

IN THE HIGH COURT OF DELHI

F.A.O. No.224/2007

Sunil Anand & Anr. Appellants
! through: Mr.J.N.Aggarwal, Advocate.

VERSUS

\$ Mr.Rajiv Anand & Ors. Respondents
^ through: Mr.Arvind Nigam, Advocate and
Mr.Samrat Nigam, Advocate.

RESERVED ON: 03.04.2008

% DATE OF DECISION: 07.04.2008

CORAM:

*** Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether judgment should be reported in Digest? Yes

: **PRADEEP NANDRAJOG, J.**

1. Late Kishen Chand Anand was blessed with 3 sons and a daughter named Prem Dutt Anand, Tilak Raj Anand and Mohan Dutt Anand (sons) and Raj Suri (daughter). He was the owner of property bearing Municipal No.53-A, Ring Road, Lajpat Nagar-III, New Delhi. On 17.7.1972 he executed a will Ex.OW-1/1 bequeathing the house in its entirety to his wife Smt.Durga Devi. The dispute pertains to a registered will dated 23.8.1973, Ex.PW-1/1, registered with the Sub-Registrar, Delhi vide registration No.1167, Additional Book No.3, Vol.46 at pages 64-68 on 27th

August 1973 (presented for registration on 23rd August 1973)
propounded by Tilak Raj Anand and Prem Dutt Anand which reads
as under:-

W I L L

This last will & TESTAMENT is made at Delhi on this 23rd day of August, 1973 by me Shri Kishen Chand Anand S/o Shri Mahesh Das Resident of 53, Ring Road, Lajpat Nagar-III, New Delhi-24 being in full possession of my understanding and physical health without any duress or fear from any quarter.

Whereas I am owner of House bearing No.53(A), Ring Road, Lajpat Nagar-III, New Delhi-24 by virtue of partition deed dated 20.6.1970 and registered in the office of Sub-Registrar III at No.3892, Addition Book No.1 Volume 2434 pages 43 to 49 on 22.6.1970 and executed between the testator and Shri Boota Ram Suri, son of Shri Aya Ram Suri who jointly with me purchased the entire plot No.53 on leasehold basis from the President of India and lease and convention deed registered at No.136, Supplementary Book No.1, Volume 27, pages 111 to 114 on 9.6.1959 in the office of Sub-Registrar-III, New Delhi. The site was purchased and the building thereon was constructed with my own personal savings and as such I am full owner of the house and the land underneath without any restriction by any law or customs and have full power of disposal.

I have two sons alive namely Prem Dutt Anand and Tilak Raj Anand and my third son Shri Mohan Dutt Anand who was in the army and lost his life in war leaving behind 2 minor children and wife who has since re-married. I have also one daughter Dr.(Mrs.) Raj Suri who is married. My wife Smt. Durga Devi is also alive.

I have given full consideration to the claims of my abovesaid heirs. My daughter and the heirs of my late son Lt.Col.M.D.Anand are very well provided for. Further more I have full confidence that my wife Smt.Durga Devi will be as much as very well looked after and taken care of after me by my sons as she has been looked after upto now and I, therefore, do not find it relevant to provide for her separately. I, therefore, bequeath to my eldest son

Shri PREM DUTT ANAND the entire ground floor portion of my house No.53(A), Ring Road, Lajpat Nagar-III, New Delhi-24 who after my death will become owner like myself. I further bequeath the first and the second floors of the said house to my second son Shri TILAK RAJ ANAND who after my death will become exclusive owner of that portion like myself. The building on the first and second floor is unerected at present. It will, however, be in the absolute ownership of my son TILAK RAJ ANAND as and when the portions on these floors are constructed either by me or by my son Tilak Raj Anand, himself.

If, however, God forbid either both of my sons pre-deceased me, the heirs of my each son will represent and inherit the property of their respective predecessors-in-interest.

Shri Tilak Raj Anand will also inherit all movable property whatever and wherever, which may be found as belonging to me after my death.

I had made a will dated 17th July, 1972 and registered at No.892, Additional Book No.3-Vol.46 pages 194 on 19.7.1972 I hereby revoke the abovesaid will which will become inoperative and ineffective hereafter. I further make it clear that my two sons SHRI PREM DUTT ANAND AND TILAK RAJ ANAND will become my heirs in the manner mentioned above to the exclusion of all others and they will be the sole executors of this will.

In witness whereof, I, the said Kishen Chand Anand have hereto signed at Delhi, this 23rd day of August, 1973.

Sd/-
(KISHEN CHAND ANAND)
TESTATOR

Signed by the said Kishen Chand Anand in the presence of us, present at the same time, who in his presence and in the presence of each other, sign the witnesses hereto.

Witnesses:

1. Sd/- (J.P.Gupta).
2. Sd/- (Kanwar Bhan)."

2. Kishen Chand Anand died on 27.10.1987. His wife

Durga Devi died soon thereafter on 8.4.1988.

3. Appellants who are the children of late Lt.Col.Mohan Dutt Anand challenged the aforesaid will alleging three distinct independent grounds of challenge. It was firstly urged that the will does not bear the signatures of their grandfather i.e. is a forged document. Secondly, if signatures on the will are those of their grandfather the same were obtained on blank papers and have been misused to create the will. Lastly, the execution of the will was surrounded with suspicion. The suspicion cast on the will was pleaded on 4 circumstances; namely (i) there was no change of circumstance nor was there any reason for the deceased to change the bequest reflected in the will dated 17.7.1972 when the instant will was purportedly executed on 23.8.1973; (ii) whereas the first will made a bequest in favour of the wife it was unnatural to deprive the wife of any share in the estate of the deceased when the second will was purportedly executed, (iii) the attesting witnesses to the will in question are interested witnesses because J.P.Gupta was a colleague of Tilak Raj Anand, a beneficiary under the will and Shri Kanwar Bhan was the Personal Assistant of Shri Tilak Raj Anand; (iv) that the will sought to be probated cannot supersede a previous will executed by the deceased in the year 1972 in which, recognizing that their father had contributed to the construction of the building, 1/3rd right in the building was bequeathed to their father.

4. Holding that the testimony of the two attesting witnesses, Shri J.P.Gupta, PW-1 and Shri Kanwar Bhan, PW-2 inspired confidence and that the will was proved to be validly executed and duly registered with the Sub Registrar (as per testimony of Tilak Raj Anand, PW-3 and one Dinesh Mittal, Record Clerk from the office of the Sub Registrar, PW-4), the learned Trial Judge negated the three grounds of objection and held that the will in question has been proved to be the last legal and valid testament of the deceased namely Shri Kishen Chand Anand.

5. Briefly summarized the findings of the learned Trial Court are rooted in the evidence brought on record and the admission of OW-1, Sunil Anand, that his mother remarried in November 1972 and that after the death of his father his mother was allotted a plot of land by the government, besides a gas agency as also pension and free education for the children. It has been noted by the learned trial judge that on account of the death of Lt.Col.Mohan Dutt Anand (who attained martyrdom during the 1971 Indo-Pak war) his widow and children receiving adequate compensation; that the widow remarried and removed herself and her children from the company of the testator. It has been held that these circumstances afford good reasons to make the bequest bequeathing the residential house to only 2 sons. It has been held that if credible evidence establishes that the testator was in a sound disposing mind and consciously executed

the will, merely because the attesting witnesses were acquaintances of a beneficiary is no ground to disbelieve the will. Emphasis has been laid on the proof of due registration of the will.

6. It may be noted at the outset that the fourth ground predicated while challenging the will, namely a prior will bequeathing 1/3rd share in favour of the father of the objectors has not been discussed in the impugned judgment; probably for the reason no evidence was brought on record to prove any will under which the father of the objectors was a beneficiary.

7. The challenge to the judgment and order dated 11.4.2007 is premised on:-

(a) Admissions in the testimony of PW-2 Kanwar Bhan who in cross examination stated: *"It is wrong to suggest that late Shri Kishen Chand was mentally sound at the time of executing the will."* *"It is wrong to suggest that late Kishen Chand Anand executed the will in my presence or in the presence of Dr.J.P.Gupta"*.

(b) The fact that the two attesting witnesses of the will were admittedly close associates of one of the beneficiary under the will has been underplayed by the learned Trial Judge. It was highlighted during arguments that the will OW-1/1 was witnessed by independent witnesses evidencing that the executor was a man of prudence who took care to have his will witnessed by

persons whose credibility would be unimpeachable.

(c) The execution of the will in question after about a year of execution of the earlier will itself was sufficient to draw a conclusion that the will in question was a result of an undue influence or was a procured will.

(d) The fact that the wife of the testator in whose favour testator had made a bequest in the first will as also the children of Late Lt. Col. M.D.Anand i.e. the objectors with whom the testator had special love and affection were excluded in the second will strongly suggests that the second will was unnatural.

(e) That the learned Trial Judge erred in ignoring the report of a handwriting expert who could not be examined because he died before the report could be filed; which report opines that the signatures on the will Ex.PW-1/1 are not those of the testator.

(f) That the learned Trial Judge placed undue emphasis on the fact that appellant No.1 stated in cross examination that he signed his affidavit by way of evidence in New York whereas the fact was that appellant No.1 was in India when he deposed to the affidavit by way of evidence; in proof of which fact photocopy of the passport was filed evidencing that the appellant no.1 was in India on the day he swore the affidavit.

8. I would be failing to note that 2 technical objections were also urged at the hearing. It was firstly urged that the will Ex.OW-1 being a registered will could not be revoked by the will

Ex.PW-1/1 as the same was not a registered will. Secondly it was urged that the probate was sought by Prem Dutt Anand and Tilak Ran Anand as the stated executors of the will and on their death their legal heirs could not be brought on record.

9. Pertaining to the said two objections suffice would it be to note that the will Ex.PW-1 is a registered will. Secondly, there is no law that a registered will cannot be superseded by an unregistered will. A will does not operate in presenti. Its operation is contingent upon the death of the executor. A will creates no right, title or interest when it is executed. The right is created under a will on the death of the testator. Till alive, the testator can always revoke the will because a will is an instrument of trust by a living person addressed in rem to be operative after his death. A will, be it registered or be it unregistered can be revoked by defacing the will, destroying the will or otherwise superseding the same. The second ground of challenge is equally frivolous because under Section 232 of the Indian Succession Act 1925, on proof of a will the beneficiaries would be entitled to letters of administration with the will annexed. The decision cited on the point by Shri J.N.Aggarwal, learned counsel for the appellant, namely, AIR 1977 Delhi 34 *Inder Chand Nayar vs. Sarvadeshik Arya Pratinadhi Sabha & Anr.* if carefully read, holds against the appellant. Paras 8 and 9 of the said decision reveal that a beneficiary under a Will can be

granted the letters of administration with will annexed. Para 11 and 12 of the decision shows that after holding that letters of administration with will annexed can be granted to a beneficiary, the Court further considered whether letters of administration can be granted to an association of individuals or not.

10. Pertaining to contention No.4 and 5 (noted in sub para (d) and (e) of para 7 above, I may note that the 4th contention is wholly frivolous because no report of any handwriting expert forms part of the record of the learned Trial Judge. I may note that an application was filed by the appellants to permit a handwriting expert to take photographs of the will dated 17.7.1972. Vide order dated 23.10.2002 the said application was allowed. But, no report of a handwriting expert was filed. The argument appears to have been raised for the sake of raising one. The 5th contention is also a contention raised for the sake of raising one. While noting the testimony of appellant No.1 who appeared as RW-1 the fact that in cross-examination he stated that he executed his affidavit by way of evidence when in the United States of America has been simply noted by the learned Trial Judge. Indeed, it was not pointed out to this Court as to in which paragraph of the judgment the learned Trial Judge adversely commented thereon.

11. I may preface my discussion on the first 3 contentions urged by noting the law relating to wills. Needless to state he

who propounds a will has the duty to prove the same and satisfy the conscious of the Court that the instrument propounded is the last will of the testator. The obligation i.e. '*onus probandi*' is generally discharged by proof of the capacity and the fact of execution from which the knowledge of an assent to the contents of the instrument are assumed. Standard of proof to be achieved to prove a will is no different than that required to prove other documents except the requirement of attestation prescribed vide Section 63 of the Indian Succession Act 1925. The proof is to be tested on the usual satisfaction of a prudent person. As against documents which are questioned during the lifetime of the executant, since a debate on a will takes place after the demise of the testator, the testator being not available to testify on the issue, an element of solemnity enters in the proceedings relating to a will. Notwithstanding this distinction, an inquiry pertaining to a will has to proceed in the same manner as in respect of other documents.

12. The propounder of a will has to satisfy the judicial conscience, by leading cogent evidence that (a) the will was signed by the testator and was duly witnessed by two attesting witnesses; (b) the testator was in a sound and disposing state of mind; (c) the testator understood the nature and effect i.e. the contents of the document; and (d) the testator put his signatures to the document of his own free will.

13. Wills are frequently made by the sick and the dying. Law does not therefore insist that the quality of the health, both physical and mental, possessed by the testator should be proved in the highest degree. Section 59 of the Indian Succession Act 1925 requires that the testator should have sound mind. To be in the state of a sound mind does not mean that the mental faculty should be in its fullest vigour. It simply means that there should be capacity to understand the nature of one's property; memory to remember the relations and persons normally having claim to the bounty of the testator; and lastly ability to form a judgment. It is sufficient to prove that the testator was capable of forming a judgment. If the propounder of a will satisfies the conscious of the Court, the Court has to grant a probate, even if the will, wholly or in part, deprives near relations. It is the will of the testator that is reflected in the will. Being the testator's own property he has the liberty to deal with it absolutely. It is not for the Court to find out justification or equity or otherwise in the action of the testator. The Court has not to venture into surmises or conjectures. Further, once it is proved that the will was executed by a person of competent understanding the burden of proving execution under undue influence or the like is on the challenger.

14. It may also be noted that suspicious circumstances are not conclusive evidence to hold against a will. A suspicious

circumstance if not satisfactory explained or dispelled by the propounder is fatal to a will. It is trite that where the propounder establishes that the will bears the signatures of the testator and that the testator was in a sound state of mind and was conscious of the document which he executed the initial onus on the propounder stands discharged. Where the challenger leads evidence to establish suspicious circumstances the onus then shifts back on the propounder who has then to clear the air surrounding the will.

15. I now take up for consideration the first three contentions urged and as noted in sub-paras (a) to (d) of para 7 above.

16. It is settled law that where the Court of original jurisdiction considers the entire evidence brought on record and while doing so does not ignore a material evidence or circumstance and does not consider irrelevant material or irrelevant circumstance, merely because two views are possible, the Appellate Court would not, on reappraisal of evidence hold that the other view i.e. the one not concluded by the Court of Original Jurisdiction would be a better view to be followed. (See the decision of the Hon'ble Supreme Court reported as Vilas Pandurang Patil v State of Maharashtra (2004) 6 SCC 158 “para 17”) Perversity in the conclusion arrived at after appreciation of evidence would also be a ground available to challenge findings

of fact recorded by the Court of Original Jurisdiction.

17. No doubt, in cross examination PW-2 stated: *"It is wrong to suggest that late Shri Kishen Chand was mentally sound at the time of executing the will."* *"It is wrong to suggest that late Kishen Chand Anand executed the will in my presence or in the presence of Dr.J.P.Gupta"*, but it is apparent that while answering a question put in the negative, the witness did not realize that two negatives make a positive. From the answers given by the witness, the questions posed are evident. It is apparent that the first question put to the witness was:- I put it to you that Shri Kishen Chand was not mentally sound when he executed the will. The second question was:- I put it to you that you were not present nor was Shri J.P.Gupta present when Kishen Chand Anand executed the will. The witness did not realize that questions put to him were in the negative and if he had to deny the suggestion he ought to have denied in the affirmative. Be that as it may, in his examination-in-chief PW-2 clearly deposed that on 23.8.1973 he went to the residence of Kishen Chand Anand where he met the other attesting witness namely Shri J.P.Gupta. He stated that first of all Kishen Chand signed on the will and thereafter J.P.Gupta signed the same as a witness followed by him i.e. PW-2 who signed as the second witness. PW-2 also identified the signatures of J.P.Gupta at point 'C' on the will and that of late Shri Kishen Chand at points 'A' and 'B'.

18. It is no doubt true that PW-1, J.P.Gupta was a colleague of Tilak Raj Anand, a beneficiary under the will Ex.PW-1/1 and PW-2, Kanwar Bhan was a subordinate officer working under Tilak Raj Anand. But, this does not mean that the testimony of these witnesses has to be disbelieved on said count. The close relationship of the attesting witnesses with a beneficiary under a will only requires the Court to be more careful and cautious while dealing with the evidenciary value of such witnesses. The reason is obvious, especially in India, it is not uncommon for a beneficiary to arrange for attesting witnesses to be present when a will is executed. Indeed, in the decision reported as Rabindra Nath Mukherjee vs. Panchanan Banerjee AIR 1995 SC 1684 the Hon'ble Supreme Court has held that if a will is validly proved the fact that the attesting witnesses to the will are interested lose significance. Same ethos was reiterated by the Hon'ble Supreme Court in the decision reported as Madhukar D.Shende vs. Tarabai Aba Shedage AIR 2002 SC 637 where the attesting witnesses to the will were classmates of the beneficiary's son.

19. Save and except the two answers given by PW-2 which have been dealt with by the learned Trial Judge as also by me, no infirmity whatsoever was pointed in the testimony of PW-1 and PW-2. Indeed, their credibility was not shaken under cross-examination. It has also be noted that the will Ex.PW-1/1 has

been duly registered, a fact proved through the testimony of PW-3 and PW-4. Though, registration of a will, by itself is no proof of it being executed but certainly lends support, howsoever small it may be, to the other evidence brought on record. Though not much, the fact of the registration of a will does slightly tilt the scale in favour of the propounder.

20. It is a fact that the will Ex.PW-1/1 was executed within a year and less than a month of the earlier will Ex.OW-1/1, but nothing turns thereon for the reason evidence on record has established a very material circumstance which intervened between the dates of execution of the two wills. Lt.Col.M.D.Anand attained martyrdom during the Indo-Pak war fought in the year 1971. In his testimony, appellant No.1, examined as OW-1 admitted that his mother re-married in November 1972 and that his mother was given a plot of land and the business of a gas agency by the government as a benefit to a widow of an ex-soldier besides free education for the children and a pension. The testator was thus aware that his widowed daughter-in-law and his two orphaned grandchildren were well provided for by the government. The widowed daughter-in-law had found a new spouse who was also a father to the two orphaned children. The social and economic insecurity of the widowed daughter-in-law and the two grandchildren had vanished. In fact this branch of the family was conferred with a

wealth much greater than what remained with the testator. For the purposes of the present decision what is relevant to note is a material circumstance between the dates of the two wills.

21. As regards the contention (d) i.e. exclusion of the wife of the testator and the objectors in the second will makes it an unnatural will suffice would it be to note it is not for the Court to refuse the grant on account of the fact that the disposition is not just and fair or is unnatural or improbable when the conscience of the Court is clear about the proof of the execution of the will on the face of the evidence, satisfactorily sufficient, to remove the suspicious circumstances. I need not speculate or enter into theories as to what prompted the testator to change his will because as noted above law prohibits a Court from speculating into the reasons which led a testator to do what he did. It would also be useful to note that in the will Ex.PW-1/1 the testator has recorded the factum of his widowed daughter-in-law being remarried. Additionally, the testator has noted that the heirs of his deceased son late Lt.Col.M.D.Anand were well provided for in the life. Testator has further noted that he has full confidence that his wife would be well looked after by his sons after his death.

22. Though not referred to by the learned Trial Judge as reasons throwing light on genuineness and due execution of the will it would be useful to note certain inherent features of

evidence which led credence to the will.

23. The will consists of 2 sheets bearing signatures of the executant on each page at a place where an executant would normally append his signatures on a document. There is no evidence that the will Ex.OW-1/1 was handed over by the testator to his sons. The will Ex.PW-1/1 specifically refers to the earlier will and revokes the same. This is also indicative of the participative role of the testator when the will Ex.PW-1/1 was executed. Further, visual comparison of the signatures of the testator on the two wills show complete identity of signatures on both the wills.

24. No evidence has been brought on record by the objectors to establish that the testator was not in sound disposing state of mind at the time of the execution of the will in question. No evidence was brought on record by the objectors to establish that the testator was under the undue influence of his sons.

25. No case is made out to interfere.

26. The appeal is dismissed.

27. No costs.

28. TCR be returned forthwith.

April 7, 2008
sl

(PRADEEP NANDRAJOG)
JUDGE