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IN THE HIGH COURT OF DELHI

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FAO No. 450/2007

Sh. Vijay Kumar Tiwari Appellant
Through: Mr.Barun Kumar Sinha, Advocate

VERSUS

The State and Anr. Respondent
Through: Mr.B.B.Gupta, Advocate

RESERVED ON:
26.05.2008

DATE OF DECISION
28.05.2008

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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. Challenge is to the order dated 15.09.2007 passed by the Court of Additional District Judge, where the appellant remained unsuccessful in convincing the Learned. Judge about the genuineness of a Will, marked "X" dated 01.02.1991.

2. Late Smt. Jitni Devi (hereinafter to be referred as testatrix) is said to have executed a will on 1st February 1991 under which she purportedly left her entire property in favour of the appellant. The will completely excludes the only natural-born child of the testatrix i.e. a daughter named Smt. Subhadra Kumari. She

is the objector to the will in question for which probate has been sought.

3. Facts of the instant case reveal and neither side is at dispute over the point that testatrix was suffering from a lung disease and was admitted in the hospital at Ballia, Uttar Pradesh on 26th January, 1991 i.e. 4-5 days before she is said to have executed the will, and that she died on 4.2.1991 i.e. 3 days after execution of the will.

4. The creation of the will may be penned through the testimony of PW-3, Sh. Hare Ram Pandey who claims to be the scribe of the will. But before that it would be relevant to record that Hare Ram Pandey is the brother of the father-in-law of the sister of the propounder of the will namely Shri Vijay Kumar Tiwari, the appellant. In his testimony said '*I had scribed the will mark X under the instructions of Smt. Jitni Devi in Ballia Hospital where she was admitted..... at the time when I scribed the document mark X, mother of petitioner, whose name I do not know, Rameshwar Nath, Shiv Bachan Verma and 5-7 other persons whose name I do not know were present by the side of Jitni Devi..... I wrote mark X as per the instructions given by Jitni Devi and after writing the same, I read over the same to her.... Jitni Devi delivered the document mark X to me with the instructions to preserve the same and that she will back on her return back from Delhi (portion underlined to highlight that the syntax error is as in the original testimony).....this will remained with me upto 1994.*' In cross-examination Hare Ram

Pandey stated *'it was after 10-15 days Shiv Bachan Verma on return from Delhi informed me in office that Smt. Jitni Devi had expired. I did not send any condolence message to the petitioner, objector or her husband or to the petitioner's father. Uptill 1994. I did not inform the petitioner about the execution of the will mark X Jitni Devi in his favour.'*

5. Propounder of the will, PW-4 Vijay Kumar Tiwari, deposed in examination-in-chief by way of an affidavit. He stated that his biological father Shri Jai Mangal Tiwari was the real brother of Rameshwar Tiwari, the husband of the testator and that he was adopted by them as a son and that on account of love and affection towards him, Jitni Devi had executed the will mark 'X' in his favour. In his cross-examination, he stated *'My date of birth is 14.7.1972. I do not know on which date I was taken in adoption. I am XIIth pass. I had taken my school leaving certificate which is available with me. The name of my father mentioned in my school leaving certificate is Shri Jai Mangal Tiwari..... The name of my father in my election identify card is also recorded as Shri Jai Mangal Tiwari. It is correct that on the date election identity card was issued to me, I had already attained the age of more than 18 years. It is further correct to suggest that I myself had disclosed the name of my father as Shri Jai Mangal Tiwari while giving a declaration for issuance of election identity card to me. I did not mention in any document prior to filing of the present suit that I am an adopted son of Shri Rameshwar Tiwari..... I came to know about the will of my Tai Ji*

late Smt. Jitni Devi after 3 years of her death. My sister's father-in-law Shri Hare Ram Pandey had told me about the will of the testatrix late Smt. Jitni Devi and it was he who had handed over her original will to me after 3 years of her death.....I got the testatrix treated first from a local doctor in the village named Dr.Sudama Pandey and then I took her to Govt. hospital in Ballia and from there I brought her to Jassa Ram Hospital in Delhi.....I was not present in the hospital at the time testatrix had executed her will in question. At that time I had gone to the house for bringing the Charpai'

6. PW-1, Shri Rameshwar Nath Tiwari, attesting witness to the will in question deposed in his testimony that 'The will was written by Shri Hare Ram Pandey as *lekak*, whose signatures is at Point A..... It was on 1st February, 1991. The will was written in the hospital, in the distt. hospital Ballia..... I do not know who had purchased the stamp paper mark X. The will mark X was written in my presence. No doctor, nurse, supdt. or any other independent was present at the time of writing mark X.' (portion underlined to highlight that the syntax error is as in the original testimony).' In cross-examination, he stated 'Smt. Jitni Devi died on 4.2.1991.....After receiving the information of her death I came to Delhi.....The doctor had told that Smt.Jitni was suffering from Uruseey (Probably the witness wanted to say Pleurisy) The water was extracted from her lungs. She was admitted in the hospital on 26.1.91 and was discharged on 2.2.91. I was not present in the

hospital at the time of her discharge. But I went to the Rly. Station. She was brought to the Rly. Station in Charpai..... I had a talk with Smt. Jitni Devi on 1.2.91 when I went to hospital, she told me that she was getting the document executed and asked me to sign on it.'

7. PW-2, Shri Shiv Bachan Verma deposed '*Smt. Jitni Devi executed a will in the hospital. I went there to meet her. We were sitting and that document had been executed and asked me to sign.....* (portion underlined to highlight that the syntax error is as in the original testimony). *It was 1st February. Smt. Jitni Devi at that time was in the hospital..... Smt. Jitni Devi did not have any conversation with me that she is executing document mark X and that I should sign on it. I do not know with whom she gave the document after it was written.'*

8. The respondent has examined herself and her husband Sh. Ram Chander. In her examination-in-chief by way of affidavit RW-1, Smt. Subhadra Kumari stated that the petitioner Sh. Vijay Kumar Tiwari is son of her father's younger brother Shri Jai Mangal Tiwari and that he was never adopted by her parents, jointly or severally. That the will dated 01.02.1991 is not signed by her mother as she was very sick on that date and her alleged signatures thereon have been forged by the petitioner.

9. RW-2, Shri Ram Chander, in his examination-in-chief by way of affidavit deposed that his father-in-law died on 21.12.1990 and soon thereafter he received information that his mother-in-law was very sick and that he should come to Ballia immediately. That

on hearing the news he immediately rushed to Ballia reaching there on 1.2.1991. He stated that he was by the bed side of his mother-in-law by noon on 1.2.1991. That she could recognise him but was unable to speak. The doctor told him that his mother-in-law was under sedation as she was suffering with acute pain because of advanced stage of cancer. That he was informed that his mother-in-law, being mortally ill was discharged with an advice that best treatment, if any, could be made available at Delhi. That in consultation with other relatives present in the native village it was decided to shift Jitni Devi to Delhi. That Vijay Tiwari brought a Charpai on which Jitni was carried to the Railway Station. They boarded the train for Banaras and therefrom boarded Nilanchal Express to reach Delhi. They reached Delhi on 3.2.1991. Jitni Devi was admitted at Jessa Ram Hospital. She died the next day.

10. Noting the evidence brought on record, brief contours whereof have been noted hereinabove, learned Trial Judge has held that the appellant miserably failed to prove that the will mark 'X' was the last legal and valid testament of the deceased. In so holding learned Trial Judge has held that the appellant failed to prove that he was the adopted son of the testatrix. That there was no reason for the testatrix to exclude her only child from inheritance. That the physical health of Jitni negated her being in a testamentary capacity. That the will being propounded after 3 years of Jitni's death created doubts about its contemporaneous existence. That there was material contradiction in the testimony of

witnesses of the appellant regarding the manner in which Jitni purportedly executed the will. That the self stated participative role of the beneficiary was ground enough to suspect the will. That the stated witnesses to the will being related to the beneficiary cast a further suspicion on the will.

11. Learned counsel for the appellant urged at the hearing held on 26.5.2008 that there was no evidence on record to prove that Jitni was either sedated or in a non-testamentary position on 1.2.1991. Counsel urged that the appellant never claimed to be the adopted son of Jitni and her late husband but claimed to be treated as a son by them. Learned counsel urged that merely because a beneficiary is present when a will is executed is no ground to suspect a will and that merely because attesting witnesses are known to a beneficiary is no ground to suspect the due execution of a will. Counsel urged that the testimony of PW-1 to PW-3 i.e. the scribe of the will and the 2 attesting witnesses to the will conclusively established due execution thereof.

12. Before discussing the evidence on record it would be relevant to note the unusual place at which Jitni Devi's purported signatures are to be found on the will mark 'X'. The signatures are not at the bottom of the document but are towards the top left margin on the document. The place where the signatures of Jitni find appended is extremely unusual and suggestive of somebody's signatures being taken on a blank paper. That apart, the use of the expressions 'Sakin' etc. in the will reveal the legal input in the

creation of the document. The testatrix was not well versed in legal language and could not have used such technical expressions. PW-3, Hare Ram Pandey claims to have scribed the will as instructed by Smt. Jitni Devi. He categorically deposed that he wrote mark 'X' as per instructions given by Smt. Jitni Devi and after writing the same he read over the same to her. Now, if a document is dictated by a person to a scribe, the scribe cannot rephrase what is dictated to him. He must faithfully use the words and expressions of the person giving the dictation. Obviously, the scribe of the document has used his expressions and not those of Jitni, if at all, Jitni told him what to write.

13. As per the appellant and Hare Ram Pandey, Rameshwar Nath Tiwari, PW-1 and Shiv Bachan Verma, PW-2 were present when the will was scribed and had signed as attesting witnesses thereto. It is relevant to note that in his examination-in-chief Hare Ram Pandey made a positive assertion that *'at the time when I scribed the document mark X, mother of petitioner, whose name I do not know, Rameshwar Nath, Shiv Bachan Verma and 5-7 other persons whose name I do not know were present by the side of Jitni Devi'*. As noted above, learned Trial Judge has found material contradictions in the testimony of PW-1, PW-2 and PW-3. PW-2, Shiv Bachan Verma deposed that *'Smt. Jitni Devi executed a will in the hospital. I went there to meet her. We were sitting and that document had been executed and asked me to sign.....* (portion underlined to highlight that the syntax error is as in the original

testimony).'
On the scribing of the will, PW-1 stated 'the executant had not read it but the same was read over to her. At that time Hare Ram Pandey, Shiv Bachan Verma, Smt. Jitni Devi and some other relatives were present at the hospital at that time.'

14. The contradiction in the testimony of PW-1, PW-2 and PW-3 is writ large. According to PW-2 when he reached the hospital the document had been executed and he was asked to sign the same. In total contradiction, PW-3 claims to have scribed the document in the presence of PW-2.

15. The testimony of PW-1 brings out that Jitni was admitted to the hospital on 26.1.1991 and was diagnosed as suffering from Pleurisy. Water had to be extracted from her lungs. She was discharged from the hospital on 2.2.1991 but was not taken home. She was carried on a Charpai to the Railway Station for being brought to Delhi where she died on 4.2.1991. Obviously, Jitni Devi was on the last leg of her journey in life. She was dying. The testimony of RW-1 and RW-2 i.e. her daughter and her son-in-law bring out the purpose for bringing Jitni to Delhi from Ballia. They stated that doctors at Ballia gave up their hands and it was thought advisable to bring Jitni to Delhi where better medical facilities would be available. I shall be failing if I do not record that testimony of RW-1 and RW-2 pertaining to the purpose of shifting Jitni from Ballia to Delhi has gone unchallenged.

16. The argument of learned counsel for the appellant that the objector has not brought on record any evidence that Jitni was

not in a testamentary capacity on 1.2.1991 needs to be noted and rejected for the reason testimony of RW-1 and RW-2 in their examination-in-chief by way of affidavit on said point has not been challenged in cross-examination by the appellant. It is true that neither party has filed any medical paper pertaining to Jitni's health but the evidence has to be considered, evaluated and probablized as a reasonable human being and not with a mathematical-pedantic approach. Not only has the testimony of RW-2 gone unrebutted on the point he stated that when he reached Ballia on 1.2.1991 on learning about the terminal illness of his mother-in-law he found her sedated as pain was unbearable and that when it was decided to shift her to Delhi for better medical treatment she had to be carried to the hospital in a Charpai, even appellants own witnesses corroborate said fact. PW-1 admitted that on discharge from the hospital at Ballia, Jitni had to be taken to Railway Station in a Charpai. This evidences the extreme physical weakness of Jitni and would also be suggestive and indicative of her frail mental health. The fact that Jitni expired on 4.2.1991 and the fact that her death is admittedly attributable to a terminal sickness probablizes Jitni not being in a testamentary capacity on 1.2.1991.

17. The argument of learned counsel for the appellant that the appellant never claimed to be an adopted son of Jitni but merely claimed to be treated to be a son by Jitni and her husband and evidence be re-evaluated in said context, is worthy of no consideration for the reason it is the positive case of the appellant

that he was adopted by Jitni and her husband. In para 5 of his affidavit by way of evidence he categorically stated that since Jitni and her husband had no male child they had adopted him as their son. Even when cross-examined on the fact of his being adopted he did not state that he was claiming to be treated as an adopted son. He stated that he did not remember the date on which he was adopted. It is an obvious case where the appellant, to justify the existence of the will falsely attempted to prove that he was the adopted son of Jitni.

18. To my mind what clinches the issue against the appellant is the suspicion clouding the existence of the will in relation to the date on which the will was propounded. Admittedly, the will was propounded by the appellant for the first time in the year 1994 i.e. after 3 years of Jitni dying. The appellant explains the delay by stating that Hare Ram Pandey, the scribe of the will gave the will to him in 1994. Is the explanation worthy of acceptance?

19. The answer requires me to note the testimony of Hare Ram Pandey. He stated '*Smt. Jitni Devi delivered the document mark X to me with the instructions to preserve the same and that she will back on her return back from Delhi.* (syntax error is as in the original testimony). He further deposed '*it was after 10-15 days Shiv Bachan Verma on return from Delhi informed me in office that Smt. Jitni Devi had expired.*' The conduct of Hare Ram Pandey in not informing appellant about the will in question for 3 years is extremely strange and has gone unexplained. It was natural human

conduct for Hare Ram Pandey to have handed over the will to the appellant at the earliest. As noted above, Hare Ram Pandey is not a stranger to the appellant. He is the brother of the father-in-law of the sister of the appellant.

20. What casts a further doubt on the existence of the will is the testimony of Hare Ram Pandey who categorically stated that when he scribed the will, mother of the propounder was present in the hospital. If this be so, it remains unexplained as to why appellant's mother never informed the appellant about the will in question. Everything is shrouded in mystery.

21. The law relating to the wills is clear that the proof of due execution of will always lies upon its propounder who must satisfy the judicial conscience that the instrument is the last will of a free and capable testator. Though no specific standard of proof can be enunciated which must be applicable to all the cases as every case depends on its circumstances, courts must be vigilant and zealous in examining evidence for the reason a will is a solemn document and speaks for the dead. Suspicious circumstances are the presumptions which hold against a will. Greater is the suspicion more heavy would be the onus to be discharged by he who propounds the will. Unless suspicious circumstances are satisfactorily explained by removing the cloud of suspicion, a court would not readily accept the document propounded as the last legal and valid testament of the deceased. It may be true that nature of proof required to prove a will is not different from that required to

prove other documents except the requirement of attestation prescribed under Section 63 of the Indian Succession Act but it cannot be lost sight of that what distinguishes a will from other documents is that the testator is not available to testify the same as his last will. Thus, an element of solemnity is introduced in the decision. The proof of a will is to be tested on the satisfaction of a prudent mind. Unnatural disposition, improbable or unfair in the light of relevant circumstances or other indications that the disposition was not the result of the testator's free will and mind cast a very heavy initial onus on the propounder and unless satisfactorily discharged the court would not be justified in treating the document as the last will of the testator. A sound mind required under Section 59 of the Indian Succession Act may not mean that the testator should have his mental faculty in their fullest vigour, but it means that at least the testator should have the capacity to understand the nature of his property; memory to remember the relations and persons normally having claim on his bounty and also a judgment.

22. Tested on the afore-said anvil of law, the appellant has been completely unsuccessful to prove that the will in question was executed by Jitni Devi. The learned Trial Judge has penned a well reasoned judgment spanning 29 pages. Since I have concurred with the decision of the learned Trial Judge I have brought out the salient features which cast a serious doubt in the judicial mind regarding Jitni's capacity to understand the nature of the bequest, her

understanding of executing the document, the very fact of existence of the document and its execution. For the evidence as evaluated by me in para 4 to 18 above I concur with the view taken by the learned Trial Judge.

23. The appeal is dismissed.

24. On the issue of cost to be awarded to the respondent No.2, it is time for the courts to come down very heavily on those who fabricate documents. The fabrication of the document propounded as a will is writ large. Thus, cost has to be exemplary. I impose a cost of Rs.30,000/- on the appellant payable to respondent No.2.

25. T.C.R. Be returned.

May 28, 2008
VG

**PRADEEP NANDRAJOG
(JUDGE)**