

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

Date of Decision: 19.11.2012

+ FAO 117/2010

SADA NAND CHOUDHARY Appellant

Through : Mr. Sanjay Agnihotri, Adv.

versus

WANTI DEVI & ORS Respondents

Through : Mr. Mohit Chaudhary with Ms. Rashi
Bansal, Advs. for R-1.
Mr. Irfan Ahmed, Adv. for R-6.

CORAM:

HON'BLE MS. JUSTICE VEENA BIRBAL

VEENA BIRBAL, J.

FAO 117/2010

1. Present is an appeal under Section 299 of the Indian Succession Act, 1925 (hereinafter referred to as 'the Act') against the impugned judgment dated 04.01.2010 passed by the learned Addl. District Judge, Delhi whereby the petition of respondent no. 1 herein i.e. Wanti Devi for grant of probate has been allowed.

2. The appellant and the respondents herein are real brothers and sisters being the sons and daughters of late Sh. Asa Nand Choudhary. The

respondent no. 1 herein i.e. petitioner before the learned trial court had filed a petition under Section 276 of the Act seeking probate of the will dated 19.07.1991 allegedly executed by her father late Sh. Asa Nand Choudhary i.e. testator whereby he had bequeathed property No. H-34 A in her favour. In the said petition, she had averred that her father i.e. late Sh. Asa Nand Choudhary had executed the aforesaid will in sound disposing mind, out of his own free will in the presence of two independent witnesses and it was his last will. The appellant as well as respondents 2 to 6 had filed objections opposing the grant of probate on the ground that said Sh. Asa Nand Choudhary never executed any such will and if any such will was there, the same was false, manipulated and fabricated one. It was further alleged that no property was bequeathed in the alleged will dated 19.07.1991 by the testator in favour of his wife as such will in question was not believable.

3. On the pleadings of the parties, the following issues were framed:-

“1. Whether the Will dated 19.7.1991 propounded by the petitioner is the last genuine will of Late Sh. Asa Nand Chaudhary and if so, was it validly executed by him in sound disposing mind? OPP

2. Relief.”

4. In order to prove her case, the respondent no. 1 herein i.e. the petitioner before the trial court had examined herself as PW1. She had also examined R.K. Grover PW6 and P.L. Mehndiratta PW7 the attesting witnesses to the will in question. The other witnesses produced by her are

Ms. Reena PW3, Sh. Inder Raj Singh, PW-5 from the office of sub-Registrar, New Delhi.

5. Appellant herein was respondent no. 6 before the court of learned Addl. District Judge, Delhi. On behalf of appellant and respondents 2 to 6 i.e. objectors, only Ramswaroop Choudhary i.e. respondent no. 6 herein had appeared as a witness as RW1.

6. Before the learned Addl. District Judge, it was argued that Sh. Asa Nand Choudhary i.e. testator had executed a valid will on 19.07.1991 in sound disposing mind. It was contended that from the evidence on record the due execution and attestation of the will as per the requirement of law has been proved. On behalf of the appellant and other objectors i.e. respondent no. 2 to 6, it was argued that probate petition was filed with ulterior motive to deprive other legal heirs of their rightful share in property in question. It was contended that the testator was suffering from various ailments at the time of execution of the alleged will. He was bed ridden for the last many years and was unable to move. It was also contended that he was mentally imbalanced person due to advance age and ailment and was not in a position to make a will. It was also argued that the will was apparently a forged document as nothing was bequeathed in favour of the wife of the testator. There are other legal heirs of the deceased i.e. appellant and respondents 2 to 6 and no reason was given in the will in question as to why the property was bequeathed only in favour of appellant in exclusion of other legal heirs.

7. Relying on the evidence and relevant case law relied upon by the parties, the learned Addl. District Judge has held that the respondent no. 1 herein i.e. petitioner before the said court was able to prove that the will dated 19.07.1991 was genuine will of the testator and the same was executed by him in sound disposing mind and accordingly allowed the petition and ordered that the aforesaid will be probated in her favour on her furnishing valuation report, administrative/surety bond.

8. Aggrieved with the same, present appeal is filed.

9. The learned counsel for appellant has argued that the will in question is false and fabricated one and does not bear the signature and thumb impression of the testator. It is contended that the alleged signatures of Asa Nand Choudhary are fabricated and forged one. It is contended that there are suspicious circumstances also inasmuch as, no property was bequeathed in favour of the wife of testator who was alive at that time and had no independent source of income. It is contended that the will itself on its reading creates a doubt about the soundness of mind of the testator. It is further contended that there is unequal distribution as per the will in question. One daughter i.e. respondent no. 1 is given half of the property i.e. house No. H-34A measuring 100 sq. yds. whereas the two sons are given remaining 100 sq. yds. i.e. house No. H-34B. Nothing has been given to other four daughters i.e. respondent no. 2 to 5. It is contended that even unequal distribution creates doubt about the genuineness of the will in question. It is further contended that will is dated 19.07.1991 whereas the testator died on 11.07.1992 and the petition is filed on 05.12.1996. It is not

shown as to why it was filed after 5 years of the death of the testator. It is contended that the delay is not explained in any manner.

10. On the other hand, learned counsel for respondent has argued that the will dated 19.07.1991 is genuine. Its due execution and attestation as provided under the law stands proved by the evidence led by the respondent no. 1 before the trial court. It is contended that though the appellant and respondent no. 2 to 6 have alleged that the will is forged one but no evidence is led by them to substantiate it. It is contended that there is a photograph of the deceased on the will dated 19.07.1991. The same is also registered with the office of sub-Registrar, Asaf Ali Road, New Delhi. Its registration has also been proved by Sh. Inder Raj Singh, PW5. The attesting witnesses of respondent no. 1 have categorically deposed that the testator was of sound disposing mind i.e. PW6 and 7 and the said witnesses have not been cross-examined on this aspect of the matter. It is categorically mentioned in the will dated 19.07.1991 that the wife of the testator was having sufficient funds/arrangement to lead her life as such he was not bequeathing in her favour. It is further pointed out that the wife of testator was also entitled for family pension till her lifetime after the death of testator and due to that reason nothing was bequeathed in her favour. About other daughters also it is mentioned in the will that his other daughters are well settled. It is further contended that the respondent no. 1 is the blind daughter of testator. She had lost her eyes in the year 1969 and was also deserted by her husband since then. Thereafter, she started living with her parents. She has a grown up daughter of marriageable age. Due to that reason the testator had bequeathed the aforesaid property in favour of respondent no. 1. It is

contended that there is no illegality in the impugned order which calls for interference of this court.

11. For deciding the present matter, it would be appropriate to reproduce the relevant provisions i.e., Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872 which reads as under :

“Section 63 of the Succession Act

63. Execution of unprivileged wills.- Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules:-

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) 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 shall be necessary."

Section 68 of the Evidence Act

"68. Proof of execution of document required by law to be attested.- If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving it's execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx”

12. To say will has been duly executed the requirement mentioned in Clauses (a), (b) and (c) of Section 63 of the Succession Act are to be complied with i.e., (a) the testator has to sign or affix his mark to the will, or it has got to be signed by some other person in his presence and by his direction; (b) that the signature or mark of the testator, or the signature of the person signing at his direction, has to appear at a place from which it could appear that by that mark or signature the document is intended to have effect as a will; (c) the most important point with which we are presently concerned in this appeal, is that the will has to be attested by two or more witnesses and each of these witnesses must have seen the testator sign or affix his mark to the Will, or must have seen some other person sign the Will in the presence and by the direction of the testator, or must have received from the testator a personal acknowledgement of signature or mark, or of the signature of such other person, and each of the witnesses has to sign the Will in the presence of the testator.

14. The propounder of the will has to show that the will was signed by the testator; that he was at the relevant time in sound disposing state of mind; that he understood the nature and effect of dispositions and had put his signatures to the testament of his own free will and that he had signed it in the presence of the two witnesses who attested in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged.”

16. Ms. Reena, PW3 is the daughter of respondent no. 1. She has filed her evidence by way of affidavit Ex.PW3/A. She has deposed that testator and his wife were residing at H-34A, Kalkaji till their death. They were being looked after by her as well as her mother i.e. respondent no. 1. She has deposed that the testator was illiterate and could sign in Urdu. She has stated in her affidavit Ex.PW3/A that the will was signed by the testator at point A, B and C on each page in Urdu. He was of sound disposing mind and was not suffering from any serious ailment. She has denied that the will was forged by her as well as her mother in collusion with the attesting

witnesses. She has denied that the testator was bed ridden for 2-3 years prior to his death and was not understanding anything. She has also stated in her cross-examination that her maternal uncle R.S.Chaudhary i.e. respondent no.6 was bearing the medical expenses of the testator because he used to get the reimbursement from his office. She has also deposed that she and her maternal uncle used to take the testator to doctor whenever it was required. She has also deposed that the testator used to reside at both the premises i.e. H-34A and H-34B. On being further cross-examined, she has further deposed that when the will was prepared the same was read over and explained to the testator. The will was prepared in the complex of office of sub-Registrar, Asaf Ali Road, New Delhi.

17. Sh. R.K. Grover, PW6 who is one of the attesting witnesses to the will dated 19.07.1991 is a resident of H-13B, Kalkaji, New Delhi. He has stated in the affidavit Ex. PW6/A that he knew testator i.e. Asa Nand Chaudhary who was the permanent resident of house No. 34A and B, Kalkaji, New Delhi. He had executed the will on 19.07.1991 in sound disposing mind in respect of immovable property No. H-34A, Kalkaji, New Delhi in favour of his blind daughter, Smt. Wanti Devi and property No. H-34B, Kalkaji in favour of his two sons, namely, Sada Nand Chaudhary i.e. appellant no. 2 and Ram Swaroop Chaudhary i.e. respondent no.6. He has also deposed that he is one of the attesting witnesses of the will in question. He has identified his signatures on will in question at point B and that of testator, late Sh. Asa Nand Chaudhary at point A, B, C, D and E on each page. As per his affidavit Ex. PW6/A, the testator had signed on the will dated 19.07.1991 in his presence as well as in the presence of other attesting

witnesses i.e. Sh. P.L. Mehndiratta. He has further stated in the aforesaid affidavit that he and Sh.P.L. Mehndiratta PW7 had signed the will dated 19.07.1991 at the request of Asa Nand Chaudhary. A photograph of Asa Nand Chaudhary was also affixed on the said will and the will was prepared in the office of sub-Registrar on 19.07.1991 and bears his signatures on the back side. He has proved the said will dated 19.07.1991. He has also deposed that the probate petition bears his signatures at point A wherein he was verified as an attesting witness.

18. In cross-examination he has denied that the respondent no. 1 had forged the will in question in collusion with him and Sh. P.L. Mehndiratta PW7. He has denied that the testator was bed ridden for 2 years before his death. He has also deposed in cross-examination that the testator had approached him one day before the execution of the will and requested him to be a witness of will in question. He is the neighbour of the testator. The contents of will in question were read over and explained to the testator as well as to them by the Advocate who had prepared the will dated 19.07.1991. He has denied that he was deposing at the instance of the respondent no. 1. His evidence on material point is not demolished in cross-examination.

19. Sh. P.L. Mehndiratta PW7 is the other attesting witness to the will. He has tendered in evidence his affidavit Ex.PW7/A. He has identified his signatures on will in question at Point B. He has deposed that the will dated 19.07.1991 was executed by the testator in a sound disposing mind in respect of property No. H-34A, Kalkaji, New Delhi in favour of his daughter

Wanti Devi who was deserted by her husband and property No. H-34B, Kalkaji, New Delhi in favour of his two sons. He has also deposed that he is one of the attesting witnesses of the said will. He has identified his signatures on the will at Point A as well as that of the testator on each page of the will. He has deposed in detail the execution and attestation of the will as is deposed by PW6. His evidence is not demolished in cross-examination.

20. Sh. Inder Nath, PW5 was an LDC in the office of sub-Registrar, Asaf Ali Road. He had brought the summoned record i.e. will in question. He had deposed that the will in question was registered vide Registration No. 3319/3 Vol. 614 Page No. 57-60 dated 19.07.1991 in the office of Sub-Registrar, Asaf Ali Road, New Delhi.

21. Respondent no. 1 i.e. Smt. Wanti Devi PW1 has tendered her affidavit Ex. PW1 by way of evidence wherein she has stated that the testator was the absolute owner of property No. H-34A and B, Kalkaji, New Delhi. He had executed the will in question on 19.07.1991 in sound disposing mind. She is blind and has been deserted by her husband. She alongwith her daughter Reena PW3 were living with her parents. After his death, his wife, Smt. Bholi Bai was getting family pension till her life. In cross-examination, she has stated that the will in question was prepared by his father of his own. R.K. Grover PW6 was their neighbour and was known to the testator in that capacity. She has further stated in cross-examination that she had informed her brothers and sisters about the aforesaid will of the testator after his first death anniversary.

22. Sh. Ram Swaroop Chaudhary, the objector had appeared as RW-1 before the Ld. Addl. District Judge. He had filed his affidavit Ex.RW1/A and had stated therein that the respondent no. 1 and her daughter i.e. Reena PW3 had forged the will dated 19.07.1991. He had stated that the testator was of 84 years of age and was suffering from various ailments and for the past few years he was bed ridden and had bed sores all over his body and was also mentally unbalanced due to advance age and ailments and was not in a position to comprehend/perform or execute any document and the question of testator going to sub-Registrar office does not arise. On being cross-examined, he has stated that he did not file any civil suit seeking declaration of the will in question as null and void. He has also stated that he has not produced on record any record about the illness of the testator i.e. his father. He has stated that his father was drawing pension and was having bank account. He has further deposed that he did not transact the account of his father. He has deposed that the will dated 19.07.1991 bears the photograph of his father. He did not file any criminal complaint against his sister i.e. respondent no. 1 for committing forgery. He has admitted that his father could read Urdu and used to sign in Urdu. He has also stated that P.L. Mehndiratta PW7 and R.K. Grover PW6 both are the residents of Kalkaji.

23. Learned counsel for appellant has contended that the will in question is false and fabricated one as the signatures of testator are fabricated and forged one. The witnesses Reena PW3, R.K. Grover PW6 and P.L. Mehndiratta, PW7 have all deposed that the testator had signed the will in question in their presence. The objector RW-1 i.e. respondent no.6 has also stated that his father knew Urdu and used to sign in Urdu. The will dated

19.07.1991 also bears the signatures of testator in Urdu. No evidence has been led by the objector i.e. appellant to substantiate that the signatures were false and fabricated one. The evidence of two neighbours of testator i.e. R.K. Grover PW6 and P.L. Mehndiratta PW7 who are the attesting witnesses to the will clearly establishes that testator had signed the will in question in their presence and they had also signed on will in question in the presence of testator. The aforesaid witnesses in their cross-examination have stated that the testator had signed the will in their presence and they had also signed as attesting witnesses in the presence of testator. Their evidence is not demolished in cross-examination. Sh. Inder Raj Singh PW5 from the office of Sub-Registrar has also proved that the will dated 19.07.1991 is a registered document. It also bears the photographs of testator. In these circumstances, burden was on the appellant/objector to prove that the signatures were forged one. Except making bald allegation, no evidence has been led by the appellant to substantiate the said allegations. The burden was on the appellant to prove that will is forged and fabricated one. In the absence of evidence, the will dated 19.7.1991 cannot be taken to be forged and fabricated one, as is alleged.

24. The other contention of Ld. counsel for appellant is that the testator was bed ridden two years prior to his death and was having bed sores and was seriously ill and was not of sound mind. Reading the evidence on record, it cannot be said that the testator was of unsound mind as is alleged. It is admitted position that he was a retired chowkidar from Safdarjung Hospital and was drawing pension. The attesting witness R.K. Grover PW6 and P.L. Mehndiratta PW7 have categorically deposed that the testator was

of sound disposing mind. No suggestion has been given to PWs by the appellants/objectors that the testator was of unsound mind. No suggestion has been given even to the respondent no. 1 (PW1) and her daughter PW3 that the testator was of unsound mind as is alleged. R.K. Grover PW6 has clearly stated in his affidavit Ex. PW 6/A that Asa Nand Chaudhary had executed the will in sound disposing mind. He has not been cross-examined on the allegations of unsoundness of mind. P.L. Mehndiratta PW7 has also deposed about the soundness of mind of the testator. Even he has not been cross-examined on this aspect of the matter. Even the respondent no. 1 i.e. PW1 and her daughter Ms. Reena, PW3 has not been given any suggestion in this regard. It has come in the cross-examination of respondent no. 1 i.e. PW1 that the testator had died at the age of 80 years and was not having any ailment. She has denied that he was bed ridden for 2-3 years prior to execution of will in question or that the testator was not understanding anything. He retired as a Chowkidar of Safdarjung Hospital and was getting pension. The appellants/objectors have also not led any evidence that the testator was of unsound mind. Nothing has been brought on record to show that he was not able to decide or that his mental faculties were not functioning properly as is contended. There is no evidence also that he was bed ridden for the past 3 years and was having bed sores. Rather, the evidence led by respondent no. 1 i.e. petitioner before the Ld. Addl. District Judge establishes that the testator was of sound mind.

25. The suspicious circumstance alleged is that nothing has been given by the testator to his wife in will dated 19.07.1991. The will dated 19.07.1991 clearly mentions about the sufficiency of funds with the testator's wife.

Further, the testator was getting pension. It has also come on record that after his death, his wife was entitled for family pension. In these circumstances, it cannot be said that the testator was not bothered about his wife.

26. Further, as per abovementioned will, 50% of the property i.e. House No. 34A, Kalkaji is bequeathed in favour of respondent no. 1 and remaining 50% in favour of his two sons i.e. appellant and respondent no. 6. It is also admitted position that respondent no. 1 who is the blind daughter of the testator had lost her eyes in 1969 and since then she was deserted by her husband and was living with her parents. It has also come in the evidence that she has a daughter of marriageable age i.e. Reena PW3. Even the said fact is recorded in the will dated 19.07.1991 also. Due to love and affection and the condition of respondent no. 1, the testator had bequeathed half of the property in her favour. Perusal of will dated 19.07.1991 shows that the testator had thought about his wife, other daughters and sons before the execution of the will in question and had executed the same after thoughtful consideration. In these circumstances, court will not go into unequal distribution, as is alleged. Reference is made to judgment of this court in **K.L. Malhotra vs. Sudershan Kumari and Anr.; 149 (2008) DLT 783.**

27. Learned counsel for the appellant has also contended that the delay in filing the probate petition is not explained. The stand of respondent no. 1 is that there is no delay. The contention raised has also no force. The probate petition was filed on 05.12.1996. The testator had died on 11.07.1992. The will in question is dated 19.07.1991. The stand of respondent no. 1 is that the right to apply accrued to her after her mother's death who had died 2-3

years after the death of testator. In these circumstances, there is no delay. Reference is made to the judgment of **Kunvarjeet S. Khandpur vs. Kirandeep Kaur and Ors.; AIR 2008 SC 2058.**

In view of the above discussion, there is no merit in this appeal and the same is dismissed.

CM Nos. 5546/2010 & 21918/2011

In view of the order on the main appeal, no orders are required on these applications.

The same stand disposed of.

VEENA BIRBAL, J

NOVEMBER 19th, 2012

ssb/kks