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IN THE HIGH COURT OF DELHI

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FAO No.343/2005

Ashok Kumar Dua Appellant

through: Mr.Rajesh K. Gogna, Advocate

VERSUS

Ranbir Kumar Dua and Anr Respondents

through: None

RESERVED ON:

15.05.2008

DATE OF DECISION

22.05.2008

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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. The question in this appeal is whether the will dated 28.07.1998 is the last legal and valid testament executed by late Sh. Nand Lal Dua.

2. Late Sh. Nand Lal dua (hereinafter referred to as the testator) expired on 10.01.1999 was survived by three sons namely, Sh. Ashoka Kumar, Sh. Ranbir Kumar and Ranjt Kumar and three daughters namely, Smt. Ved Puri, Smt. Darshana Gulati and Smt. Subhash Kumar. Testator's wife had predeceased him.

3. On 08.01.2002 Ranbir Kumar filed a petition under Section 276 of the Indian Succession Act, 1925 seeking probate of the will purported to have been executed by the testator on 28.07.1998.

4. The will dated 28.07.1998 is a registered document typed in English bearing the signature of the testator in Hindi and attested by two witnesses namely, Sh. P.C. Khanna, Advocate and Sh. Gurbachan Singh, Advocate.

5. The will reads as under:

WILL

Life is but short. God knows what time or when may it come to an end.

I Nand Lal Dua aged 86 years. Son of Late Shri M.R. Dua R/O 12/16A and B Tilak Nagar, New Delhi do hereby make the following will and declare that this Will shall stand cancelled and absolutely inoperative and unenforceable.

I declare that I am in perfect and sound disposing mind and that I am making this will after careful consideration and thought.

I am the absolute owner of the property no 12/16 A and B Tilak Nagar, New Delhi, which was acquired by me with my own efforts.

Now I wish and desire that after my death, the property No 12/16 A and B Tilak Nagar, New Delhi Shall devolve in the following manner:-

1. I wish and desire that after my death, "A" portion of the property 12/16 Shall devolve exclusively on my son SH Ranbir Kumar Aged 48 Years in which he and his family is living along my wife physically, financially and morally from the time he became earning member and could not own any house due to heavy expenditure on us. My wife who was able to help me in my daily routine expired on 22.11.97. Now I am fully dependent and properly looked after by my son Ranbir Kumar.

Sh. Ranbir Kumar Shall became the owner of "A" Portion of the 12/16 Property after my death and he will be fully entitled to do all other necessary acts, deeds and things relating to this "A" portion of property no 12/16 as he deems fit and necessary.

2. I wish and declare that "B" portion of the property 12/16 Shall devolve in the following manner:-

(a) 40 sq.yds of rear portion of 12/16B Tilak Nagar facing service line and main public road shall devolve exclusively on my daughter Subhash Kumari as she owns no house.

(b) My remaining four children namely Sh Ashok Kumar, Sh Ranjit Kumar, Smt. Ved Puri and Smt. Darshan Gulati are financially very sound and all have their own houses and bungalows. Yet as members of my family I wish and desire and declare that:-

(c) Remaining 60 Sq. Yds. front side of 12/16B Tilak Nagar Shall devolve on the rest of my these two sons and two daughters Namely Sh Ashok Kumar, Sh Ranjit Kumar, Smt. Ved Puri and Smt. Darshan Gulati equally.

I appoint Sh Ranbir Kumar as Executor of the Will to carry out the effect of this Will as per the directions given by me in this will.

I witness where of I have signed this will on this 28th day of July, 1998.

sd/-
TESTATOR

The Testator has signed this Will in our presence and we both have also signed this will in the presence of the testator and each of us.

Witnesses:

1. Mr. P.C.Khanna
2. Mr. Gurbachan Singh

6. The three daughters of the testator gave their no objection to the grant of probate in respect of the will in question in

favour of the petitioner.

7. Two sons of the testator, namely Ashok Kumar and Ranjit Kumar have objected to the grant of probate.

8. They have raised doubts over the genuineness of the will broadly on the following grounds: (a) That the testator could not read and write in English; the will being in English it casts a doubt on its execution; (b) That the signature on the will are forged; (c) The testator did not possess a sound disposing mind as on the date of the will as he had suffered a paralytic attack in January, 1998 and since then was not in a position to recognize his sons and daughters; (d) The testator was not competent to bequeath the property as it devolved upon him as an ancestral property and thus, there is a wrong declaration about the ownership of the property; (e) The attesting witness being strangers to the testator and family members he cannot be believed to have acted in good faith; arguably for the reason that an attesting witness was a friend of the major beneficiary thus he was an interested witness to the will; (f) The disproportionate distribution of the property raises further doubts; (g) No evidence was led by the propounder of the will regarding the preparation of the will in question and also there is a delay in disclosure of will.

9. At the outset it may be said about the will that the testator has not distributed his property amongst his children equally but reasons have been given for the same. For the larger portion being devolved upon the two out of the six children, the will

records that remaining four children are financially sound, owning houses of their own while one of the son has supported the testator and his wife in old age and one daughter does not have house of her own.

10. Apart from being his own witness, propounder examined two other witnesses: PW-2 Sh. P.C.Khanna, one of the attesting witnesses of the will in question and PW-3 Smt. Subhash Kumari, testator's daughter. The other attesting witness, Sh. Gurbhachan Singh is said to be no more.

11. The propounder himself deposed that his father, the testator was already in possession of a typed will, which he himself got prepared before 28.07.1998. That he had accompanied his father to the office of registrar at Janakapuri for the purpose of execution of the will as he was residing with his father. That the will was not executed and registered in his presence as he was asked to wait outside the office of the Sub-Registrar. In Cross examination he stated that his father changed the earlier will because of misbehaviour of the other children. That his father had passed matriculation examination at the age of 57 years and therefore knew English. That his father was keeping good health till 25.11.1998 and never suffered an attack of paralysis.

12. PW-2 Sh. Parvesh Chandra Khanna, one of the attesting witness to the will in question deposed that the propounder is his friend and because of his friendship with him he was on visiting terms with his family including Sh. Nand Lal Dua. That the testator

was already in possession of a typed will, the contents of which he read over before PW-2, late Sh. Gurbachan Singh. That after the contents of the will were read over, by testator himself, the testator put his signature at point A and B on the two pages of the will. In his cross-examination he stated that he started knowing the testator only through the propounder.

13. PW-3 Subhash Kumari, daughter of the testator deposed that the her father was in good health and sound disposing mind. In cross-examination she stated that the testator loved all his children equally but the petitioner and she were more attached to the testator.

14. The objectors' examined none other than themselves as OW-1 Sh. Ashok Kumar Dua and OW-2 Sh. Ranjit Kumar Dua.

15. OW-1 Sh. Ashok Kumar Dua deposed that his father always signed: 'Nand Lal' and not as 'Nand Lal Dua'. That his father held the post of cashier for a long time in Arya Samaj Mandir Society, Tilak Nagar, New Delhi. That his father was not in good health and did not possess sound disposing mind at the time of making the will.

16. OW-2 Sh. Ranjit Kumar Dua deposed *pari materia* on lines of OW-1.

17. Pertaining to the evidence regarding physical and mental health of the testator the learned Trial Judge has held as under:-

“The objectors have not led any satisfactory

evidence to prove any of their aforementioned objections against the will in question. OW-1 Mr.Ashok Kumar Dua has deposed in his cross examination that he is not in possession of any record of treatment of his father Late Shri Nand Lal Dua. He also could not produce any treatment record of his father to show that he ever suffered a paralytic attack...

...The admission of the objector Mr.Ashok Kumar Dua in his cross examination that his father was an office-bearer of Arya Samaj Society at Tilak Nagar and further held that he held the post of cashier for a long time coupled with the testimony of the petitioner that the testator himself used to issue receipts in his capacity as cashier of Arya Samaj Society, Tilak Nagar till October/November, 1998 goes to show that the testator though an old person of around 86 years of age was quite active till he died on 10.1.1999."

18. Learned Judge has discussed the testimony of OW-1 Sh.

Ashok Kumar Dua of the testator being a Cashier as under:-

".....He, however, admitted that his father was a member of Dayanand Adarsh Vidhayala Managing Committee. He further admitted that his father was also a member of the managing committee of Arya Samaj Mandir, Tilak Nagar, New Delhi and held the post of cashier for a long time in the said society. The petitioner as PW-1 has deposed in his cross examination that the testator had worked as a cashier of Arya Samaj Mandir, Tilak Nagar, New Delhi till October/November, 1998 and he himself used to issue the receipts."

19. Relating to the issue of signature of the testator the

learned Trial Judge held as under:-

"PW-3 Mrs. Subhash Kumari is the testator's daughter has further deposed that her father was conversant with English language. She has said that her father was not using the title 'Dua' as he being an Arya Samaji did not use to believe in caste and creed and also on account of the fact that he was brought up in an orphanage and had nothing to do with his ancestors. She, however, volunteered that the testator started using the title 'Dua' later on at the instance of his children. Neither the petitioner nor the objectors have produced any document on record which contains the signatures of

the testator by writing his full name as 'Nand Lal Dua'. The testimony of the petitioner as well as of his sister (PW-1 & PW-3) to the effect that his father sometime used to sign by writing his name as 'Nand Lal' and sometime by writing his name as 'Nand Lal Dua' has remained uncontroverted. The objectors have not produced any such document on record which may show that the testator never used to sign by writing his full name as 'Nand Lal Dua'. The testator had signed on his will Ex.PW2/1 by writing his full name as 'Nand Lal Dua' and this in my opinion, does not create any suspicion on the genuineness of the said will."

20. Issue of the propounder taking active role in the execution of the will was dealt by the learned Trial Judge as under:-

"I have carefully scanned the entire evidence produced by the parties on record. The learned counsel for the objectors has relied upon a judgment of the Hon'ble Apex Court in **H. Venkatachala Iyenger Vs. B.N.Thimmajamma & Ors., (1959) Supp. SCR 426** and on the strength of the said judgment, he contended that if the propounder of the will takes a prominent part in the execution of the will which confers a substantial benefit on him, that itself is a suspicious circumstance attending the execution of the will. It was argued by the learned counsel that as per the testimony of PW-2 and PW-3, the petitioner who is the main beneficiary of the will of his father had accompanied the testator to the Office of Sub-Registrar, Janak Puri at the time of execution of the said will and PW-2 Mr. P.C.Khanna who is one of the attesting witnesses of the will is an interested person as he is a close friend of the petitioner. This objection against the validity of the will taken on behalf of the objectors appears to be without any substance. Merely because the petitioner had accompanied his father to the Office of Sub-Registrar at the time of execution of the will or that one of the attesting witnesses of the will in question happens to be a friend of the petitioner by itself would not render the will suspicious or invalid. I am supported in my view from a judgment of the Hon'ble Apex Court in **Rabindra Mukherji Vs. Panchanan Banerji, 1998 R.L.R. (SC) 197**. In this case, it was held by the Hon'ble Apex Court that if a relation of an executor actively helps the testatrix in making the will then he cannot be called obnoxious. Even otherwise in the present case, the petitioner has satisfactorily explained in his evidence as

to why he went with his father to the office of Sub-Registrar at the time of execution and registration of the will in question. His testimony to the effect that at the relevant time, the testator was residing with him has remained uncontroverted. Admittedly the testator was an old person and in case he took the petitioner with him at the time of execution of the will, this cannot be taken as a suspicious circumstance against the said will. The execution and registration of the will Ex. PW2/1 has been amply proved by PW-2 Mr. P.C.Khanna who is one of the attesting witnesses of the will in question. He has very categorically deposed in his evidence that the testator had read the contents of his will before it was signed by the testator and the attesting witnesses. This witness has also identified the signatures of the testator as well of his own signatures and the signatures of the other attesting witness Mr. Gurbachan Singh. There is overwhelming evidence on record to show that the testator did not suffer from any such ailment before his death which might have incapacitated him or made him immobile around the time the will in question was executed by him. The very fact that the testator has given a share in his property to all his six children by itself shows that the will in question is a genuine document. It is true that all the six children of the testator have not got equal shares in the property bequeathed under his will but this also cannot be treated as a suspicious circumstance to invalidate the said will. Generally the object of making a will is to deprive an heir either wholly or partially. The fact that the will in question was got duly registered by the testator before the Sub-Registrar, Janak Puri on the same day of its execution on 28.7.1998 as also lends credence in support of its genuineness. All the three daughters of the deceased testator have given their statements before the Court in which they have admitted the genuineness of the will in question."

21. After noting respective versions and evidence led by the parties, vide impugned order dated 01.08.2005 the learned Trial Court held that the applicant was entitled to grant of probate of the said will Ex.PW2/1.

22. The challenge to the judgment and order dated 01.08.2005 is premised broadly on the same grounds as were urged

in the objections before the learned Trial Judge i.e. the following grounds:

(a) That the signatures of the testator on the will are forged, and that the testator was paralytic and hence could not have executed the will.

(b) That the only witness produced in the court was a close friend of the petitioner and being so it gives rise to suspicious circumstances.

(c) That the will confers substantial benefits on the propounder and he played dominant part in execution of the will, which is enough to suspect the will.

(d) That the trial court has failed to appreciate that the testator was not conversant with English language and therefore could not have known the contents of the will and signed it with a free mind.

(e) That the trial court failed to appreciate that no evidence was lead by the propounder of the will regarding the preparation of the will in question.

(f) That since the property was ancestral, there is a wrong declaration about the ownership of Late Sh Nand Lal Dua in the property.

(g) That there is delay in disclosure of will creating another suspicious circumstance.

23. Challenge to the will on the grounds that the testator was not conversant with English language and was paralytic on the date of the alleged will as also that the will does not bear the signatures of the testator may be dealt with together.

24. As noted by the learned Trial Judge, there is no evidence on record that the testator suffered a paralytic attack and on said account was immobilized on the date when he executed the will. It is relevant to note, as noted by the learned Trial Judge, the appellant Ashok Kumar who examined himself as OW-1 admitted that his father was an office bearer of Arya Samaj Society, Tilak Nagar and rendered service to the Samaj as a cashier till October-November 1998. The will is dated 28.7.1998. Appellant's admissions prove that the testator was in good health, both mental and physical as on the date of execution of the will.

25. From the fact that the testator worked as a cashier, the learned Trial Judge has opined that a presumption could be drawn that the testator was familiar and conversant with English language and its script. The conclusion as stated may be faulted on the process of reasoning adopted by the learned Trial Judge, but can be affirmed on a different line of reasoning. Admittedly, the testator worked as a cashier. Obviously, as a cashier his job included issuing receipts. A reasonable presumption can thus be drawn that the testator was aware of the value of a signature on a document. Such a testator would be presumed to append his signatures on a document only after knowing and understanding the contents thereof. Thus, in the facts and circumstances of the instant case it would be safe to assume that Sh. Nand Lal Dua signed the will in question in full knowledge of its contents.

26. The plea that Sh. Nand Lal Dua always signed as Nand

Lal and never as Nand Lal Dua has remained a mere plea inasmuch as the appellant has not brought on record any evidence to establish that his father never signed as Nand Lal Dua.

27. Also, the registration of the will though not a conclusive proof, does lend some support to the authenticity of the will even though to a limited extent. As in the circumstances of the present case, registration of the will by the testator proves the existence of the will to the extent that the testator had visited the office of Sub-Registrar. It need hardly be emphasized once again that Nand Lal Dua was a cashier and it is thus reasonable to presume that he would understand the nature and purpose of a visit to a Government office and would understand what was going on in his presence. Thus, in the present case, registration, though not by itself but along with other supporting facts and circumstances furnishes corroborating evidence to the authenticity of the will.

28. As regards the contention that the disproportionate distribution of the property held by the deceased in favour of the applicant suggests that the will is created, it should be noted that it is not for the court to refuse the grant of probate on account of the fact that the disposition is not equal or fair. A will is a volitional act indicative of one's desires and the court cannot substitute itself in place of the testator to test it on the grounds of just and reasonable.

29. Moreover, the will in the present case on a first impression seem to present sufficient reasons for the alleged unequal treatment stating that since all other siblings have been

owning residential accommodation except the petitioner and one daughter, the testator devolves upon them relatively larger portion of the property by way of the will. The will also states that since Sh Ranbir Kumar had been looking after the testator and his wife physically, financially and morally from the time he became an earning member and could not own any house due to heavy expenditure on them, after the death of the testator, the 'A' portion of the property 12/16, A and B Tilak Nagar, New Delhi, shall devolve exclusively on Sh Ranbir Kumar'. To that extent the will is self-explanatory.

30. Regarding the propounder playing a dominant role in the execution of the will and one of the attesting witness being his friend, the view of the learned trial judge is quite affirmable. In support of the same, it may be noted that in Madhukar D. Shende v Tarabai Aba Shedage AIR 2002 SC 637, the Hon'ble Supreme Court observed that the two attesting witnesses on account of being known to the beneficiary's son, being his classmates, were known to the family, and therefore, were natural witness to be called to attest the execution of will. On account of their acquaintance with the family, they could have naturally known and identified the executant. Merely because of being classmates they would be interested in obliging their classmates' mother so as to benefit her and go to the extent of falsely deposing is too far fetched an inference to draw.

31. Regarding the challenge to the probate on the ground

that the propounder failed to produce evidence regarding the preparation of the will, the testimony of the PW-2 is noteworthy as he deposed that the testator already possessed a type-written will, contents of which he read out to the other witnesses before they signed it. The propounder seem have played no role in preparation of the will. Also, where the will was typed does not assume significance until it is proved that the testator was rendered physically immobile due to ill-health.

32. No evidence was shown to this court to support the challenge on the ground that the signatures on the will are forged.

33. Challenge to the will on the ground of belated production thereof is worthy of no credence as the objector never cross examined the propounder on the issue of delay in seeking probate of the will. Who knows, there may have been an explanation. It is not out of place to note that disputes are attempted to be resolved within the family before being brought before judicial forums if amicable resolution thereof fails.

34. Regarding the contention urged that there is a wrong declaration of title in the will, suffice would it be to state that the property bequeathed under the will is admittedly purchased in the name of the testator and during his lifetime he acted as owner thereof. It was never treated as joint Hindu family property. Thus, there is no wrong narration qua ownership of the property.

35. No case is made out to interfere.

36. The appeal is dismissed.

- 37. No costs.
- 38. TCR be returned forthwith.

MAY 22, 2008
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(PRADEEP NANDRAJOG)
JUDGE