

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

+ **FAO No. 89/2007**

% *Reserved On: 28.03.2011*
Decided On: 08.04.2011

DEVI SHANKAR SHARMA Appellant
Through: Mr. M.P. Sharma, Adv.

Versus

STATE & ORS. Respondents
Through: Ms. Ruchi Sindhwani, Ms. Megha
Bharara, Advs.

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

1. Whether reporters of Local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether the judgment should be reported in the Digest?

: **MOOL CHAND GARG,J.**

CM No. 5714/2011

1. This order shall dispose of an application filed by the appellant under order 41 Rule 27 CPC seeking direction to second page of the Will dated 14.06.1988 for examination by CFSL. It is the case of the appellant that the second page of the Will which is a registered document contains signatures of someone which are different from the signatures of the deceased testator which are available on page No. 1 & 3 and this paper appears to have been fabricated. No such plea has been taken by making any specific allegation with regard to the change of page No.2 because the written statement no such plea has been put forward in the cross-examination of the witnesses who have appeared on behalf of the appellant. No application was filed by the appellant before the lower Court for leading any such evidence with regard to difference of signatures on page 2 of the Will as alleged before this Court. The appellant has also not taken a specific ground in the grounds of appeal on this aspect.

2. The provisions contained under order 41 Rule 27 CPC reads as under:

“27.Production of additional evidence in Appellate

Court.-(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if-

(a)the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b)the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2)whenever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.”

3. In the facts of the case none of the paragraphs of the provision as referred to above helps the case of the appellant to refer the second page for examination of CFSL. The attempt of the appellant in seeking comparison of the signatures at the second page with signatures on other pages are primarily to delay the matter.

4. The appellant has relied upon the judgment delivered in the case of Ahmad Reshi Vs. State & Ors. AIR 2008 JAMMU AND KASHMIR 5, wherein it has been observed:

“Needless to say that no amount of oral evidence from here or there would establish the genuineness or fallacy of petitioners allegation that he did not put the thumb impression. As a matter of fact proposed examination by FSL expert is the only reliable mode of getting substantial evidence on that aspect, which as such would have to be the first thing to be done in the matter. Viewed thus learned trial Judge’s refusal to have the same done does not appear to be proper, not only because by doing so he has rendered it impossible to have authority evidence on the issue pending before him but also because in absence of such evidence the litigation between the parties is bound to become an unending chain during course whereof certainly at some stage the Forensic examination of challenged thumb impression would have to be done. That petitioner did not

ask for it while his evidence was being recorded appears to be a hyper technical view directly defeating substance of the issue without helping either the proceedings or any of the parties. Still then the scope of asking for it appears to be available to petitioner during exercise of his right to lead evidence in rebuttal to that of respondents on issues onus whereof is on them and as such the door to have the Forensic examination of thumb impression does not appear to be finally closed upon the petitioner.”

5. However, when the foundation is not there merely because it would help the Court to consider the case of the appellant regarding difference of signatures as alleged, that also in a case where the appellant has not complied with the directions of this Court for a period of more than three years regarding deposit of cost does not call for any interference. The application, therefore, deserves dismissal and the same is hereby dismissed for that reason.

FAO No. 89/2007

1. The appellant herein is aggrieved by the order dated 28.11.2006 whereby the Learned Additional District after considering the entire facts and circumstances and the evidences led by the respondents, dismissed the objections filed by the appellant and granted probate of the Will dated 14.06.1988 in favour of the respondents. Thus, the appellant has impugned the order before us in the present appeal.

2. Briefly stating facts of the case are: that the Testator was the owner of house No 2803/20, Beadenpura, Karol Bagh, New Delhi. He has four sons and five daughters. In his sound and disposing mind, he executed a Will on 14.06.1988 in the presence of two attesting witnesses namely Jai Kumar and Puran Chand Jain. The Will was prepared by Sh, Sham Babu, advocate. Thereafter the testator died on 15.02.1994. His wife pre-deceased him on 14.11.1993. After his death, the respondents filed probate for the grant of Will in their favour. Only Devi Shankar Sharma, the appellant herein contested the petition.

3. The first objection raised by the appellant before the Trial Court was that the property in question was a lease hold property and the lease expired long ago before filing of the probate petition , hence the testator was not competent to execute a Will in respect to the property in question. The appellant further objected the grant of probate on the

ground that the testator after his retirement from MCD was seriously ill since 1980 and was not in sound and disposing mind so as to differentiate good from bad. Besides this, the testator was also suffering from chronic heart disease and in June 1985 had suffered a serious heart attack after which he was completely bed-ridden. The appellant also objected by submitting that during the lifetime of the testator, the respondents had alleged that a Will dated 08.08.1995 was executed by the deceased in their favour but when they were confronted by the testator they kept mum.

4. The appellant also submitted that even when directions were issued by the court to produce the Will dated 08.08.1995, the respondents did not comply. It is the allegation of the appellant that the respondents have forged the Will dated 14.06.1988 to grab the property.

5. On the pleadings of the parties, the Ld. ADJ framed the following issues.

“Whether the Will dated 14.06.1988 propounded by the petitioners is the last testament and the Will of deceased Gopi NATH Sharma and it was executed by him in sound and disposing mind and it is a valid Will?

Relief”

6. The respondents examined four witnesses to prove their case, however from the appellant side appellant alone entered in the witness box and made a statement but did not produce any witness on his behalf including any handwriting expert.

7. Thus, it was observed that the Will was executed on 14.06.1988 in the presence of two attesting witnesses namely Jai Kumar and Puran Chand Jain and was duly registered in the office of Sub-Registrar which got proved from the statement of PW-1 Sh. Bhagwan Saha, LDC from the office of Sub-Registrar, Asaf Ali Road, New Delhi who deposed about the registration of the Will witnessed by Jai Kumar Jain and Sham Babu Gupta, advocate.

8. Further the attesting witness PW-2 Puran chand deposed that he knew the testator and that the Will was drafted by one Sham Babu

Gupta, advocate. He also stated that the said Will was executed in his presence and in the presence of Jai Prakash PW-3, the second attesting witness. Further he also identified his signature at point A on the Will and that of Gopi Nath Sharma at point B and that of Jai Prakash at point C. He also identified the thumb impression of Gopi Nath Sharma at point D. Thereafter, he admitted that he went to the office of Sub-Registrar, Asaf Ali Road for the registration of the said Will. The Will is Ex. PW2/1.

9. The witness specially deposed that the Will was not executed in favour of appellant and that the testator was of sound and disposing mind at the time of the execution of the Will though he was eighty years old. Further in his cross-examination, the witness deposed that he knew the family of the testator for about four years and he also deposed that apart from the testator, the attesting witness PW-3 and the scribe of the Will Sham Babu Gupta, Advocate had gone to the office of the Sub-Registrar for the purpose of registration of the Will. He also stated that the testator died in 1994 and the Will was written at 20, Beadonpura, Karol Bagh which was read over to them and was executed in their presence at 20, Beadonpura, Karol Bagh which was probably the office of the advocate. It was also stated by him that the testator thumb marked the Will on the first as well as on the second page and requested PW-2, the attesting witness to accompany him for the purpose of execution of the Will.

10. The said attesting witness PW-2 further stated that PW-3 Jai Kumar was already sitting there when he reached there and first of all it was Jai Kumar who put his signature and after Jai Kumar, he signed the Will and both of them had signed after the testator had put his thumb impression and signature. PW-2 denied the suggestion that eye sight of the testator was weak and that the Will was forged by the respondents in collusion with attesting witnesses.

11. To the same effect was the statement of PW.3, Jai Kumar. Though he was cross examined extensively on behalf of appellant but nothing fruitful could be elicited from him during his cross-examination which could falsify his statement. As per the requirement

of Section 63 (c) of The Indian Succession Act and Section 68 of Indian Evidence Act, the attesting witnesses must state that each of the two witnesses had seen the executor sign or affix his mark to the instrument or has seen some other persons sign the instrument in the presence and by the direction of the executants. Further the witness should state that each of the two attesting witnesses signed the instrument in the presence of the executants. Hence in the present case respondents had complied with the requirements of Section 63(c) of Indian Succession Act and Section 68 of Indian Evidence Act.

12. The Id. ADJ on perusal of the original will observed that the Will was written in Hindi and thumb marked by the testator as well as signed by him in Hindi at both the pages as well as on the reverse of the first page in token of getting the Will registered before the Sub-registrar. Jai Kumar and Puran Chand signed the Will as two attesting witnesses and it was drafted by Sham Babu, advocate, whose address is 2776/20, Beadon Pura, Karol Bagh. Further Specific endorsement was made on the Will that both the attesting witnesses signed in the presence of the testator as well as in the presence of each other after understanding the contents of the Will. Hence the Ld. ADJ did not find any reason to disbelieve the testimony of these attesting witnesses.

13. The onus therefore shifted on the appellant to prove that the Will was not legally executed or that it was not a genuine document. The appellant argued that the testator was not competent to execute the Will as he was lessee of the property and the lease had already expired before the execution of the Will but when the Ld. ADJ perused the certified copy of the lease deed, at page number 5 of that document, it was specifically provided that lease can be renewed from time to time upto a total period of ninety years. Hence it got proved that the house was allotted to the testator on a perpetual lease hold basis which could be renewed after expiry of 20-30 years. Therefore for all legal and practical purposes testator was owner of the house and was competent to bequeath his lease hold rights in the property through a Will.

14. Further the only evidence led by the appellant was his own statement. He filed his affidavit Ex.DA wherein he deposed that the Will

Ex.PW2/1 does not bear the signature of his father. The alleged signature were forged and fabricated by the respondents in collusion with the attesting witnesses, Puran Chand Jain, Jai Kumar and the scribe, Sham Babu, Advocate. He further deposed that even in the year 1985 the respondents claimed that the father executed a Will on 8.8.1985 in their favour but when confronted by Gopi Nath, denied the execution of any such will. Gopi Nath repeatedly called upon the respondents to produce that Will but they could not.

15. Further he deposed that the attesting witnesses, Jai Kumar and Puran Chand Jain are the property dealers and friends of the respondents. They never visited testator during his lifetime. During his lifetime, testator was living and sharing his mess with appellant Devi Shankar while Uma Shankar was residing in Kedwal Nagar, New Delhi. Further he deposed that the testator lost his vision of both eyes prior to 1988 and was not able to attend his daily routine without the assistance of somebody. His wife had been serving his mother during her lifetime. It was also alleged by the appellant that the testator loved all his children equally and there was no question of his executing the Will in favour of the respondents only.

16. However, in the cross examination appellant deposed that he was not in possession of any document containing the genuine signature of his father. The only reason for his stating that the signature of his father on the Will are not genuine was that his father used to put his signature with lot of pressure whereas the signature on the Will Ex.PW2/1 are very light. In this regard, The Id. ADJ has observed that”

“Once the execution of the Will was prime facie proved by the petitioners by examining both the attesting witnesses, the onus shifted on the respondents to prove that the Will does not bear the genuine signature of his father. The bald statement of respondent number 2 is not sufficient to hold that the Will is not signed by Gopi Nath Sharma or thumb marked by him. The only reason assigned by him for stating that the signature of his father are not genuine is that his father used to put lot of pressure while signing but the signature on the Will are very light. I have perused the signature of the testator on the Will at three different places. All the signatures are put with a shivering hand. They are not in running hand as the young person signs and lot of

pressure is used while signing. The testator was a government employee. If respondent was having any doubt about his signature, he could have summoned the official record from the office of the testator to prove the genuineness or otherwise of the signature as well as thumb mark of the testator. Respondent engaged one handwriting expert Sh. Kamal Kant Khandelwal. Though he was not examined in the Court but I have perused his report. The handwriting expert without comparing the signatures with any other admitted signatures of the testator formed an opinion that the signatures were forged. The perusal of the report of handwriting expert engaged by respondent also shows that respondent was not having any document or any basis to deny the signature of his father except his own whims and presumption that it was not a genuine signature.”

17. In any case, the handwriting expert has not been examined, hence the said report cannot be said to be in favour of either respondent or the appellant. Thus the Ld. ADJ after the perusal of the Will as well as the evidence led by the respondents did not find any reason to disbelieve the testimonies of the attesting witnesses namely Jai Kumar and Puran Chand Jain. Further he found that there was no unusual distribution of the property and no such circumstances were pointed out by the appellant which raised any doubt about the genuineness of the Will or suspicious circumstances which may falsify the statements of attesting witnesses. Having observed that the Ld. ADJ granted probate to the respondents.

18. Before us the appellant impugning the order in question has submitted that there was manipulation, fabrication and forging of the Will which is apparent on record as the typing print on two pages of the alleged Will and the signatures of the alleged executants on two pages were entirely different from the one who alleged to have appeared before the sub-registrar for the registration of the alleged Will.

19. The appellant has also submitted that as a practice two original sets of the Will are required to be prepared and both are to be produced before the Sub-Registrar for registration. In the present case, the Will was typed on two pages of which the endorsement of the Sub-Registrar has been made on the back side of the first page only and not on the second page at all. According to the appellant there is a possibility of

replacement of the second page on which point though the cross-examination was done of the witnesses but nothing is on record to support this contention.

20. The appellant also submits that on perusal of the endorsement made by the Sub-Registrar's office on the back of the first page of the two original Wills is that the date of registration and the mode of writing on the back of the first page were different in the Will which has been given back to the respondents herein and which is on record of this Court with the other original Will retained by the Sub-Registrar office which is with them.

21. The appellant also submits that the space between the thumb impression and the signature of the testator at the two places at the back of the first page was also different in the two original Will and this vital discrepancy was very clear on a bare perusal of the document. Therefore the appellant submits that collusion with the witnesses as well as with the officials of the Sub- Registrar office could not be ruled out.

22. The appellant also submits that the thumb impression and the signatures on the second page which contains the operative part of the Will and containing contents of apportionment of the property do not absolutely tally with those of the back of the first page of the Will.

23. The appellant also submits that in his appeal as well as in the subsequent applications moved in the High Court he had pointed out the fact of the forged thumb impression and the signature on the second page of the impugned Will. After filing of the present appeal this court prima facie found the allegations as correct and accordingly passed the order dated 06.03.2007 wherein it asked appellant to deposit a sum of Rs 1.5 lacs as security for comparison by CFSL of the thumb impression and the signature of the testator on the alleged Will with that of the admitted thumb impression and signature on the DDA lease executed by the testator. This order was further reinforced in the order dated 16.11.2010, however the appellant submitted that the portion of the order was missing from the proceedings dated

16.11.2010. The appellant therefore moved an application praying for immediate directions for getting the required examination done. However, the perusal of the order does not prove the stand taken by the appellant. The said order is quoted hereunder:

“Order/16.11.2010
CM No. 20321/2010

1. This is an application filed by the appellant for modifying the condition for depositing the security amount which was ordered to be deposited by this Court on 06.03.2007 on his own showing of the appellant when he stated that he was ready to furnish security of ₹ 1.5 lakh.

2. However till today the said security amount has not been deposited.

3. This case is pending for adjudicating the matter of the Addl. District Judge whereby probate has been granted of the Will dated 14.06.1988 which petition was probated on 28.11.2006.

4. It is thereafter apparent that after the grant of probate the petitioner is only trying to protract the proceedings and has taken a stand that the signatures and thumb marks on the registered will are forged and in this regard he stated before this Court that he was very sure of this fact and to justify his submissions he was ready to pay the security but despite order dated 06.03.2007 he has not deposited the security till date. This only shows that he is not serious about his objections.

5. In these circumstances, the application filed on 12.11.2010 for modifying the condition of the deposit of the security vide order dated 06.03.2007 is without any merits and the same is hereby dismissed.

6. In view of the non-deposit of the security amount, the interim orders are also vacated.

FAO 89/2007 & CM Nos. 3404/2007, 4317-4318/2009,
12022/2009

List for hearing on 08.12.2010.”

24. The appellant further submits that deprivation of the natural heir from the property also amounts to suspicious circumstance.

25. On the other hand respondents have submitted that appellant was the only legal heir of the testator to contest the petition rest other respondents who are the daughters of the testator had withdrawn their objections by filing separate “no objection certificate”. The respondents further submit that:

“The reasons assigned by the appellant that the Will is forged is the solitary statement made by the appellant himself and which is not supported by any other evidences or witnesses.

The respondents also submit that the report of the handwriting was not based on comparison of any questioned and admitted signatures

The respondent further submit that the replacement of the second page of the Will in the office of the sub-registrar is a ground in absurdity

The respondent also submit that there was no personal motive between the one who drafted the Will and the other witnesses who attested the Will

The respondents also submit that the circumstance of depriving natural heir is not a suspicious circumstance.”

26. I have heard the parties and have also perused the records as well as the impugned order and the written submissions of both the parties. I would like to observe that in the instant case respondents who had filed probate in respect to the Will dated 14.06.1988 had fully complied with the requirements of Section 63 (C) Of Indian Succession Act as well as Section 68 of Indian Evidence Act inasmuch as both the attesting witnesses had testified that the testator had signed in their presence and they had signed in each other's presence. Further during the cross-examination of the witnesses nothing fruitful could be elicited by the appellant which could falsify the statements of the witnesses. Also, appellant had no witness or evidence which could prove his case barring his own bald statement which could not be held correct in the light of the facts and circumstances of the case.

27. The appellant has also alleged that there was some kind of manipulation done in the Will in the office of the Sub-Registrar which goes to show that there was some sort of connivance among respondents, officers of the Sub-Registrar as well as the attesting witnesses and the scribe of the Will. However, such stand taken before us in the appeal about the manipulation of the Will was not taken by the appellant before the Trial Court, hence such plea cannot be entertained in the first place by this court and even if it is considered to be correct, the appellant still has no effective evidence to prove the

same. Thus, such an allegation can only be taken as a conjecture and not something substantive.

28. The appellant has also alleged that the testator loved all his natural heirs and hence could not have deprived him of the property, hence such a deprivation of the appellant from the property rights amount to suspicious circumstance. However, it has been held in number of judgments that deprivation of natural heir from the property should not raise any suspicion as in some cases they are fully debarred and in some cases partly. In this regard reference can be made to a judgment delivered by the Apex Court in the case of Savithri & Ors. Vs. Karthyayani Amma & Ors. (D) AIR 2008 SC 300.

29. Thus, I do not find any reason to interfere with the orders of the LD. ADJ. Hence the appeal is dismissed. The amount of security deposited by the appellant be released to him.

30. All other pending applications shall also stand disposed of.

MOOL CHAND GARG,J

APRIL 08, 2011

‘sg’