

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

+ **FAO.No.140/2003**

% *Reserved on : 25.01.2011*
Pronounced On:31.01.2011

ASHA RAM Appellant
Through: Mr. J.C. Mahindroo, Adv.

Versus

SHANTI DEVI & ANR. 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? | Yes |
| 2. | To be referred to the reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

: **MOOL CHAND GARG,J.**

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1. Appellant Asha Ram is the son of deceased testator who executed a Will dated 21.10.88 which was also registered. As per the aforesaid Will estate comprising of a double storey house built on a plot area of 80 sq. yds bearing No. 16-1/690-91, Bapa Nagar, Padam Singh Road, Karol Bagh, New Delhi was bequeathed by the deceased testator in favour of Smt. Shanti Devi who was a widow of late Shri Raj to the exclusion of the appellant (his son) and five daughters besides other son. None of the daughters on the other side filed any objection with regard to their exclusion in the aforesaid Will. The execution and attestation of the Will was only challenged by the appellant, namely, Shri Asha Ram.

2. According to the appellant the deceased testator at the time of execution of the Will was lying on bed for last one year prior to his death on 18.04.1989 and as such the alleged Will is a fabricated document obtained by manipulation and fraud.

3. The Addl. District Judge framed following issues:

“(1) Whether the deceased Sh. Shobha Ram had duly and

validly executed will dated 21.10.1988 in sound disposing mind?
(2) Relief”

4. As far as the respondent, Smt. Shanti Devi is concerned, she examined PW1 Lachman Dass and PW3 Smt. Kesar Devi in addition to examining herself as PW2. She also examined Shri Narain Dass as PW4, a clerk from the office of Sub Registrar.

5. On the other hand, the appellant examined two witnesses, namely, himself as OW1 and Surender Singh as OW2 from Ram Manohar Lohia Hospital to prove that deceased testator was admitted in RML Hospital in medical ward on 05.09.1988.

6. While deciding issue No.1 the Addl. District Judge took note of the objections of the objector as also the evidence led on his behalf.

“However, the case of the objector Shri Asha Ram is that the testator was bed ridden for about one year prior to his death and as such he was not in a position to move out of the house and go to the office on the sub Registrar for executing any of the aforesaid documents.

PW2 & PW3 who both are the daughters on the testator have admitted in their cross-examination that the testator was suffering from Asthma before his death and they have further admitted that their father was taking treatment for asthma from Willingdon Hospital. The objector has examined the witness from RML Hospital in order to prove his plea that the testator was not possessed of sound disposing mind at the time he executed the alleged will. DW2 Shri Surender Singh record clerk from RML Hospital has deposed that the testator was admitted in RML Hospital in medical ward on 5.9.1988 but he could neither tell the disease for which the testator was admitted in the hospital at that time nor could he tell the date of discharge of the testator from the hospital at that time. The objector has not brought any such thing on record from which it may be said that the testator was not possessed of sound disposing mind at the time he executed the Will in question and the documents of cancellation of earlier Will on 21.10.1988. OW1 Shri Asha Ram who is objector himself has deposed that his father was half mad and remained confined to bed for six months before his death. It may be noted that the objector has denied the date of death of his father given by the petitioner in her petition while giving reply to para No.1 of the petition but in cross-examination he had no option but to admit the date of death of his father. It appears that the objector is not a trustworthy person. It cannot be said that the testator was not possessed of sound disposing mind

on or around the time he executed the Will Ex.P.2 and cancellation of his earlier Will Ex.P.1 merely because he was suffering from Asthma prior to his death. Furthermore it may be seen that the objector has denied the signatures of the testator on Ex.P.1 and P.2 merely for the sake of denial. The signatures of the testator on both these documents have been identified by PW1, PW2 and PW3 but no suggestion was given from the side of the objector either to PW1 or to PW3 to dispute his signatures on the said documents. Objector OW1 Shri Asha Ram has denied the signatures of the testator on both the aforesaid documents. The signatures of the testator on both the aforesaid documents Ex.P.1 and P.2 are in urdu language but the objector has admitted in his cross-examination that he does not know urdu language and has denied the signatures of his father on Ex.P.1 and P.2 because the alleged signatures on these documents do not tally with the signatures in his possession. The witness OW1 Shri Asha Ram was directed by the Court to produce all the documents in his possession bearing the signatures of his father in Urdu language and he was directed to do that on 7.4.1997 before the next date of hearing which was fixed for 28.4.1997. However, the objector has not produced any such document till date which now give rise to a presumption against him that he had denied the signatures of the testator on documents Ex.P.1 and P.2 merely for the sake of denial. Though the objector has taken a plea of forgery in his objection but he has not produced any evidence worth the name to prove his said plea.”

7. An unprivileged Will is required to be executed as per the provisions contained under Section 63 of the Indian Succession Act, which reads 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 acknowledgement 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.

8. To prove the attestation of the Will by the two witnesses, the document is to be proved in accordance with Section 68 of the Indian Evidence Act which reads as under:

“68. 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 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 specifically denied.]

9. In the present case, the objector i.e. the appellant herein has taken objections to the execution as well as the attestation of the Will. He has also claimed that the signatures of Late Sh. Shobha Ram, his father on the Will dated 21.10.1988 Exhibit P-2 does not bear the signatures of his father. Even though he has not cared to either examine any handwriting expert or to produce on record any admitted signature of his father whereas his sister, namely, Shanti Devi, who is the propounder of the Will and Smt. Kesar Devi, his another sister has proved the signatures of the deceased testator on the Will in question.

10. The proof of execution and attestation of the Will by two witnesses stands proved by the respondent in terms of the deposition made by PW-1, Sh. Lachman Dass, PW-2, Smt. Shanti Devi and PW-3, Smt. Kesar Devi. Out of them, PW-1 and PW-3 are the two attesting witnesses of the Will Ex.P-2. They also proved the thumb impression of the deceased testator even on Will Ex.P-1. In his examination-in-chief, PW-1 has deposed as under:

“When the deceased Sobha Ram had executed the Will on

21.10.1988, he was enjoying sound health and was of sound disposing mind. I have signed that will and my signatures are at point B on Ex.P2. The signatures of Sobha Ram are at point A. I have seen cancellation of Will Ex.P1. My signatures appear at point C on Ex.P1. Signatures of Shobha Ram are at point A on Ex.P1.”

11. No doubt, there is some contradiction about the date of death of Sh. Shobha Ram in the cross-examination of PW-1 but that alone considering an illiterate person will make no difference in the light of the testimony of PW-2, Smt. Shanti Devi, daughter of deceased Shobha Ram who has propounded the Will Ex. PW-2 and has also very categorically stated about its execution by his father and attestation by two witnesses, namely, PW-1 and PW-3, who appeared in the witness box and supported the case of Smt. Shanti Devi. She also deposed about the Will having been thumb marked by the deceased testator and signed by Lachman Dass, PW-1. The testimony of PW-3, which is relevant is also reproduced hereunder for the sake of reference:-

“Smt. Kesar Devi w/o Chure Lal, aged 50/60 years, Labourer r/o D-Block, Nangloi, Delhi.

On SA

The deceased Sobha Ram was my father. He had expired on 18th of a month after Holi festival. He expired about 6 years ago. My father had executed a Will in favour of Parveen kumar and Shanti Devi. Later, my father had got the name of Parveen cancelled and executed the Will in favour of Shanti only. I had signed the Will as attesting witness. Again said, I had thumb marked that Will, but Laxman Dass had signed the same. I had thumb marked that Will Ex.P1 at point B. It is cancellation of Will. Ex.P2 does not bear my thumb impression. My deceased father had brought me to old court where my impression was taken. My father had signed the Will Ex.P1. I am totally illiterate. My father was absolutely of sound mind and of good health at the time he executed the Will. He had not executed this will under any pressure. He executed the Will of his own free will. I am one of the objectors in this case, but I am not making any claim in the property.”

12. At this stage, it would also be relevant to take note of the cross-examination of these two witnesses. As far as PW-1 is concerned, he has denied the suggestion that on 21.01.2008, the deceased Shobha Ram was admitted in the hospital. He has also denied the suggestion

that he had not gone to the office of the sub-Registrar along with Shobha Ram. He has reiterated that the Will was propounded on 21.10.1988 and that he and Shobha Ram had gone to the office of the Sub-Registrar. He has proved his signatures on the aforesaid Will at point 'B' while signatures of Shobha Ram have been proved at point 'A'. He has also proved the examination of the earlier Will Ex.P-1. Similarly, Smt. Kesar Devi, the second attesting witness has also stood by her examination-in-chief. In fact, in her cross-examination she has reiterated her testimony while appearing in examination-in-chief. She also very categorically stated that her father was not sick before the execution of the Will. Even though, she admitted that he was getting treatment as an Asthama patient from Willingdon Hospital for which disease he was suffering for about six months before his death. As regards his admission in Ram Manohar Lohia hospital, she stated that he remained in hospital for about 12-14 days but also denied the suggestion that the deceased testator was not in his senses one year before his death. Specific suggestion given by Asha Ram to Kesar Devi and Shanti Devi that the Will in question was a fabricated document have also been specifically denied by her.

13. In the light of the depositions of these two witnesses as regards the statement of PW-2, Smt. Shanti Devi, who also proved the signatures of her father as well as that of Kesar Devi on the Will Ex.P-2, I find that as far as Asha Ram is concerned, even though he has stated that signatures at point 'A' on Will Ex.P-2 are not that of his father and that signatures at point 'A' on the cancellation document Ex.P-1 are also not of his father, he has not placed on record any document to show that the thumb impression of his father on the document Ex.P-2 was not a genuine impression, despite opportunities having been granted to him to produce such record which he claims to be having in his possession in terms of the order dated 07.04.1997. It is a matter of record that once the opportunity granted to the appellant to produce the documents which may enable the court to compare the signatures/thumb impression of his father with his admitted signatures/thumb impression, was closed, the appellant also moved an application before the learned ADJ under Order XIII Rule 2 read with

Section 151 CPC for review of the said order but the said application was also dismissed by the ADJ vide order dated 09.09.2000. The appellant, thereafter, filed a Civil Revision but he withdrew the said revision on 13.11.2002, though he was allowed to file an appeal against judgment and decree granting probate in his case. As stated above he has filed this appeal and along with the appeal he also filed an application under Order XLI Rule 27 read with Section 151 CPC for permission to lead additional evidence. As observed earlier, the said application was dismissed by the learned predecessor of this Court with costs. SLP against imposition of costs also stands dismissed.

14. In these circumstances, when the execution of the Will has been proved by the three witnesses and its attestation by two witnesses stand proved by PW-3, the requirement of law with regard to execution of the Will in question that also with a sound and disposing mind in the light of the deposition made in this regard by all the three witnesses and then attestation of the Will by at least two witnesses in terms of the requirement of Section 63(c) of the Indian Succession Act stands proved by the propounder of the Will Ex.P-2. Since Ex. P-1, the previous Will has been cancelled, Ex.P-2 was the last and final Will of the deceased. No doubt evidence has been led by the appellant regarding the deceased testator having taken treatment in Ram Manohar Lohia Hospital and having remained admitted there as an in-house patient but in the absence of any other evidence for which period he remained in-house patient in the said hospital and without any evidence regarding the nature of illness, the allegations of the appellant falls to the ground.

15. The learned ADJ has considered the entire evidence which has come on record including the objections taken by the appellant, I find no infirmity in the approach of the learned ADJ, and consequently, the appeal is dismissed.

16. LCR be sent back.

MOOL CHAND GARG,J

JANUARY 31, 2011

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