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IN THE HIGH COURT OF DELHI AT NEW DELHI

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FAO 562/2003

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7th July, 2014

SMT. DARSHAN

.....Appellants

Through: Mr. Israel Ali, Advocate.

VERSUS

SHRI RAJ KUMAR & OTHERS

..... Respondents

Through: Mr. Ajit Kumar, Adv. for R-1.

Mr. S.K.Singh, Adv. for R-5 & L.Rs.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This first appeal is filed under Section 299 of the Indian Succession Act, 1925 against the impugned judgment of the probate court below dated 14.7.2003 by which the probate petition filed by respondent no.1 herein (Sh. Raj Kumar) has been allowed. Probate has been granted for the Will dated 11.9.1973, Ex.PW2/1, executed by late Sh. Amolak Ram. Sh. Amolak Ram died on 14.6.1979.

2. Sh. Amolak Ram had married twice. His first wife was Smt. Nainawanti who died in about 1940. Probate petition is filed by one son of

Smt. Nainawanti, namely Sh. Raj Kumar, and who is supported by his two other real brothers who are the beneficiaries under the Will. Sh. Amolak Ram had nine children from the first wife Nainawanti i.e six sons and three daughters. Three sons who would have benefitted if the probate of the Will is granted are Sh. Raj Kumar, Sh. Deputy Lal and Sh. Babu Lal. These three sons of the first wife claim that the second wife Smt. Raj Kaushalaya only had a life estate in the property bearing no. 20-A/1-AB situated in Tilak Nagar, New Delhi which belong to the testator and they were to be the owners of the property after the death of Kaushalyawanti. The probate petition was opposed by the second wife of Sh. Amalak Ram namely Smt. Raj Kaushalaya @ Kaushalayawanti and her four daughters.

3. The probate court below has granted probate of the Will by holding that the same is duly executed and attested and that there are no suspicious circumstances to discard the Will.

4. Let us firstly turn on to the aspect as to whether the probate court below is correct in arriving at conclusion that the Will has been proved to be duly executed and attested. The Will is stated to have been executed by Sh. Amolak Ram on 11.9.1973. The will is stated to be registered with the sub-Registrar on 17.9.1973.

5. It is settled law in terms of the very language of Section 63 of the Indian Succession Act, 1925 that it has to be proved by credible evidence that the signatures on the Will are of the testator; the testator signed in the presence of the attesting witnesses and the attesting witnesses signed in the presence of the testator. And, if none of the attesting witnesses depose then, the signatures of the attesting witnesses must also be shown indubitably to be those of the attesting witnesses in addition to the aspect that the signatures of the testator have to be proved as that of the testator.

6. In the present case, none of the attesting witnesses have come to depose because they had expired. Will is sought to be proved as executed and attested through the petitioner Sh. Raj Kumar. Sh. Raj Kumar as PW-3, with respect to execution of the Will by the testator and attestation of the attesting witnesses has only given the following deposition which is relevant:-

“Sh. Mulak Ram was my father. My father had executed a will in my presence which was got written by him from S.Harnam Singh Bindra. I can identify the signatures of my father as I have seen him writing and signing. He used to sign in Urdu. I have seen the will dated 11.9.1973 which is in Urdu language Ex.PW2/1. I identify the signatures of my father at point A on the same. The attesting witnesses of the will had signed the will in my presence. Both of them have since died. I can identify the signatures of the witnesses One of the signatures are of Sardar Sunder Singh advocate at point C while those of

Sardar Gurbachan Singh appear at point B. The will was got registered by my father.....”

7. A reading of the aforesaid para shows that even if we liberally apply the language of Section 63 of the Succession Act, there is no deposition of the petitioner Sh. Raj Kumar (respondent no.1 herein) that the testator signed the Will in presence of the attesting witnesses or the attesting witnesses signed in the presence of the testator. What has already been deposed to are the existence of the signatures of the testator and existence of the signatures of the attesting witnesses, and which is not enough because what is required in law is the deposition as to signing by the testator in front of the attesting witnesses and by the attesting witnesses in the presence of the testator. These aspects could well have been deposed to by Sh. Raj Kumar because he claims to have been physically present at the time of execution and attestation of the Will. Therefore, there is no evidence whatsoever on record of the testator having signed in the presence of the attesting witnesses and the attesting witnesses having signed in presence of the testator. In my opinion therefore the Will Ex.PW2/1 has been wrongly exhibited since it has not been proved at all as required by law.

8. Once the Will is not proved, the probate petition had to be dismissed and it has been wrongly allowed by the impugned judgment.

9. The next reason for denying the grant of probate of the Will is that once the signatures on the Will of the testator were disputed and contended not to be of the testator. One of the objector Smt. Darshna Devi in this regard has deposed that the Will is a bogus/forged/fabricated document. It was hence necessary that undisputed and unimpeachable signatures of the testator Sh. Amolak Ram were brought on record by the respondent no.1, such as from the bank or from the place where Sh. Amolak Ram was serving or from any other public/Government record for the signatures on the Will to be proved as that of the testator. However, except, an oral statement that the signatures on Will dated 11.9.1973 are of Sh. Amolak Ram, there is no proof or any clinching evidence on record that the signatures on the Will are of Sh. Amolak Ram and that the signatures on the Will tally with the signatures of Sh. Amolak Ram on an undisputed document or the signatures appearing of Sh. Amolak Ram on public record/bank. Therefore, a mere oral deposition that the signatures on the Will dated 11.9.1973 are of Sh. Amolak Ram, cannot be accepted in the facts of the present case.

10. Not only the signatures of the testator Sh. Amolak Ram are not proved as required by law, even the signatures of the attesting witnesses are also not proved as required by law because neither any of the two attesting

witnesses came to depose with respect to their signatures as they had already expired, and, there is no undisputed/clinching record of admitted signatures of the attesting witnesses for those admitted signatures of the attesting witnesses to be compared with that so called signatures of the attesting witness appearing on the Will dated 11.9.1973. Therefore, even the signatures of the attesting witness, in my opinion, cannot be said to be proved as those being of the attesting witnesses from a mere oral deposition in the facts of this case.

11. Smt. Darshana Devi the daughter of Smt. Kaushalyawanti, and who deposed as RW3 as one of the objectors, no doubt did state that she was not aware of the actual signatures of her father Sh. Amolak Ram, however, this statement cannot help the respondent no.1 herein (petitioner in trial court or other sons who support the Will) inasmuch as Sh. Raj Kumar/petitioner/respondent no.1 in his cross-examination dated 27.10.1999 admitted that he had never seen his father writing and reading and that he cannot recognize all the signatures of Sh. Amolak Ram as he was not an expert. Therefore, in my opinion, in the facts of the present case, and as per the depositions of the witnesses of both the parties it cannot be said that the Will is proved and for the judicial conscience of this Court to be convinced

that the signatures on the Will are that of the testator and the attesting witnesses, much less of the testator and the attesting witness having signed in the presence of each other and which aspects are *sine qua non* as regards the proof of the Will.

12. No doubt the Will is registered, but, merely because the Will is registered, it does not mean that the signatures appearing on the Will are necessarily that of the testator and also of the attesting witnesses. Merely because of registration there is automatic proof of execution and attestation of the Will. Registration of the Will only shows that a particular document exists in the record of the sub-Registrar. Registration however does not mean that the Will in question has been duly proved to have been executed and attested as required by law. Therefore, I hold that Sh. Raj Kumar/respondent no.1 has failed to prove and lead necessary evidence for execution and attestation of the Will.

13. I may state that counsel for the appellant on instructions from the appellant and other legal heirs of Smt. Kaushalyawanti agreed that the immovable property at Tilak Nagar, and which is the only immovable property of late Sh. Amolak Ram, be divided equally between all the children of Sh. Amolak Ram; whether they be of the first wife Smt.

Nainawanti or through the second wife Smt. Kaushalyawanti; however, counsel for the contesting respondents on instructions from the three sons of Sh. Amolak Ram through the first wife, namely Sh. Raj Kumar (petitioner), Sh. Deputy Lal and Sh. Babu Lal did not agree for equal division of the property between all the legal heirs. Counsel for the appellant and other legal heirs of Smt. Kaushalyawanti had made this statement because as per the counsel for the appellant even if the Will is proved, it is in fact Smt. Kaushalyawanti who would be the beneficiary because Smt. Kaushalyawanti admittedly under the Will had got a life interest in the property at Tilak Nagar and which life interest will convert itself into a full ownership by virtue of Section 14(1) of the Hindu Succession Act, 1956 read with the Division Bench judgment of three Judges of the Supreme Court in the case of *C. Masilamani Mudaliar and Others Vs. The Idol of Sri Swaminathaswami Swaminathaswami Thirukoil and Others AIR 1996 SC 1697*. In the case of *C. Masilamani Mudaliar (supra)* the Division Bench of three Judges overruled an earlier judgment of the Supreme Court in the case of *Gumpha Vs. Jaibai, (1994) 2 SCC 511* as regards the interpretation of Section 14(1). In *C. Masilamani Mudaliar (supra)* it has been held that where under any instrument, including a Will, a lady receives a life estate, such life estate converts into a full estate by virtue of Section 14(1) of the

Hindu Succession Act. The relevant paras of this judgment are paras 26 to 29 and the same read as under:-

“26. It is true that Section 30 of the Act and the relevant provisions of the Act relating to the execution of the wills need to be given full effect and the right to disposition of a Hindu male derives full measure there under. But the right to equality removing handicaps and discrimination against a Hindu female by reason of operation of existing law should be in conformity with the right to equality enshrined in the Constitutional and the personal law also needs to be in conformity with the Constitutional goal. Harmonious interpretation, therefore, is required to be adopted in giving effect to the relevant provisions consistent with the constitutional animation to remove gender-based discrimination in matters of marriage, succession etc. Cognizant to these constitutional goals, Hindu Marriage Act, Hindu Adoption and Maintenance Act, Hindu Succession Act etc. have been brought on statute removing the impediments which stood in the way under the Sastric law. Explanation I to Section 14(1) gives wide amplitude to the acquisition of property in the widest terms. It is merely illustrative and not exhaustive. The only condition precedent is whether Hindu female has a pre-existing right under the personal law or any other law to hold the property or the right to property. Any instrument, document, device etc. under which Hindu female came to possess the property-movable or immovable-in recognition of her pre-existing right, though such instrument, document or device is worded with a restrictive estate, which received the colour of pre-existing restrictive estate possession by a Hindu female, the operation of Sub-section (1) of Section 14 read with Explanation 1, remove the fetters and the limited right blossoms into an absolute right.

27. As held by this Court, if the acquisition of the property attracts Sub-section (1) of Section 14, Sub-section (2) does not come into play. If the acquisition is for the first time, without any vestige of pre-existing right under the instrument, document or device etc. then Sub-section (2) of Section 14 gets attracted. Sub-section (2) being in the nature of an exception, it does not engulf and wipe out the operation of Sub-section (1). Sub-section (2) of Section 14 independently operates in its own sphere. The right to disposition of property by a Hindu Under Section 30 is required to be understood in this perspective and if any attempt is made to put restriction upon the property possessed by a Hindu female under an instrument, document or device, though executed after the Act had come into force, it must be interpreted in the light of the facts and circumstances in each case and to construe whether Hindu female acquired or possessed the property in recognition of her pre-existing right or she gets the rights for the first time under the instrument without any vestige of preexisting right. If the answer is in the positive, Sub-section (1) of Section 14 gets attracted. Thus construed, both Sub-sections (1) and (2) of Section 14 will be

given their full play without rendering either as otiose or aids as means of avoidance.

28. In Gumpha's case (supra) though the will was executed in 1941 and the executor died in 1958 after the Act had come into force, the concept of limited right in lieu of maintenance was very much in the mind of the executor when will was executed in 1941 but after the Act came into force, the will became operative. The restrictive covenant would have enlarged it into an absolute estate; but unfortunately the bench had put a restrictive interpretation which in our considered view does not appear to be sound in law.

29. The legatee Sellathachi had right to maintenance under the Hindu Adoption and Maintenance Act when the property was given to her for maintenance. It must be in lieu of her pre-existing right to maintenance and the property given under the will, therefore, must be construed to have been acquired by the legatee under the will in lieu of her right to maintenance. That right to maintenance to a Hindu female received statutory recognition under the Hindu Adoption and Maintenance Act, 1956. She is entitled to realise maintenance from property of her husband and even in the hands of strangers except the bona fide purchaser for value whether notice of her right. She is equally entitled Under Section 37 of the Transfer of Property Act to have charge created over the property for realisation of her maintenance. On the demise of the testator, she being the class-I heir but for the bequeath, is entitled to succeed as an absolute owner. In either of those circumstances, the question emerges whether she acquires a limited right Under Section 14(2) for the first time under the Will. In the light of the facts and circumstances of the case and the legal setting, we are of the considered view that she having had under Sastric law, as envisaged in the Will, the properties in recognition of her pre-existing right to maintenance, it is not a right acquired for the first time under the instrument will, but it is a reflection of the pre-existing right under the Sastric law, which was blossomed into an absolute ownership after 1956 Under Section 14(1) of the Act. Under these circumstances, it cannot be held that Sellathachi acquired the right to maintenance for the first time under the instrument will. The Division Bench, therefore, does not appear to have approached the problem in the correct perspective. In view of the settled legal position right from Tulasamma's case (supra) the right acquired under the Will is in recognition of the pre-existing right to maintenance known under the Sastric law and was transformed into an absolute right Under Section 14(1) wiped out the restrictive estate given under the Sastric law and Sellathachi as absolute owner of the property. The Division bench of the High Court, therefore, was not correct in holding that Sellathachi has acquired only a limited estate under the Will and Section 14(2) attracts to the restrictive covenants contained in the will limiting her right to maintenance for life time and, thereafter, the right to enjoy the income from the lands and on her demise,

the income should go to the temples as mentioned in the will is not correct in law.” (emphasis supplied)

14. Accordingly, learned counsel for the appellant and other legal heirs of Smt. Kaushalayawanti argued that even if the Will is proved the said Will will only confer absolute ownership rights on the Tilak Nagar property in favour of Smt. Kaushalayawanti, however, I need not go into this aspect of interpretation of the Will because a probate court and an appellate court hearing an appeal does not go into the interpretation of the Will but only on the aspect of the proof of the Will.

15. I have given the aforesaid observations to show that though the appellant and in fact Smt. Kaushalayawanti may be in law in view of *C. Masilamani Mudaliar's case (supra)* be entitled to complete ownership of the suit property yet they have been more than fair in agreeing that in spite of Smt. Kaushalayawanti becoming the sole owner, yet all the legal heirs of Sh. Amolak Ram should get equal ownership in the property. But, as stated above this was not acceptable to the three sons of Sh. Amolak Ram through first wife Smt. Nainawanti namely Sh. Raj Kumar, Sh. Deputy Lal and Sh. Babu Lal (now represented by his legal heirs) and who want the ownership of the Tilak Nagar property only for themselves.

16. In view of the above, appeal is allowed. Impugned judgment of the probate court dated 14.7.2003 is set aside. The probate petition will stand dismissed. Parties are left to bear their own costs.

JULY 07, 2014
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VALMIKI J. MEHTA, J.