

IN THE HIGH COURT OF DELHI AT NEW DELHI

TEST.CAS. 14 of 2004 & IA No. 3067 of 2006

Reserved on: August 30, 2013

Decision on: September 4, 2013

DEEPIKA HINGORANI

..... Petitioner

Through: Mr. Suman Kapoor,
Mr. Tarun Sharma and
Ms. Isha Shah, Advocates

versus

STATE & ANR.

..... Respondents

Through: Ms. Lily Thomas, Advocate
for the Objector/R-2.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

04.09.2013

1. The Petitioner, Mrs. Deepika Hingorani, has filed this petition under Sections 276 and 278 of the Indian Succession Act, 1925 ('ISA') for grant of probate/letters of administration of the Will dated 11th November 1992 (hereafter 'the Will') executed by her father late Shri K.P. Mathai [hereinafter referred to as 'the Testator'].

2. The case of the Petitioner is that Testator died on 17th January 1996 within the territorial jurisdiction of this Court and prior thereto, the Testator made and published his Will and testament dated 11th November 1992 bequeathing his property No. N-181, First Floor,

Sector-25, Javayu Vihar, Noida, Phase—II, Noida (U.P.) [‘Noida property’] in favour of the Petitioner. The original of the Will executed by the Testator has been placed on record (Ex.PW-1/B). The Petitioner stated that on the basis of the said Will, she became the owner of the Noida property after the death of her father. The Will was attested by two witnesses, Mr. Jagmohan and Mr. Mathuresh Sharma. Mr. Jagmohan was examined as PW-2. His affidavit by way of examination-in-chief filed on 29th July 2008 was exhibited. Mr. Jagmohan identified his handwriting and signatures of the Testator at Point A and B in the Will. The other witness, Mr. Mathuresh Sharma, who was the other witness to the Will also filed an affidavit dated 29th July 2008 by way of examination-in-chief. In the said affidavit he too identified the signature of the Testator. The Petitioner examined herself as PW-1. She filed her affidavit dated 29th July 2008 by way of examination-in-chief. Both PW-1 and PW-2 were cross-examined.

3. As disclosed by the Petitioner, Testator left behind at the time of his death the following legal heirs (a) Mrs. Mabel Mathai, his wife (who expired on 15th September 1998), (b) Mrs. Marry Leela Thukral who is the Objector to the present petition and (c) Mrs. Daisy Katyal who is presently living in Kolkata, has given her no objection to the grant of probate of the Will dated 11th November 1992 in favour of the Petitioner.

4. The Testator executed another Will dated 29th September 1992 in respect of another flat bearing No. B-2C, 77B, Janakpuri, New Delhi

[hereinafter referred to as 'Janakpuri property']. In terms of the said Will he bequeathed 50% share in the Janakpuri property in favour of the Petitioner, 30% thereof in favour of his daughter Mrs. Katyal and 20% in favour of another daughter Mrs. Thukral.

5. As regards the Janakpuri Property the Petitioner filed a separate petition, Testamentary Case No. 54 of 2004, for grant of probate in the Court of learned Additional District Judge, Delhi in respect of which too Mrs. Katyal has given no objection. The learned ADJ granted probate of the Will dated 29th September 1992. Against the said decision the objector Mrs. Thukral has filed an appeal has been filed in this Court which is stated to be pending. Although submissions were made before this Court as regards the Janakpuri property, the Court refrains from discussing them as it is *sub judice* before another Court.

6. There are serious objections raised by Mrs. Thukral to the grant of probate of the Will dated 11th November 1992 in favour of the Petitioner. On the basis of the objections filed by Mrs. Thukral this Court by its order dated 22nd May 2008 framed the following issues:

(1) Whether the deceased K.P. Mathai executed a valid and enforceable Will dated 11th November 1992? **OPP**

(2) Whether the Petitioner is entitled for probate of the Will dated 11th November 1992? **OPP**

(3) Whether the petition is not maintainable in view of the objections raised by the Objector Ms. Mary Leela Thukral? **OPR**

(4) Relief.

7. While the Petitioner examined herself and two attesting witnesses as PW-1, 2 and 3 respectively, Mrs. Thukral did not examine herself as a witness. She examined only one witness, Rev. Sister Shalini, RW-1. Several opportunities were granted to Mrs. Thukral to lead further evidence. The Petitioner's evidence was closed on 20th July 2010. RW-1 Rev. Sister Shalini was cross-examined and discharged on 24th July 2010. Thereafter, the matter was adjourned to 27th August 2010, 29th November 2010 and 19th May 2011 to enable Mrs. Thukral to lead further evidence. On 19th May 2011, further time was granted to Mrs. Thukral to lead evidence subject to payment of cost of Rs. 5,000. On 27th September 2011 when no affidavit was filed by Mrs. Thukral, her evidence was closed by the Joint Registrar ('JR'). On 2nd November 2011 the Court waived the cost of Rs. 5,000 and took on record the affidavit of Mrs. Thukral and listed the matter before the JR on 2nd December 2011 for her cross-examination. However, on that date she sought a further adjournment. The case was listed on 22nd February 2012 but she was not present on that date.

8. The matter was thereafter listed on 21st April 2012. On that date the following order was passed by the JR:

“In this case, PW-1 was examined on 14th January 2009. She was cross-examined on 15th January 2009, 1st April 2009, 28th July 2009, 29th July 2009, 10th November 2009, 23rd February 2010 and finally on 13th July 2010.

PW-2 was examined and discharged on 20th July 2010 and the matter was kept for the Respondents evidence.

The Respondent examined one witness on 24th July 2010 and the matter was kept for remaining evidence of the Respondents on 28th August 2010, 29th November 2010.

Objector No. 2 has sought for time on 19th May 2011. Time was granted by imposing cost of Rs. 5,000. In spite of that, affidavits were not filed. Therefore, the evidence of objectors was closed on 27th September 2011.

However, by an order of the Court dated 2nd November 2011, the cost was waived and Objector No. 2 was permitted to file affidavits; she was directed to be present on 2nd December 2011. The Objector No. 2 submitted on 2nd December 2011 that she has to take her daughter to the hospital and sought for time. Thus, the matter was adjourned to 12th April 2012. However, upon the request of Objector No. 2 and the Petitioner, matter is preponed for the cross-examination of Objector No. 2 by 22nd February 2012.

On 22nd February 2012, though the matter was preponed, none appeared for Objector No. 2. Court notices were issued for today. None appears for the Objector even today.

The Petitioner in person submits that evidence of the Objector No. 2 be closed and the matter may be placed before the Hon'ble Court.

Let the matter be placed before the Hon'ble Court for further directions on 23rd May 2012.”

9. On 4th September 2012, it was recorded that evidence was complete. Again an adjournment was sought on behalf of learned counsel for Mrs. Thukral.

10. This Court has heard the submissions of Mr. Suman Kapoor, learned counsel for the Petitioner and Ms. Lily Thomas, learned counsel for the Objector respectively.

11. As far as the witnesses for the Petitioner are concerned, they have remained unchallenged as far as the fact of execution of the Will is concerned. There is nothing in their answers which indicates that that Testator has not executed the Will. The Petitioner has in fact been extensively cross-examined on various aspects but nothing remotely suggests that the Testator was neither in a sound frame of mind when he executed the Will nor was he otherwise not inclined to make the Will. As far as the cross-examination of the attesting witness Mr. Jagmohan is concerned, he clearly states that the Testator signed the Will in his presence and he signed it as a witness in the presence of the Testator.

12. On this aspect Ms. Lily Thomas, learned counsel appearing for Mrs. Thukral referred to Section 63 of the ISA concerning the testator's *jurat*. She referred to a model Will appended at the end of the bare Act. Section 63 of the Act reads as under:

“63. Execution of unprivileged Wills. Every testator, not being a soldier employed in an expedition or engaged in actual warefare, 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 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 acknowledgment of his signature or mark, or 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.”

13. Nowhere does the above provision mandate that the Will should contain a statement to the effect that it has been signed in the presence of the witnesses who have then signed in the presence of the testator. The model specimen at the end of the bare Act cannot be taken to be a part of the statute. That apart, notwithstanding a statement made to the above effect in a Will, it would be really a matter of evidence whether the Testator signed the Will in the presence of the witnesses and each of them signed it in his presence and in the presence of each other. In *Smt. Punni v. Sumer Chand AIR 1995 HP 74*, the Court while interpreting Section 63(c) clarified that it is not necessary that both

witnesses should be present simultaneously at the same time while affixing their signatures. The requirement only is that each of them should have seen the testator sign or affix his mark to the Will.

14. As far as the present case is concerned, both attesting witnesses have given their respective affidavits by way of examination-in-chief testifying that the Testator affixed his signature on the Will in their presence. The Will itself is a hologram. In other words, it is written in the hand of the Testator. There is no interpolation, correction or any sort of overwriting in the Will that can even remotely suggest that it has been tampered in any way. The mere fact that there is no date below the signatures makes no difference to the genuineness of the Will. The date can be found on the top right corner of the Will. That is sufficient to indicate when it was signed by the Testator and attested by the witnesses.

15. The other 'defect' in the Will pointed out by Ms. Thomas is about the blank space below the Will where the two attesting witnesses have appended their signatures. This does not indicate that they were not present or that their signatures were added at a later point in time. There is nothing in the cross-examination of one of the witnesses, Mr. Jagmohan which would substantiate this allegation.

16. There is nothing in the evidence of the Objector to suggest that the Testator was not of sound mental disposition. The burden is on the Objector to make good such allegation. Apart from her sole witness

Rev. Sister Shalini, whose testimony will hereafter be discussed, there is no evidence produced by the Objector to substantiate her allegation that the Testator was not of a sound mental disposition when he wrote the Will.

17. Sister Shalini (RW-1) did not figure in the written objections filed by the Objector, Mrs. Thukral. Her affidavit by way of examination-in-chief is dated 19th July 2010 and it was filed on 20th July 2010 upon the closure of the evidence of the Petitioner. She states that she had known the Objector since 1994 because the Objector's son was mentally unsound. In para 3 of the affidavit, she stated "I happened to visit her parents in Janakpuri one day in 1995 in their Janakpuri flat along with Rev. Fr. I Santos of Gol Dak Khana Church.....". It is seen that the answers given by Sister Shalini in her cross-examination as to her recalling of a visit to the father of the Petitioner and the Objector in 1995 does not appear to be very convincing. She confirms that there were in fact two Wills written by the father. This undoes the attempt by the Objector to show that the Will was a forged and fabricated document.

18. The thrust of the evidence of Sister Shalini is that the father wanted to change the second Will as he did not want the Petitioner to take the Noida property entirely. Why he would disclose this to Sister Shalini and that too in 1995 is not clear. Why Sister Shalini kept quiet about this for 15 years is again not clear. Why she informed the Objector about this only in 2010 is a mystery. Had she informed the Objector

earlier, it would doubtless have found mention in her written objections. The evidence of Sister Shalini does not persuade this Court to doubt the genuineness of the Will. If the testator changed his mind, after executing the Will but did not do anything about it then the Court cannot possibly presume that the Testator intended to change his Will. Once the Testator states that a certain document is his last and irrevocable Will and that Will after his death is shown to be a genuine document, the Court has to proceed on that basis. The only ground on which the Court may interfere with a Will is if it is shown even on a preponderance of probabilities to the satisfaction of the Court, that the testator was not of sound mental disposition or that in fact he did not execute the Will in the presence of the attesting witnesses. On both these aspects, the evidence produced by the Objector is unhelpful to the case of the Objector to the Will.

19. Consequently, this Court is satisfied that that Will dated 11th November 1992 executed by the testator is a genuine document. Consequently the objections to the Will are hereby rejected.

20. Accordingly, probate is granted in favour of the Petitioner in respect of the Will dated 11th November 1992 executed by her father late Shri K.P. Mathai. The Petitioner will, on the basis of the valuation of the Noida property calculated on circle rates prevailing on the date of filing pay, within four weeks, the requisite court fees and submit an administration bond with one surety in accordance with law for issuance of letters of administration. A certified copy of the Will dated

11th November 1992 will be attached to the letters of administration,
and the original will be kept in a sealed cover by the Registry.

S. MURALIDHAR, J.

SEPTEMBER 4, 2013

Rk/akg

