

* **HIGH COURT OF DELHI : NEW DELHI**

Judgment reserved on: February 24, 2011
Judgment pronounced on: March 18, 2011

+ **TEST CASE NO. 35/2003**

% Ms. Anita Bishnu ... Petitioner
Through: Mr. Rajshekhar Rao and
Ms. Swathi Sukumar, Advocates

versus

State Govt. of NCT of Delhi & Others ... Respondents
Through: Mr. A.K. Sen, Advocate for
Respondent No. 2.
Mr. Rama Shanker, Advocate for
Respondent No. 5 and 6

AND

+ **C.S. (OS) No. 449/2011**

% Mr. Deepak Kumar Vishnu ... Plaintiff
Through: Mr. A.K. Sen, Advocate for Plaintiff.

versus

Ashok Kumar Bishnu & ors. ... Defendants
Through: Mr. Rama Shanker, Advocate for
Defendant No. 1
Mr. Rajshekhar Rao and Ms. Swathi
Sukumar, Advocates for Defendant
No. 5.

CORAM:

HON'BLE MR. JUSTICE SUNIL GAUR

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

SUNIL GAUR, J.

1. Subject matter of the suit for partition instituted by Plaintiff - Deepak Kumar as well as the Probate case filed by Petitioner - Ms. Anita is common i.e. residential property No. B-249, EPDP Colony, Chitranjan Park, New Delhi (hereinafter referred to as the 'suit property'). They are the legal heirs of late Sh. G.C. Bishnu. Plaintiff - Deepak Kumar is claiming partition of the suit property on the basis of natural succession while asserting that he has 1/6th share in it, whereas Petitioner - Ms. Anita relies upon a Will of 14th August, 1972, vide which the suit property was bequeathed to her and has thus sought probate on the basis of the aforesaid Will. The remaining two legal heirs - Ashok Kumar and Kalyani, are with Petitioner - Ms. Anita and the other two legal heirs i.e. Ms. Manisha and Ms. Sona have joined their brother Deepak Kumar to claim their respective shares in the suit property.

2. It is a matter of record that the probate case was filed in this Court and, the suit for partition was instituted in the District Courts and was thereafter transferred vide order of 25th January, 2005 to this Court for common trial with this Test case. However, vide order of 9th September, 2005, it was made clear that the suit for partition would be the lead case. For facility of reference, the parties to the suit proceedings are being referred to by their names instead of being referred to as Defendant no: or Respondent no:.

3. Deepak Kumar in his suit for partition claims to be co-owner of the suit property with the five defendants who are his brothers and sisters,

having 1/6th share each therein. It is also asserted by him that on several occasions he had sought partition of the suit property and when on 27th June, 2003, he had gone to the suit property to have a dialogue with Defendants - Ashok Kumar, Kalyani and Anita regarding partitioning of the suit property, and a scene was created there by the aforesaid defendants and not only there was a refusal by aforesaid Defendants to the partition of the suit property but also a false complaint was registered against the plaintiff- Deepak Kumar and hence, this suit.

4. In the written statement, the contesting Defendants, i.e., Ashok Kumar, Kalyani and Anita have denied the averments made in the plaint and have set up a Will of 14th August, 1972 of their father late Sh. G.C. Bishnu and it is asserted that plaintiff- Deepak Kumar was living with the family during the life time of his father and was very much aware of the aforesaid Will and for this very reason, during the life time of their mother, he had not dared to seek partition of the suit property and even after many years of death of their mother, plaintiff-Deepak Kumar has come up with this suit for partition as a counter to the petition for probate filed by Ms. Anita, defendant herein. According to these defendants, the suit property goes to defendant- Ms. Anita, as per the Will in question.

5. Defendants - Ms. Manisha and Ms. Sona, who are the married sisters of plaintiff- Deepak Kumar, in their written statement have given 'no objection' to the partition of the suit property, while claiming their share in it. In the replication filed, the averments of the plaint have been reiterated by plaintiff- Mr. Deepak Kumar.

6. In the petition for probate, petitioner- Ms. Anita seeks letter of

administration in respect of the Will of 14th August, 1972 of their father late Sh. G.C. Bishnu who had died on 16th July, 1974 and has placed on record the copy of the Lease Deed of the suit property in favour of her father and the particulars of his legal heirs, who are party to this petition. It is also asserted by Petitioner – Anita that the suit property was purchased and built up from the office home loan taken by her father and after the death of her father, the house loan was repaid from the family pension received by her mother. Thus, it is asserted that the suit property is purely self acquired property of late Sh. G.C. Bishnu, who had after considering the existing family circumstances made the Will in question while he was in sound disposing mind and had signed the said Will in the presence of her mother and brother – Ashok Kumar. Petitioner- Anita further asserts that the factum of this Will was known to plaintiff- Deepak, who was in service but was in no way of any help to the family. As per petitioner- Anita, she and her brother- Ashok, had dedicated themselves to look after their mentally retarded sister- Kalyani and had also looked after their ailing mother who had died on 18th April, 1995, and thereafter, according to Petitioner - Anita, her brother –Deepak used to give threats of dire consequences if the Will in question is not handed over to him or is not destroyed in his presence and on 27th June, 2003, her brother- Deepak with his son came to the suit property and had assaulted her when she had refused to hand over the Will in question and regarding this incident, a criminal case was registered. Probate of the Will in question is sought in respect of the suit property which is the only dwelling house of petitioner- Anita, her brother – Ashok Kumar and their mentally retarded sister- Kalyani.

7. The resistance to this petition for probate by Respondent - Deepak

Kumar is on the ground that the purported Will relied upon is forged and fabricated and that the suit for partition in respect of the suit property is pending where Will in question would be an issue. Order of 9th September, 2005 in Test Case No. 35 of 2003 makes it clear that the Issues framed in the suit for partition would also cover the findings required to be returned in the probate petition as well.. The Issues on which the parties went to trial are as under:-

- (i) Whether the Plaintiff has locus standi to file the present suit? OPD-1
- (ii) Whether the suit is barred by law of Limitation? OPD-1
- (iii) Whether the Will has been executed by Shri G.C. Vishnu (deceased) in favour of Defendant No.5? OPD
- (iv) Whether the Plaintiff is entitled to the relief of partition as claimed? OPP
- (v) Relief.

8. The evidence led is of Ms. Anita (PW-1), her brother Ashok Kumar (PW-2), Devinder Rajan (PW-3) - concerned Assistant from the Central Board of Secondary Education, Govt. of NCT of Delhi, Anil Kumar (PW-4)- UDC from the Department of Transport, Govt. of NCT of Delhi, N.S. Katana (PW-5)- Head Clerk from Govt. of NCT of Delhi and that of Deepak Kumar (RW-1) and her sister Manisha (RW-2).

9. Since there was a common trial in the suit for partition and the probate petition, therefore, the arguments advanced by both sides were common and necessarily both these matters were heard together and are

being disposed of together by this common order. Learned Counsel for the parties had meticulously referred to the aforesaid evidence on record and during the course of hearing, had relied upon decisions reported in *Mt. Gomitibai v. Kanchhedilal and others*, AIR (36) 1949 Privy Council 272; *Krishna Kumar Birla vs. Rajendra Singh Lodha and Others*, (2008) 4 SCC 300; *Pargat Singh vs. Aas Kaur (died) through her L.R. Lakha Singh*, 1997 (3) RCR Civil 193 (P&H); *Pratap Singh & Anr. Vs. State*, 157 (2009) DLT 731; *Smt. Indu Bala Bose and others vs. Munindra Chandra Bose & Anr.*, AIR 1982 SC 133; *Vrindavanibai Sambhaji Mane vs. Ramchandra Vithal Ganeshkar and others*, AIR 1995 SC 2086; and *H.Venkatachala Iyengar vs. B.N. Thimmajamma and others*, AIR 1959 SC 443.

10. The submissions advanced and the decisions cited have been duly considered and the evidence on record has been scrutinized and thereafter, the findings returned on the Issues framed are herein as under:-

Issue No. (ii)

11. About thirty years, after the death of Shri G.C. Bishnu, this suit for partition has been filed, which is said to be hopelessly barred by time, as Defendants - Ashok Kumar, Kalyani and Anita assert that immediately after the death of Shri G.C. Bishnu on 16th July, 1974, the demand for partition of the suit property was made by the Plaintiff – Deepak Kumar, which was rejected by the aforesaid three Defendants and their mother on the strength of the Will in question and on 27th June, 2003, Plaintiff – Deepak Kumar with his sons had visited the suit premises to take over/destroy the Will in question but in vain and had furiously assaulted Petitioner - Ms. Anita, to whom the suit property is bequeathed by the Will in question.

Whereas, according to Plaintiff – Deepak Kumar, on 27th June, 2003, he had visited the suit property to seek partition thereof and a scene was created by the contesting Defendants and a police complaint was lodged against the Plaintiff – Deepak Kumar.

12. The law of limitation governing suit for partition of immovable property stands reiterated in **Nanak Chand and Ors. Vs. Chander Kishore and Ors.**, AIR 1982 Delhi 520, in the following words:-

“The crucial question in such cases is when a right to sue accrues, there can be no right to sue until there is an accrual of the right asserted in the suit and its infringement or, at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted : Mst. Bolo v. Mt. Koklen and others,. AIR 1930 PC 270 Where there are successive invasions or denials of a right, the right to sue under Article 120 (Article 113) accrues when the defendant has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Every threat by a party to such right, however, ineffective or innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether the threat effectively invades or jeopardizes the said right: Mst Rukna Bai v. Lala Laxminarayan, (1960) 2 SCR 253.”

13. In the instant case, Plaintiff – Deepak Kumar pleads ignorance about the Will in question, which according to him is forged and fabricated. The evidence of the Plaintiff – Deepak Kumar, of his seeking partition of the suit property and of the contesting Defendants postponing it on one pretext

or the other and of his lastly seeking it on 27th June, 2003 and a scene being created and refusal by the contesting Defendants to the proposed partition, remains unchallenged in his cross-examination. Therefore, it has to be taken that effective refusal of the contesting Defendants to the assertion of the Plaintiff – Deepak Kumar to seek partition of the suit property was on 27th June, 2003, thereby giving him cause of action to file the suit for partition, which was in fact filed on 19th November, 2003. Since the contesting Defendants have failed to lead cogent evidence that there was specific denial of the right of the Plaintiff – Deepak Kumar to seek partition of the suit premises, prior to 27th June, 2003, therefore, they have failed to establish that the right to seek the partition of the suit property has been lost on account of lapse of time. Resultantly, it is held that this suit for partition is not barred by time. This Issue is answered accordingly.

Issue No. (i), (iii) & (iv)

14. Validity of the Will of 14th August, 1972 by late Shri G.C. Bishnu in favour of Defendant/Petitioner - Ms. Anita, is the crucial question, which would determine the fate of these three Issues. But first, status of the suit property requires determination, i.e., whether it was self-acquired or ancestral qua the parties to these proceedings. Except a vain attempt by Plaintiff – Deepak Kumar to orally assert that loan against suit property was repaid from pension of the Testator or he had also contributed towards the said repayment, there is no worthwhile evidence on record to establish the ancestral nature of the suit property. It is not even the case of Plaintiff – Deepak Kumar that suit property was HUF property. Rather, the evidence led clearly proves that the suit property was allotted to Late Shri

G.C. Bishnu and he had built it with the office home loan, which was repaid from his pension, but Plaintiff – Deepak Kumar fails to prove that he had in any way contributed towards its repayment. Thus, it stands amply proved that the suit property was the self-acquired property of the Testator – Late Shri G.C. Bishnu.

15. What is the true legal position in the matter of proof of Wills, is well established and it stands reiterated by the Apex Court in **Bharpur Singh and Ors. vs. Shamsheer Singh** (2009) 3 SCC 687 and the suspicious circumstances, which are likely to surround the execution of a Will, highlighted are as under:-

- (i) *The signature of the testator may be very shaky and doubtful or not appear to be his usual signature.*
- (ii) *The condition of the testator's mind may be very feeble and debilitated at the relevant time.*
- (iii) *The disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or absence of adequate provisions for the natural heirs without any reason.*
- (iv) *The dispositions may not appear to be the result of the testator's free will and mind.*
- (v) *The propounder takes a prominent part in the execution of the Will.*
- (vi) *The testator used to sign blank papers.*
- (vii) *The Will did not see the light of the day for long.*
- (viii) *Incorrect recitals of essential facts. 18. The circumstances narrated hereinbefore are not exhaustive. Subject to offer of reasonable*

explanation, existence thereof must be taken into consideration for the purpose of arriving at a finding as to whether the execution of the Will had duly been proved or not.

16. Undoubtedly, it is an established rule of law that the propounder of the Will has to prove its due execution, as provided under Section 63 of the Indian Succession Act, 1925. The Will of 14th August, 1972 (Ex.PW-1/2) is witnessed by the mother of the parties as well as by one of their brothers, i.e., Mr. Ashok Kumar, PW-2. The mother of the parties had left this world in the year 1995 and the surviving witness to this Will is Mr. Ashok Kumar (PW-2), who in his deposition has categorically stated that the Testator had signed on both the pages of the Will in his presence and he and his mother had also signed the said Will and he has identified the signatures of the Testator as well as his signatures and that of his mother on the Will in question. It has come in the evidence of this witness that the suit property is a self acquired property of the Testator who was in complete control of his mental and physical faculties at the time of the execution of this Will.

17. In the cross-examination of this witness (PW-2), a vain attempt was made to show that since the Testator was suffering from cancer of urinary bladder, therefore, he was not keeping good health. Simply because, rest was advised for fifteen days to the Testator vide medical certificate (Ex. RW-1/P2), it cannot be inferred that the Testator was not physically and mentally fit to execute the Will in question. In fact, it has come in the cross-examination of this witness that Testator used to remain mentally and physically fit even at the time of undergoing the therapy/treatment. Infact, nothing turns on the fact that the Testator was not following the advice of

the doctor because the Plaintiff – Deepak Kumar, himself had admitted in his evidence that his father, i.e., the Testator was an officer and remained a prudent man till his death. Thus, there remains no manner of doubt that the Testator had the requisite mental faculties to execute the Will in question. Even Manisha (RW-2), sister of the parties, who is supporting Plaintiff – Deepak Kumar has admitted in her evidence that though her father Shri G.C. Bishnu, i.e., Testator had died of cancer, but before his death, he was having good health.

18. During the course of hearing, attention of this Court was drawn to the cross-examination of the *Attesting Witness* Ashok Kumar (PW-2) to show that his duty timings were from 10 AM to 5 PM and so, he could not have been present at the time of alleged signing of the Will (Ex.PW-1/2) as a witness at 4 or 4.30 PM. To disbelieve the presence of this *Attesting Witness* Ashok Kumar (PW-2) at 4 or 4.30 PM at the house, when the Will in question was signed, it was required to specifically cross-examine this witness as to how he was present at 4 O'clock at the house, when his duty timings were up to 5 PM. Had there been any cross-examination of this witness to this effect, then only, this witness could have thrown some light on this aspect. Therefore, this conjectural submission cannot be accepted on the face of it, for the reason that there is not even a suggestion to this *Attesting Witness* –PW-2, of his not being present at the time of execution of the Will, because of his being present on duty.

19. In any case, the stand of the Plaintiff – Deepak Kumar is that the Will in question is forged and fabricated. To assert so, learned counsel for the Plaintiff – Deepak Kumar had drawn attention of this Court to the Will of

14th August, 1972 (Ex.PW-1/2) to show that the Testator has not signed at the place, where he ought to have signed. Upon perusal of the Will of 14th August, 1972 (Ex.PW-1/2), I find that though there is some space between the place where 'EXECUTANT' is typed and the place where the name and address of the Testator is typed, and the Testator has signed above the word 'EXECUTANT' but this by itself would not probabalise the plea of Plaintiff – Deepak Kumar of the Testator signing the blank document and thereafter, the Will in question is being typed thereon, because, on the first page of the Will of 14th August, 1972 (Ex.PW-1/2), the Testator had signed on the left margin, as there was no space to sign at the bottom of the first page of this Will. Even if it is assumed that the Testator had signed on blank pages, then his signatures would have appeared at the bottom of the first page. But it is not so. He has signed on the left margin of the first page of the Will. Therefore, on this account, the Will in question is not rendered doubtful.

20. Since the Will in question bequeaths the suit property to Petitioner – Ms. Anita, therefore, by any stretch of imagination, it cannot be said that the beneficiary of the Will in question is the Attesting Witness – Ashok Kumar (PW-2). It was asserted by learned counsel for the Plaintiff – Deepak Kumar that the *Attesting Witness* (PW-2) was minor at the time of execution of the Will as he was aged 17 years then. Though, there was some ambiguity on this aspect as this witness (PW-2) in his evidence by way of Affidavit had given his present age as 52 years, from which it could be inferred that he was less than 18 years when this Will was executed but this aspect stands clarified from the evidence of Official Witness (PW-5) who has produced the official record (Ex.PW-5/1) running into six pages,

comprising of the application for inclusion of the name in the electoral roll with copy of the Higher Secondary Examination Certificate and Ration Card, to conclusively show that the date of birth of this Witness Mr. Ashok Kumar (PW-2) was 2nd April, 1953, which clearly proves that on the day of execution of the Will in question, he was more than 19 years of age.

21. Simply because, this *Attesting Witness* –PW2 has candidly stated in his evidence that the Testator had got the Will in question already typed and he does not know from where he got typed, his deposition cannot be disbelieved, for the reason that nothing worthwhile has been brought out in his cross-examination to cast any doubt about the due execution of the Will in question. Merely because the Will in question was not registered, its evidentiary value does not get diminished. Since this Will was executed in Delhi, therefore, it was not required under the law to get it probated and the Plaintiff – Deepak Kumar or his sisters - Ms. Manisha and Ms. Sona, cannot plead ignorance about the existence of this Will because the Testator had diligently made it clear in the Will itself that he had conveyed about the Will to all his family members and that this was his last Will. Candidly, the Testator had disclosed in the Will (Ex.PW-1/2) that he is suffering from cancer or urinary bladder and the chances of his recovery are negligible, but, he is absolutely of sound mind and he has bequeathed the suit property very carefully to his daughter Ms. Anita, so that there may not be any dispute in future, because he was very much worried about the future of his daughter Anita and Kalyani, who was mentally retarded, while making Petitioner – Anita responsible for looking after his mentally retarded daughter Kalyani and the Testator had expressed in so many words his hope that Petitioner – Anita would not disappoint his soul after

his death.

22. Oral assertions by Plaintiff – Deepak Kumar and his sister Manisha (RW-2) of their being blissfully unaware of the Will in question or of non production of the Will in question during the life time of their mother, does not cut any ice, for the reason, it is the consistent stand of Petitioner – Anita and the *Attesting Witness* (PW-2) that all the family members were aware of the Will in question, as its execution was not kept secret and it was disclosed to all the family members at the time of its execution. This stand is fortified from the contents of the Will in question as it is specifically recorded therein that the Testator had conveyed about this Will to all his family members.

23. The reasons to exclude his five legal heirs from succeeding to the suit property have been succinctly spelt out by the Testator in the Will in question. The reason to exclude Plaintiff – Deepak Kumar is clearly stated in the Will in question as the Testator had found Plaintiff – Deepak Kumar to be rude, disobedient and wayward and has no help to him. Since the Testator had legitimately expected that his son Ashok Kumar can on his own establish himself in life, therefore, he had reposed confidence in him and has made him an *Attesting Witness* to this Will, as Manisha daughter of the Testator was married and well settled in her life in Calcutta, so she was excluded and the reason to exclude his another daughter Sona was that she was in Government Service and he was not worried about her. The subsequent events speak themselves. It is not even the case of the Plaintiff – Deepak Kumar that his mentally retarded sister Kalyani is not being looked after by Petitioner – Anita, who had not married and is diligently taking care of her sister Kalyani, who is not only mentally

retarded but is totally dependent upon Petitioner –Anita as well as on her brother Ashok Kumar, who has also not married. The Testator in his wisdom has reposed immense confidence in Petitioner – Anita to which, she has lived upto and therefore, rightly so, he had rightly bequeathed the suit property to her. Thus from any angle, it cannot be said that the bequeathing of the suit property by the Testator to Petitioner – Anita was unnatural, improbable, unjust or unfair. Infact, the Testator had wisely bequeathed the suit property to Petitioner – Anita.

24. After analytical analysis of the entire evidence on record, I, unhesitatingly conclude that there are no suspicious circumstances surrounding the Will of 14th August, 1972 (Ex.PW-1/2) and so, reliance placed upon decisions in *Pargat Singh vs. Aas Kaur (died) through her L.R. Lakha Singh*, 1997 (3) RCR Civil 193 (P&H); *Pratap Singh & Anr. Vs. State*, 157 (2009) DLT 731; *Smt. Indu Bala Bose and others vs. Munindra Chandra Bose & Anr.*, AIR 1982 SC 133; *Vrindavanibai Sambhaji Mane vs. Ramchandra Vithal Ganeshkar and others*, AIR 1995 SC 2086; and *H.Venkatachala Iyengar vs. B.N. Thimmajamma and others*, AIR 1959 SC 443, by learned counsel for the Plaintiff – Deepak Kumar is of no avail. In the light of the evidence on record, it is held that the Will of 14th August, 1972 (Ex.PW-1/2) had been validly executed in favour of Petitioner – Anita, who is entitled to letter of administration in respect of the Will of 14th August, 1972 (Ex.PW-1/2). Consequentially, it is held that Plaintiff – Deepak Kumar loses the locus and is not entitled to the relief of partition, as claimed by him. Findings on Issues (i) & (iv) are returned against Plaintiff – Deepak Kumar and the suit being C.S. (OS) No. 449/2011 is accordingly dismissed, whereas the petition for probate being Test Case

No.35/2003 is allowed. These three Issues are answered accordingly.

Issue No.(v)

25. Consequent upon the findings returned as aforesaid, the suit for partition is dismissed and the petition for grant of probate is allowed while leaving the parties to bear their own costs.

26. This suit and the petition are accordingly disposed of.

Sunil Gaur, J.

March 18, 2011
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