

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

+ **FAO 309/2008**

Reserved on : 10.11.2010
Date of Decision : 19.11.2010

HARINDER PAL SINGH Appellant
Through Mr. Mohinder Singh, Adv.
versus

STATE & ORS. Respondents
Through Mr. B.R. Bakshi, Adv. for R-2.
Mr. Davinder Pal Singh, R-5 in
Person.

CORAM:

HON'BLE MR. JUSTICE MOOL CHAND GARG

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

: **MOOL CHAND GARG,J**

1. This appeal arises out of an order passed by the learned Additional District Judge granting probate of the Will dated 03.12.1979 alleged to have been executed by deceased Sardar Kapur Singh bequeathing his property bearing No.90/74 Malviya Nagar, New Delhi and some to his wife. Sardar Kapur Singh died on 13.12.1979 while he was admitted in G.B. Pant Hospital.

2. Notices were issued to the probate petition to all the legal heirs. A public notice was also sent. It may be observed here that except for the appellant, nobody else has filed any objection to the grant of probate. It may be mentioned here that while the appellant is the eldest son of deceased Sardar Kapoor Singh, respondents No.4 and 5 are also sons while respondent No.3 is the daughter of the deceased. Respondent No.1 is the wife, who has filed the probate petition. In fact except for the appellant no other person came forward to contest the petition or to challenge the execution of the Will in question.

3. In the written statement-cum-objections filed by the appellant it was pleaded that Will in question was forged and fabricated and could

not have been validly executed by the deceased as he was not in sound and disposing mind. It was also pleaded that even otherwise the Will was shrouded with suspicious circumstance inasmuch as the deceased was seriously ill at the time of execution of the Will and was hospitalized during the period 21.11.1979 to 13.12.1979 in G.B. Pant Hospital. According to the appellant, the deceased even lost his mental faculties at that time and was not capable of taking proper decision. He had also undergone an operation of cyst liver and could not survive. Additionally, It was also pleaded that a gap of 22 years in bringing the Will on record was also a circumstance which negates the execution of the Will. Moreover, competence of the deceased testator to execute the will in relation to the property in question was also questioned by pleading that the property had been purchased by the deceased from the compensation amount received from the Rehabilitation Department in lieu of the ancestral property left in Pakistan at the time of partition. It was also stated that huge amounts were spent even by the appellant towards construction/renovation of the property in question.

4. The averments made by the objector in the written statements/objections were denied in the replication filed by the first respondent. Respondents No. 3 to 5 gave their no objection in writing. On the pleadings of the parties following issues were framed:

- “1. Whether the Will dated 3.12.1979 as propounded by the petitioner was validly executed by the deceased Sardar Kapur Singh in his sound disposing mind and same is his last Will and testament? OPP
2. Whether the Will in question is forged and fabricated one? OPR
3. Relief.”

5. After recording the evidence of the parties, the learned ADJ decided issue No.1 and 2 in favour of respondent No.1 and accordingly granted letters of administration of the Will on 03.12.1979 to her. On the question of limitation the Addl. District Judge even though made a reference to the judgment quoted by the appellant delivered by this Court in the case of Prem Sagar Vs. State 2007 IV AD (Delhi) 332 and Pamela Kumar Vs. Chandrashekhar 2007 (99) DRJ 475 but found that

the ratio of those judgments was not of any help to the case of the appellant. Following observations were made by the Addl. District judge in this regard:

“Delhi High Court in the above mentioned Prem Sagar’s case rejected the Will as there were other reasons also besides the delay in filing petition. In that case, there was no explanation of exclusion of three daughters from the benefits of the estate of the deceased. Deceased used to sign but Will was containing his thumb impression. Signatures of second attesting witness were of different type at different parts of the Will and the father of the beneficiary himself actively participated in the execution. All these grounds in addition to delay in filing petition were treated by the High Court for rejection of the Will. However in the present case in hand, I hardly found any other ground to reject the Will Ex. P-1. Moreover it is well settled law and even repeated in Prem Sagar’s case that law of limitation has no application to the filing of the probate petition.

In the Pamela Kumar’s judgment, there was a delay of 43 years in filing of probate petition. Hon’ble High Court rejected the probate petition not merely on the ground of delay but due to the fact that Will on which basis probate petition was filed was already superseded by another subsequent Will which was admitted one. Thus the fact of this case also can be distinguished from the facts and circumstances of the present case.”

6. The Addl. District Judge also found no substance in the issue raised by the appellant qua the title of the property and observed that the question of title or ownership cannot be decided by probate Court by making reference to the judgment of the Apex Court in Chiranjilal Shrilal Goanka Vs. Jasjit Singh (1993) 2 SCC 507 where it has been held:

20. On a conspectus of the above legal scenario we conclude that the Probate Court has been conferred with exclusive jurisdiction to grant probate of the will of the deceased annexed to the petition (suit); on grant of refusal thereof, it has to preserve the original Will produced before it. The grant of probate is final subject to appeal, if any, or revocation if made in terms of the provisions of the Succession Act, It is a judgment in rem and conclusive and binds not only the parties but also the entire world. The award deprives the parties of statutory right of appeal provided under Section 299. Thus the necessary conclusion is that the Probate Court alone has exclusive jurisdiction and the Civil Court on original side or the Arbitrator does not

get jurisdiction, even if consented to by the parties, to adjudicate upon the proof or validity of the Will propounded by the executrix, the applicant. It is already seen that the executrix was nominated expressly in the will is a legal representative entitled to represent the Estate of the deceased but the heirs cannot get any probate before the Probate Court. They are entitled only to resist the claim of the executrix of the execution and genuineness of the Will. The grant of probate gives the executrix the right to represent the estate of the deceased, the subject-matter in other proceedings. We make it clear that our exposition of law is only for the purpose of finding the jurisdiction of the arbitrator and not an expression of opinion on merits in the "probate suit."

7. In this regard it was also taken note by the learned ADJ that the property in question was purchased by the deceased in open auction which fact was not denied by the objector and that it was rightly held by the Addl. District Judge that the question as to whether the property was purchased by him from his own funds or from compensation amount received by Rehabilitation Department in lieu of ancestral property in Pakistan at the time of partition was not to be decided by this Court.

8. Referring to the registration of the Will, even though respondent No.1 failed to examine any witness from the office of the Sub-Registrar, the learned ADJ while agreeing with the submissions made by the appellant that mere registration was not sufficient to prove that the Will was genuine or to presume otherwise, observed that there was always a presumption of due and proper execution of Will which is the registered Will and it becomes the duty of the objector to revert this presumption, which presumption was not rebutted by the appellant by leading any evidence in this regard.

9. Dealing with the plea of the appellant that the deceased was not in sound disposing mind, the Addl. District judge analyzing the evidence which has come on record has observed that the appellant took contrary stand inasmuch as on the one hand he described the Will as forged and fabricated, on the other hand he alleged that the deceased was not of sound and disposing mind and was incompetent to execute any Will. In his cross-examination the appellant himself stated that his father remained of sound mind throughout his life and even

admitted that during the period of three weeks stay in hospital he was not suffering from any mental infirmity found no merit in the aforesaid objection taken by the appellant

10. It would be also relevant to take note of the statement of the appellant and his cross-examination in the Court. It has been stated:

“Respondent is taking contradictory stand. On one hand he described the Will as forged and fabricated whereas on another hand alleged that deceased was not of sound disposing mind and was incompetent to execute any will. This plea of incapacity and unsound mind position itself has failed on the ground when respondent admitted in his cross-examination that his father remained of sound mind throughout his life. He also admitted at one stage that during the period of three weeks stay in hospital (during which the Will in question was executed) he was not suffering from any mental infirmity. Though at next moment of cross-examination he showed ignorance about non-suffering from any mental infirmity but still he did not deny specifically that his father was incapacitated due to unsound mind position to execute the Will. On the other hand PW-1 specifically alleged that Sardar Kapur Singh was in perfect disposing mind at the time of execution and registration of the Will which fact is not challenged in his cross-examination. Accordingly it is held that deceased was in perfect sound mind position and was competent to execute the Will.”

11. The Addl. District judge also rejected the submission of the appellant that merely because the deceased was in the hospital at the time when the Will was executed it itself was sufficient to hold that the Will was not genuine by taking note of the cross-examination of the appellant where he admitted that his father i.e. the deceased testator postponed the major operation till the marriage of his younger son and got admitted in the hospital after two days of the marriage. Thus it can be inferred that while he was apprehending that he may not survive after liver operation he participated in the marriage of his son. His apprehension that he may not survive after the operation rather is a good justification for him to make a Will. The Addl. District judge rightly observed that such conduct of the deceased was not an improbable conduct. In fact, the very fact that he even got his Will registered itself shows that the Will was genuinely executed.

12. As far as relationship of the deceased with the appellant and other children is concerned it has come in the statement of PW2 that the deceased had good relations with all his sons. This is a statement made by PW2 in the cross-examination conducted upon him by the appellant. Regarding the statement made by the appellant there there was no reason for the deceased to exclude him from conferring any benefits under the Will, it has been observed by the learned ADJ that while executing the Will the deceased has bequeathed the immovable property in favour of his wife i.e. the petitioner till she survives and thereafter it has to go to others while cash amount was given to his wife and number of other relatives. It cannot be said that the deceased had gone in favour of a particular person. During the course of arguments the appellant agreed that he is living separately, has his own property and is quite capable of looking after himself and that on several occasions he was even given money by the other legal heirs. This goes to show that there could be no suspicion on the conduct of the deceased.

13. Even otherwise, the execution of the Will has been duly proved inasmuch as PW1 is one of the attesting witness. In his examination-in-chief PW1 has deposed that he accompanied Sardar Kapoor Singh to the office of the Sub-Registrar where Sardar Kapoor Singh signed the Will in his presence and in the presence of another witness. He has identified the signatures of the deceased as well as his own signatures on the Will which was put before the Sub-Registrar. PW1 has also stated that he along with another witness appeared before the Sub-Registrar for the purpose of registration of the Will. At that time according to this witness the testator was in perfect disposing mind.

14. In the light of the aforesaid evidence, conclusions drawn by the lower Court that respondent No.1 was able to prove all the ingredients of Section 63 of the Indian Succession Act regarding execution of Will of deceased Sh. Sardar Kapoor Singh and thus, discharged the onus placed upon her by the legislature; the appellant who was questioning the execution of the Will and also made several objections regarding the capacity and the mental situation of the deceased testator failed to rebut the presumptions which can be drawn for the valid execution of

the Will under Section 63 of the Indian Succession Act and therefore, the learned ADJ decided issues No.1 and 2 in favour of respondent No.1

15. Now coming to the aspect of delay in bringing on record the Will, a judicial notice can be taken of the fact that in Delhi there is no need to obtain a probate by coming to the Court. No doubt Article 137 of the Limitation Act applies even to a petition for grant of letters of administration but the question arises as to what is the point of time when the limitation would turn. In this regard in a judgment given by the Apex Court in the case of Kunvarjeet Singh Khandpur Vs. Kirandeep Kaur 2008-TLPRE-0-654 (TLS) 46042 it has been observed:

“The crucial expression in the petition is “right to apply”. In view of what has been stated by this Court, Article 137 is clearly applicable to the petition for grant of Letters of Administration. As rightly observed by the High Court in such proceedings the application merely seeks recognition from the court to perform a duty because of the nature of the proceedings it is a continuing right. The Division Bench of the Delhi High Court referred to several decisions. One of them was S. Krishnaswami and etc. etc. v. E. Ramiah (AIR 1991 madras 214). In para 17 of the said judgment it was noted as follows:

“In a proceeding, or in other words, in an application filed for grant of probate or letters of administration, no right is asserted or claimed by the applicant. The applicant only seeks recognition of the court to perform a duty. Probate or letter of administration issued by a competent court is conclusive proof of the legal character throughout the world. An assessment of the relevant provisions of the Indian Succession Act, 1925 does not convey a meaning that by the proceedings filed for grant of probate or letters of administration, no rights of the applicant are settled or secured in the legal sense. The author of the testament has cast the duty with regard to the administration of his estate, and the applicant for probate or letters of administration only seeks the permission of the Court to perform that duty. There is only a seeking of recognition from the Court to perform that duty. That duty is only moral and it is not legal. There is no law which compels the applicant to file the proceedings for probate or letters of administration. With a view to discharge the moral duty, the application seeks recognition from the court to perform the duty. It will be legitimate to conclude that the proceedings filed for grant of probate or letters of administration is not an action in law. Hence, it is very difficult to and it will not be in order to

construe the proceedings for grant of probate or letters of administration as applications coming within the meaning of an 'application' under Art. 137 of the Limitation Act, 1963”

16. In the present case in the facts and circumstances of the case it cannot be said that the petition filed by the first respondent was barred by limitation as nothing has been brought to the notice of this Court that any dispute was raised by the appellant regarding the execution of the Will at any time prior to filing of the probate petition by the first respondent.

17. It may also be observed that in this case while the appellant had contended that the Will of deceased testator Ex.P1 which is a registered Will was a forged document and was not genuine. There is nothing on record to show that this aspect was ever raised as an issue by the appellant before the probate petition was filed by respondent No.1. In any event, statement made by PW1 who is an attesting witness to the aforesaid Will and who has proved the execution of the Will the appellant/ objector while denying signatures of his father on the Will has not cared to examine any hand-writing to prove the fact that the signatures on Ex.P1 were not that of his father. It is a matter of record that the deceased was working as a Headmaster in a Government school and lot of documents/records containing his hand-writing and signatures would have been easily procured by the objector but he did not took any steps to get the signatures of the deceased on the Will compared through an expert.

18. In this regard, it may be observed here that once the propounder of the Will has been able to establish that the Will in question was executed by the testator in accordance with the legal requirements and that the testator was having sound and disposing mind, the onus to prove that the condition of the testator's mind was not such which may satisfy the conscious of the Court that the execution was done in a sound and disposing mind or that the execution of the Will was improbable or unfair, would shift on the objector.

19. I have also gone through the written submission filed by the appellant and the judgments mentioned by learned counsel for the appellant in the written submissions. However, in the light of the

evidence which has come on record, I find that those judgments are also of no help to the case of the appellant.

20. Thus, I find no merit in the appeal filed by the appellant and accordingly, the same is dismissed with no orders as to costs.

21. A copy of this order be sent to the trial Court along with TCR.

C.M.12985/2008(*stay*)

Interim order is vacated.

The application is disposed of.

MOOL CHAND GARG, J

NOVEMBER 19, 2010

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