

IN THE HIGH COURT OF DELHI

FAO No. 82/2007

Mr. Suraj Bhan Appellant
! through: Mr. Harish K. Mehra, Advocate

VERSUS

\$ State & Ors. Respondents
^ through: Mr. S.M.Chopra, Advocate for
respondents 2 to 4.

RESERVED ON: 7.01.2008

% DATE OF DECISION: 10.01.2008

CORAM:

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

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

: **PRADEEP NANDRAJOG, J.**

1. This appeal is directed against the order dated 30.11.2006 passed by the learned Additional District Judge, Delhi whereby petition filed by the appellant under Section 276 of the Indian Succession Act 1925 seeking probate of the will dated 10.12.1992 purported to have been executed by Late Sh. Prabhu Singh in favour of the appellant was dismissed.
2. Late Sh. Prabhu Singh (hereinafter referred to as the deceased) who died on 28.12.1992 was survived by his wife Smt.

Asarfi (respondent No.2), two sons namely Suraj Bhan (appellant), Jai Bhagwan (respondent No.3) and a married daughter Smt. Patasso (respondent No.4).

3. Suraj Bhan i.e. appellant herein filed a petition under Section 276 of the Indian Succession Act 1925 seeking probate of the will purported to have been executed by the deceased on 10th December 1992.

4. As per the said will the deceased has bequeathed following movable and immovable properties in favour of Suraj Bhan to the exclusion of his other legal heirs:-

A Plot ad measuring 120 square yards and bearing Municipal No.60, Khasra No.32/6 and 32/7, Village Matiala, New Delhi.

B Compensation of one killa which shall be granted in respect of agricultural land ad measuring 4 bighas and 8 biswas and situated in Khasra No.57/7, Revenue Estate, Village Matiala, New Delhi. (It has been mentioned in the will that compensation of one killa in respect of same agricultural land has already been received by younger son of the deceased i.e. Jai Bhagwan).

C Amount lying deposited in the saving account of the deceased with the Oriental Bank, Naraina.

5. The will in question Ex. PW-1/1 is a computer typed document and consists of a single sheet of paper. It has been

typed in the English language. Towards the bottom of the sheet at the right corner a thumb impression purported to have been affixed by the deceased is affixed.

6. The will Ex. PW-1/1 is a notarized and unregistered document.

7. The will in question has been witnessed by one Sh. Man Singh and one Sh. Syed Ahmed.

8. The other legal heirs of the deceased i.e. his widow Asarfi, son Jai Bhagwan and daughter Patasso has opposed the petition for grant of probate.

9. In the objections to the petition filed by the appellant respondents has pleaded that the will Ex. PW-1/1 is a forged and fabricated document. That the deceased never executed a will in favour of the appellant. That the deceased during his life time was living under the care and guidance of respondents No. 2 and 3. That the relations between the deceased and appellant were strained evidenced by the fact that the appellant did not participate in the last rites of the deceased.

10. In the reply to the objections filed by the respondents, appellant denied that during his life time the deceased was living under the care and guidance of respondents No.2 and 3 or that the relations between him and deceased was strained. It is necessary to note following portion of the reply filed by the

appellant:-

“4. It is pertinent to mention here that the deceased before his death used to live separately at his own house and the petitioner took best possible care and provided all the necessary treatment to his deceased father. It is reiterated that the deceased Sh. Prabhu Singh, before his death, executed a will in favour of the petitioner.

7. That para 7 of the objections is wrong false and denied except to the extent that the petitioner could not be present at the time of cremation of the deceased Sh. Prabhu Singh as he was on duty but the other family members of the petitioner were present at the time of cremation and the petitioner participated in the other last rites of the deceased Sh. Prabhu Singh. It is vehemently denied that the petitioner refused to take care of his father or that he refused to see him after his death.”

11. It is relevant to note that it was only pleaded by the appellant that he used to look after the deceased but it has nowhere been pleaded that the deceased used to live with the appellant.

12. To prove the genuineness of the will Ex. PW-1/1 appellant examined himself as PW-1 and the two attesting witnesses to the will i.e. Syed Ahmad and Man Singh as PW-2 and PW-3 respectively.

13. Appellant in his testimony as PW-1 deposed that:-

A Will Ex. PW-1/1 was executed by the deceased at the house where deceased was residing.

B Man Singh and Syed Ahmad has witnessed the due execution of the will Ex. PW-1/1.

C He was present when the will Ex. PW-1/1 was executed by the deceased.

D Before his death deceased used to live with him.

E During his life time deceased never lived with respondent No. 2 and 3.

F He, the deceased and the two attesting witnesses to the will Ex. PW-1/1 had no knowledge of English language.

14. As regards preparation and notarization of the will Ex. PW-1/1 appellant deposed as under:-

“The will was prepared on 10.12.92. I and Sayed Ahemd went to get the will prepared. We got prepared the will from the court. We came to court by bus. Will was prepared at home on a plain paper and the same was typed in court..... The stamps on the will of Notary Public were put in my presence after putting of thumb impression at home. Man Singh signed on the will at home. One typist typed the will.”

15. When questioned in cross examination as to why he did not attend the cremation of the deceased appellant deposed as under:-

“I was in Delhi when my father expired. I am the elder son of my father. It is correct that I have not given light as per rituals to the dead body of my father as I was not there.”

16. It is relevant to note that the appellant has nowhere deposed as to in what circumstances the will Ex. PW-1/1 came into his possession. Did the deceased ask the appellant to keep the will Ex. PW-1/1 in his possession?

17. Syed Ahmed in his testimony as PW-2 deposed that the deceased was his friend.

18. As regards the preparation and notarization of the will Ex.PW-1/1 Syed Ahmed deposed that a draft of the will was first prepared in Hindi as per the instructions of the at the residence of the deceased. (Who prepared the draft in Hindi is not forthcoming from the testimony of PW-2). That thereafter he and appellant went to the court where the draft scribed in Hindi was got typed by a typist in English language. Thereafter they returned to the residence of the deceased with the typed will. That he and appellant explained contents of the typed will to the deceased. Thereafter deceased affixed his thumb impression on the typed will. Thereafter he and Man Singh signed on the will as an attesting witness. That after execution and attestation of the will Ex. PW-1/1 he and appellant again went to the court where the will was got notarized from a Notary Public.

19. It is necessary to note following portion of the testimony of PW-2:-

“I have no knowledge of English language..... The contents of the will also gives half share of the old properties which also includes a vehicle..... I and Suraj Bhan explained Prabhu Singh regarding the contents of the will.”

20. Man Singh in his testimony as PW-3 deposed that the deceased was his elder brother. That the deceased affixed his

thumb impression on the will Ex. PW-1/1 in his presence. That he signed the will Ex. PW-1/1 in the presence of the deceased as also in the presence of the other attesting witness Syed Ahmed. That before the deceased signed the will contents of the will were explained to the deceased in Hindi. That the deceased was ill for a period prior to 2-3 years before his death. That the deceased used to stay for 10 days with his elder son Suraj Bhan and for the next 10 days with his other son Jai Bhagwan.

21. It is relevant to note that it is not forthcoming from the testimonies of both the attesting witnesses as to in what circumstances they happened to become the attesting witnesses to the will. Who ask them to attest the will? When were they asked to attest the will?

22. On behalf of the respondents Jai Bhagwan respondent No.4, one Sh. Jile Singh (an acquaintance of the family of the deceased) and Smt. Asarfi respondent No.2 were examined as RW-1, RW-2 and RW-3 respectively.

23. Jai Bhagwan and Asarfi in their testimony as RW-1 and RW-3 respectively deposed on the lines of the objections filed by them. Jai Bhagwan also deposed that the will Ex. PW-1/1 is a forged and fabricated document inasmuch as because of the ill health it was not possible for the deceased to have executed the will Ex. PW-1/1. That the deceased died in a hospital. That

before being hospitalized deceased was residing with him.

24. Jile Singh in his testimony as RW-2 deposed that he had known family of the deceased since a long time as he was residing in the same village as that of the family of the deceased. He deposed that the relations between the deceased and appellant were strained.

25. After considering the case in its entirety vide order dated 30.11.2006 learned Additional District Judge has held that the appellant failed to prove that the will Ex. PW-1/1 is a genuine document and that it was last legal and valid testament of the deceased and thus dismissed the petition filed by the appellant under Section 276 of the Indian Succession Act 1925. Relevant portion of the decision of the learned Trial Court reads as under:-

“Section 68 of the Indian Evidence Act, 1872 deals with proof of execution of document required by law to be attested. This section lays down that if the deed sought to be proved is a document required by law to be attested and if there by an attesting witness alive and subject to process of the Court and capable of giving evidence, he must be called to prove execution. Execution consists in signing a document written out, read over and understood and to go through the formalities necessary for the validity of legal act.

Section 63 of the Indian Succession Act gives meaning of attestation as under:

Section 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) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(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 acknowledgement 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.

It is clear from the definition that the attesting witness must state that each of the two witnesses had seen the executor sign or affix his mark to the instrument or has seen some other persons sign the instrument in the presence and by the direction of the executant. The witness should further state that each of the attesting witnesses signed the instrument in the presence and by the direction of the executant. The witness should further stated that each of the attesting witnesses signed the instrument in the presence of the executant. These are the ingredients of the

attestation and they have to be proved by the witnesses. The word 'execution' in Section 63 includes attestation as required by law.

In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts indicated above.

Registration of the will does not dispense with the need of proving, execution and attestation of a document which is required by law to be proved in the manner as provided in Section 68 of the Evidence Act.

The onus is discharged by the propounder adducing prima facie evidence providing the competence of the testator and execution of the will in the manner contemplated by law. In such circumstances, the onus shift to the contestant opposing the will to bring material on record meeting such prima facie cases in which event the onus shift back on the propounder to satisfy the court affirmatively that the testator did know well the contents of the will and in sound disposing capacity executed the same.

In this case, prima facie both the attesting witnesses deposed that the will was thumb marked by the testator in their presence and they both signed in the presence of each other. But there are certain suspicious circumstances in which this will was executed. PW-3 deposed that testator was sick for about 2-3 years prior to the execution of this will. He died in a hospital after fifteen days of the execution of the will. There is no documentary proof on record that for how many days deceased remained admitted in the hospital. He was an old man. This is the case in which all the three witnesses examined on behalf of the petitioner deposed that the will was prepared at home. Then it was taken to the court by the petitioner and Sayed Ahmed where it was got typed in English. They came back with the will. It was executed in the house of the petitioner. Again petitioner and Sayed Ahmed went back to the court and got is notarized. Draft

will is not on file. There is no evidence that who scribed the will at home. PW-3 has deposed that the original will was prepared in Hindi. It was got typed in English from a typist by the petitioner himself. Neither the petitioner nor the testator could read and write English. Both the attesting witnesses also do not understand English language. PW-3 deposed that the will was explained to the testator in Hindi by the petitioner himself. The petitioner himself does not understand English. There is no evidence that who explained the contents of the will to the testator in Hindi before obtaining his thumb mark and if a document was thumb marked by the testator at the instance of the petitioner who himself is the sole beneficiary under this will, it cannot be taken as proved to have been executed with the free consent of the testator without any pressure from any third party. It is the admitted fact that PW-3 Man Singh is having strained relations with the respondents and he appeared as a witness in another civil suit also which was pending between the petitioner and the respondents. There is no evidence that the will which is placed on record was prepared at the instructions of the testator either by any typist or by an advocate. It is an admitted case that the testator did not go to the court to get the will notarized. Notary public has not been examined in this case. No particulars of the notary public including his name is given on the will. Notarial stamp of rupees three is affixed and the stamp reads:

“attested
Notary Public, Delhi
10.12.1992.”

At one place it has the stamps of Chaudhary D.S.Dalal, Notary Public, Delhi. It is the admitted case of the petitioner that testator did not go to the court. The will was got typed from the court. It was brought to the house of the testator where it was executed and then petitioner along with Sayed Ahmed went to the court and got it notarized. I do not know what was attested by

the notary public because none of the signatory of this document signed in his presence. Even the testator did not sign in his presence. Without seeing the testator the notary even affixed his rubber stamp on the photograph. Considering the fact that testator died after fifteen days of the execution of the will in hospital and he was sick for 2-3 years prior to his death and considering the fact that neither the executor nor any of the witness to the will understood English language and it was got prepared by the petitioner who is the sole beneficiary under this will, I hold that petitioner has failed to prove it beyond suspicion that the will Ex. PW1/A was executed by the testator in his sound disposing mind without any coercion or pressure from the petitioner.”

26. Aggrieved by the impugned order dated 30.11.2006 passed by the learned Additional District Judge appellant has filed the present appeal.

27. In support of the appeal following two grounds have been urged by the appellant:-

A That by leading the evidence of two attesting witnesses to the will Ex. PW-1/1 the appellant discharged the onus of proving the will and that the onus shifted upon the objectors/respondents to disprove the will which they failed to discharge. That the learned Trial Court ignored that objectors/respondents failed to establish that the will Ex. PW-1/1 is a forged and fabricated document.

B That Smt. Asarfi in her testimony as RW-3 turned hostile as she did not depose on the lines of the case projected by the objectors in the objections filed by them. That the learned

trial court failed to appreciate this aspect of the case.

28. In the decision reported as Smt Jaswant Kaur v Smt Amrit Kaur AIR 1977 SC 74 the Supreme Court has described the nature and standard of evidence required to prove a Will. In para 10 of the decision, the Supreme Court has observed as under:-

“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 R. Venkatachala lyengar v. B.N. Thimmajamma and Ors. [1959] Supp. 1 S.C.R. 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 63 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 pro-pounder 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 circumstance 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.”(underlining emphasised)

29. Judgment of this court in the decision reported as Vidya Sagar Soni Vs. State & Ors. AIR 2006 Delhi 354 extensively dealt with the legal burden of proof when a will is propounded. What would constitute suspicious circumstances and what form of affirmative proof should be sought by the court to satisfy the judicial conscience that the document propounded is the last legal and valid testament. I need not repeat. Principles culled out in paras 5 to 21 of the said decision are as under:-

“5. Section 2(h) of the Indian Succession Act, 1925 defines a will to mean the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.

6. The legal burden to prove due execution always lies upon the person propounding a will. The propounder must satisfy the judicial conscience of the court that the instrument so propounded is the last will of a free and capable testator.

7. A will is a solemn document, being written by a person who is dead and who cannot be

called in evidence to testify about the due execution of the will. It is the living who have to establish the will. It naturally throws a heavy burden on the court to satisfy its judicial conscience that the burden of proof of due execution is fully discharged and every suspicious circumstance explained.

8. No specific standard of proof can be enunciated which must be applicable to all the cases. Every case depends upon its own circumstances. Apart from other proof, conduct of parties is very material and has considerable bearing on evidence as to the genuineness of the will which is propounded. Courts have to be vigilant and zealous in examining evidence. Rules relating to proof of wills are not rules of Laws but are rules of prudence. Normally, a will is executed by a person where he desirous, to either alter the normal rule of succession, or where he desirous to settle his estate in a particular manner amongst the legal heirs. Therefore, though to be kept in mind, as to what is the nature of bequest too much importance cannot be attached to the disproportionate nature of a bequest. However, as observed in **AIR 1995 SC 1684, Rabindra Nath Mukherjee and Anr. Vs. Panchanan Banerjee (dead) by LRs,** disproportionate nature of a bequest is no doubt a suspicious circumstance to be kept in mind, but, being a mere suspicion, it is capable of being dispelled by other evidence to show voluntary character of the document.

9. Therefore, the first rule to appreciate evidence is to peruse the will. Normally, if there is rationality in a will, a presumption arises about due execution. Of course, being a presumption, it is rebuttable.

10. As observed in AIR 1962 Punjab 196 **Smt. Kamla Devi Vs. Kishori Lal Labhu Ram and Ors.,** the omission of a close relation from the bounty of a testator raises a presumption in favour of some undue influence. The probative force of such a testament rises and falls in inverse

ratio to its unreasonableness.

11. The more unreasonable an instrument is, the less probative value it carries. Where the terms of a will are unusual and the evidence of testamentary capacity doubtful, or due execution doubtful, the vigilance of the Court will be roused and before pronouncing in favour of the will, the court would microscopically examine the evidence to be satisfied beyond all reasonable doubt that the testator was fully conversant of the contents and executed the will fully aware of what he was doing.

12. Expanding on the care and caution to be adopted by courts, and presumptions to be raised, in the decision reported as **(1864) 3 Sw & Tr. 431 *In The Goods of Geale***, it was opined that where a person is illiterate or semi literate or the will is in a language not spoken or understood by the executor, the court would require evidence to affirmatively establish that the testator understood and approved all the contents of the will.

13. This affirmative proof of the testator's knowledge and approval must be strong enough to satisfy the court, in the particular circumstances, that the will was duly executed.

14. One form of affirmative proof is to establish that the will was read over by, or to, the testator when he executed it. If a testator merely casts his eye over the will, this may not be sufficient. [see 1971 P.62 *Re Moris*]. In the report published as **(1867) 1 P.D.359 *Goodacr Vs. Smith***, it was held that another form of affirmative proof is to establish that the testator gave instructions for his will and that the will was drafted in accordance with those instructions.

15. Courts have to evaluate evidence pertaining to the circumstances under which the will was prepared. If a will is prepared and executed under circumstances which raise a well grounded suspicion that the executor did not express his

mind under the will, probate would not be granted unless that suspicion is removed.

16. As held in the report published as **(1838) 2 Moo P.C. 480 Barry Vs. Butlin**, a classic instance of suspicious circumstances is where the will was prepared by a person who took a substantial benefit under it. Another instance is as opined in the report published as **(1890) 63 LT 465 Brown Vs. Fisher** where a person taking benefit under the will has an active role to play in the execution of the will.

17. A word of caution. Circumstances can only raise a suspicion if they are circumstances attending, or at least relevant to the preparation and execution of the will itself.

18. How the legal heirs acted and how and when a will was propounded after the death of the executor are also relevant to decide upon, where the will is genuine or a created or a procured document.

19. Another point that has to be considered is about the improbability in the manner in which the instrument is scripted. As observed in the report published as **AIR 1959 SC 443 H.Venkatachala Iyengar V. B.N. Thimmajamma & Ors.**, instance of suspicious circumstances would be alleged signatures of the testator being shaky and doubtful, condition of the testator's mind being feeble and debilitated, bequest being unnatural, improbable or unfair. Apart from these infirmities, propounder taking a prominent part in the execution of the will, more so when substantial benefits flow to them are all presumptive of the will not being duly executed and or of suspicious circumstances.

20. Suspicious circumstances are a presumption to hold against the will. Greater is the suspicion more heavy would be the onus to be discharged by he who propounds the will.

21. Reference to satisfaction of judicial

conscience is a heritage inherited by court's since time immemorial for the reason, as noted above, a will is a solemn declaration as per which the living have to carry out the wishes of a dead person."

30. Thus from the aforementioned two judgments it is clear that when the execution of a will is surrounded by suspicious circumstances the initial onus upon the propounder to prove the will is very heavy.

31. As already noted in the instant case the Trial Court has held that the execution of the will Ex. PW-1/1 is surrounded by suspicious circumstances.

32. It has to be first seen whether the Trial Court has rightly held that the execution of the will Ex. PW-1/1 is surrounded by suspicious circumstances.

33. It is an admitted fact that the deceased died within 20 days of the execution of the will Ex. PW-1/1. It has further come in the testimony of Man Singh Ex. PW-3 that the deceased was ill for a period of 2-3 years prior to his death. It is an admitted fact that the will Ex. PW-1/1 was allegedly executed at the residence of the deceased and that the deceased also did not go to the court to get the will notarized. These three circumstances cast a doubt upon the fact that the deceased was having a sound disposing mind at the time when he executed the will Ex. PW-1/1.

34. Appellant in his testimony as PW-1 has admitted that

he was present at the time when will Ex. PW-1/1 was executed by the deceased. The testimonies of the appellant and the attesting witnesses particularly that of Sayed Ahmed PW-2 show that the appellant played an active role in the execution of the will Ex. PW-1/1.

35. Sub Para 4 of para 10 of the decision of the Supreme Court in Jaswant Kaur's case (supra) clearly holds that the feeble mind of the testator, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit are the circumstances which raise suspicion about the due execution of the will.

36. In such scenario when the execution of the will Ex. PW-1/1 is fraught by the suspicious circumstances the question arises whether the evidence of the attesting witnesses that the will bears the signatures of the testator and that the testator was in a sound and disposing state of mind and memory at the time when the will was made is sufficient to establish the genuineness of the will Ex. PW-1/1.

37. The answer to the above question is to be found in sub para 4 and sub para 5 of the para 10 of the decision of the Supreme Court in Jaswant Kaur's case (supra). Reading of the aforementioned two paras make it clear that in cases where the execution of the will is fraught by suspicious circumstances the

propounder of the will must remove all such suspicions by leading positive evidence. In such cases the court scrutinizes the evidence led by the propounder with a microscopic eye.

38. A cumulative reading of the pleadings of the appellant and the evidence led by him reveals following facts:-

A Objectors/respondents pleaded that the relations between the deceased and the appellant were strained. In order to lend credence to their version objectors further pleaded that the appellant did not participate in the last rites of the deceased. To counter the version of the objectors appellant in the reply filed by him relevant portion whereof has been noted in para 10 above pleaded that he was unable to attend the cremation of the deceased as he was on duty. In his testimony relevant portion as been noted in para 15 he has deposed that the death of the deceased had taken place in Delhi and that he was also present in Delhi on the death of the deceased but he was unable to attend the cremation of the deceased as he was not present there. Why he was not present has not been explained by the appellant. The ipxi dixi and evasive stand taken by the appellant in his testimony strengthens the version of the objectors that the relations between the deceased and appellant were strained.

B Appellant and Sayed Ahmed have deposed that a draft of the will was first prepared in Hindi as per the instructions of

the deceased. As noted in para 18 above who prepared the draft of the will has not been explained by them in their respective testimonies. The omission of this necessary fact weakens the case of the appellant. (This fact has been noted by the Trial Court).

C Though a testator may inform some other person about the execution of will but generally he keeps the will in safe custody during his lifetime. Appellant and Sayed Ahmed have deposed that after the will was executed and attested they went to the court to get the will notarized. As already noted in para 16 above neither appellant nor Sayed Ahmed have explained as to in what circumstances the will was handed over to them by the deceased. Had deceased himself given the will to the appellant? The omission of this necessary fact weakens the case of the appellant.

D Appellant and Sayed Ahmed have deposed that they took draft of the will to the court and that the same was got typed in English language by a typist. That thereafter they returned to the residence of the deceased with the typed will and explained the contents of the will to the deceased in Hindi as deceased was having no knowledge of the English language. Appellant and Sayed Ahmed have deposed in their respective testimonies that they were having no knowledge of English

language. When they themselves did not know English language how could they explain the contents of the will Ex. PW-1/1 which was written in English language to the deceased remains a mystery? (This fact has been noted by the Trial Court)

E As already noted in para 21 above Sayed Ahmed and Man Singh have not explained as to in what circumstances they happened to attest the will Ex. PW-1/1. The omission of this necessary fact weakens the case of the appellant.

F Sayed Ahmed in his testimony relevant portion whereof has been noted in para 19 above has deposed that in the will Ex. PW-1/1 deceased has also bequeathed a vehicle. A perusal of the will Ex. PW-1/1 reveals that the will nowhere talks about a vehicle. This glaring defect in the testimony of Sayed Ahmed discredits his testimony.

G The appellant has deposed that during his lifetime the deceased used to reside with him and that he never resided with respondent No.2 or 3. However Man Singh (a witness on behalf of the appellant) belied the version of the appellant by deposing that deceased used to stay for 10 days with appellant and for the next 10 days with respondent No.3.

H In his testimony as PW-1 appellant has sought to prove that during his lifetime the deceased used to reside with him. However in the reply filed to the objections of the

respondents relevant portion whereof has been noted in para 10 above appellant has not clearly stated that the deceased used to reside with him. The said vagueness in the pleading of the appellant coupled with the testimony of PW-3 that deceased used to reside with both appellant and respondent no.3 belies the version of the appellant.

I It is an admitted fact that the will Ex. PW-1/1 was notarized by a Notary Public in the absence of the deceased and Man Singh. How did a Notary Public who had never seen or met deceased and Man Singh attest their signatures on the will Ex. PW-1/1 remains a mystery? (This fact has been noted by the Trial Court).

J Man Singh in his testimony as PW-3 has admitted that the relations between him and respondent were strained. In such circumstances not much importance can be attached to the testimony of PW-3. (This fact has been noted by the Trial Court).

39. The ill health of the deceased, appellant playing an active role in the execution of the will Ex. PW-1/1 and the facts noted in para 38 above throw a grave suspicion on the genuineness of the will Ex. PW-1/1.

40. Smt Asarfi RW-2 in her cross-examination deposed as under:-

“I do not know anything about the will of the deceased.”

41. This statement of the Smt. Asarfi RW-2 has been sought to be relied upon by the appellant in support of his contention that the Smt. Asarfi was a hostile witness.

42. By no stretch of imagination it can be said that the afore-noted statement of Smt Asarfi made her a hostile witness. By stating she knew nothing about the will of the deceased she only meant that she has no knowledge about the will Ex.PW1/1 dated 10.12.92 purported to have been executed by the deceased. While appreciating testimony of Smt Asarfi it has to be borne in mind that she was an illiterate lady.

43. The evidence on record particularly the evidence led by the appellant probablizes the view taken by the Trial Court that the will Ex. PW-1/1 is not a genuine document and is not the last legal and valid testament of the deceased.

44. It is settled law that a finding of fact arrived at by the Trial Court shall not be interfered by an Appellate Court unless the view taken by the Trial Court is perverse, contrary to settled principles of law or any material evidence or fact has been ignored to by the Trial Court.

45. In view of above discussion I find no infirmity in the impugned order dated 30.11.2006 passed by the learned Additional District Judge Delhi.

46. The appeal is dismissed.

47. No costs.

January 10, 2008
mm

(PRADEEP NANDRAJOG)
JUDGE