

* HIGH COURT OF DELHI : NEW DELHI

FAO. No.369/2009 & CM No. 17093/2009

% Judgment reserved on: 02nd December, 2009

Judgment delivered on: 07th December, 2009

Shri Bhagwan Dass
S/o Late Shri Tara Chand,
Premise No. 411, Patli Chandi Wali Gali,
Paharganj,
New Delhi.

AND ALSO AT:

C/o Shri Alam Ansari,
AB-431, Amarpuri, Nabi Karim,
Paharganj,
New Delhi- 110 055.

....Appellant

Through: Mr. Avinash Chander Bhasin with
Mr. Amit Bhasin, Adv.

Versus

1. Smt. Rama Devi,
D/o Shri Tara Chand,
W/o Shri Vijay Kumar,
R/O House No. 411, Patli Chandi Wali Gali,
Paharganj,
New Delhi- 110 055.

2. The State.
(Govt. of NCT of Delhi).

....Respondents.

Through: Nemo

Coram:
HON'BLE MR. JUSTICE V.B. GUPTA

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

V.B.Gupta, J.

This appeal has been filed against judgment dated 22nd October, 2009, passed by District Judge-II, Delhi. Vide impugned judgment, petition filed by the appellant for grant of Probate/Letters of Administration in respect of Will dated 6th June, 1984, executed by Smt. Mohini Devi, was dismissed.

2. Brief facts of this case are that appellant is the adopted son of late Shri Tara Chand and Smt. Mohini Devi. Respondent no. 1-Smt. Rama Devi is also the adopted daughter of Smt. Mohini Devi and Shri Tara Chand. It is stated that Smt. Mohini Devi was owner and in possession of a house bearing No. 411, Ward No. XV, situated in Patli Chandi Wali Gali, Pahar Ganj, New Delhi. She left behind the last Will dated 6th June, 1984, whereby she bequeathed the property in favour of appellant and respondent no. 1, in equal share. Respondent no. 1 contested the petition by filing objections that this Will was superceded by a Will dated 24th April, 1994. The Objector is only legal heir of deceased Smt. Mohini Devi, who executed last Will in favour of Objector on 24th April, 1994, whereby she bequeathed all her properties movable and immovable in her favour.

3. It is contended by learned counsel for appellant that trial court committed error in holding that appellant has failed to prove the due execution of Will dated 6th June, 1984. Respondent no. 1 has admitted due execution of signature of deceased Mohini Devi and signatures of the attesting witnesses on Will dated 6th June, 1984. Thus, there was no question of producing of any attesting witness by the appellant to prove the said Will.

4. It is also contended that once it is proved that the testator had in fact executed the Will, it must be held to be a legal device in accordance with its terms even if it is not proved by calling any attesting witness to fulfill the formalities as laid down in the Indian Succession Act, 1925.

5. In support of its contentions learned counsel for appellant relied upon *Amar Singh & Anr. Vs. Amarjit Singh & Ors*, AIR, 2009, Punjab and Haryana, 166. In this case, suit for specific performance of agreement to sell was filed, in which execution of agreement to sell was specifically admitted by vendors in earlier suit filed for declaration and injunction. In that context it was observed;

“Appellants vendees were not required to prove anything further and Court should accept admission straightway without any further proof”.

6. Section 63 of Indian Succession Act, 1925 deals with the execution of unprivileged Wills. It read as under;

“63. Execution of unprivileged Wills-Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules:-

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign

or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary. “

7. Section 68 of the Indian Evidence Act, 1872 read as under:

“Proof of execution of document required by law to be attested - If a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specially denied.”

8. In view of these provisions, it is crucial that it is proved that the Will was duly and validly executed. In the instant case, the Will was executed by deceased Smt. Mohini Devi. It was drafted by Shri Chet Singh, Advocate and was attested by two witnesses namely, Sh. Hemraj Verma and Sh. Raj Kumar. However, the appellant has not examined any of the attesting witness.

9. Trial court in this regard observed ;

“It is also settled rule of law that legal burden to prove due execution always lies upon the person propounding a Will. The propounder must satisfy

the judicial conscious of the Court that the instrument so propounded is the last Will of a free and capable testator. A combined reading of Section 63 of the Indian Succession Act and Section 68 of the Evidence Act, makes it clear that a person propounding the Will has to prove that the Will was duly and validly executed. Merely, proving the signatures of the Will of the testator is not sufficient and the propounder has to prove that the attestation were also made properly as required by clause (c) of Section 63 of the Succession Act. Though, Section 63 of the Succession Act requires that a Will has to be attested at least by two witnesses but Section 68 of the Evidence Act provides that a document, which is required by the law, to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution”.

It further observed:

“In the instant case, the petitioner has propounded Will dated 06.06.1984 purported to have been executed by Smt. Mohini Devi, which is Ex.PW 2/1. Said Will goes to indicate that same was drafted by Shri Chet Singh Advocate, same was attested by two witnesses namely, Hemraj Verma and Raj Kumar. But the petitioner has not examined any of the attesting witness. The petitioner has also not examined the scribe of the Will”.

10. In *H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Or.*, AIR1959 SC443, the Supreme Court observed;

“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”.

11. Similarly, in *Niranjan Umeshchandra Joshi Vs. Mrudula Jyoti Rao and Ors.* AIR 2007, SC 614, the Court held;

“Section 63 of the Indian Evidence Act lays down the mode and manner of execution of an unprivileged Will is to be proved. Section 68 postulates the mode and manner in which proof of execution of document which is required by law to be attested. It in unequivocal terms states that execution of Will must be proved at least by one attesting witness, if an attesting witness is alive subject to the process of the court and capable of giving evidence. A Will is to prove what is loosely called as primary evidence, except where proof is permitted by leading secondary evidence. Unlike other documents, proof of execution of any other document under the Act would not be sufficient as in terms of Section 68 of the Indian Evidence Act, execution must be proved at least by one of the attesting witnesses. While making attestation, there must be an animus attestandi, on the part of the attesting witness, meaning thereby, he must intend

to attest and extrinsic evidence on this point is receivable.

12. In the present case, appellant did not examine any of the attesting witnesses nor did he examine the scribe of the Will. Thus, execution of Will has not been proved at all. Case of *Amar Singh (Supra)* is not at all applicable to the facts of the present case. Under these circumstances, trial court was fully justified in dismissing the petition of the appellant.

13. There is no legal force and merits in this appeal and the same is dismissed with costs of Rs.10,000/- (Rupees ten thousand only).

14. Appellant is directed to deposit the costs with Registrar General of this Court, within four weeks from today, failing which Registrar General shall recover the same in accordance with law.

15. List for compliance on 11th January, 2010.

+CM No.17093/2009

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Dismissed, being infructuous.

7th December, 2009
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V.B.Gupta, J.