

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

+ **FAO.No.342/2005**

% *Reserved On: 11.11.2010*
Decided On: 22.11.2010

SARLA JAIN Appellant
Through: Mr. Pradeep Kumar Arya, Mr. Sobhit
Mittal, Mr. Narinder Chaudhary, Advs.

Versus

STATE & ORS. Respondents
Through: None.

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | No. |
| 2. | To be referred to the reporter or not? | No. |
| 3. | Whether the judgment should be reported in the Digest? | No. |

: **MOOL CHAND GARG, J.**

1. The appellant who is the beneficiary under the Will dated 05.10.1987 alleged to have been executed by Late Sh. S.L. Jain, her father-in-law in her favour is aggrieved of the judgment and order passed by the then learned Additional District Judge (as he then was) dated 02.08.2005, whereby the probate petition filed by the appellant seeking grant of probate in respect of the Will dated 05.10.1987 of her father-in-law has been dismissed, by holding that the Will, exhibit PW-2/1 propounded by the appellant was not a genuine Will and that the said Will by no means can be said to have been executed by the deceased voluntarily of his own free will after understanding the nature of disposition contained therein. With these observations, the issue No.1 framed in that case was decided against appellant and in favour of the Objector and accordingly, the petition was dismissed.

2. Briefly stating the facts giving rise to the filing of this appeal are that the appellant filed a probate petition on 27.06.1994 for the grant of probate of the Will dated 05.10.1987 allegedly executed by father-in-law. It is a matter of record that her father-in-law expired just after 20

days of the execution of the Will i.e. on 27.10.1987 leaving behind his widow Smt. Rajwati, 4 sons and 4 daughters. Smt. Rajwati also expired on 11.06.1994 before filing of the probate petition. The legal heirs were arrayed as respondents No.2 to 9 in the original petition. Sh. Jinender Kumar Jain one of the other legal heirs of the deceased also expired during the pendency of these proceedings and thereafter he was substituted by his widow and two sons. After citation of the probate petition was got published, respondents No.8 to 11 in the original petition being daughters of the testator filed their no objection. Nobody appeared for respondents No.2 and 3 despite service and thus, they were proceeded *ex parte*.

3. The objections against Will in question were filed only by one of the four sons of the deceased, namely, Sh.B.M. Jain who was arrayed as respondent No.4 in the probate petition. It was his allegations that the Will propounded by the appellant was a forged and fabricated document. The testator was mentally ill for about one year prior to his death and was not able to understand, write or even talk on the date on which the Will is stated to have been executed by him. In his objections, the said respondent also stated regarding circumstances which, according to him, created suspicion on the genuineness of the Will in question inasmuch as he also stated that the appellant has failed to explain as to why he got the Will in question registered on 20.04.1989 i.e. after about one year and 7 months of the death of the deceased testator. It was alleged that the manner in which signature of the testator appeared on the Will, only goes to show that as if signatures of the testator was procured by the petitioner on a blank paper which was later on misused by her. It was also stated that the non-mentioning of the Will in question in a legal notice dated 14.07.1992 sent by her and in the agreement dated 29.12.1989 or even in the Suit bearing No.400/1992 filed by the wife of respondent No.2, namely, Smt. Bimla Jain, also creates a mystery and causes serious doubt about the circumstances executing the alleged Will and thus, it was contended that the Will in question was surrounded by suspicious circumstances and was not a genuine Will and, therefore, the petition filed by her should be dismissed.

4. It was specifically stated that while the Will talks about bequeathing proprietary right of the trademark VITA BRAIN in favour of the appellant, the appellant omitted to seek probate with regard to the said trademark and for that reason also the petition was not maintainable.

5. The objections filed by the objector were denied by the appellant in her replication.

6. On the pleadings of the parties, the learned ADJ framed following issues:

“1. Whether the Will dated 27.10.1987 (sic. It should be will dated 5.10.1987) propounded by the petitioner is the last testament and will of deceased Shri Siri Lal Jain and it was executed by him in sound and disposing mind and is a valid Will?

2. Relief?”

7. The learned ADJ decided issue No.1 against the appellant by holding that the suspicion and dark clouds of doubt were hovering all around the genuineness of the Will in question inasmuch a bare look of the Will which is a typed one would show that the signature of the testator was obtained on a blank sheet of paper and was misused for fabricating the Will in question. In this regard, the learned ADJ further observed that having gone through the signatures of the deceased on exhibit PW1/1 which was a register of the operation of the bank locker which were admittedly operated by the deceased on 03.02.1987, 22.07.1987 and 22.08.1987 showed that while there were serious tremors in the testator's hand while appending his signatures on the record register on the said dates, the signatures of the testator on Will in question were not containing any such tremors and thus, concluded that the signatures of the testator was procured on the blank sheet of paper prior to 03.02.1987 and were later on misused for fabricating the Will in question. It may however be observed that these observations of the ADJ are based upon his own comparison of the signatures on the bank locker register and on the Will. The comparison is not supported by report of any hand-writing expert. Another objection found weighty by the learned ADJ is regarding the conclusions drawn by him or the factum of registration of the Will by the appellant after one year and 7

months of the death of the testator. In this regard, learned ADJ also noted the contradictions in the dates of execution and registration given by the witnesses produced on behalf of the appellants.

8. The learned ADJ further found the testimony of Sh. Srikant Aggarwal who appeared as PW2 doubtful. He has made the following observations in this regard:-

The attesting witness PW-2 Mr. Siri Kant Aggarwal could not tell in his evidence as to when and from where the said will was got typed. He has very candidly deposed that he was called to sign the will in question as its attesting witness by the petitioner's husband Mr. Virender Kuamr Jain who is the sole beneficiary of the said will. On this point it shall be relevant to quote the testimony of PW-2 in his cross-examination which is referred hereinbelow;-

“...I was called by the son of Siri Lal Jain for signing the said will but I do not remember the name of said son who had called me. The said son is the husband of the wife in whose favour the said will was executed. I do not know the name of the deed writer who had written the said will. I also do not know his sitting place. I had signed the said will at point B in House No. 3002, Kucha Neel Kanth, Darya Ganj, Delhi. At the time of execution of the said will, Siri Lal Jain, Davinder Kuamr Jian and Varinder Kumar and husband of the petitioner were present besides myself.”

15. PW-2 has also admitted in his cross that one Jain had been asking him to give evidence in this case and he further admitted that he did not want to spoil his relations with his neighbourer who had been asking him to give evidence in the case.

9. Learned Judge also observed that:

“PW-3 Mr. Devender Kumar Jain has testified in his cross examination that the testator was alive on the date of registration of the said will. The fact of the matter is that the will Ex.PW2/1 was admittedly got registered post humously after 1 year 7 months of the death of the testator and for that reason the testimony of PW-2 and PW-3 cannot be relied upon with regard to execution and registration of the said will. PW-2 has deposed in his cross examination that though the testator was alive on the date of registration of his will and he could not go to the office of Sub-Registrar for registration of his will as he was ill. PW-3 as per his evidence is a resident of Etawah and was not visiting the house of the testator frequently. No cogent explanation has been given on record as to how PW-3 happened to be present

at the house of the testator on the date the will was allegedly executed by him.”

10. Another suspicious circumstance noted by the learned ADJ is mentioned in para-16 of the impugned order wherein the learned ADJ made the following observations:

16. The petitioner being the daughter in law of the testator is the sole beneficiary under his Will. It is an admitted fact that on the date the testator had allegedly executed his will in question, his wife was also alive besides his four sons and four daughters. It is highly unnatural and improbable that the testator would not make any provision for his own wife leaving aside the children while making the will of his property only in favour of his daughter in law. No explanation much less satisfactory explanation has been given by the petitioner on this point as to why the testator disinherited his own wife and children from giving any share in his property to them. This in my opinion constitutes a strong suspicious circumstance and creates a grave doubt on the genuineness and validity of the will in question.

17. It shall further be significant to mention that prior to his death, the testator was carrying on the business of manufacturing of ayurvedic medicines under the tradename ‘BITA BRAIN’. He had his factory at Sahibabad and also used to do his business from the property bearing No. 3002, Kucha Neel Kanth, Darya Ganj bequeathed under the will in question. After the death of the testator, the parties had entered into an agreement between themselves on 29.12.1989 and the said agreement was reduced into writing by which the business carried on by the testator from premises No. 3002, Kucha neel Kanth, Darya Ganj, New Delhi came to the share of petitioner’s husband mr. Virender Kumar Jian whereas the factory premises at Sahibabad along with the business run from there came to the share of the remaining three brothers Mr. Surendera Kuamr jain, Mr. Jinendra Kumar Jian and Mr. Brij Mohan Jain. The agreement to that effect executed between the parties on 29.12.1989 is Ex.R-2/6. The said agreement has not been denied by the petitioner. Again on 14.07.1992 a legal notice was sent on behalf of the petitioner’s husband to the testator’s widow and her remaining three sons regarding alleged grievance in relation to factory premises at Sahibabad. The said legal notice is Ex.R-2/5, receipt of which has been admitted by the petitioner in her cross examination. A perusal of the agreement between the parties dated 29.12.1989 Ex.R-2/6 and legal notice dated 14.07.1992 Ex.R-2/5 would show that there is not even a whisper about the existence of Will in question in any of these two documents, though they both pertain to the period subsequent to the death of the testator. In case the Will in

question was in existence at the time of execution of agreement Ex.R-2/6 or sending of legal notice Ex.R-2/5, the said Will must have found mention in these documents. The petitioner PW-5 has said in her evidence that the Will in question was handed over to her by her mother in law after about 1½ years of death of her father in law. In case there is even a grain of truth in her said assertion, the petitioner would not have waited for the death of her mother in law for filing the present petition. It is a matter of record that the present petition was filed by the petitioner just after 15 days of the death of her mother in law who expired on 11.06.1994 though according to the petitioner herself, she came in possession of the Will in question in the early 1990. It shows that the petitioner was waiting for the death of her mother in law for filing the present petition on the basis of a fabricated Will of her father in law and this fact also create a strong suspicion on her bonafides.”

11. To assail the judgment it has been contended by the appellant that the only objection to the grant of probate with respect to the Will in question has come from Sh.B.M. Jain one of the son of the deceased testator. All others are supporting the case of the appellant and have no objection if the probate is granted. It is submitted that the appellant has been able to discharge the onus to remove all suspicious circumstances with regard to the execution of the Will. She has been able to establish that the Will was executed in a sound and disposing mind by the testator voluntarily. There was no question of any fabrication as alleged. The execution of the Will has been proved by PW2 and PW3 both of whom are the attesting witnesses. Nothing material came out from their cross-examination. Moreover, the sound and disposing mind of the appellant has been proved by PW-1 Sh. Radhey Shyam who deposed on oath regarding operation of the bank register by the deceased on 03.02.1987, 22.07.1987 and 22.08.1987 which fact is not disputed. It is submitted that the comparison of the bank locker by the deceased shows that he was not having any mental illness and that he was of sound and disposing mind at that time and consequently the plea of the objector that on 05.10.1987 which is prior to 22.07.1987 and 22.08.1987 falls to the ground. It is also stated that the registration of the Will has been proved by PW-4. In this regard it is pointed out that in terms of Section 23 of the Registration Act, 1908, it

was not necessary to get the Will registered soon after the death of the deceased or earlier thereto.

12. Referring to the statement made by Smt. Sarla Jain, the appellant who appeared in the witness box and exhibited the Will exhibit PW2/1 has deposed that it was given to her by his mother-in-law after death of deceased father-in-law only after one year and 6 months of the death of the deceased and it was, thereafter, she got it registered with the sub-Registrar. In this regard it is stated that her statement has not been challenged by the Objector at this point. Reliance has also been placed upon the statement made by Smt. Bharti Jain, RW-1 who though filed an affidavit in support of the objection filed by the Objector regarding mental illness of the deceased testator, it is stated that when she was cross-examined, she demolished the case of the objector inasmuch as she even could not tell the name of the doctor who treated the deceased, the date when deceased was admitted/discharged from the hospital. She even did not tell the alleged room number of the hospital in which the deceased was admitted. She further said that she has no proof of illness of deceased. She even denied the filing of the affidavit in the case i.e. evidence by way of affidavit.

13. On the strength of the statement given by PW1, PW2 and PW3 and PW5 it is claimed that the Will in question was executed by Late Sh. Siri Lal Jain in his full senses and at the relevant time he was fit and rather operating his bank lockers regularly. It is further submitted that mere look of the Will shows that signatures are in existence on the Will of the deceased above the word "testator" and thus, it is stated that it cannot be said that the Will has been prepared on a blank paper containing his signatures or that it has been misused. As regards non-mentioning of the Will in the notice dated 14.07.1992 and 29.12.1989, it is stated that non-mentioning of the said Will was of no consequence. Those documents were not with regard to the subject matter of the Will. In this regard it may be observed that the two documents, namely, notice dated 14.07.1992 and 29.12.1989 does not have any concern with respect to the bequeathing of the residential property or the bequeathing of the trademark VITA BRAIN which are the subject matter of the Will in question.

14. It is submitted by the appellant that the appellant has proved the execution of the Will by producing positive evidences of its execution, mental fitness of the deceased and has also explained why it was got registered after the death of the deceased. Whereas it is stated that the objector took unsustainable objections, such as mental illness of the deceased without any proof of any nature to prove the alleged forgery. It is further stated that out of the total 8 children of the deceased it is the only objector i.e. the Dewar of the appellant who has the objection to the grant of probate whereas the entire family is in favour of the appellant. It is, thus, submitted that the order passed by the ADJ needs reversal.

15. During the course of arguments it is also submitted on behalf of the appellant that no evidence has been led by the objector that the signatures on the Will are not that of the testator. The objector has also not led any evidence to prove that the mental status of the deceased at the time of the execution of the Will in question was such that he could not have take a decision to execute the Will in question. He has also not led any evidence to show as to what was the mental state of the deceased testator when he had gone for operation of the bank locker which are prior and after the date of the execution of the Will in question.

16. I have given my thoughtful consideration to the submissions made on behalf of the appellant. I have also gone through the record and the impugned order passed by the learned ADJ. I may observe here that nobody has come forward to oppose the appeal on behalf of the respondent.

17. Taking into consideration all the fact of this case, I find that the witnesses produced by the appellant, namely, PW2 and PW3 have proved the execution of the Will. Their testimony that the Will has been signed by Late Sh. Siri Lal Jain in their presence has not been denied by anyone. The state of mind of the deceased testator being that of sound and disposing mind stands proved by the statement of PW1, the bank clerk who proved the operation of the bank locker by the deceased on 12.01.1987, 14.01.1987, 03.02.1987 and after the date of the execution of the Will on 22.07.1987 and 22.08.1987. The observation made by the learned ADJ that the signatures on the Will was not that of the deceased testator are mere observation which do

not find support with any report given by any expert inasmuch as the objector has not produced any hand-writing expert who could have compared the signatures on the bank locker register and on the Will in question so as to conclude that the signature on the Will are not that of the testator. In fact, the observation made by the ADJ on the one hand accepting the case of the objector that the testator was not in sound and disposing mind on the date of the Will and then comparing the signatures as being not that of the testator coupled with observations that the signatures were taken on a blank paper and misused by fabricating will in question are not supported by cogent evidence. In this regard, I have also perused the original Will. A scanned copy of which is pasted hereinafter:

Registration of will after death
allowed to S.K.D.
Wife *28/11/87*

I, Sh. Shri Lal Jain aged about 69 years s/o. Late Sh. Munni Lal Jain R/o, 2253 Gali Bari Pahar Wali Dargam Pura, Delhi-6 hereby devise and bequesth that after my death my property bearing No. 3002, situate at Kucha Neel Kanth Darya Ganj, New Delhi-2 alongwith proprietor ship of my Trade Mark "VITA BRAIN" at 3002 Kucha Neel Kanth, Darya Ganj, New Delhi-2, shall go and belong and devolve to my daughter-in-law Smt. Sarla Jain wife of my son Sh. Virender Kumar Jain and she shall have full power to use the same in any manner she may like and to transfer the same, and she is my executor of my this WILL. That my other legal heirs, successors, usurviour and assignees and any other claimant of mine shall have no claim, title and interest in the above said property and any objection to be made by them regarding this WILL the same shall be deemed as null, void and ineffective.

That this Will is made At Delhi on this 5th the day of Oct. 1987, with my free Will, in full senses and without coercion of any person body in the presence of the under mentioned witnesses, who are personally known to me and I am known to them.

Witnesses:-

1. *Devi Lal Jain*
देव लाल जैन गुरुजी राका
पणल जैन देव लाल राका
जयपुरिया देहावा
2. *श्रीमती अश्वनी*
श्रीमती अश्वनी देवी
आला भकाना नं. 4/4
नू. नमो लाल देहावा
- 3.

Shri Lal Jain
(Sh. Shri Lal Jain)

ESTATOR

18. The statement of RW-1, Bharti Jain who was produced on behalf of the objector to prove the state of health of the deceased testator also shows that the plea of the testator being of not in sound and disposing mind on the date of the execution of the will is again a contradiction inasmuch as in the absence of any evidence to prove that the testator was not in a position to operate the bank lockers on the dates as mentioned above contradicts the stand of the objector that he was not having sound and disposing mind on 05.10.1987 and thus, supports the version of the appellant that the Will was executed by him.

19. Having gone through exhibit R2/5, R2/6 and R2/8, I find that those documents have nothing to do with the occupation of the residential property or the trade mark rights which have been assigned to the appellant by the deceased testator and thus, not referring the execution of the Will in those documents could not make the execution of the Will suspicious and will have no bearing regarding the bequeath made in the Will in question. It is well settled that in the absence of any evidence which may establish that the execution of the Will itself was doubtful or that the Will was not executed by the testator or that the testator was not of a sound and disposing mind at the time of the execution of the Will, the probate could not have been refused. In this regard, the judgment relied upon by the appellant of which reference has also been made by the learned ADJ in the impugned order i.e. the judgment in the case of Pushpawati & Ors. Vs. Chandraja Kadamba & Ors. AIR 1972 SC 2492 has not been correctly appreciated by the learned ADJ while delivering the judgment in question. It would be appropriate to make reference to the observations made by the Apex Court in the said judgment as also incorporated by the learned ADJ in para -11 of the judgment which reads as under:

“It is for the propounder of the will to prove it, and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient, to discharge the onus which is placed upon the propounder of the Will. Where there are suspicious circumstances, the propounder of the will has to explain them away to the satisfaction of the Court. The suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator’s mind, the dispositions made in the

Will being unnatural, improbable or unfair in the light of the relevant circumstances or there might be other indications in the Will to show that the testator's mind was not free. **If the propounder succeeds in removing the suspicious circumstances the Court would have to give effect to the Will even if the Will might be unnatural in the sense it has cut off wholly or in part near relations.**

When the signature of the testator is challenged as a forged signature and the Will does not come from the custody of a public authority or a family Solicitor the fact that the disposition made in the Will were unnatural, improbable or unfair, would undoubtedly create some doubt about the Will, especially, when the document is unregistered and comes from the custody of a person who is the major beneficiary under the Will.”

20. In this case, the evidence produced by the appellant goes to show that at the time of the execution of the Will, the condition of testator's mind was sound inasmuch as he had been operating the bank locker by going to the bank. There is nothing on record to show that the signatures on the Will were not that of the testator rather the reasons given by the learned ADJ goes to show that the signatures were not that of the testator though the allegations that they were obtained on a blank paper have not been substantiated by the Objector. Moreover, reference made regarding the other circumstances are also of no consequence, as for the reasons discussed above, it cannot be said that the Will in question was unnatural.

21. As regards the registration of the Will after a period of one year and 7 months, explanation given by the appellant that she got the Will only after one year and 6 months of the death of the deceased testator which submission has not been challenged by the objector in cross-examination. In any event, it may also be observed here that Section 23 of the Registration Act, 1908 enables acceptance of a Will for registration even beyond the time prescribed for bringing other documents.

22. In view of the aforesaid, the findings returned by the ADJ on issues framed in this case are reversed and the appeal is allowed. It is held that the appellant is entitled to grant of letters of administration of the Will with Will annexed after complying with other nodal formalities to the satisfaction of the learned ADJ.

23. With these observations, the appeal is disposed of with no order as to costs.

24. TCR be sent back along with a copy of this order.

MOOL CHAND GARG,J

NOVEMBER 22, 2010

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