

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

+ **FAO 259/2009**

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Reserved on : 03.03.2011
Date of Decision : 21.03.2011

SATYA PAL CHOPRA

..... Appellant

Through: Mr. S.K. Mehra, Ms. Mamta
Mehra, Advs.

versus

STATE & ORS.

.... Respondents

Through: Ms. Padmini Handa, Ms. Monisha
Handa, Mr. Mohit D. Ram,
Advs. for R-4.

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. This appeal arises out of the order passed by the Addl. District Judge dated 18.05.2009 whereby the probate petition filed by the appellant for seeking letters of administration with Will dated 05.08.1989 annexed has been dismissed.

2. Briefly stating the facts of this case are; that a probate petition was filed by the appellant seeking probate of the Will dated 05.08.1989 alleged to have been executed by deceased Smt. Suhagwanti with respect to property No. 17/7, Pant Nagar, Jangpura Extension, New Delhi bequeathing that property in favour of the appellant to the exclusion of all other legal heirs of the deceased testatrix. Smt. Suhagwanti expired on 08.01.1991 leaving behind three sons, namely, Shri Satya pal Chopra the appellant, Shri Yash Pal Chopra, Shri Sushil Kumar Chopra the other two brothers of Satya Pal Chopra and two daughters, namely Smt. Usha Rani and Smt. Sunita. After the death of Smt. Sunita her legal heirs were also brought on record.

3. Respondent No.2 gave no objection. However, the Will was described as forged and fabricated by respondents No. 3 to 5. It was also the assertion of Sushil Kumar Chopra that Will dated 31.12.1989 was executed by the deceased in his favour. He also filed a separate probate petition subsequently on 07.08.2003 on the basis of the aforesaid Will which was contested by the appellant and Shri Yash Pal Chopra. On the pleadings, the following issues were framed by the Court:

- “1) Whether the Will dated 5.8.89 was the Will duly executed by the deceased and is the valid Will? OP-Satyapal
- 2) Whether the Will dated 31.12.89 was duly executed by the deceased and is the valid will? OP-Sushil Kumar
- 3) Which of the party is entitled to the probate in respect of what property?
- 4) Relief”

4. In order to prove his case, appellant Shri Satya Pal Chopra examined himself as PW-3 and also examined two other witnesses namely S. Anil Vij, PW-1 and Shri Yash Pal Chopra PW-2 the attesting witnesses of the Will dated 5.8.89. Respondent No.4 Shri Sushil Kumar Chopra stepped into witness box as R4W-2 and also examined Shri Sanjeev Verma as R4W1 who is attesting witness of the Will dated 31.12.89.

5. Vide impugned order the Addl. District judge has opined that in the relevant period the deceased testator was of sound and disposing mind. In this regard it has been observed by the Addl. District Judge:

“First of all question of sound disposing mind of the testatrix arises. Both the wills in question were executed within a period of five months whereas death took place after a gap of more than one year. Even if for the sake of arguments, it is presumed that deceased became sick in November, 1989 and she remained admitted in hospital for about fortnight and thereafter remained confined to bed till her death which took place on 8.1.1991, then also none of the witnesses of petitioner however alleged that due to sickness, mental capacity of the testatrix had also suffered to such an extent that she could not understand what was right or wrong. Mere old age and suffering from sickness itself is not sufficient to presume that testatrix was of unsound mind at the relevant time of alleged execution of will as propounded by the respondent. Otherwise also it is not the case of any party that deceased was of unsound mind at the relevant

time either on 5.8.1989 or on 31.12.1989. No medical record of testatrix is produced to show her alleged mental incapacity to execute the Will so accordingly it is held that she was not mentally unsound on both the day of execution of the Wills.”

6. With respect to the Will dated 05.08.1989 Ex. P1, PW1 and PW2 who were the witnesses examined by the appellant almost corroborated each other in their affidavits. However, when cross-examination of both these witnesses was considered and read along with the statement of PW3 both have been found contradicting each other in various aspects. The contradiction noticed by the Addl. District Judge in the statement of PW1 and PW2 are as under:

“PW-1 stated that he was called by the testatrix in her house on 5.8.89 through telephone at about 1 PM and he reached there at about 3.30/4 PM and stayed there till 4.45. However, PW-2 in his deposition stated that he had called PW-1 through telephone who reached there at about 2/2.30 PM.

According to PW-1 when he entered the house of testatrix, she and PW-2 were present there, and no else was there in the house which is a flat consisting of two rooms. Wife of respondent was also not present in the house. But according to PW-2, at that time petitioner was also present in the house that consisted only of one room. PW-2 on the other hand not only shows presence of wife of respondent but also his both children at the time of execution of the Will even from 11 AM to 5 PM who had not gone anywhere. Version of petitioner PW-3 that he had gone to house of deceased in the morning but had not seen respondent or his family members present there, is contradictory from the own witness PW-2. It is very strange that PW-3 did not know when attesting witnesses of the Will came and when they left when as per PW-2, he was present in the small house consisting of one or two rooms only.

PW-1 stated that Will was already typed and was in the hands of PW-2 when he reached in the house of deceased. Admittedly the Will was not typed in presence of PW-1 and PW-2 stated that he had already gone for getting Will typed and PW-1 reached in house during his absence.

According to the cross-examination of PW-1, the Will was firstly signed by Testatrix, then by PW-2 and lastly by him but this sequence is changed by PW-2 who stated that after signatures of testatrix, PW-1 signed on the Will and he signed it lastly.

PW-2 got the Will typed from one typist Shaji who as per this witness typed it himself but PW-2 already got draft of the Will from his office three days prior to the date of typing. It point out that Will was not got typed at the instructions of the testatrix which were allegedly given on the same day of execution in between 11 to 12 AM but petitioner had already planned to prepare the Will without any prior intention or instructions of the testatrix. This is a major fact which creates doubt about the genuineness of the Will as well as whether it was prepared at the instructions of the testatrix or not. Petitioner could not remove this doubt and thus the Will dated 5.8.89 cannot be relied upon. This obtaining of draft of Will before hand by PW-2 also falsify the deposition of this witness that testatrix desired on 5.8.89 itself to get her Will prepared.

PW-1 in his cross examination stated that in the year 1989 he was doing private job in Kawality drycleaner shop situated in Ashok Vihar and telephone of testatrix was received at his residence and at that time he was in his shop. However, PW-2 made PW-1 owner of this shop and not an employee. After leaving the house of testatrix, PW-1 went to house of petitioner and took tea but PW-2 denied this fact of taking tea.

There was no reason also to exclude the respondent from the benefits of estate of the decease when he was also looking after his deceased mother was admitted by PW-1 and was living in the same house with her. Petitioner and PW-2 during relevant period were residing in different houses though were situated adjacent to each other. Daughters of the deceased were excluded under both the Wills and they have not claimed any share in the property in any of the petitions. Hence, non-giving of any share in the Wills to daughters is not a ground to reject this Will.

PW-1 also partly disputed the correctness of his own affidavit of evidence. In para No.2, 12 and 14 of his affidavit there are some handwritten corrections, deletion and additions, which are not initiated by him. PW-1 specifically stated that his affidavit was typed and nothing was written in hand. It leads to the inference that handwritten portion in his affidavit was either written by someone without his knowledge subsequently or this witness is telling lie. In both situations, the affidavit of evidence of PW-1 that is treated as examination in chief can be rejected being not valid. When examination in chief is ignored then the entire statement of witness goes and cannot be considered or read in evidence. On these grounds as well keeping in view the various contradictions in statements of witnesses of the petitioner, their testimony can be declared as unreliable.

7. The learned ADJ also observed that PW1 is a highly interested witness being son-in-law of the appellant and for that had reasons to depose against the respondent. He was residing in a house in Shalimar Bagh during the year 1989 which once belonged to respondents. It is a matter of record that since the house was not being vacated it was sold by the respondents to somebody else's and the new purchaser instituted eviction suit in 2001 and got the possession decree against him. This has been taken as a reason for the said PW1 to depose against the first respondent. It was, thus, concluded that there was suspicious circumstances which hover a cloud over the genuineness, legality and validity of the Will dated 05.08.1989. The burden to explain these suspicious circumstances which are on the appellant was not discharged. It has been observed that the contradiction in the statement of these witnesses are not minor or having occurred due to old-age or passage of time but these contradictions go to the root of the case and cannot be ignored. In view of that, the learned ADJ has found suspicion regarding execution of the Will dated 05.08.1989 by the deceased testatrix and thus, as decided Issue No.1 against the appellant.

8. As regards the Will dated 31.12.1989 while referring to the objections of the appellant that the said Will was not a genuine Will and was not containing the signatures of the testatrix the Trial Court has observed that the appellant has not examined any hand-writing expert. To prove the execution of that Will the respondents have examined R4W-1 one of the attesting witness. Having gone through the statement of R4W-1 the Court observed that:

“The evidence of R4W1 is reliable and can be accepted. He not only identified signatures of testatrix, his own and second witness's signatures but also proved the manner of execution of the Will Ex. R4W1/B. His testimony fulfils the requirements of Section 63 of Indian Succession Act. This witnesses was not totally stranger but was also in relation of the testatrix as respondent is his Mausa. Testatrix was living along with the respondent in the same house and this witness used to come there. Accordingly putting some faith upon him by the testatrix cannot be ruled out. The deposition of this witness that he got typed Will with dated 31.12.89 as per instructions of the testatrix on 25.12.89 who

not only supplied necessary details but also supplied copy of the title documents of her property is found not unreliable fact. No effective cross examination of this witness was done on behalf of the petitioner on point of manner of execution and attestation of the Will. I find no ground to disbelieve the testimony of this attesting witness and do not find any material contradictions in the examination in chief and cross examination to disbelieve him. Similarly there are no major contradictions in the statement of respondent and his witness to reject their testimony or to find out who is telling lie and who is giving true version that was not the case of the petitioner whose witnesses contradicted on number of facts not only from each other but also from the petitioner.”

9. In view of that it has been held by the Addl. District Judge that the Will dated 05.08.1989 was not proved but the Will dated 31.12.1989 Ex. R4W1/B as propounded by the respondent is reliable and genuine which is duly proved and established on record. Thus, the learned ADJ has decided Issue No.2 in favour of the respondent.

10. In view of the aforesaid, the Trial Court has dismissed the petition filed by the appellant but has allowed the petition filed by Shri Sushil Kumar Chopra bearing No. 416/06/03 on the basis of Will dated 31.12.1989. Accordingly, probate has been granted in his favour with respect to property No. 17/7, Pant Nagar, New Delhi subject to completion of necessary formalities including deposit of Court fee etc.

11. The appellant while assailing the order passed by the learned ADJ has submitted that the evidence led on behalf of the appellant was sufficient to prove the due execution of the Will dated 05.08.1989. The attestation of the said Will by the two witnesses was also proved. The contradictions which have been found in the statement of PW-1 and PW2 by the learned ADJ are not substantial. They are not material. They do not create any suspicious circumstances with respect to the execution of the Will dated 05.08.1989. However, the testimony of the witness examined by respondent No.3 regarding the second Will creates sever doubts. It is thus, submitted that judgment of the learned ADJ regarding Issue No.1 is not sustainable while it requires to be reversed with respect to Issue No.2 and consequently, the appeal of the appellant must be decided and probate be granted in his favour with respect to the first Will.

12. The appellant also submits that respondent No.4 never claimed at any time after the death of mother Suhagwanti that he was in possession of any Will dated 31.12.1989 of his mother and intentionally avoided receiving notices issued from the court in probate case filed by the appellant. Another point strongly contested by the appellant is that the testimony of PW1 was rejected by the trial court on the ground that minor correction of typographical mistakes in para 2,12,14 in his affidavit by way of evidence not signed by PW1 but the trial court has grievously erred in ignoring the reply of PW1 in cross examination and has illegally rejected the evidence by way of affidavit of PW1 on this flimsy ground.

13. The appellant has further stated that the trial court also is taking the view by stating on one hand clearly that PW1 and PW2 have corroborated each other in their affidavits of due execution and attestation but during cross-examination they both are found contradicting each other on various aspects. Finally the appellant submits that respondent no.4 never produced any evidence to show that the will dated 5.08.1989 is forged and not bearing the signatures of the mother and knowing his mother well it is highly improbable for an old illiterate lady to put confidence on a stranger when she has 5 children of her own and since the relations in family were also cordial as has also been mentioned by respondent no. 4 thus the attesting witnesses to the will dated 31.12.1989 are strangers as alleged by the appellant and thus raises suspicious circumstances surrounding the will dated 31.12.1989.

14. The respondent no.4 in their written synopsis have submitted a table of the contradicting statements of PW1, PW2 and PW3 and have stated that the contradictions are not minor in nature and give rise to suspicious circumstances. Further respondent no.4 submits that he has discharged the burden of proving the will dated 31.12.1989 and he has gone onto state further that the respondent no.3 and respondent no.5 in their written statement have denied the execution of the will dated 5.08.1989 and thus the will dated 31.12.1989 has been duly proved.

15. I have heard the parties and gone through the written synopsis

filed by both of them. In my opinion the contradictions in the statement of PW1 and PW2 are minor since the Will got executed on 05.08.1989 whereas the evidence was recorded on 26.7.2005 so it is only practical to believe that after a gap of so many years the memory cannot remember every precise detail and over a period of time the memory fades and hence these contradictions are minor.

16. However, the fact that one of the attesting witness of the first Will, Anil Vij, PW-1, who is the son-in law of the appellant had reasons to depose against the respondent as he was residing in a house which belonged to respondent but refused to vacate it when asked for & ultimately had to suffer eviction at the instance of the new purchaser to whom respondent had sold the property, supplies good reasons to depose against respondent and this important fact was rightly noted by the Additional District Judge.

17. Further the contradictions in the statements of both the attesting witnesses of the first Will dated 05.08.1989, i.e PW-1 and PW-2 though seems to be minor but still raises doubt, on the veracity of the statements made by both the attesting witnesses and gives an impression of something suspicious. On the other hand, a perusal of the statement deposed by the attesting witness, Shri Sanjeev Verma, RW4-1, appearing on behalf of the respondent is a clear statement inasmuch as appellant was unable to point out any contradiction in the statement of the witness, further no suggestions were made by the appellant that the second Will was forged and fabricated, in fact no effective cross-examination was done by the appellant on the point of manner of execution and attestation of the Will. The testimony of RW4-1 is in accordance with the requirements of Section 63(c) of Indian Succession Act and Section 68 of Evidence Act. More so, even the language of the second Will is quite clear in itself and specifies the reason behind the testatrix bequeathing her property in favour of the respondent, hence the second Will in totality along with the statement of the attesting witness do not raise any suspicion nor was appellant able to point out any such discrepancy either in the statement of the

witness or in the Will. The second Will also supersedes any earlier Will and also describes the Will to be the last Will.

18. Considering all the circumstances of this case and the fact that the Will dated 05.08.1989 is shrouded with suspicious circumstances and the testimony of PW-1 Anil Vij is also not clear from doubt, I do not find any reason to interfere with the order passed by the learned Addl. District Judge granting probate of the second will dated 31.12.1989 in favour of the fourth respondent. As such, the appeal filed by the appellant is dismissed with no orders as to costs.

CM No. 11784/2009 (stay)

Dismissed as infructuous.

MOOL CHAND GARG, J

MARCH 21, 2011

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