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IN THE HIGH COURT OF DELHI AT NEW DELHI

Pronounced on : 11.08.2009

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CS (OS) No.893/2007

DR. MANGAL DASS KAPOOR

..... PLAINTIFF

Through : Mr. Ashutosh Lohia with Mr. Prem Mishra,
Advocates

Vs.

SMT. KAMLA RANI

..... DEFENDANT

Through : None

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

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

S.RAVINDRA BHAT, J. (Open Court)

1. The plaintiff sues for a declaration that he is the sole and absolute owner in possession of the entire movable and immovable estate, of late Shri Mehar Chand; he premises the suit on a bequest, through a registered will, dated 7th April, 1992.

2. According to the suit averments, the plaintiff is the son of the said late Mehar Chand (hereafter “the deceased”). The relationship of the parties is that the plaintiff is the only son, and the Defendants 2 to 5, daughters of the deceased. Smt. Kamla Rani, arrayed as the first

defendant, had died; she is represented by her legal heirs, impleaded in the suit. She was also a daughter of the deceased.

3. It is contended that the deceased had, during his lifetime, on 7th April, 1992, executed a will, bequeathing all his assets and properties in favour of the plaintiff. According to him, the defendants were aware of this development, and had also not expressed any reservation or objection, as the properties were the acquisitions of the deceased. The will was registered in the office of the Sub-Registrar, as Document No. 2017, Additional Book No. 3, Volume 659, at pages 28 to 30, on 7th April, 1992. The will, says the plaintiff, bequeathed the entire properties and assets of the deceased to the plaintiff, to the exclusion of all other heirs. The testator died on 3rd June, 1993. The plaintiff avers that after the death of the testator, he revealed the contents of the will, and no one raised any objections. He also claims to be in sole and exclusive possession of all the properties and assets that are the subject matter of the bequest.

4. It is submitted that despite their knowledge about the will, and even the consent about its terms, the Defendants started casting aspersions, and expressing doubts about the plaintiff's rights to claim the entire subject matter of the bequest. It is claimed that the defendants stated claiming to be co-owners of the suit property, sometime in 2001. The plaintiff alleges that they, however, did not file any suit, or initiate any legal proceeding, to assert their rights. On these averments, the relief of declaration is sought.

5. The suit had been filed in 2002, before the Additional District Judge. The defendants had entered appearance and opposed the claim. After evidence of the parties was recorded, it was noticed by the court that the valuation for purposes of jurisdiction was Rs.25,00,000/-; in these circumstances, the plaint was returned, with liberty to be filed in this court. Accordingly, the

present suit, along with the record of the lower court, was filed. The defendants were represented, through counsel, who appeared in the case. After persistent default, they were set down *ex-parte*, by the order dated 27th November, 2008.

6. In support of his claim, the plaintiff has examined himself and Ms. Vidya Gudani, an Advocate who was also attesting witness in respect of the will, on the basis of which the suit has been filed. The plaintiff, PW-1 deposed to the circumstances under which the will was executed. He was extensively cross examined by the defendants, who sought to elicit admissions from him, about his alleged indifference to his late father, and his repudiation of relationship with his parents, as well as other members of his family. However, he denied those suggestions. Similarly, a suggestion was made to him that the deceased was seriously ailing, and bed ridden, at the time of his death, and even when the will was executed. These suggestions, too, were refuted.

7. PW-2, Ms. Vidya Gudani, deposed having drafted the will, and also attesting it. She also mentioned that it was registered with the sub-registrar, in whose office the testator deceased was present. She stated that the other attesting witness, Mr. J.L. Pahuja was present when she signed the will. It was also stated that the said J.L. Pahuja was known to her for the last 15 years. The defendants sought to elicit, from her, that the plaintiff was instrumental in the drafting of the will; however, she denied suggestions to that effect. She deposed that the deceased was in sound and good health when the will was signed by him.

8. Some of the defendants (DW-1 to DW-2) deposed through affidavits. They alleged that the plaintiff married against the wishes of his parents, and members of his family, in 1969, when three of his sisters were unmarried. They all alleged that the plaintiff's wife had aggressive

behavior, and as a result, he did not maintain a good relationship with his sisters, i.e. the defendants. It was alleged that the plaintiff did not attend the last rites of the late first defendant, as well as his brother in law. The defendants alleged that in 1995, the plaintiff sought to have the property mutated in his favour, but that at the time, the defendants protested, and, as a result, the Land and Development Office (L&DO) did not proceed to transfer the properties in his favour.

9. The plaintiff had filed a certified copy of the will as Ex. PW-1/1. He also produced its original, when his statement was recorded in this court.

10. The defendants' pleas are premised on the deceased not having executed the will. Their position is that being neglected and also ill, the testator could not have validly bequeathed the properties; their attempt was also to show that the plaintiff was an active participant in the making of the will.

11. The above discussion would reveal that the suit is one for declaration that the plaintiff is the exclusive beneficiary or legatee of the deceased. The first question is whether a suit of the kind, is maintainable. The answer to this lies in two judgments of this court; one reported as *Chander Bhan v. Har Nath Singh* 20 (1981) DLT 32 and *Arjan Das v. Madan Lal* 6 (1970) DLT 260. In those decisions, it was held that where a litigant relies upon a will, it is not necessary for him to apply for and obtain a probate. The Calcutta High Court, following an old Privy Council ruling (*Raj Shatranjai v. Rai Bahadur Singh* (1950) 77 Ind App 98) held that such suits are maintainable, in *Smt Maya Basak v. Smt Kalidasi Dassi & Anr* AIR 1980 Cal 145:

*“Construing Section 42 of the old Specific Relief Act which corresponds to Section 34 of the Specific Relief Act, this court in the case of **Tarak v. Anukul**, (1945) 49 Cal WN 716 pointed out that a right to property though signifies an existing right of the plaintiff such right need not necessarily be a right which is*

*vested. "No declaration can possibly be made on the basis of a chance or a mere hope entertained by the plaintiff but a person having even a contingent right in a property may sue for a declaration, though the court in exercise of its discretion may refuse to make such declaration if it considers the claim to be too remote or that the declaration given would be ineffectual or abortive. The question, therefore, really is not one of jurisdiction but one of discretion to be exercised by the court." In our view there exists a just cause for Mr. Mitter to complain that the learned Judge in the present case totally overlooked this aspect when he proceeded to think that once he found the plaintiff's interest to be contingent the reliefs claimed by her must necessarily fail. Mr. Mitter had rightly drawn our attention to the decision of the Privy Council in the case of **Raj Shatranjai –vs- Rai Bahadur Singh** (1950) 77 Ind App 98 wherein the Privy Council restored a decree passed by the learned Subordinate Judge declaring the plaintiff's contingent interest in the remainder by observing "It is clear that it was competent for him to do so under Section 42 of the Specific Relief Act..."*

The above view about maintainability of a suit for declaration *simplicitor*, where the plaintiff does not seek any other relief, has been affirmed in the judgment of the Punjab and Haryana High Court in *Joginder Kaur Malik v. Malik Anup Singh* AIR 1966 Pun 385 as well as two judgments of this court, in *Sanjay Gupta v. Ved Kanti Gupta* 1994 (31) DRJ 76 and *Jugdish Chander v. Punjab National Bank* 1998 RLR 254. Thus, the present suit is maintainable, even though the plaintiff has not sought any consequential relief.

12. Next, the question whether the plaintiff, on the merits, has proved due execution of the will. It has been often held that a will, unlike other documents, has to be proved in a particular manner, in view of specific provisions of the Indian Succession Act, 1925, regarding its attestation. The court has to be satisfied, in addition to proof of due execution, in the manner prescribed, that the execution of the will was not shrouded in suspicious circumstances, that disentitle the petitioner or plaintiff to relief. These were spelt out clearly, in the judgment reported as *H. Venkatachala Iyengar v. B.N. Thimmajamma* AIR 1959 SC 443:

“However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.”

These mandatory requirements have been emphasized in several judgments, leading up to the recent ruling of the Supreme Court in *Yumnam Ongbi Tampha and Ibemma Devi v. Yumnam Joykumar Singh and Ors.* (2009) 4 SCC 780.

13. The evidence in this case shows that the plaintiff relied on his deposition, as well as that of one of the attesting witness. Even if the plaintiff's evidence were not to be given credence, since he has an interest in the outcome of the suit, the attesting witness has been shown to be independent; she had no concern with the family, or any party. She clearly deposed to having drafted the will, and attesting it, before the sub-registrar, when it was also registered. She also mentions the presence of the other attesting witness. The order-sheet of the trial court, which is part of the record, reveals that the other attesting witness was present in court on several dates, and was even scheduled to depose; however at the defendants' behest, his examination was postponed, and, instead, the plaintiff was examined first. In view of the uncontroverted evidence of PW-2 about the circumstances of the execution of the will, and in the absence of

any evidence to corroborate the defendants' allegations about the ailment of the deceased, at the time of execution of the will, the court is unable to subscribe to the defence that there was no due execution of the will, or that it was executed under suspicious circumstances.

14. As far as admissibility of testimony, recorded in the court of the Additional District Judge is concerned, Section 33 of the Evidence Act is relevant; it reads as follows:

"33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated - Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceedings, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party or if his presence cannot be obtained without, an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable;

Provided -

That the proceeding was between the same parties or their representatives in interest;

That the adverse party in the first proceeding had the right and opportunity to cross examine;

That the questions in issue were substantially the same in the first as in the second proceeding.

Explanation - A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section."

It is thus clear that the depositions of witnesses recorded by the trial court, are relevant and admissible in the present proceeding.

15. In view of the above discussion, the court is of opinion that the plaintiff has been able to prove execution of the will. He is entitled to the declaration sought for. However, he has valued the suit at Rs. 25 lakhs for the purpose of jurisdiction, and paid court fee on that amount. This is not based on any objective material, or relevant valuation. In view of this fact, the plaintiff is entitled to a declaration, that the will mentioned, has been duly proved, in which he is the heir of the late Shri Mehar Chand. Let decree be drawn, subject to proper valuation of the properties mentioned in the will, and deposit of differential court fees. No costs.

11th August, 2009

(S.RAVINDRA BHAT)
JUDGE