

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

% *Judgment reserved on: 10.01.2013*
Judgment delivered on: 17.01.2013

+ FAO(OS) 576/2009 & CM No.17199/2010

SUBHASH NAYYAR Appellant

Through: Mr. Kirti Uppal, Sr. Adv. with
Mr. S.K. Chaudhary, Adv.

Versus

REGISTRAR, UNIVERSITY OF DELHI & ORS. Respondents

Through: Mr. A.P.S. Ahluwalia, Sr. Adv. with
Ms. Beenashaw N. Soni, Ms. Manimala
Roy & Mr. S.S. Ahluwalia, Adv. for
R-1.
Mr. Manu Nayar, Adv. for R-2 to 5.
Mr. M.A. Niyazi & Mr. Sanjay Sood,
Adv. for R-6(a) to 6(c).

+ FAO(OS) 627/2009

VEENA NAYAR & ORS. Appellants

Through: Mr. M.A. Niyazi & Mr. Sanjay Sood,
Adv.

versus

REGISTRAR, UNIVERSITY OF DELHI & ORS. Respondents

Through: Mr. A.P.S. Ahluwalia, Sr. Adv. with
Ms. Beenashaw N. Soni, Ms. Manimala
Roy & Mr. S.S. Ahluwalia, Adv. for
R-1.
Mr. Manu Nayar, Adv. for R-2 to 5.
Mr. S.K. Chaudhary, Adv. for R-6.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 Both these appeals have impugned the order dated 06.10.2009 whereby the probate petition filed by the University of Delhi/petitioner/executor of the Will dated 13.03.1974 (hereinafter referred to as the 'University') of the testator Roshan Lal had been decreed in its favour.

2 Record shows that Roshan Lal (hereinafter referred to as the 'testator') had executed his last will and testament dated 13.03.1974. This document has been proved as Ex. PW-1/1. It bears the signatures of the testator Roshan Lal. In the column of witnesses, three names have been mentioned; first two names are neither legible and nor decipherable. It was for this reason that even the list of witnesses filed by the respondent on 07.04.2001 contains the name of Madan Lal Kapoor alone to prove the Will whose name finds mention at serial No.

3. In terms of Ex. PW-1/1, the testator had described himself as the absolute owner of Cottage No. 13, West Patel Nagar, New Delhi comprising of 10 shops and a three room residential portion. The recitals

contained in the Will are to the effect that after his death his wife Seeta Devi during her lifetime will continue to live and be in possession of the residential portion of the property and will also be entitled to get rent of all the shops except shop No. 10; the rent for shop No. 10 will be received by the University. The University would be entitled to ownership of all the shops as also the residential portion only after the death of his wife; further the University shall as soon as may be convenient sell the entire property at the best possible price and the sums so received by the University by way of sale as also the rents shall be kept in the State Bank of India or any other nationalized bank on an interest bearing account in the name of "Roshan Lal Scholarship Fund"; out of the interest so received known as the Roshal Lal Scholarship, Rs.100/- per month per student would be awarded by the University to deserving and promising students of the University Medical College or failing which of any other medical college affiliated to the University who being poor are unable to meet his/her expenses on medical education; the account of the Roshan Lal Scholarship Fund would be operated by the Registrar of University. This document further recites that no other person has any concern with this property and is not in any

manner entitled to it; it also does not concern his moveable properties. It is a registered document and had been proved by PW-1 who had brought the original summoned record from the office of the Sub-Registrar.

3 The appellants before this Court are the two sons of the testator. Their submission is that the Will is forged and fabricated and it had not been executed by the testator; the subject matter of the Will being ancestral property, the testator did not have the capacity to bequeath the said property; the Will not being free from suspicious circumstances, is an invalid document. These submissions have been noted in the amended objections filed by the objector/respondent No. 7/Sushil Nayar. His other brother Subhash Nayar and second son of the testator who is the appellant in FAO (OS) No. 576/2009 was ex-parte in the Court below. Relevant would it be to point out that in the first set of objections filed by respondent No. 7, there was no objection taken about the validity of the Will; his objections at that stage were bordered on the submission that the subject matter of the Will being ancestral property could not have been bequeathed. Six years later the amended objections were permitted to be filed where for the first time the contesting respondent had taken the plea that the Will has not been executed by

Roshan Lal; the fact that the Will was a registered document was never disputed.

4 The controversy before the learned Single Judge was one single issue. The said issue reads as follows:-

“Whether the deceased Roshan Lal has duly and validly executed the Will dated 13.03.1974?”

5 On behalf of the appellants it has been pleaded that the Single Judge has gravely erred in concluding that the Will has been validly executed. The test contained in Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act had not been adhered to; Section 69 of the Evidence Act has been mis-applied. The twin requirements contained in the said provision have not been met with. The testimony of PW-2 could have been adverted to in the absence of resort to the provisions of Order XVI Rule 10 of the Code. In support of this submission, the learned counsel for the appellants has placed reliance upon (2008) 14 SCC 754 Babu Singh & Others Vs. Ram Sahai Alias Ram Singh; submission being that it is the duty of the plaintiff to exhaust all the processes of the Court in order to compel the attendance of any one of the attesting witnesses and when the production of such

witnesses is not possible either legally or physically, only then can the plaintiff avail of the provisions of Section 69 of the Evidence Act. Attention has been drawn to the provisions of Section 107 of the Evidence Act; submission being that presumption about the death of Madan Lal Kapoor could be addressed only after 30 years and the person propounding this fact must prove it by cogent evidence. Further submission being that the mandate contained in Section 63 (c) of the Indian Succession Act and Section 68 of the Evidence Act is not an empty formality; it has to be strictly adhered to. There is no witness who has come into the witness box to prove the signatures of the testator.

6 Arguments have been countered. Submission of the learned counsel for the respondent being that the intent of the testator has to be gathered from the various correspondences addressed by the testator to the University expressing his desire to bequeath the suit property to the University for giving scholarships to deserving students of the Medical College. Further submission being that all along the case of the respondent/University has been that the Will of the testator contained only one name in the list of witnesses which was legible and that was the reason why the name of Madan Lal Kapoor alone had been listed in

the list of witnesses to prove the Will. Attention has been drawn to I.A. No.9342/1993 filed by the University under Section 151 of the Code along with the probate petition wherein it had been so clarified; submission being that the question of exhaustion of the procedure contained in Order XVI Rule 10 of the Code did not arise as in the absence of knowledge about the name and addresses of the other two attesting witnesses, the question of sending notices to them did not arise. Further submission being that the next attesting witness Madan Lal Kapoor had expired and this was clear from the version of PW-2 who had come into the witness box and identified the signatures of his father being familiar with the same. In these circumstances, the provision of Section 69 of the Evidence Act has rightly been adverted to. Reliance has been placed upon III (2008) SLT 370 Krishna Kumar Birla Vs. Rajendra Singh Lodha & Other to support a submission that in a probate petition, the question of title cannot be gone into and although admittedly no evidence has been led by the appellants to substantiate their submission that the suit property was ancestral property; even otherwise, this question could not be answered in a probate petition which is also the reason why no issue on this count had been framed.

Reliance has been placed upon (1993) All. ER 129 Re Dale (deceased) Proctor Vs. Dale to support the last submission that Section 90 of the Evidence Act is also applicable in such a scenario and a document which is more than 30 years old may, when produced from proper custody, be presumed to be a duly executed document.

7 Arguments have been appreciated. Record has been perused.

8 The probate petition has been filed by the Registrar of the University of Delhi; he being the executor of the Will Ex. PW-1/1 dated 13.03.1974. This petition has been filed on 13.10.1993. It states certain undisputed facts; first being that the testator Roshan Lal had expired on 02.02.1977; there is also no dispute that his wife Seeta Devi had expired on 12.05.1992; undisputed fact also being that the Will was registered with the Sub Registrar of Assurance on 16.03.1974 as document No. 598 in Additional Book No. III, Volume 85 at pages 167 to 169.

9 Para 12 of the petition recites that the Will has been duly executed and registered by the deceased Roshan Lal in accordance with law. In the corresponding para of the amended objections filed by the contesting respondent, the only submission is that in view of the existence of another hand-written copy of a Will which has not been signed by him, FAO (OS) Nos. 576/2009 & 627/2009

the execution of the alleged Will (Ex.PW-1/1) propounded by the petitioner is not free from suspicious circumstances as both the Wills are similar but the hand-written copy of the Will was not signed by late Roshan Lal. There is otherwise no specific denial about the execution of the Will.

10 The case of the petitioner as is evident from the pleadings is that although Ex. PW-1/1 had been attested by the attesting witnesses but since the names of first two witnesses as also their addresses were not legible, the question of issuance of notice to these attesting witnesses did not arise. This is clear from the averments contained in IA No. 9342/1993 which had been filed along with the probate petition. Relevant would it be to state that no reply in opposition to this application was filed. It is also not the case of the appellants that the names of these aforementioned witnesses were known to the respondent and he did not deliberately produce the said witnesses. It was only witness Madan Lal Kapoor who was known to the respondent and since he had expired, the testimony of his son (PW-2) Rajender Lal Kapoor was recorded. PW-2 had on oath identified the signatures of his father at point 'A' on Ex. PW-1/1 stating on oath that his father had died. No

suggestion has been given to this witness that he was deposing falsely in this context. Section 107 of the Evidence Act would thus have no application. PW-2 had also on oath deposed that his father during his lifetime had discussed the execution and attestation of the Will with him, being known to the testator Roshan Lal as they were close friends.

11 In this scenario, there was no scope for the application of the provisions of Order XVI Rule 10 of the Code which envisages a situation where summons have been sent to a witness to give evidence and he has failed to appear and the Court, may, then, in its discretion, adopt a coercive process. In the facts of this case, the names and addresses of the attesting witnesses (apart from Madan Lal Kapoor) not being known to the respondent, the question of resort to this provision did not arise. The ratio of judgment of Babu Singh (Supra) in this context would be inapplicable.

12 The settled position of law is that a Will is mandatorily required to be attested by two witnesses in terms of Section 63 (c) of the Indian Succession Act, 1925. The requirement of Section 68 of the Evidence Act has also to be complied with for proof of the Will. Section 68 of the Evidence Act lays down the mode of proof; it envisages that it is not

necessary to call more than one attesting witness to prove the due execution of the Will. When the genuineness of a Will is in question apart from the execution and attestation of the Will, it is also the duty of the propounder of the Will to dispel all suspicious circumstances.

13 In the instant case, the only attesting witness whose name was legible and whose address was known to the propounder of the Will was Madan Lal Kapoor. He had admittedly expired at the time when the evidence was to be led. His son PW-2 had come into the witness box and identified the signatures of his father on Ex. PW-1/1. Under Section 67 of the Evidence Act, if a document is alleged to be signed by any person, the signatures of the said person must be proved to be in his handwriting in the manner as laid down in Sections 45 & 47 of the said Act. It does not lay down any particular mode of proof for proving the particular handwriting or signatures; a person acquainted with the handwriting of a person by whom the document is supported to be signed can discharge that onus which was accordingly done so by PW-2.

14 Section 69 reads as under:-

“69. Proof where no attesting witness found.- If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom,

it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.”

15 This section presupposes that if no attesting witness can be found i.e. if he is either dead, insane, unable to attend, out of the jurisdiction of the Court or cannot be traced the rigors of Section 68 can be relaxed. Section 69 requires the fulfillment of two conditions-

(a) proving that the attestation of one attesting witness at least is in his handwriting and

(b) proof the signatures of the executants in his handwriting.

16 In 1995 AIHC 277 Jambunatha Lyer (deceased by LR's.) Vs. Sankari Ammal and others, a Bench of the Madras High Court had opined that although this section requires the fulfillment of the aforementioned two conditions, the emphasis has been laid on the first of the aforementioned two conditions. For this proposition, a passage from Mr. Starkie in his Law of Evidence, Fourth Edition, page 519 had been noted which inter-alia reads as under:-

“The signature of the witness, when proved is evidence of everything upon the face of the instrument, since it is to be presumed that the witness would not have subscribed his name in attestation of that which did not take place.

Therefore, the signature of the attesting witness, having been provided, is evidence of everything, on the face of the document and that he saw the executant make his mark.”

17 That apart even presuming that both the twin conditions of Section 69 of the Evidence Act have to be fulfilled, nowhere can it be deciphered from the reading of the aforementioned statutory provision that both these requirements have to be fulfilled by the same witness. The deposition of PW-2 has admittedly fulfilled the first requirement; he has identified the signatures of the attesting witness. The identification of the signatures of the executant which is the second requirement has been answered in the testimony of PW-3. PW-3 was S.C. Sharma, Estate Officer working with the University of Delhi. In para 6 of his affidavit, he has categorically stated that the testator had executed and got registered Ex. PW-1/1. No suggestion has been given to this witness that Ex. PW-1/1 was in fact not executed by the testator. This is relevant; in fact the entire line of cross-examination adopted by the contesting appellant was largely to the effect that the suit property could not be the subject matter of the Will; being an ancestral property, it could not have been bequeathed to the University.

18 The only witness of the respondent was RW-1. He was Sushil Nayar, the son of the testator. His examination in chief running into eight paragraphs does not even whisper that the executant had not signed Ex. PW-1/1. A large part of the affidavit speaks of the suit property being ancestral property which could not have been bequeathed not being the self-acquired property of Roshan Lal. In his cross-examination, this witness has admitted that he no document to show that the property of Roshan Lal was an ancestral property. Even otherwise, in view of the ratio of Krishna Kumar Birla (supra), the question of title could not be gone into in probate proceedings being beyond the domain of the probate Court. Further deposition being that a hand-written Will had been propounded by the respondent which not having been signed created a suspicion that the testator was not of a sound disposing mind. In his cross-examination, RW-1 has further admitted that he has not filed any medical papers to support his submission that his father was not of a healthy mind when the Will was made.

19 A will is executed by the owner of a property when he forms his opinion that his/her estate should not devolve upon the existing heirs and is a departure from the law governing inte-state succession. It is an

interference with the ordinary line of succession. The appellants have challenged the genuineness of the Will but as is evident from the evidence have failed to substantiate their stand.

20 The University/propounder of the Will who was also its executor has discharged this onus. Not only has the execution been proved through the testimony of PW-3 which remained un-rebutted but attestation also stands proved in terms of Section 69 of the Evidence Act through the version of PW-2. This Will was made by the testator on 13.03.1974. The probate petition has been filed in the year 1993. This was for the reason that the Will has bequeathed a life estate in the suit property to his widow Sita Devi who was alive till 1992. Out of the 10 shops forming a part of the suit property, the rent of shop No. 10 was alone to devolve upon the University during the lifetime of Sita Devi. This Will was acted upon by the widow and this fact becomes evident from Ex. PW-3/31 wherein the widow of the testator on 30.12.1978 tendered Rs.720/- by way of a cheque which was the interest accruing from the 10th shop into the 'Roshan Lal Scholarship Fund' account. This is an admitted document. In fact the various correspondences exchanged between the testator and the University exhibited in the testimony of

PW-3 (Ex.PW-3/2 to Ex. PW-3/29) also evidence the intent of the testator. These were letters exchanged between the testator and the University throwing light upon his unequivocal intent to bequeath the suit property to the University keeping the residential portion of the property as a life interest for his wife during her lifetime with a desire that after his death the whole property should be sold and accruals from the sale of the property as also the rentals from the 10 shops should be used for funding deserving students of medical colleges under a scholarship to be named after him i.e. "Roshan Lal Scholarship". This intention of the testator is apparent from these correspondences exchanged between the years 1971 up to 1976; Ex. PW-3/7 is a handwritten letter where the testator had expressed his desire to keep this intent is a secret; declaring this property to be his self-acquired property which he wished to bequeath to the University keeping a life estate for his wife. The subsequent letter Ex. PW-3/8 also reiterates this intent; the correspondence disclosing the fact that he had no faith in gurudwaras, hospitals and mandirs and he wanted his funds to be utilized for scholarships to deserving students. Relevant would it be to state that except for 9 letters (Ex.PW-3/2 Ex.PW-3/6, Ex.PW-3/10,

Ex.PW-3/12, Ex.PW-3/13, Ex.PW-3/16, Ex.PW-3/19, Ex.PW-3/20 and Ex. PW-3/24) all other letters are in the handwriting of the testator this was probably for the reason that he had wished his will to be kept a secret. There has also been no denial by RW-1 as on this aspect in his cross-examination. The intention of the testator can well be gathered from these documents which intent was clearly and unequivocally to bequeath this property to the University. This last wish and testament of the testator had to be preserved.

21 Section 90 of the Evidence Act reads as follows:-

90. Presumption as to documents thirty years old.- Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person' s handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

22 The principal underlying this provision is that if a document is thirty years old and if produced from proper custody, the Court may presume that it has been duly executed and attested. For the application of this Section, there are two pre-requisite conditions; firstly that the document is thirty years old and the second is that the same has been

produced from a proper custody. If the aforementioned twin conditions are fulfilled, the Court may presume that the document is in the person's handwriting and it has been so executed and attested.

23 Ex. PW-1/1 is a Will dated 13.03.1974. It had been proved in the testimony of PW-1 on 30.05.2006 when the original Will had been produced by the Sub-Registrar and its certified copy had been exhibited. The presumption contained in this provision of law stood additionally attracted.

24 In this context, the Privy Council in AIR (34) 1947 PC 15 Munnalal, minor and others Vs. Mst. Kashibai and others while extending the presumption under Section 90 of the Evidence Act had also noted the provisions of Section 114 of the said Act and the Will of Bahadur Singh in that case being more than thirty years old having been produced from proper custody was held to be proved. The aforementioned observations of the Privy Council in this context are relevant; they read as under:-

“This presumption can be justified under the express provisions of S. 90, since a will cannot be said to be “duly” executed by a person who was not competent to execute it; and the presumption can be fortified under the more general provisions of S. 114, since it is likely that a man who performs a solemn and rational act in the presence

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of witnesses is sane and understands what he is about. There was no evidence whatever that Bahadur was not in a perfectly normal state. Their Lordships feel no doubt that on this point the decision of the High Court was right, and that the will must be presumed to have been duly executed. The view taken by the learned Subordinate Judge would render it impossible, in most cases, to prove ancient wills. This disposes of the first appeal.”

25 The judgment reported as AIR 2009 SC 1766 Bharpur Singh and Others Vs. Shamsher Singh does not help the case of the appellants. In this case, the Apex Court had noted the settled legal proposition that a Will must be proved in terms of provisions of Section 63 (c) of the Indian Succession Act and Section 68 of the Indian Evidence Act; in the event that the said provisions cannot be complied with, the exceptions contained in Sections 69 & 70 of the Indian Evidence Act would be attracted. It was in this context, where the aforementioned provisions had not been complied with, that the Court had noted that the provisions of Section 90 of the Evidence Act would not apply.

26 Further undisputed fact being that Ex. PW-1/1 is a registered document. This also adds to the authenticity of the document.

27 In AIR 1995 SC 1684 Rabindra Nath Mukherjee and another Vs. Panchanan Banerjee (dead) by L.Rs. and other, the Supreme Court on

this aspect had inter-alia has held as under:-

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“In case where a Will is registered and the Sub-registrar certifies that the same had been read over to the executor who on doing so, admitting the contents, the fact that the witnesses to the document are interested lose significance. The documents at hand were registered and it is on record that the Sub-registrar had explained the contents to the old lady. So, we do not find the third circumstance as suspicious on the facts of the present case.”

28 Ex.PW-1/1 has withstood the test of close scrutiny on all counts. Impugned judgment does not call for any interference.

29 Appeals as also pending application are accordingly dismissed.

INDERMEET KAUR, J.

SANJAY KISHAN KAUL, J.

JANUARY 17, 2013

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