

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

+ **F.A.O. (OS) 294 OF 2007**

Reserved on : March 24, 2008.

% Date of Decision: April 7, 2008

P.P. Sharma

!

..... Appellant
Through - Mr. P.V. Kapur, Sr. Adv. With
Mr. Inderjeet Sharma, Adv.

versus

\$ Smt. Swaran Lata

^

..... Respondent
Through - Mr. Tarun Chandhiok, Adv.

AND

F.A.O. (OS) NO. 7 OF 2007

P.P. Sharma

!

..... Appellant
Through - Mr. P.V. Kapur, Sr. Adv. With
Mr. Inderjeet Sharma, Adv.

versus

\$ Smt. Swaran Lata

^

..... Respondent
Through - Mr. Tarun Chandhiok, Adv.

CORAM:

* **HON'BLE MR. JUSTICE MANMOHAN SARIN**

* **HON'BLE MR. JUSTICE MANMOHAN**

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? **YES**
3. Whether the judgment should be reported in the digest? **YES**

J U D G M E N T

MANMOHAN, J:

1. Appellant has filed two appeals being FAO(OS) Nos. 7 and 294 of 2007 for setting aside the orders dated 18th November, 2006 and 23rd July, 2007 in I.A. No. 10302 of 2006 and R.A. No. 12 of 2007 respectively. Appellant in the present appeals has also prayed for dismissal of the Testamentary Case No. 47 of 2005 filed by the respondent.

2. By way of the impugned orders, the learned Single Judge has permitted the respondent in the proceedings filed by her under Section 263 of the Indian Succession Act (hereinafter referred to as “the said Act”) to lead evidence in support of her plea that the Will dated 15th June, 1984 (hereafter referred to as “the said Will”) is a forged and fabricated document. Further the learned single Judge has sent the said Will to a handwriting expert in CFSL for verification of the testator’s signature. Since the two appeals are between the same parties and raise common issues of fact and law, we are deciding them by a common order.

3. Mr. P.V. Kapoor, learned senior counsel for the appellant, submitted that this Court as well as the Supreme Court have already held the Will in question to be a valid and genuine document, the respondent cannot challenge the genuineness of the said Will either by leading any evidence or by asking a hand writing expert from CFSL to examine the said Will. Learned senior counsel further submitted that the respondent’s challenge to

the said Will is barred by principles of res judicata and by principles of re-litigation.

4. Mr. Tarun Chandhiok, learned counsel for the respondent, very fairly admitted that the only anomaly pointed out to assert that the Will is a forged one is with regard to the endorsement made on the said Will. The original Will carries an endorsement made by the Registrar “presented Will after death by Mr. Prem Prakash Sharma” while the certified copy as issued by the Registrar’s Office carries the endorsement, “Will after death and presented by/of Shri Sudershan Lal”. Mr. Chandhiok’s argument is that the testator, Mr. Sudershan Lal Sharma, could not have presented the said Will after his death and hence the said Will itself raises suspicion and is shrouded with doubt and has to be discarded. Respondent, therefore, prays for full opportunity to lead evidence with regard thereto.

5. The material facts for this case are that Pandit Bakshi Ram had three sons and five daughters. One of his sons, Mr. Sudershan Lal Sharma, who was a bachelor, is stated to have bequeathed his self-acquired properties to his nephew, Mr. P.P. Sharma, the appellant herein. After the death of Mr. Sudershan Lal on 1st February, 1987, Mr. P.P. Sharma filed a petition being Probate Case No. 34 of 1988 for grant of probate of the said Will dated 15th June, 1984. Out of the five sisters of Mr. Sudershan Lal, three sisters, namely, Smt. Swaran Lata (respondent herein), Smt. Shakuntala Devi and Smt. Kailash Devi filed objections in the aforesaid Probate case.

6. On 18th September, 1995, the following issues were framed in Probate Case No. 34

of 1988 for consideration :

- (1) Whether the deceased had executed a valid Will on 15.6.1984? OPP.
- (2) Whether the properties mentioned in the Will are joint Hindu properties? If so, to what effect? OPD.
- (3) Whether the Will dated 15.6.1984 is a forged and fabricated document and as a result of a conspiracy, as alleged in para 8 of the Preliminary Objections in the written statement? OPD.
- (4) Whether the petition is not in accordance with Sections 276, 280 and 281 of the Indian Succession Act? If so, to what effect? OPD.
- (5) Whether the registration of the Will is in accordance with the law? OPD.
- (6) Whether the schedule of the properties filed along with the petition is not in accordance with the Will? If so, to what effect? OPD.

7. A learned Single Judge of this Hon'ble Court, after examining the documents and evidence on record in particular the opinions of the two handwriting experts (one from each side), lengthy cross-examination of appellant's handwriting expert as well as that of the attesting witness to the Will by respondent's counsel, held that the said Will was a genuine document and rejected the objections filed by the three sisters and ordered issuance of Letter of Administration to the appellant herein. In fact, the learned Single Judge in his judgment and order dated 2nd March, 2005 held in paragraph 62 as under :

"62. In view of my decision on issues No. 1 & 3, I hold that the Will dated 15.6.1984 has not been proved to be a forged document and, accordingly, I dismiss the application filed by the objectors....."

8. As far as the issue that the property bequeathed under the Will was HUF property,

the learned Single Judge did not decide the same as with the consent of the parties the said issue was left to be decided in the suit for partition filed by the sisters being Suit No. 2400 of 1990.

9. Only the respondent herein filed FAO(OS) No. 103 of 2005 against the aforesaid judgment and order dated 2nd March, 2005. A Division Bench of this Hon'ble Court vide judgment and order dated 18th May, 2005 dismissed the respondent's appeal with costs of Rs.5,000/-.

10. The respondent then filed Special Leave Petition (Civil) No. 1607/2006 which was also dismissed by the Hon'ble Supreme Court on 30th January, 2006.

11. Subsequently, the respondent filed the present Testamentary Case NO. 47 of 2005 under Section 263 of the said Act for revocation of the grant of Letters of Administration vide judgment and order dated 2nd March, 2005. The relevant part of Section 263 of the said Act is reproduced hereinbelow for ready reference :

*“263. Revocation or annulment for just cause. The grant of probate or letters of administration may be revoked or annulled for just cause.
Explanation – Just cause shall be deemed to exist where –
(a) The proceedings to obtain the grant were defective in substance; or
(b) The grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case; or”*

12. In the above case filed under Section 263 of the said Act, the respondent has prayed for revocation of the order of grant of Will on the following three grounds :

- (a) The Will is a forged and fabricated document.
- (b) The testator was a karta of HUF property and thus could not dispose of coparcenary property by way of a Will.
- (c) The endorsement of registration made on the original Will did not correspond with those on the official record of the Office of the Sub Registrar.

13. A learned Single Judge of this Hon'ble Court on 4th August, 2006 framed the following issues on all the above three grounds :

- I. Whether the petitioner is entitled to the revocation of the grant of letters of administration issued to the respondent by a judgment and order of this Court dated 2.3.2005 in Probate Case No. 34/1988 under Section 263 of the Indian Succession Act, 1925 for the reasons set out in the petition? OPP*
- II. To what relief, if any, is the petitioner entitled? OPP*

14. The appellant herein filed an application being I.A. No. 10302 of 2006 under Section 114, Order 47 Rule 1 CPC for review and recall of order dated 4th August, 2006 as the appellant wanted the new Testamentary Case to be disposed of without the respondent being given any opportunity to lead evidence. The appellant also wanted new testamentary case to be numbered as a miscellaneous application and not a suit. In its application, the appellant submitted that the respondent's contention that the said Will is a

forged and fabricated document is barred by principles of res judicata. However, the learned Single Judge vide his order dated 18th November, 2006 without dealing with the appellant's contention that the respondent's contention was barred by principles of res judicata rejected the respondent's application being I.A. No. 10302 of 2006 holding that under Section 263 of the said Act it was open for the court to dispose of the proceedings either summarily or after giving opportunity to both the parties to adduce evidence. In this connection, the learned Single Judge relied on the judgment of the Hon'ble Supreme Court in ***Mrs. Nalini Naveen Bhagwati and others vs. Chand Vardhan Mehta, reported in AIR 1997 SC 1055.***

15. Another learned Single vide his order dated 23rd July, 2006 refused to review his ex parte order dated 18th April, 2007 for sending the said Will for verification of the testator's signature to a handwriting expert from CFSL. While passing the said order, the learned Single Judge declined to entertain the review application noting that Appellant had failed to either file reply or oppose the prayer made in the original application. He also did not entertain and review the plea of the Appellant that Respondent's application was barred by principles of res judicata. Consequently, while passing both the impugned orders, the appellant's submission that the present 263 proceedings were barred by principles of res judicata were not considered.

16. We have perused the judgment and orders passed by the learned Single Judge, the Division Bench as well as that of the Hon'ble Supreme Court in Probate Case No. 34 of 1988 and we are of the view that respondent's endeavour to lead evidence in support of its

contention that the said Will is forged and fabricated document is barred in law as it is hit by principles of res judicata. Firstly, the issue that the said Will was a forged and fabricated one was directly and substantially an issue in the previously instituted probate proceedings. Secondly, the former probate proceedings were between the same parties. Admittedly, the court which decided the former probate proceedings is a court competent to try the subsequent testamentary proceedings. Moreover, the said issue had been heard and finally decided by not only the original court in the first probate proceedings but also the judgment of the learned Single Judge had attained finality as not only a Division Bench of this Hon'ble Court but also the Hon'ble Supreme Court had dismissed appeals filed against the said judgment and order dated 2nd March, 2005.

17. In *K. Yenkana vs. K. Latchana, reported in AIR 1939 Rangoon 215*, a Division Bench of the Rangoon High Court has held as under :

“It is clear that the appellant is seeking to adduce fresh evidence which would convince the Court that the respondent's claim for letters of administration was unwarrantable. Such new evidence even if admitted would not necessarily show that the respondent's claim was fraudulent, though it might show that it was ill-founded. By S. 268, Succession Act, the proceedings in the Court of the District Judge in this matter shall, so far as circumstances permit, be regulated by the Code of Civil Procedure. O. 47, R. 1 lays down the procedure and in my opinion the learned District Judge was right in dismissing the application. If appellant's contentions were right, his application to revoke for just cause the letters of administration could be made with complete disregard of the formalities enjoined by the rule and he would even be exempt from proof of having exercised due diligence in presenting his case before the Court which granted the letters. He could watch the proceedings to which he was a party with indifference and could subsequently make an application for the revocation of the grant as though he had never been cognizant of them at all. In 38 Mad 203 at p. 208 it was said:

But where two parties fight at arm's length, it is the duty of each to question the allegations made by the other to adduce all available evidence regarding the truth or falsehood of it. Neither of them can neglect this duty and afterwards claim to show that the allegation of his opponent was false.

This is an application of the broad principle of res judicata.....”

“In my opinion the phrase “new grounds” does not mean additional evidence on old grounds; it might apply, for instance, to a case in which the person to whom letters of administration were granted had subsequently become of unsound mind. It is meant to cover contingencies quite different in character from the mere discovery of evidence which if it had been available before might have induced the Court to take a different view. In the present case the learned District Judge by implication at least held that the appellant had not exercised due diligence. Whether by doing so he could have found out about these registered mortgage deeds or not, I think we need not trouble to inquire. It is enough to say that the appellant was bound to comply with the provisions of O. 47, R. 1 and in other respects at all events he failed to do so.

An application for the revocation of a grant by a party who contested the order at the time which it was made is on an entirely different footing from such an application made by a party who was a stranger to the proceedings which led to the making of the order and had no notice of them. In the former case the matter is prima facie re judicata as between the parties. Where there is an allegation of fraud as a ground for vacating a judgment or order, the fraud proved must be extraneous to everything which has already been adjudicated upon by the Court. Subject to what I have already said in relation to “new grounds” the only other way in which the grant can be attacked by a party who contested the order at the time it was made and who relies on fresh evidence merely is by bringing his application within the comparatively narrow limits of an application for review.”

18. In the matter of *Will of Pitambar Girdhan reported in (1881) ILR 5 Bombay 638*,

a similar proposition of law has been reiterated. In the said judgment it has been held as under :

“In the month of June last, the petitioner had an opportunity of laying his case before the Court. He did so partially, at all events. In the exercise of his own discretion he thought proper to withdraw his opposition at the close of the evidence given in favour of the propounded will, and thereupon probate of that will was granted by the Court. Now, however, he says that he has discovered that Mr. Terry was, and is, of opinion that the alleged will was a forgery, and on this ground he seeks to have the whole question of the validity of the will re-opened. If this circumstance were to be held sufficient to justify a review, there would be no limit to such applications as the present. It would always be possible for a party to a cause to discover some individual whose opinion was favourable to his case, but it can hardly be contended that the fact of his having obtained such an opinion would entitle him to ask the Court to set aside its former decision, and allow a re-hearing of the case.”

19. We have also carefully seen the endorsement in the original Will as well as the endorsement in the certified copy issued by the Registrar's Office as placed on record in the new testamentary case and we are of the view that there is no discrepancy. While in the registered Will it has clearly been mentioned that the said Will had been presented by the appellant, Shri P.P. Sharma, in the Registrar's copy in the column "presented by" the Registrar has written above the word "by", "of" thereby mentioning that the document pertains to the Will of Shri Sudershan Lal. In any event, Mr. Sudershan Lal could not have presented the Will for registration as admittedly the Will was registered on 18th May, 1987 i.e. much after the death of the testator. The new ground being urged by Mr. Chandhiok in support of his contention that the said Will was forged is only an additional evidence on old grounds. The said Will and the endorsement on its back page were always available on the record of the earlier Probate Case. The respondent cannot be exempt from proof of having exhausted due diligence in presenting her objection to the earlier Probate Case. Consequently, we do not find that the new ground being urged by Mr. Chandhiok is even

prima facie enough to warrant a finding that the Letter of Administration was obtained fraudulently by making a false suggestion or by concealing something material from the record.

20. Another point urged by Mr. Chandhiok, which we would refer to only as a “talking point” is that one of the pages carries the name of Mr. Madan Mohan, Advocate. This, he said, represents Mr. M.M. Sharma. We are not inclined to agree with Mr. Chandhiok. Mr. M.M. Sharma is a distinct individual who has separately signed down below at the back of the said Will.

21. In our view the genuineness of the Will having been upheld right upto the Supreme Court, the respondent’s endeavour to lead fresh evidence on the ground that the said Will is a forged and fabricated document is clearly barred by principles of res judicata and by principles re-litigation.

22. In view of the conclusion reached, we do not think any useful purpose would be served by getting the signature of the testator on the Will verified by a handwriting expert from CFSL. In the ultimate analysis, it is an exercise in futility. However, the appellant’s argument that the new Testamentary Case needs to be numbered as a miscellaneous application and not a suit does not impress us. We are of the view that the neither the number nor the styling of the present proceedings is a relevant issue or of any consequence.

23. Consequently, both the orders dated 18th November, 2006 and 23rd July, 2007 in I.A. No. 10302 of 2006 and R.A. No. 12 of 2007 respectively are set aside and the matter is remanded back to the learned Single Judge for deciding the matter in accordance with law. FAO(OS) 294 of 2007 and FAO(OS) 7 of 2007 stand allowed of in the above terms.

[MANMOHAN]
Judge.

[MANMOHAN SARIN]
Judge.

April 7, 2008.
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