

14. In *Navneet Lal alias Rangi Vs. Gokul and Others*, the Supreme Court has also taken the view that the true Intention of the testator has to be gathered not by attaching importance to isolated expressions but by reading the Will as a whole with all its provisions and ignoring none of them as redundant or contradictory.

The Court is entitled to put itself into the testator's armchair and is bound to bear in mind also other matters than merely the words used. It must consider the surrounding circumstances, the position of the testator, his family relationship, the probability that he would use words in a particular sense. But all this is solely as an aid to arriving at a right construction of the Will and to ascertain the meaning of its language when used by that particular testator in that document.

15. In the said judgment, the Supreme Court further observed that "if there are two repugnant provisions conferring successive interests, if the first interest created is valid the subsequent Interest cannot take effect but a Court of construction will proceed to the farthest extent to avoid repugnancy so that effect could be given as far as possible to every testamentary intention contained in the Will."

16. As recently as in 1995, the Supreme Court in *Kaivelikkal Ambunhi (dead) by LRs. and others Vs. H. Ganesh Bhandary*, has dealt with the problems faced by the Court while giving effect to Will that is ambiguous or suffers from the vice of repugnance. The Supreme Court has observed that "the rules of interpretation of the 'Will' are different from the rules which govern the interpretation of other documents say, for example, a Sale Deed or a Gift Deed or a Mortgage Deed or for that matter, any other instrument by which interest in immovable property is created. While in these documents if there is any Inconsistency between the earlier or the subsequent part or specific clauses inter se contained therein, the earlier part will prevail over the latter as against the rule of Interpretation applicable to a Will under which the subsequent part, clause or portion prevails over the earlier part on the principle that in the matter of 'Will', the testator can always change his mind and create another interest in place of the bequest already made in the earlier part or on earlier occasions. The Supreme Court has further observed that "a Will may contain several clauses and the latter clause may be inconsistent with the earlier clause. In such a situation, the last intention of the testator is given effect to and it is on this basis that the latter clause is held to prevail over the earlier clause. This is regulated by the well known maxim 'cum duo inter se pugnantia reperiuntur in testament ultimum rectum est'".

17. There is no gainsaying the fact that the Court entrusted with the probate petition has to return finding as to the validity or legality of the Will and should not traverse beyond that. As is the tenor of the ratios in the aforesaid authorities duty is also cast upon the Court dealing with the probate petition to grant probate and letters of administration in unambiguous terms and not resulting in an anomalous or fallacious situation.

18. Facts of no two cases are akin and Therefore it is not rule of thumb as propounded by the learned counsel for the respondent who on the one hand has no objection in case a Will executed by Lakhmi Devi is probated while on the other hand has also asked for probate in respect of the Will executed by Boota Mal the genesis and source of whose Will is the Will executed by Lakhmi Devi. If

the Will of Lakhmi Devi cannot be given effect to and if letters of administration cannot be issued in respect of the covenant made in the Will, no such probate or letter of administration in respect of the Will executed by Boota Mal can be Issued. I am afraid to give effect to the Will executed by Lakhmi Devi the intention contained in Para 6 is neither interpretation of the Will nor searching meaning of the Will. It is the last intention of a testator which is to be given effect. Merely because in Para 5, Boota Mal was made absolute owner of the property after the death of Lakhmi Devi did not mean that she had no intention at all to bequeath the property in favor of her two sons.

19. To know the intention of the testator one has to see as to what is working behind the walls of his or her mind or what is the actual intention of managing or disposing property after his/her death. These are not such hard walls which cannot be or should not be penetrated. It is the last Intention of a testator referred in the Will which has to be given effect to and which is to prevail over the earlier clause of the Will.

20. The function of the Court is to minimise or eliminate fallacious or anomalous situation emanating from the document particularly the Will and not to embroil the parties in imbrogio of legal jargon. If there are two clauses in a Will which appear to be irreconcilable and cannot stand together, it is the last covenant or the clause that shall prevail as the last clause or the covenant of the Will is the last intention of a person executing the Will. If the preceding clause confers any right which may be either absolute or limited that may be out of close relationship as that of husband and wife or out of love and affection or to protect the interest during one's life time. That is not the last Intention of the testator. What is relevant, and material is the last intention which is given effect to as this is the sole intention which is to prevail. In this case, if the property was bequeathed by Lakhmi Devi in respect of Clause 5, then Clause 6 which is the main clause shall have no meaning in spite of the fact that it was the last clause and last intention of the testator,

21. If the contention of Mr. Chaudhary is accepted then no probate or letters of administration can be granted in respect of the Will executed by Lakhmi Devi in spite of the fact that respondent has neither challenged its validity nor has any objection to the grant of probate. Probate cannot be granted in respect of clause/ para 5 as the beneficiary is neither alive nor approached the Court during his life time and rightly so as according to his own understanding the last wish of his wife was projected in Para 6.

22. If Clause 6 of the Will executed by Lakhmi Devi prevails then the Will executed by Boota Mal has no legs to stand upon even if it is held to be validly executed. These are two such parallels that can never meet. If Will executed by Lakhmi Devi is probated, the Will executed by Boota Mal which is subservient to the Will of Lakhmi Devi, then the original Will that too of an absolute and sole owner of the property in question cannot be probated and shall be rendered nonexistent.

23. One cannot be oblivious of the fact that the property in question belonged to Lakhmi Devi and not to her husband Boota Mal. Had Lakhmi Devi any intention to bequeath this property in favor of Boota Mal exclusively by placing him on the pedestal of absolute owner, there was no purpose for Incorporating Clause 6 whereby she clearly demonstrated the intention that after the death of her husband, her two sons will share the properties equally and that too with the exclusion of other L.Rs,

24. Thus, I have no hesitation in arriving at a conclusion that while granting probate in respect of Will of Lakhmi Devi in terms of clause/Para 6. It does not either amount to Interpretation nor does it amount to traversing beyond the arena that does not belong to the Court dealing with the probate matters.

25. From any angle or any aspect we may examine the matter, the ineluctable conclusion one can arrive at is that intention of Lakhmi Devi was manifested and writ large on the Will executed by her that it will be the petitioner who will share her property. She demonstrated her concern for the welfare of husband as a faithful wife while covenanting that after her death, her husband would be the owner of the property in order to see that her husband does not suffer at the hands of her sons, so far as his possession or right to live in the suit property is concerned.

26. There is unvarying unanimous universal judicial opinion that it is the last intention of a testator which is relevant and has to prevail if the earlier clause or covenant is found repugnant or inconsistent with the last clause.

27. Observations made in this regard in *Hammond v. Treharne* (1938) 3 All ER 308 need to be reproduced :--

".....that an intention is to be attributed, sometimes arbitrarily, to the testator that, where in a Will there are two inconsistent provisions, the later one is to prevail. It is an arbitrary rule in the sense that one can only give effect to the intention of the testator, but it is better to follow a general rule than to rely upon fine distinctions which can be of no substance."

28. In view of the foregoing reasons, I find that probate case No. 33/79 is to be granted with letter of administration whereas probate case No. 58/79 is to be dismissed as the Boota Mal had neither any authority nor any locus to bequeath the property in question. By disrespecting the last wish or intention of his wife, he has rather created bad blood among his two sons who were bequeathed equal share in the property by their mother. It is in their interest that they should live in peace and hearken to the last words of their mother.

29. The result, Therefore, is that probate is granted in favor of Pishori Lal with regard to the Will of Smt. Lakhmi Devi. He will furnish security for due administration of this Will in terms of the bequest. The application of Gulshan Kumar will stand rejected.