

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+

TEST CASE 15/1994 & TEST CASE 9/2000

%

26th July, 2012

TEST CASE 15/1994

SWAMI DR. KISHORE DASS JI

..... Petitioner

Through: Mr. Ravi Kant Chadha, Sr. Adv. with Mr.
R.K.Gautam, Adv.

VERSUS

STATE & ANR.

..... Respondents

Through: Mr. Deo Prakash Sharma, Mr. Manoj
Yadav, Mr. Umesh Gupta and Mr. Roopak
Gaur, Advocates.

AND

TEST CASE NO. 9/2000

SWAMI GURUDEV MUNI JI

....Petitioner

Through: Mr. Deo Prakash Sharma, Mr. Manoj
Yadav, Mr. Umesh Gupta and Mr. Roopak
Gaur, Advocates.

VERSUS

STATE

... Respondent

Through: Mr. Ravi Kant Chadha, Sr. Adv. with Mr.
R.K.Gautam, Adv.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? Yes

VALMIKI J. MEHTA, J (ORAL)

By this judgment, Test Case 15/1994 and Test Case 9/2000 are being disposed of. Whereas, Test 15/1994 is a petition by the named executor/petitioner seeking probate of the Will of late Swami Amar Muni Ji, the Test case 9/2000 is a petition seeking letters of administration to the properties of Swami Amar Muni Ji by his co-brother Swami Gurudev Muni Ji in a religious sect-the Udasin Sect- and of which sect Swami Amar Muni Ji was said to be a member.

Before proceeding to pass judgment, I must note that the real brother of late Swami Amar Muni Ji i.e. namely Mr. Surjit Singh has already filed a no objection for grant of the probate in Test Case 15/1994 by way of affidavit dated 29.7.1994.

Test Case No. 15/1994

1. This petition seeking probate has been filed by the executor of the Will namely Swami Dr. Kishore Das Ji. Probate has been sought with respect to the Will dated 8.10.1993 of late Swami Amar Muni Ji. Swami Amar Muni Ji had two immovable properties. One being D-120/121 Lajpat Nagar, New Delhi and another being a plot of land admeasuring 1 bigha, 13 biswas and 13 ½ biswansi at Patta Khasra No. 4/23, Situated at Village Phupatwala Kalan, Jawalapur, Haridwar

now Uttarakhand, and which was originally in the State of UP. Late Swami Amar Muni Ji also had certain movable assets as stated in schedule A to the petition.

2. On 26.4.1994, notices were issued and citation was ordered to be published. Objections have been filed by one Swami Gurudev Muni, objector no.2 and who is the petitioner in probate petition no. 9/2000. Another set of objections were filed by one Sh. O.P.Gupta qua the Lajpat Nagar property, however, Sh. O.P.Gupta has led no evidence in support of his objections. In fact, counsel for the parties state that Sh. O.P.Gupta expired during the pendency of this petition and his legal heirs were not brought on record. The objection petition filed by Sh. O.P.Gupta is therefore dismissed as abated.

3. Swami Amar Muni Ji was the Parmadhyaksh of Swami Ram Tirath Mission. He died at New Delhi on 28.12.1993. As already stated, the petitioner states that Sh. Amar Muni Ji, before his death executed a Will dated 8.10.1993, which is said to be the last Will and testament of late Sh. Amar Muni Ji. By the Will, Sh. Amar Muni Ji bequeathed his properties in favour of the petitioner who is a Parmadhyaksh of Swami Ram Tirath Mission.

4. Before it is held that the Will is proved for a probate to be granted on the same, it is necessary that it should be proved to be executed by the deceased testator, it should be proved that the attesting witnesses saw the testator signing the

Will, and, that the attesting witnesses signed in the presence of the testator. Another important requirement is that the testator must be of a sound disposing mind. In the present case, there is no issue urged on behalf of the objector that Swami Amar Muni Ji was not in a sound disposing mind. I have only to see whether the Will in question dated 8.10.1993 of Swami Amar Muni Ji was duly executed and attested as required by law.

5. There are two attesting witnesses to this Will dated 8.10.1993. The first attesting witness is Sh. Lalit K. Malhotra. The second attesting witness is Sh. O.P.Wadhwa. Sh. Lalit K.Malhotra is the owner of a hotel and was a disciple of late Swami Amar Muni Ji and Swami Amar Muni Ji is said to have sometimes resided at the residence of this attesting witness Sh. Lalit K. Malhotra. The second attesting witness Sh. O.P.Wadhwa retired as Assistant Director from the Ministry of Planning, Department of Statistics, S.P.Bhawan, New Delhi.

6. Both the attesting witnesses have deposed in Court. Sh. Lalit K. Malhotra has deposed as PW-1. Sh. O.P.Wadhwa has deposed as PW-3. A reference to the affidavits of both these attesting witnesses show that they have deposed to the testator signing the Will in their presence and these attesting witnesses signed in the presence of the testator. In my opinion, therefore, the Will dated 8.10.1993 which has been exhibited as Ex.PW1/1 will stand proved.

7. The issue is that have anything been extracted in the cross-examination of these attesting witnesses to show that the Will which is propounded should not be relied upon as the said document is not the last Will and testament of Swami Amar Muni Ji i.e the Will dated 8.10.1993 is not a validly executed Will. Counsel for the objector no.2 Swami Gurdev Muni Ji has argued the following points before this Court:-

(i) There are contradictions which are said to be existing in the depositions of the attesting witness Sh. Lalit K. Malhotra given before this Court and the statement given by the said Sh. Lalit K. Malhotra in the proceedings before the Tehsildar at Haridwar and before whom mutation proceedings were initiated with respect to the land which Swami Amar Muni Ji owned at Haridwar. These contradictions are as under:-

(a) Whereas in the depositions made before the Tehsildar at Haridwar, Sh. Lalit K. Malhotra had stated that the Will was executed at his Vasant Vihar residence, in the deposition before this Court it is stated that the Will was executed at the office of Swami Ram Tirath Mission at Jhandewalan, New Delhi.

(b) Whereas in the cross-examination before this Court on 19.8.2004 Sh. Lalit K. Malhotra said that the Will was already prepared when he reached the Ashram/Jhandewalan Office, in the deposition before the Tehsildar, it is stated that

the Will was prepared after the attesting witness reached at the request of Swami Amar Muni Ji.

(c) Whereas in the cross-examination of the same date in this Court, Sh. Lalit K. Malhotra had stated that Swami Amar Muni Ji had not consulted him before the Will was executed, and however, in the proceedings before the Tehsildar, there is reference of discussion before making of the Will.

(d) There is no reference in the proceedings before this Court that a typist was called for making of the Will, whereas, details of calling of the typist have been deposed to in the deposition before the Tehsildar at Haridwar.

8. In my opinion, all these alleged contradictions are of no avail to the objector, inasmuch as, before a person seeks to take benefit out of contradictions of a person made in a previous statement, it is required as per Section 145 of the Evidence Act, 1872 that those portions of the statements pertaining to the contradictions must necessarily be put to the witness. Section 145 of the Evidence Act reads as under:-

“145. Cross-examination as to previous statements in writing.—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.” (underlining added)

9. Admittedly, during the cross-examination of Sh. Lalit K. Malhotra, only the complete typed statements made by Sh. Lalit K. Malhotra before the Tehsildar at Haridwar were got confronted and exhibited in evidence as Ex.PW1/D2-A and Ex.PW1/D2-B. There is no specific cross-examination of any alleged contradictions brought to the notice of the witness Sh. Lalit.K.Malhotra, and therefore, none of the alleged contradictions which are relied upon on behalf of the objector, can be taken note of by this Court in view of the specific bar contained in Section 145 of the Evidence Act. Section 145 of the Evidence Act serves the salutary purpose that without giving opportunity to a person to explain his statement, no statement of such person can be used against him.

10. I may however state that for various reasons even on merits none of the alleged contradictions would make any difference to the present judgment allowing the testamentary petition. Firstly, except one, really there are no contradictions, and, which I will deal with hereinafter. Secondly, and at best, there can be said to be one contradiction, however, surely it cannot be and it is not the law that one contradiction has the effect of setting aside the entire testimony of the witness, which has to be read as a whole for its overall effect. One contradiction cannot destroy the complete credibility of a witness as is being sought to be argued.

11. So far as the contradiction in the statements before the Tehsildar at Haridwar and before this Court of Sh. Lalit K. Malhotra with respect to the Will being executed at the Vasant Vihar residence as before the Tehsildar at Haridwar, and at Jhandewalan in the deposition in this court, I have read both the statements. The statement of Sh. Lalit K. Malhotra at Haridwar when read as a whole shows that residence of Sh. Lalit K. Malhotra was at Vasant Vihar, but, there is no categorical statement before the Tehsildar Haridwar that Will was executed at his residence. May be reading of the few lines may seem to suggest however, there is no clear cut averment in the statement made before the Tehsildar, Haridwar that the Will was executed not at the office/Ashram at Jhandewalan but at the residence of Sh. Lalit K. Malhotra at Vasant Vihar. Also, there is no contradiction with respect to any alleged consultation for making of the Will as stated before the Tehsildar and that in the statement made in this Court that there was no consultation before making of the Will. A reading of the statement made before the Tehsildar, Haridwar by Lalit K. Malhotra only shows that what is stated by Sh. Lalit K. Malhotra before the Tehsildar is that Swami Amar Muni Ji expressed a desire to make a Will. Expression of “a desire to make a Will” is different from consultation with respect to the Will. Thus there is no contradiction as is sought to be urged on behalf of the objector no.2. Even with respect to the calling of a typist at best, the deposition in

this case is silent in this regard and silence cannot mean contradiction simply because the statement made before the Tehsildar mentions of a typist having been called for typing the Will. There is a contradiction with respect to the Will already having been prepared as stated by Lalit K. Malhotra in this Court and in the Haridwar statement that he was called by late Swami Amar Muni Ji and the Will was subsequently prepared but, as already been stated above, there are always certain statements made during evidence which may not be the 'truth' however, the testimony of a witness has to be seen as a whole inasmuch as the doctrine of *falsus in uno falsus in omnibus* has no application in India as has repeatedly been held by the Supreme Court in many cases.

12. One aspect on which counsel for the objector no.2 very strenuously argued is that the second attesting witness Sh. O.P.Wadhwa in his cross-examination admitted that he was not in a position to read and write for about four and half years prior to his cross-examination on 22.10.2005, and consequently, it is argued that since the affidavit by way of evidence on behalf of this witness was prepared on 10.11.2003, this shows this witness signed his affidavit by way of evidence without reading the same or understanding the same. In my opinion, merely because it is not mentioned in the affidavit by way of evidence that the affidavit has been read over and explained to the person cannot mean that the affidavit

would not have been read over and explained. Once a person signs an affidavit by way of evidence, ordinarily there is a presumption that he has read the same and thereafter signed it and the onus to prove otherwise is on the person making such an allegation. Merely by arguing that the affidavit has been prepared by Sh. O.P.Wadhwa without reading the same cannot help the objector inasmuch as after all the said witness Sh. O.P.Wadhwa not only filed the affidavit by way of evidence but has on different dates appeared in these proceedings and has been cross-examined and that he has supported his stand mentioning in the affidavit by way of evidence as examination-in-chief.

13. I may note that in this testamentary case, unfortunately no issues were framed. In terms of arguments of the counsel for the parties, only one issue was argued and therefore, in exercise of my powers under Order 14 Rule 5 CPC, which permits the Court to frame issues at any stage, I frame the following issue:-

“Whether Swami Amar Nath Ji left behind a valid Will dated 8.10.1993?
OPP

14. In view of the discussion as aforesaid, this issue is answered in favour of the petitioner and against the objector and I hold that the Will Ex.PW1/1 dated 8.10.1993 of Swami Amar Nath Ji stands proved.

15. I must mention at this stage that at one stage, counsel for the objector argued that the deceased Swami Amar Nath Ji had joined the Udasin Sect and therefore, as per the customs of Udasin sect, the Bhatija/Chela of deceased Swami Amar Nath Ji i.e the objector would inherit the properties, provided the same was approved by the Bhek (congregation) of the Udasin Sect. It was also argued that on the deceased Swami Amar Nath Ji joining the Udasin Sect he met a civil death and consequently, objector has become the owner of the properties of the deceased Swami Amar Nath Ji as the name of the objector has been approved by the Bhek of the Udasin Sect after performing all necessary rituals/ceremonies. It was also argued that once a person meets a civil death by joining a religious order, then, in such cases, it is only the Bhatija/Chela who will inherit the properties of such a deceased member of the Udasin Sect.

16. Purely, on first principles, I was of the opinion that if there is no bar to a Swami owning properties, then surely there cannot be a bar to the said Swami making a Will. The making or barring from making a Will has necessarily to be governed by the provisions of Indian Succession Act, 1925. Admittedly, there is no provision in the Indian Succession Act, which prevents a Hindu, even if he is a Swami or Sannyasi, from making a Will. Therefore, a Sannyasi is very much capable in law of owning a property and also bequeathing the same inasmuch as,

unless there is a bar which is proved to exist in law (including customary law), there cannot be any bar for a Swami/Sannyasi owning a property and bequeathing the same.

My view as per first principles is confirmed by the judgment cited on behalf of the petitioner of the Supreme Court in the case of ***Math Sauna and Ors Vs. Kedar Nath @ Uma Shankar & Ors (1982) 1 S.C.R. 659***. The head note given in the S.C.R sums up the entire factual and legal position in that case and which I am reproducing below:-

“Hindu Law- Sannyasi-Whether could acquire personal property- Property acquired by application of nucelus- Tests for deciding.

The plaintiffs in their suit claimed that the properties in dispute belonged to the Math Sauna temple and that one of the plaintiffs Mahant Sadashiva Yati on the death of his predecessor was elected as Mahant of the temple and that therefore as Sarbarakar he was entitled to all the properties recorded in the name of the deity or his predecessor.

The defendant claimed that by virtue of a will executed by Mahant Shivshankar Yati, the predecessor Mahant, the properties in dispute which were his personal properties devolved on him.

The Civil Judge decreed the plaintiffs’ suit with a finding that Mahant Sadashiv Yati was not the Sarbarakar.

Upholding the respondent’s claim, the High Court in appeal, held that the properties did not belong either to the Math or the deity but were the personal and separate properties of Mahant Shivshankar Yati.

In appeal to this Court the appellants impugned the correctness of the High Court's view.

Dismissing the appeal.

HELD: The properties in dispute did not form part of the properties of Math Sauna or of the deity but were the personal properties of the respondent. [664D-E]

It is well accepted that certain sects of Sanyasis (such as Dashnami Sanyasis in this case) could acquire personal property of their own and that the pronamis given to a Mahant are generally his personal property. **The mere fact that a Mahant is an ascetic does not raise any presumption that the property in his possession is not his personal property.** There is no presumption either way. In each case the burden is upon the plaintiff to establish that the properties in respect of which he is asking for possession are properties to which he is entitled [662 F-G]

In the instant case the three earlier Mahants before they took to sanyasi had been grahasthas. They were entitled to possess, enjoy and acquire personal property. Mahant Shivpher Yati, one of the predecessor Mahants whose reputation as a man of learning and personal attainments was high, received personal bhents from many of his affluent chelas. In addition, on the death of his predecessor Mahant Shivbaran Yati. Mahant shivpher Yati inherited his personal property, all of which devolved on Shivshankar Yati. A succession certificate in respect of these properties was granted in the name of Shivshankar Yati. The revenue records also showed him as the owner of the properties and not the Math or the deity. None of the transfers of small parcels of these properties made by Mahant Shivshankar Yati from time to time was challenged by the plaintiffs at any time.[663 A-E]

Whether a property was acquired by the application of the nucleus could only be determined after taking into consideration all the facts and circumstances of a case and on a balancing of the entire evidence. The burden of proof rests on the party making the claim.[663 F-G]

In the present case there is no material on record to show whether the total income from the properties belonging to the Math and the deity, left any appreciable surplus after meeting the expenditure on bhog and other ceremonies. The High Court rightly held that the fund from which the properties were acquired constituted the personal property of Mahant Shivpher Yati on whose death Shivshankar Yati employed it for the purchase of the properties and by virtue of his will the properties devolved on the respondent.[663H]

17. I may state that the relevant portions which are given in the head note are taken from placitum H at page 661 of the report and placitums A and B at page 662 of the report, the further placitums are E to G are at page 662 and the conclusion with regard to the facts and law are given at placitum H at page 663 and placitums A to C at page 664 of the report. I have therefore, no hesitation in concluding that there was no bar in law of Swami Amar Muni Ji owning properties and making a Will with respect to the same as there is nothing to the contrary established before this Court. The facts of the present case are strikingly similar to the facts in the *Math Sauna's* case.

18. In view of the above, the testamentary case is allowed. The petitioner namely Dr. Kishore Das Ji, the named executor in the Will is granted probate of the Will dated 8.10.1993 of Swami Amar Muni Ji. Petitioner be granted the necessary probate on his filing the necessary administration/security bond and other formalities as required in law.

Probate Case 9/2000

This probate case is filed by Sh. Gurdev Muni Ji for Letters of Administration of the properties of late Swami Amar Muni Ji. Since I have already allowed the testamentary petition 15/1994 inasmuch as there exists a Will dated 8.10.1993 of late Swami Amar Muni Ji, there does not arise any issue of granting any letters of administration without the Will annexed in favour of Sh. Gurdev Muni Ji inasmuch as the deceased Swami Amar Muni Ji left behind his Will dated 8.10.1993 in which there is a named executor.

The probate case bearing no.9/2000 is accordingly dismissed. I also formally state that the petitioner in this case had moved an application being I.A 14140/2011 for amendment of the schedule of the properties. The application being formal in nature is allowed. The allowing of the amendment makes no difference inasmuch as I have already dismissed the main testamentary case. Parties are left to bear their own costs.

JULY 26, 2012
ib

VALMIKI J. MEHTA, J.