

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

% *Reserved on : 18.01.2011*
Pronounced on: 03.02.2011

+ **FAO 234/2009**

SHAIL KUMARI SAXENA Appellant
Through: Mr.Rajinder Dhawan and
Ms.Shafali Dhawan, Advocates

VERSUS

STATE & ORS. Respondents
Through: Mr.Manbir Singh, Advocate for
R 2, 4, 5, 6, 8 (a) to (d)
Respondent No.7 in person

WITH

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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? | 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. By this common order, I shall dispose of the appeals arising out of an order passed by the Additional District Judge dated 28.03.2009, whereby the learned Additional District Judge granted letters of administration to Respondent No.2 with respect to Will dated 10.08.1990 and Codicil dated 27.09.1992 alleged to have been executed by late Sh. Krishan Murari Swarup.

2. Briefly stating, the facts leading to filing of the present appeal are that late Sh.Krishna Murari Swarup, owner of the suit property bearing

No. B-1/280, Janak Puri, New Delhi executed a Will dated 10.08.1990 and thereafter, Codicil dated 27.09.1992 naming his eldest son as the executor of the Will. By the aforesaid Will and Codicil his property situated at B-1/280, Janak Puri, New Delhi was bequeathed to Respondent No.2. After the death of the testator on 20.10.1993, his eldest son, Amulya Kumar has not taken any steps for seeking probate of the Will in his life time but after his death, the probate petition was filed by the youngest son of the deceased, Shashi Kumar Saxena, registered as Probate Petition bearing No.92/2007. The legal heirs of the first two sons of the deceased, namely, Sh.Amulya Kumar and Sh.Vimal Kumar also filed an independent probate petition with respect to the same Will bearing No. 2/2008. The said petition was consolidated for trial along with Probate Case bearing No. 92/2007.

3. After citations were issued while no objections were received from Respondent Nos. 3, 4, 5, 6 and 7 but objections were filed on behalf of the daughters of the deceased, Smt.Mala Saxena and Smt.Shail Kumari Saxena (appellant), alleging that the Will was not executed by the testator in his sound disposing mind and Will was not written out of the deceased's free will and made under pressure.

4. The other objection taken by the objectors was that the deceased bequeathed only life interest in favour of Smt.Vidyawati (wife of the deceased) which translates into absolute right and since Smt.Vidyawati has died intestate hence all the legal heirs have become equal share holders of the property in question by virtue of Section 14 of the Hindu Succession Act, which reads as under:-

“14. Property of a female Hindu to be her absolute Property: (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation.- In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.”

5. The learned Additional District Judge on the pleadings of the parties has framed the following issues:-

“1. Whether the will dated 10.08.1990 and the codicil of the said will dated 27.9.1992 as propounded by the petitioner was validly executed by the deceased late Sh. Krishna Murari Swarup in his sound disposing mind and same is his last will and testament? OPP

2. Relief.”

6. The propounders of the Will have examined three witnesses, namely, PW-1 Sh.Shashi Kumar, PW-2 Sh.Samir Saxena and PW-3 Sh.Desh Bandhu, who was one of the attesting witnesses to the Will. PW-3 Sh.Desh Bandhu filed his affidavit Ex.PW3/A and deposed that the Will and the Codicil were executed by the deceased in his presence. This witness has also identified the signatures of the other attesting witness to the Will, Sh.S.C.Singhal.

7. PW-2 Sh.Samir Saxena in his affidavit Ex.PW2/A has proved the handwriting of his grandfather and has also stated that he had seen his grandfather writing and signing during his life time and that he can identify the handwriting and signatures of his grandfather. He has deposed that:-

“I have perused the will and the codicil. Both the documents are handwritten and no questions have been put to PW.2 Sh. Samir Saxena and PW.3. Sh. Desh Bandhu that the will and codicil are not in the handwriting of the testator. No suggestions have been given that the will was obtained forcibly. The respondents have not disputed the fact the testator was in sound disposing mind on the day of the execution of the will and the codicil. He died after more than three years of the execution of the will and more than one year after the execution of the codicil. I have carefully gone through the will and the codicil. There is no change of mind from the original will in the codicil. Hence there is no reason to disbelieve the testimony of PW.3. Sh.

Desh Bandhu that the will dated 10.08.1990 and the codicil dated 27.9.1992 were executed by the testator in his sound disposing mind in the presence of two attesting witnesses namely Sh. S.C. Singhal and Sh. Desh Bandhu.”

8. In the light of the aforesaid evidence, the Ld. Additional District Judge has allowed both the probate petitions vide impugned order dated 28.03.2009 and held that the testator executed a valid Will on 10.08.1990 Ex.PW3/1, and a codicil on 27.9.1992 Ex.PW3/2, in his sound and disposing mind in the presence of two attesting witnesses and granted the letters of administration in favour of Sh.Shashi Kumar Saxena on two grounds, first for having applied earlier in time and second for having a larger share in the property as compared to other legal heirs. Hence this appeal.

7. The appellants herein have challenged the validity of the Will on the ground that the Will and Codicil are invalid and were never validly executed and that the signatures differ in the Will and the Codicil and that these signatures do not belong to that of the testator. They also submit that the propounders of the Will were also required to establish besides other things that the testator was in sound disposing mind when the Will and Codicil in question were executed. It is further submitted that none of the witnesses examined by the propounders have deposed about the mental condition of the testator.

8. It is also submitted by the appellants that the propounders of the Will were also required to prove that the Will was fair and they were also required to remove all suspicions. It is submitted that the testator had seven children and all of them were Class I legal heirs. All of them were entitled to the share in his estate. No reason had been given for excluding daughters from his estate and, therefore, the Will is unfair and is liable to be rejected. Reference has been made to *K.Laxmanan Vs. Thekkayil Padmini & Ors, 2009 (1) SCC 354*.

9. The main ground on which the appellants have challenged the impugned order is that due to change in counsel, they were unable to lead evidence despite last opportunity having been granted to the appellants, which led to the Ld. ADJ passing an order dated 20.03.2009 closing the evidence. Thereafter the appellants on 23.03.2009 moved two applications, one under order XVIII Rule 17 r/w Section 151 CPC

recalling PW3 Shri Desh Bandhu for further cross examination and secondly, under Order 47 Rule 1 and section 151 CPC seeking review of order dated 20.03.2009 seeking permission to adduce their evidence. It is the grievance of the appellants that the learned trial court dismissed both the applications without calling for a reply of the respondents.

10. Another submission made on behalf of the appellants is that the respondent No.2 has examined only one attesting witness to the Will, who was an interested witness, whereas the other witness i.e Shri S.C. Singhal who was an independent witness has not been examined. The appellants have also raised a finger at the suspicious appearance of the Will 13 years after the death of the testator i.e. on 2.4.2006 and no proper reason has been given for such non-production of the Will after such a long period of time.

11. I have heard both the parties and have perused the record of the case. It is pertinent to note the provisions of Section 63(c) of the Indian Succession Act with respect to the attestation of Will, which reads as under:-

“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 be necessary”

11 A perusal of the judgment of the Apex Court in the case of Daulat Ram & Ors. Vs. Sodha (2005) 1 SCC 40 shows that a Will is required to be attested by two witnesses. The Will cannot be used as an evidence until one of the attesting witnesses has been called for proving its execution. In the present case, PW3 Sh. Desh Bandhu, testified to the genuineness of the Will and thus, the requirement of proving Will under Sec. 63(c) of the Indian Succession Act read with Section 68 of the Evidence Act is met in this case.

12. The other ground taken by the appellants that the two applications filed by the appellants, one under Order 18 Rule 17A r/w

Section 151 CPC for recalling PW3 for further cross examination and the second under Order 47 Rule 1 seeking review of order and permission to adduce their evidence, ought not to have dismissed by the learned Additional District Judge. In this regard, the learned Additional District Judge while dismissing the application under Order 18 Rule 17 has observed as under:-

“this is no ground for re-summoning the witness if party keeps on changing more and more intelligent advocate on every date. The witness cannot be re-summoned for cross-examination on such applications. Application is hereby rejected.”

13. Regarding the second application under Order 47 Rule 1, the Ld. Additional District Judge has observed that:-

“The only ground seeking review of the order is that previous advocate of the deponent returned the brief. She engaged a new advocate and new advocate could not prepare the case on 20.3.2009. This is no ground for review of the order under order 47 rule 1. Hence this application is dismissed.”

12. It is also pertinent to mention here that on 10.2.2009, the previous lawyer of the appellants, Mr. R. Nanawati, cross-examined PW3 in front of the Ld. Additional District Judge and put his questions which were answered by PW3 and now raking up the issue of cross-examination again on the plea that their erstwhile lawyer did not examine PW3 regarding the Codicil i.e. Ex. PW3/2 is not tenable since opportunity was afforded to the appellants and they should have made the best use of it. If the Court keeps allowing these applications on such frivolous grounds then in the future the Courts will be bombarded by such applications which will be a gross misuse of justice.

13. I have gone through the applications filed by the appellants and the order given by the Ld. Additional District Judge and in my opinion there is no infirmity in the order dated 23.03.2009 dismissing the applications since the grounds pleaded by the appellants are frivolous. The learned Additional District Judge was correct in dismissing the applications.

14. In view of the observations made above, I find no grounds to interfere with the impugned order dated 28.03.2009. The appeals are accordingly dismissed with no orders as to costs.

MOOL CHAND GARG, J

FEBRUARY 03, 2011
'ps/dc'