

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

+ **FAO 6/2008**

Reserved on : 15.12.2010
Date of Decision : 22.12.2010

KULDEEP KAUR Appellant
Through Mr. Alok Krishna Aggarwal,
Mr. Mayank Bughani, Mr. Saurabh,
Mishra, Advs.

versus

STATE & ORS Respondents
Through Mr. Arjun Mitra, Adv. for R- 3,8,
9 & 10.

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

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

: **MOOL CHAND GARG,J**

1. This is an appeal arising out of the order dated 01.10.2007 whereby the Addl. District Judge has been pleased to dismiss the probate petition bearing No. 175/06/04 filed by the appellant for seeking letters of administration in respect of Will dated 03.05.1990 of Shri Shangara Singh, the deceased, in respect of property bearing No. 207 Gautam Nagar, New Delhi as one of its beneficiary under the Will.

2. According to the appellant, late Shri Shangara Singh expired on 25.05.2002 leaving behind the appellant being his wife as one of the legal heir besides respondents No.2 to 10 as his other legal heirs. Prior to his death, he had executed Will dated 03.05.1990 which, it is stated, was duly registered bequeathing immovable property to her. The appellant herein filed a probate petition before the Additional District Judge, notice whereof was issued to the State through Collector as well as to the other legal heirs of the deceased. Citations were also published in the newspaper. All other

legal heirs were duly served. While respondent Nos. 2, 4, 6 & 7 submitted their no objections, respondent Nos. 5, 8 & 10 did not file any objections but the probate was contested by respondent Nos. 3 who filed objections to the grant of probate/letters of administration in respect of the Will in question. According to the objector late Shri Shangara Singh did not execute any Will and died intestate. It was alleged that the Will dated 03.05.1990 was a forged and fabricated document to usurp the right, title and interest of the other legal heirs. He also stated that there was no reason for his father to exclude him as he was having cordial relations with his father. He also questioned the authenticity of the Will in having excluded him from the estate left by his father.

3. The appellant filed reply to the objections reiterating and re-affirming the contents of the probate petition.

4. On the pleadings of the parties, following issues were framed:

“1. Whether late Shri Singhara Singh executed a valid and enforceable Will dated 03.05.1990? OPP

2. Whether the petitioner is entitled for grant of probate in her favour as claimed? OPP

3. Whether the petition is not maintainable as alleged by the respondent in the objection? OPP

4. Relief.”

5. Evidence was led by the parties inasmuch as the appellant filed her own affidavit and appeared as PW1. She also examined Shri Amarjeet Singh, one of the attesting witnesses, as PW2 and Shri P.K. Gupta the other attesting witness was examined as PW-3. Shri Amarjeet Singh and Shri P.K. Gupta were also re-examined after the matter was remanded back by this Court pursuant to the orders of this Court dated 28.03.2007.

6. As far as the third respondent is concerned, he adduced no evidence. The Additional District Judge took note of the various provisions of the Indian Succession Act, particularly Section 281 which provides for verification of a probate petition by at least one of the attesting witnesses as well as Section 66 which provides for execution of un-privileged Will. In particular, he referred to provisions contained under Section 63(c), which reads as under:-

“Execution of unprivileged Wills

a)....

b)....

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 signatures 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. While referring to few judgments cited at internal page 6 of the impugned order, the Additional District Judge after observing that the non-verification of a petition by one of the attesting witnesses is a curable defect, further observed that :-

“The petition has not been verified by any of the attesting witnesses to the Will. The two attesting witnesses were very much available and procurable. And one of the attesting witnesses namely, Shri P K Gupta is an advocate, well conversant with legal provisions and requirement of law, and it is unconceivable and unbelievable that Shri P. K. Gupta, Adv. was reluctant to verify the probate petition.

12.A.8. In the decision in Rama Singh Rajput (supra) it has been held that the defect of non-verification of the petition by an attesting witness is curable and the defect can be cured through amendment of the petition.

12.A.9. Nothing has been brought on record to show that the petitioner had made any efforts to cure the defect of non-verification of the petition even when she was put to notice as regards non-verification of the petition by any of the attesting witness and simply saying that they were reluctant to verify the petition in reply to the objection petition is no answer to the defect particularly when the two attesting witnesses were procurable and one of whom is a practicing advocate.

12.A.10. In the absence of any effort on the part of the petitioner to cure the defect of non-verification of petition by an attesting witness when they were procurable, the issue has to be decided in favour of the respondents.”

8. Accordingly, the Additional District Judge decided Issue No.3 against the appellant.

9. Even with respect to attestation of the Will as required under Section 63(c) of the Indian Succession Act, the Court having examined the statement of two attesting witnesses examined on behalf of the appellant came to a conclusion that the appellant failed to prove the attestation of Will by two witnesses, which is a mandatory requirement and thus,

observed that the appellant failed to discharge the onus placed upon her even in respect to Issue No.1 and consequently, dismissed the petition.

10. As far as the appellant is concerned, it is argued that Sh. Amarjeet Singh, one of the attesting witnesses, supports the appellant qua the attestation of Will by him and the execution of Will by Sh.Shangara Singh. Sh.P.K.Gupta, the second attesting witness, has proved the attestation of Will by him. Thus, it is contended that the requirement of Section 63(c) of the Indian Succession Act has been proved by the appellant in this case. It is submitted that in the absence of any contrary evidence led on behalf of the objector, the learned ADJ ought to have granted letters of administration of the Will annexed in favour of the appellant. It is submitted that the orders passed by the learned ADJ are not sustainable in law and consequently, the appeal should be allowed.

11. At this stage, it would be appropriate to take note of the statement of Sh.Amarjeet Singh, one of the attesting witnesses, who appeared as PW-2 and has deposed that the younger son Sh.Jasvir Singh (R-2) of Sh.Singhara Singh, had called him for signing a Will and had reached the office of the Sub-Registrar, Asaf Ali Road. **He further deposed that Sh. Singhara Singh was not present there and Sh.Singhara Singh had not executed any Will in his presence.** He also deposed that when he was asked to be a witness to the Will, it was already signed by Sh. Singhara Singh. Even after his recall, this witness has not changed his version.

12. As far as PW-3 Sh. P.K.Gupta is concerned, in his examination in chief, he has deposed that Shri Singhara Singh had came to him at this chamber at Tis hazari Courts, Delhi with Shri Ram Chander and Shri Amarjeet Singh (PW-2) for getting a will executed. He further deposed that Shri Singhara Singh and the witnesses signed the will in his presence and in the presence of each other.

13. However, **in his cross-examination, PW-3, Sh.P.K.Gupta has stated that his statement in examination-in-chief that Shri Singhara Singh and the witnesses signed in his presence, in his chamber is wrong being made under a mistake and stated that Shri Singhara Singh and the witnesses had not signed the Will in his chamber.**

14. There is further contradiction in his statement with regard to the registration of Will as he has stated that the executor and witnesses accompanied him to the Sub-Registrar Office, Asaf Ali Road, Delhi and in his cross-examination, he stated this statement also to be wrong being made under a mistake.

15. Further, in his cross-examination PW-3 has also stated that Sh. Singhara Singh had came at about 11 AM for getting the Will prepared and it took about 45 minutes in drafting the Will and thereafter he got it signed from testator and witnesses. In his cross examination, PW-3 stated that he gave the Will to Shri Singhara Singh for taking it to the Doctor. And further stated that he and Shri Singhara Singh left the chamber simultaneously and he alone went to the office of the Sub-Registrar, Asaf Ali Road, Delhi in a TSR and it took about 20 minutes in reaching that office. In his cross-examination itself PW-3 stated that when he reached Sub-Registrar Office, Shri Singhara Singh was already there.

16. In his cross-examination, PW-3 admitted that a certificate to be issued by the Doctor was got typed by him and stated that when the Doctor signed the Will, there was no signature of Shri Singhara Singh and the witnesses on the Will and that the Doctor had signed the Will first and the witnesses had signed the Will at Sub Registrar Office. Further, he also stated that he is not aware where the Doctor was living and expressed his unawareness that the certifying Doctor practices at Gautam Nagar. The address of the Doctor on the Will Ex.PW-1/3 is of Green Park Extn., New Delhi. The locality Green Park Extn., New Delhi is situated about 20 Kms away from Tis Hazari Courts which take about one hour in reaching and another one hour in coming back from that place to Tis Hazari, Delhi. The office of Sub-Registrar, Asaf Ali Road, Delhi is somewhat nearer to the Tis Hazari Court.

17. The Doctor has not been examined by the appellant. It is surprising that PW-2, who is an advocate and a professional did not even ask the testator about the location of the doctor. This reflects that the certificate from the Doctor has not been obtained on the Will Ex.PW1/3 till its execution but later on.

18. Considering the contradictions in the statements made by PW-2 and PW-3, the learned ADJ has observed:-

“13.A.25. Thus even if the account of the witnesses as to the signature of Shri Singhara Singh on the Will and sound state of mind is accepted, it is not sufficient to prove the valid execution of the Will and the other requirements of a valid execution of the Will have to be proved. Reference with advantage can be had to the decision in Janki Narayan Bhoir Vs. Narayan Nanideo Kadam AIR 2003 Supreme Court 761, wherein it has been laid down that the Will cannot be proved by simply proving the signature on the Will to be that of the testator and it must also be proved that the attestations were also made properly as required by S.63 (c) of the Indian Succession Act.”

19. The Court further observed that:

“13.A.28. As per PW-3, the Will Ex. PW-1/3 was prepared on the day it was registered, though he has not deposed the date, i.e. 03.05.1990. However, the Will Ex. PW-1/3 states its execution to be in April 1990 as is evident from page NO. 3 of the Will, and PW-3 who is a practicing advocate and has drafted the Will Ex. PW-1/3 has not explained as to under what circumstances and at whose instructions the Will Ex. PW-1/3 was prepared in April 1990.”

13.A.27. Considering the evidence of the attesting witness, in view of all the circumstances, even if it is presumed that the Will Ex. PW-1/3 bears the signature of Shri Singhara Singh who signed the same while in sound disposing state of mind, the testimony of PW-2 and PW-3 who are attesting witnesses to the Will, has failed to prove the proper attestations of the Will as required under Section 63(c) of the Indian Succession Act.

13.A.29. In view of the aforesaid it cannot be said that the witnesses signed the Will Ex. PW-1/3 in presence of Shri Singhara Singh and in presence of each other, and as such the Will Ex. PW-1/3 is not a validly and genuinely executed document. And the petitioner is not entitled to the grant of probate/letters of administration in respect of the same.

The issues No.1 and 2 are decided accordingly.

Issue No.4: Relief

14. In view of the findings recorded on issues No.1 and 2, the petitioner is not entitled to any relief and the petition is liable to be dismissed.

Accordingly, the petition is dismissed.”

20. It may also be observed here that even if testimony of PW-3 Sh.P.K.Gupta has to be considered for proving the attestation of Will, in the light of the statement of PW-2 Sh.Amarjeet Singh the testimony of PW-3 Sh.P.K.Gupta loses significance. Thus, the requirement of proving Will under Section 63(c) of the Indian Succession Act is not met in this case and it has been rightly observed by the Addl. District Judge that as held by the Hon'ble Supreme Court in the case of Daulat Ram & Ors. Vs. Sodha

(2005) 1 SCC 40 that Will is required to be attested. It cannot be used as evidence until one of the attesting witnesses has been called for proving its execution. Such requirement is in order to assess:

“As to whether the Will has been validly executed and is a genuine document, the propounder has to show (i) that the Will was signed by the testator and that he had put, his signatures to the testament of his own free will; (ii) that he was at the relevant time in a sound disposing state of mind and understood the nature and effect of the dispositions and (iii) that the testator had signed it in presence of the two witnesses who attested it in his presence and in the presence of each other.”

21. The learned ADJ has dismissed the petition taking all these facts into consideration and the manner and method in which the witnesses deposed regarding the attestation of the Will. I have no hesitation but to accept that in this matter the appellant has failed to prove due execution of the Will and the attestation by two witnesses as is required under Section 63(c) of the Indian Succession Act. As stated above, she also failed to get the petition verified from one of the attesting witnesses to the Will and even failed to cure the defect despite having come to know about it.

22. In these circumstances, there is no merit in the appeal. The appeal is accordingly dismissed with no orders as to costs. TCR, if any, be sent back forthwith along with a copy of this judgment.

CM No. 6092/2008 (stay)

Dismissed as infructuous.

MOOL CHAND GARG, J

DECEMBER 22, 2010

ga/dc