

REPORTABLE

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

FAO No.241-43/2005

Reserved on: March 08, 2010

Date of Decision: May 17, 2010

KHEM CHAND AND ORS Appellants
Through Mr. Manoj V George, Advocate

versus

STATE AND ORS Respondents
Through Mr. T.S.Chaudhary, Advocate with
Mr. R.Nanawati, Advocate for respondent No.3

CORAM:
HON'BLE MISS JUSTICE REKHA SHARMA

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

REKHA SHARMA, J.

The appellants before me are, one son and two daughters of Smt. Bholi Devi, while respondents No.2 & 3 are her two other sons. Smt. Bholi Devi, who shall hereinafter be referred to as the 'testatrix', died on February 19, 1996 leaving behind her aforesaid three sons and two daughters besides a step-daughter from her husband's first wife. She also left behind a registered 'Will' dated December 04, 1991 and thereby she bequeathed a double-storey house built on a plot area of 100 Sq. Yards bearing No.WZ-39, Mukh

Ram Park Extension, Tilak Nagar, New Delhi in favour of respondents No.2 & 3 to the exclusion of the appellants and her step-daughter. The respondents applied for probate/Letters of Administration of the 'Will' under Section 276 of the Indian Succession Act, 1925 (hereinafter referred to as the 'Act') in the Court of the District Judge which was opposed by the appellants, in the first place, on the ground that the application for probate itself was not maintainable, as it was not verified by one of the attesting witnesses to the 'Will' as per the requirement of Section 281 of the Act. And as regards the 'Will' in question, the appellants sought to rubbish the same on the following grounds:-

- (a) that the 'Will' was not attested by two witnesses as required under Section 63(c) of the Act;
- (b) that the 'Will' was shrouded in suspicious circumstances; and,
- (c) that the property bequeathed under the 'Will' was acquired by the testatrix out of the joint family funds and, therefore, she was not competent to make the 'Will' of the said property, much less in favour of respondents No.2 & 3 to the exclusion of her other children.

None of the grounds on which the 'Will' was called into question by the appellants cut any ice with the learned Additional District Judge who heard the probate petition. The learned Judge found no merit in the contentions raised before him by the appellants and hence, vide judgment dated July 21, 2005 allowed the petition resulting in grant of "Letters of Administration" in favour of respondents No.2 & 3.

It is this judgment of July 21, 2005 which is the subject matter of the present appeal.

The learned counsel for the appellants had raised no new ground before me other than those raised before the learned Additional District Judge. Hence, what needs to be examined is, whether the trial Judge was right in rejecting the submissions raised before him by the appellants.

Let me begin with the objection that the probate petition itself was not maintainable, as it was not verified by an attesting witness in terms of Section 281 of the Act which requires that: *“where the application is for probate, the petition shall also be verified by at least one of the witnesses to the will (when procurable) in the manner or to the effect following, namely.....”*

It was contended before me that respondents No.2 & 3 while filing the probate petition chose not to get the petition verified by one of the available attesting witnesses. It was further contended that though non-verification of the petition was a curable defect, but despite the objection taken by the appellants to the non-verification of the petition by an attesting witness, respondents No.2 & 3 did not care to get the said defect cured and hence, it was argued that the petition was liable to be dismissed at the threshold.

No doubt, Section 281 of the Act provides that a probate petition shall be verified by at least one of the attesting witnesses, but what it does not provide, is the effect that non-verification will have on the probate petition. There is no provision in the entire Act which lays down that in the event of non-verification of a probate petition by one of the attesting witnesses, it is liable to be dismissed. What then should be done? The clue is provided by Section 268 of the Act. It

says that, *“the proceedings of the Court of the District Judge in relation to the granting of probate and letters of administration shall, save as hereinafter otherwise provided; be regulated, so far as the circumstances of the case permit, by the Code of Civil Procedure, 1908.”* The closest similar provision that one finds in the Code of Civil Procedure (hereinafter referred to as the ‘Code’) is Order VI which deals with the form of pleadings. Rule 15 of the said order provides that, *“every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case.”* What is similar in both, Section 281 of the Act and Order VI Rule 15 of the Code is, that in both the expression used is “shall” as though, suggesting that the provisions are mandatory in nature. However, non-verification or the defective verification under the Code is treated as a mere irregularity and not an illegality. I am saying so, on the strength of a judgment of the Supreme Court in the case of *Vidyawati Gupta and Ors. versus Bhakti Hari Nayak and Ors.*, reported in AIR 2006 SC 1194. It has been held in the said judgment that, *“the intention of the legislature in bringing about the various amendments in the Code with effect from July 01, 2002 were aimed at eliminating the procedural delays in the disposal of civil matters and that the amendments effected to Section 26, Order IV and Order VI Rule 15, are also geared to achieve such object, but being procedural in nature, they are directory in nature and non-compliance thereof would not automatically render the plaint as nonest.”* What is also important to notice, is Section 99 of the Code which provides that, *“no*

decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder or non-joinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court.” In view of this Section, it follows, that when the matter is in appeal, then in any case, the order of the trial Court shall not be set-aside on account of any error, defect or irregularity in any proceedings of the suit not affecting the merits of the case. This being the position under the Code, non-verification of a probate petition by an attesting witness cannot have a more serious effect than that of a plaint in a suit. I may, in this context, also refer to a judgment of the Madhya Pradesh High Court in the case of *Jamunabai and two others Versus Surendrakumar and Another*, reported in AIR 1995 Madhya Pradesh 274. The relevant paragraph of the judgment runs as under:-

“The intention of the Legislature behind enacting S. 281 is very clear. It is expected that forged Wills which have been attested by such persons who are not to be found may not be brought before the Court. The intention behind S. 281 is to be seen from its own language. According to S. 281 a petition should also be verified by at least one of the witnesses. The effect of non-observance of the conditions laid under S. 281 are not given under the Indian Succession Act. The use of the word ‘shall’ under these circumstances would not mean mandatory resulting in the dismissal of the petition for grant of probate but in fact it only means that the petition should be verified by one witness if he is available.”

For what has been noticed above, I find myself one with the view taken by the learned Additional District Judge that the non-verification of the probate petition by one of the attesting

witnesses to the 'Will' was not such a defect as would have made the petition liable to be thrown out at the threshold.

Coming to the question of validity of the 'Will' the first ground that has been taken as to its due execution is that it was not attested by two attesting witnesses as required under Section 63(c) of Indian Succession Act, 1925. It was contended that one of the alleged attesting witnesses was only a scribe of the 'Will' and was not an attesting witness. Emphasis in this regard was laid on the last paragraph at page-2 of the 'Will' which reads as under:-

"IN WITNESS WHEREOF the testator has signed this will in sound sense, after fully understanding the contents of this deed without any undue influence, pressure of, coercion of anyone in presence of the witness on the day, month and year first above written."

Relying upon the above recital, it was argued by the learned counsel for the appellants that reference therein to the word 'witness' in 'singular' was clear proof of the fact that the 'Will' was signed by only one witness and that witness was Shri Surender Singh Yadav with identity number (RC No.706802/7350). In so far as the seal and initials of Shri H.S.Mehta, Advocate on the 'Will' is concerned, it was argued that he was only a scribe and not an attesting witness to the 'Will'. According to the counsel, neither the address nor the complete signatures or the identity proof (RC and Election ID Card) were mentioned near or under the signatures of Shri H.S.Mehta, Advocate. It was, thus, further argued that the Court below completely ignored the above facts and since the 'Will' in question was not signed by two attesting witnesses as required by law, the probate/Letters of

Administration on the basis of the said 'Will' could not have been granted in favour of respondents No.2 & 3.

The first thing that needs to be borne in mind while dealing with the aforementioned submission is that there is no prohibition in law that a scribe cannot be an attesting witness. What is required to be seen in relation to attestation is, whether a person who attested a document had the intention to attest and who can better tell about that fact than the person who attested the document or the person in whose presence the attestation was made. Here, in the present case we have the statement of PW-2 Shri Surender Singh Yadav who was one of the attesting witnesses to the 'Will' in question. The relevant portion of his testimony is extracted below:-

"x x x x x

I know the documents shown to me. The same is a will executed by late Smt. Bholi Devi on 4.12.1991. I identify the thumb impression of late Smt. Bholi Devi at point A. My signature is at point B and the signature of Sh. H.S.Mehta, Adv. who drafted the will at point C. First Smt. Bholi Devi put her thumb impression on the said will. After that I signed on the will in the presence of Smt. Bholi Devi and Shri H.S.Mehta and after that Shri H.S.Mehta signed in presence of Smt. Bholi Devi and myself. The said will was handed over to Smt. Bholi Devi by Shri H.S.Mehta, Adv. as the same could not be registered on the same day.

On 5.12.1991 the will was registered before the Registrar and in presence of Registrar, late Smt. Bholi Devi put her thumb impression at point B and point E. It also bears my signature at point F. The will is Ex.PW2/1 (objected to as the same is laminated). The said will was executed without any undue influence, pressure or coercion from any quarter. The contents of the will were read over in English and then the same was translated and told to Smt. Bholi Devi in Hindi. The will was executed in presence of each of the above three persons (objected to as Shri H.S.Mehta is drafter, and the same is beyond pleadings)."

It is clear from the above testimony of PW-2 Shri Surender Singh Yadav that Shri H.S.Mehta, Advocate not only had drafted the 'Will' and in his such capacity, had put his signatures at point-C but thereafter again signed the same after he and Smt. Bholi Devi had signed the 'Will'. A perusal of the 'Will' Ex.PW2/1 also shows that it bears the signatures of Shri H.S.Mehta at two places on page-2 of the 'Will'. The said Shri Mehta also appeared before Sub-Registrar along with Smt. Bholi Devi and Shri Surender Singh Yadav and, before the Sub-Registrar, all three of them had signed on the reverse of page-1 of the 'Will' at points-D, E & F. It may also be noted that Shri Surender Singh Yadav was thoroughly grilled by the counsel for the appellant during his cross-examination but he failed to shake his testimony on the question of attestation of the 'Will' by two witnesses, namely, he himself and Shri H.S.Mehta, Advocate. The law does not mandate that both the attesting witnesses must be examined to prove the legality and validity of the 'Will'. The examination of one of the attesting witnesses meets the requirement of law. I feel that the evidence of Shri Surender Singh Yadav was convincing and he sufficiently proved that the testatrix had executed the 'Will' in question in his presence and in the presence of Shri H.S.Mehta, Advocate. The judgments of the Supreme Court in *N. Kamalam (Dead) and Anr. Versus Ayyasamy & Anr.*, reported as 2001(5) SCALE 65 and, in *Mathew Oommen Versus Suseela Mathew*, reported as 2006(1) SCC 519 relied upon by the learned counsel for the appellants are not applicable to the facts of the present case because in both those cases, the Court had found that the Will in those cases was not

signed by two attesting witnesses as required by the law. Each case depends on its own facts. In the present case, I have no doubt that Shri H.S.Mehta, Advocate was not only a scribe to the 'Will' but was also an attesting witness to the same. The objection is found to be without merit.

It was next contended that the 'Will' propounded by respondents No.2 & 3 was shrouded in suspicion. This was sought to be demonstrated on the basis of evidence of PW-2 Shri Surender Singh Yadav. Before I deal with the contention let me reproduce the relevant portion of his evidence. This is how it reads:-

"The attendant of H.S.Mehta purchased the stamp paper with the money given by Smt. Bholi Devi. Bholi Devi given the entire money after finishing the whole work and not given to purchase the stamp paper at the time of purchasing the stamp paper. I cannot tell the name of the attendant of the H.S.Mehta, Adv. I do not have any idea regarding the nature of the work of the H.S.Mehta. Late Bholi Devi took more than half an hour again said took about one hour in apprising the facts relating to the alleged execution of the will. The whole instance was narrated by H.S.Mehta in Hindi. H.S.Mehta who drafted the will called the steno and dictated the contents of the will on plain paper and not on stamp paper. It was directly typed by the steno on plain paper and not on stamp paper. It took 10 mnts. Only in typing on plain paper. The dictation was started at about 12 p.m. and was ended within 10 mnts. Then the same was read over english and again in Hindi to late Bholi Devi. It took only 15 mnts. Then it was typed on stamp paper. Only ten mints on typing the stamp paper. The consequences of the alleged will also told to late Smt. Bholi Devi by H.S.Mehta. Bholi Devi put her thumb impression of her right hand. The thumb impression was boot marked by attendant of H.S.Mehta. I cannot tell the name of the attendant of H.S.Mehta. The LTI have been written by H.S.Mehta. It is correct that at point A the word LTI is written by H.S.Mehta on Ex.PW2/1. Then I signed on the will Ex.PW2/1. Surender Singh Yadav have been inscribed by me on 4.12.1991. It took more than one and half hour in completing the whole process. Drafting charges were near about 250/- rupees which were given to H.S.Mehta, Adv."

Relying upon the above testimony of Shri Surender Singh Yadav it was argued that two Wills of the testatrix were made by Shri H.S.Mehta, Advocate, one on a plain paper and the other on a stamp paper. It was further argued that the 'Will' executed by the testatrix on stamp paper never surfaced and, therefore, probate/Letters of Administration could not have been granted in favour of respondents No.2 & 3 on the basis of the 'Will', allegedly, executed by the testatrix on a plain paper.

The aforesaid submission at first sight appears to be specious but on a closer scrutiny of the same, one finds that only a draft of the 'Will' was made at the first instance and after it was approved by the testatrix, it was got typed on a stamp paper purported to have been purchased by the attendant of Shri H.S.Mehta, Advocate. As per PW-2, the testatrix had paid only Rs.250/- to Shri H.S.Mehta, Advocate which included his professional fee for drafting the 'Will' as well as the cost of the stamp paper. It was not disclosed or asked in cross-examination from PW-2, as to what was the denomination of the stamp paper used for executing the 'Will'. The 'Will' Ex.PW2/1 is on a judicial paper and not on a plain paper. In common parlance, the litigating public takes judicial paper also as stamp paper. Therefore, to say that there were two Wills, one on the plain paper and another on stamp paper, will be misconstruing the evidence of the attesting witness PW-2. In any case, PW-2 never stated that the draft of the 'Will' which was typed on plain paper was also signed by the testatrix and the attesting witnesses. As per the testimony of PW-2, the testatrix had thumb marked her 'Will' in the presence of attesting

witnesses and the attesting witnesses had signed the 'Will' in her presence. What follows from the testimony of PW-2 is that, if at all, anything was typed on a plain paper, it was only a 'draft Will' and that the testatrix as well as the attesting witnesses had signed only one document and that document has been brought before the Court as the last 'Will' and testament of the testatrix. In this view of the matter, the appellants cannot derive any advantage from the deposition of PW-2 where he says that the 'Will' was initially typed on a plain paper and then it was got finally typed on a stamp paper.

It was next argued on behalf of the appellants that the Court below ought not to have acted upon the testimony of PW-2 Shri Surender Singh Yadav, as he was a relation of respondent No.3. This argument is wholly misplaced. The law does not forbid a person who intends to execute his or her Will from making his or her relative an attesting witness to the Will. More often than not the attesting witnesses are relatives and a 'Will' cannot be discarded on this score.

It was further argued by the learned counsel for the appellants that the testatrix was incapable of executing the 'Will' in 1991 as she had suffered a paralytic stroke in 1984. This argument is of no legal consequence because the appellants did not bring any material on record from which it could be inferred that the testatrix was immobile and could not have visited the Advocate or the office of Sub-Registrar in connection with the execution and registration of 'Will'. The intensity of paralysis alleged to be have been suffered by the testatrix has not been brought on record by the appellants. Her mental capacity has also not been called into question by the appellants. It

may be noted that the 'Will' in question is a registered document and the same was got registered by the testatrix in the office of the Sub-Registrar on the next day of its execution. The photograph of the testatrix is pasted on the first page of the 'Will' and the same bears the seal of the Sub-Registrar. These facts lead me to lean in favour of the genuineness of the 'Will' in question.

The learned counsel for the appellants also relied upon the discrepancy regarding the age of testatrix mentioned in her death certificate Ex.PW1/1 and her age as given by PWs.1 & 2 in their evidence. It is true that the age of the testatrix in her death certificate Ex.PW1/1 is mentioned as 85 years whereas in evidence, her age at the time of her death is disclosed as 75 years. This discrepancy in her age, in my view, cannot cause a suspicion on the genuineness of the 'Will' in question. The fact that the testatrix was an old lady was not in dispute. Both PW-1 & PW-2 were thoroughly cross-examined on behalf of the appellants regarding the age of the testatrix but the appellants could not throw any light on the effect of discrepancy in the age of the testatrix as noticed above. The said discrepancy in her age can by no means be taken as a suspicious circumstance and cannot be made a ground to discard the 'Will'.

It was also argued that since the testatrix had not given any reason in her 'Will' to divest the appellants from her property by making the 'Will' only in favour of respondents No.2 & 3, it created doubt regarding the genuineness of the 'Will'. I find no merit in the argument so advanced. There was no obligation on the part of the testatrix to disclose reasons for having divested some of her natural

heirs to succeed to her property on her death. In any case, it is clear from the tone and tenor of the 'Will' that what led the testatrix to bequeath her property only in favour of respondents No.2 & 3 was their loyalty and faithfulness to her as against her other legal heirs. The law grants freedom to a person who owns property to bequeath the same by executing a 'Will' to anyone including a stranger to the complete or partial exclusion of his or her natural heirs. He can take detour from the line of succession and can dispose of his property in the manner, he likes. In this view of the matter, it cannot be said that the 'Will' in question is suspicious merely because the appellants have been divested of their shares in the property by their mother.

And lastly, I may also refer to the objection that the property which is the subject matter of the 'Will' was purchased out of the joint family funds and the testatrix, therefore, was not competent to make the 'Will'. It is well settled that the probate Court will not go into the question of ownership of the property. The probate Court has only to examine the due execution and validity of the Will.

For what has been noticed above, I find no merit in the appeal. The same is dismissed with no order as to costs.

MAY 17, 2010
g/ka

REKHA SHARMA, J.