

\$~7

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

+ **FAO 148/2014**

Reserved on 12th November, 2014
Decided on 18th November, 2014

SMT. NIRMALA HANDA Appellant
Through :Mr. Sanjeev Anand, Mr. Abhas
Kumar, Mr. Arush Khanna and Mr.
Subham Tripathi, Advs.

versus

SMT. KRISHNA KAURA (NOW DECEASED) THROUGH HER
LRS & ANR. Respondents
Through :Mr. Jayant Mehta and Mr. Sukant
Vikram, Advs. for R-1(i) & (ii)

CORAM:
HON'BLE MR. JUSTICE A.K. PATHAK

A.K.PATHAK, J.(ORAL)

1. Respondent no. 1(i) and (ii) are sons of deceased respondent no. 1 and Late Shri J.L. Kaura (testator); whereas appellant is daughter of Late Shri J.L. Kaura from his first marriage. Respondent no. 1 Smt. Krishna Kaura propounded a Will dated 13th December, 1994 (Ex. PW2/1) of Late Shri J.L. Kaura before the trial court and prayed for grant of probate of the said Will. Appellant challenged the Will by filing objections and opposed the grant of probate. During the pendency of probate petition, Smt. Krishna Kaura died

and respondent nos. 1(i) and (ii) were impleaded as her legal heirs and continued to prosecute the petition. After trial, trial court has granted probate in favour of respondent nos. 1(i) and (ii) in respect of the estate of testator, in the manner as detailed in the Will dated 13th December, 1994.

2. Aggrieved by the grant of probate to respondents, appellant has preferred this appeal.

3. One of the attesting witnesses to the Will, namely, Shri C.D. Khurana was examined by the respondents as PW2. He deposed that testator was his friend. Another witness to the Will Colonel C. Anand was also their friend as all of them had worked together in the Indian Army, inasmuch as, had settled in Defence Colony after their respective retirements. Testator requested him and Colonel C. Anand to accompany him to the office of Sub-Registrar in connection with execution, attesting and registration of his Will. On 13th December, 1994, all of them went to the office of Sub-Registrar at Vikas Sadan, New Delhi, where testator read out the contents of the Will and signed the same at points “A” to “A-1” at page 1, at point “A-2” at page 2, at point “A-3” at page 3 and at point “A-4” at page 4 in their presence and within their sight. Thereafter, he and Colonel C. Anand signed the Will as attesting witnesses at points “B” and “C”. They signed the Will in presence

of each other. Testator was hale and hearty, physically fit and in sound disposing mind when he executed the Will. Immediately after execution of the Will, same was submitted to the Sub – Registrar for registration. In his brief cross – examination, PW2 denied that testator was not mentally fit and was suffering from Alzheimer and other ailments since 1990 till he died. He also denied a suggestion that Will was not executed by the testator. He also denied that Will was forged and fabricated document. He denied that Will was not executed in his presence. He denied that testator did not sign the Will in his presence. No other question was put to this witness.

4. Trial court has found the testimony of PW2 trustworthy and reliable. By placing reliance on Section 68 of the Indian Evidence Act, 1872 read with Section 63 of the Indian Succession Act, 1925 trial court has held that respondents had succeeded in proving the Will. They had succeeded in proving that testator had executed his last Will dated 13th December, 1994 (Ex. PW2/1) in his full senses and sound disposing mind in presence of two attesting witnesses, namely, Shri C.D. Khurana and Colonel C. Anand. It has been further held that Will was not surrounded by suspicious circumstances.

5. Appellant had taken a plea that testator was suffering from Alzheimer

right from 1990 onwards till he died in the year 1999, thus, Will was not executed by him in sound disposing mind. It was alleged that testator was not capable of understanding what he was doing or executing. Trial court has held that appellant had failed to prove this fact by leading any cogent evidence, more particularly, documentary evidence. Trial court has further noted that appellant had admitted the existence and validity of Will in her letter dated 10th September, 2000 (Ex. PW4/1) written to American Express (India) Ltd. as well as in her affidavit dated 6th October, 1999 (Ex. PW3/2), thus, her above plea was not acceptable. During her cross-examination, appellant had admitted her signatures on Ex. PW3/2 but stated that she had signed the papers at the instance of her brothers on their representation that the papers were required for change of meter. Appellant further stated that when she was in New York, her brothers had sent some papers stating that tenants were not paying rent and she was required to sign the said papers so that rent is received. Accordingly, she signed the same. Trial court has disbelieved this explanation on the ground that appellant was not an illiterate lady. She was living in foreign countries like U.S.A. and Indonesia, thus, it was very unlikely that she would have signed the papers without reading the contents thereof. Trial court has also held that Will was not shrouded with

suspicion. In the Will Ex. PW2/1, testator had not concealed anything. He had disclosed about the first marriage with Smt. Prakash Vati and appellant being his daughter from his first wife as well as about second marriage with respondent no. 1 and further that respondent nos. 1(i) and (ii) were born from the second marriage. Immovable property was bequeathed by the testator to his wife and sons. Appellant was not ignored completely as she was given 50% share in the movable properties.

6. Learned counsel for the appellant has vehemently contended that testator was suffering from dementia right from 1990 till he died in the year 1999 at the age of 85 years. Will was executed on 13th December, 1994. At that time, testator was suffering from dementia. He was not in sound disposing mind. Will is, otherwise, shrouded with suspicion since appellant was excluded from the inheritance of immovable property. She was only given 50% share in the movable properties, that is, old household articles, which were worthless. No reason for excluding the appellant was given, thus, Will is shrouded with suspicious circumstances. Ex. PW3/2 and Ex. PW4/1 are irrelevant, once the Will is found to be surrounded with suspicious circumstances. He has placed reliance on H. Venkatachala Iyengar Vs. B.N. Thimmajamma & Others, AIR 1959 SC 443, Smt. Jaswant

Kaur vs. Smt. Amrit Kaur & Others, (1977) 1 SCC 369, Bharpur Singh & Others vs. Shamsheer Singh, (2009) 3 SCC 687. Learned counsel has further contended that in the death report (Ex. RW4/1) of testator issued by Army Hospital it has been recorded that testator was diagnosed suffering from ‘multi infract dementia with IHD & HTN’, which clearly proves that testator was suffering from dementia at the time of his death. By placing reliance on literatures downloaded from the internet on ‘multi infract dementia’ it has been contended that dementia is a progressive disease and develops in a period of 5 to 10 years. Testator died in the year 1999, which shows that testator was suffering from dementia in the year 1994. In view of the specific plea taken by the appellant that testator was suffering from dementia, onus was on the respondents to have produced medical reports of testator to show that he was not suffering from alzheimer/dementia. Since no such record was produced, adverse inference has to be drawn against the respondents. Reliance has been placed on Kulwant Kaur & Another vs. State & Others, 2013 V AD (Delhi) 624.

7. Per contra, learned counsel for the respondents has contended that execution of Will by the testator has been proved by the respondents by leading cogent, relevant and trustworthy evidence. Respondents have

produced one of the attesting witnesses to the Will, in terms of Section 68 of the Evidence Act, 1872. From the statement of PW2, Shri C.D. Khurana it has been duly proved that testator had executed the Will in full senses, in sound disposing mind and of his own volition in the presence of PW2 and Colonel C. Anand, inasmuch as got it registered in the office of Sub-Registrar. From the statement of PW2, it is established that testator had signed the Will in presence of two attesting witnesses, that is, PW2 and Colonel C. Anand, inasmuch as witnesses also signed the Will in presence of the testator. Thereafter, Will was submitted to Sub Registrar for registration and was duly registered. It is contended that requirements, as contained in Section 63 of the Indian Succession Act, 1925, thus, duly stands fulfilled. The Will was not surrounded by any suspicious circumstances. Appellant had been living in U.S.A. and during the period 1990 – 1999 she had visited only once in a year; whereas respondents were living with the testator and taking his care at Delhi, thus, mere exclusion of appellant from inheritance of the immovable property, by itself, would not constitute suspicious circumstances grave enough to disbelieve the Will, which has duly been proved in accordance with law. Reliance has been placed on Savithri and Others vs. Karthyayani Amma and Others (2007) 11

Supreme Court Cases 621. It is further contended that burden to prove a fact lies on such person who alleges the same. Appellant had alleged that testator was suffering from Alzheimer from 1990 onwards. Thus, onus was on her to had proved this allegation. Appellant has failed to lead any evidence to prove that testator was suffering from Alzheimer in the year 1994. It is further contended that appellant had produced Subedar Bhoop Singh Chauhan in the witness box as RW3 to establish that in the year 1994 testator was not in fit mental state of affairs. However, this witness did not support the appellant. He stated that in the year 1994 Shri J.L. Kaura used to remain ill but his mental condition was good.

8. I have heard learned counsels for the parties and have perused the trial court record carefully. Law governing the mode and manner of proof of a Will needs to be deliberated and discussed first. In this context it would be necessary to refer to Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872, which read as under:-

“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 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”.

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 its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving

evidence: Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 unless its execution by the person by whom it purports to have been executed is specifically denied.”

9. In the context of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872 Supreme Court in *Niranjan Umeshchandra Joshi Vs. Mrudula Jyoti Rao* (2006) 13 SCC 433 held thus:-

“32. Section 63 of the Indian Succession Act lays down the mode and manner in which the execution of an unprivileged Will is to be proved. Section 68 postulates the mode and manner in which proof of execution of document is required by law to be attested. It in unequivocal terms states that execution of Will must be proved at least by one attesting witness, if an attesting witness is alive subject to the process of the court and capable of giving evidence. A Will is to prove what is loosely called as primary evidence, except where proof is permitted by leading secondary evidence. Unlike other documents, proof of execution of any other document under the Act would not be sufficient as in terms of Section 68 of the Indian Evidence Act, execution must be proved at least by one of the attesting witnesses. While making attestation, there must be an *animus attestandi*, on the part of the attesting witness, meaning thereby, he must intend to attest and extrinsic

evidence on this point is receivable.

33. The burden of proof that the Will has been validly executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has signed the Will and that he had put his signature out of his own free will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. In the case of proof of Will, a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion or undue influence is raised, the burden would be on the caveator. [See *Madhukar D. Shende v. Tarabai Shedage* (2002) 2 SCC 85 and *Sridevi & Ors. v. Jayaraja Shetty & Ors.* (2005) 8 SCC 784]. Subject to above, proof of a Will does not ordinarily differ from that of proving any other document.”

10. In *H. Venkatachala Iyengar* (supra), Supreme Court held thus:

“18. What is the true legal position in the matter of proof of wills ? It is well-known that the proof of wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding

how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under section 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, sections 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that 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 and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the

propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will ? Did he understand the nature and effect of the dispositions in the will ? Did he put his signature to the will knowing what it contained ? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound

and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.”

11. In Smt. Jaswant Kaur (supra), Supreme Court held thus:

“9. In cases where the execution of a will is shrouded in suspicion, its proof ceases to be a simple *Us* between the plaintiff and the defendant. What, generally, is an adversary proceeding becomes in such cases a matter of the court's conscience and then the true question which arises for consideration is whether the evidence led by the propounder of the will is such as to satisfy the conscience of the court that the will was duly executed by the testator. It is impossible to reach such satisfaction unless the party which sets up the will offers a cogent and convincing explanation of the suspicious circumstances surrounding the making of the will.”

12. In Bharpur Singh (supra), Supreme Court held thus:

“23. Suspicious circumstances like the following may be found to be surrounded in the execution of the Will:

- i. The signature of the testator may be very shaky and doubtful or not appear to be his usual signature.
- ii. The condition of the testator's mind may be very feeble and debilitated at the relevant time.
- iii. The disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or absence of adequate provisions for the natural heirs without any reason.
- iv. The dispositions may not appear to be the result of the testator's free will and mind.
- v. The propounder takes a prominent part in the execution of the Will.
- vi. The testator used to sign blank papers.
- vii. The Will did not see the light of the day for long.
- viii. Incorrect recitals of essential facts.”

13. It is trite law that propounder has to prove that Will has been validly executed and is a genuine document. Propounder is required to prove that testator had signed the Will of his own free will in a sound disposing mind after understanding the nature and effect thereof. Testator has signed the Will in presence of the witnesses. Will has been attested by at least by two attesting witnesses in presence of the testator, inasmuch as had seen the testator signing or affixing his mark on the Will.

14. In the backdrop of above settled legal position, if present case is examined, I am of the view that respondents have succeeded in proving the

Will. From the evidence adduced by the respondents, it is proved that testator had voluntarily executed the Will in full senses and in sound disposing mind in presence of two attesting witnesses. PW2 is one of the attesting witnesses to the Will and has stepped in the witness box. He was known to the testator, inasmuch as other witness to the Will was also known to the testator as all of them had worked together in the Indian Army, inasmuch as were living in the same Colony and were in touch with each other. Testimony of PW2 has remained unshattered in his cross-examination. He is not related to the respondents. There is no reason as to why he will not speak the truth. PW2 has categorically deposed that testator requested him and Colonel C. Anand to accompany him to the office of Sub-Registrar. On 13th December, 1994 they went to the office of Sub-Registrar, where testator appended his signatures on the Will dated 13th December, 1994, inasmuch as he has identified signature of the testator. Thereafter, he and Colonel C. Anand also appended their signatures on the Will as attesting witnesses to the Will. Thereafter, Will was presented before the Sub – Registrar for registration. His testimony has remained unshattered in his cross-examination and is reliable and trustworthy. There is no reason to disbelieve his deposition. His testimony has rightly been

accepted by the trial court. It is, thus, evident that requirement of Section 63 of the Indian Succession Act, 1925, stands duly complied with.

15. Merely because, in the death report it has been mentioned that testator was diagnosed with 'Multi Infarct Dementia with IHD & HTN' at the time of his death, by itself would not be sufficient to presume that testator was suffering from Alzheimer or dementia in the year 1994 also. Onus to prove that testator was suffering from Alzheimer or dementia was on the appellant, which she has failed to discharge as no cogent evidence was led by her before the trial court on this point. RW2 was working with the testator. He was produced by the appellant to prove that testator was suffering from dementia in the year 1994. However, RW2 has not supported the appellant, inasmuch as has made a categorical statement that mental condition of testator was good. Only on the basis of literatures produced by the appellant during the course of hearing, it cannot be said that in the year 1994 testator was suffering from dementia, merely because, at the time of his death, he was diagnosed with this ailment. Merely on surmises and conjectures, it cannot be concluded that testator was suffering from dementia in the year 1994, more particularly, when no evidence, in this regard, was produced by the appellant. As against this witnesses of the respondents have categorically

deposed that testator was in sound disposing mind at the time he executed the Will.

16. The plea of appellant that Will is surrounded by suspicious circumstances since appellant has not been given any share in the immovable property also cannot be accepted. Merely because, one legal heir has been excluded from inheritance, by itself, would not be sufficient to discredit the Will. Appellant was married long ago and had been living with her family in foreign countries. She was well settled. This fact has come on record. Testator was living with his wife and children in Delhi. Between 1990-1999, appellant had visited India once a year. In these circumstances, if no share in the immovable property has been given to her, would not make the Will suspicious. Above all, appellant has acknowledged this Will in her affidavit Ex. PW3/2 and letter dated 10th September, 2000 Ex. PW4/1 written by her to American Express. Her plea that respondents had obtained her signatures on some papers on the pretext of procuring a meter and on the pretext that letter was required to be submitted to the tenants, cannot be accepted. The pleas to the above effect appears to have been taken as an afterthought. Appellant is an educated lady and settled abroad. Thus, it is highly improbable that she would have signed the papers without even going

through the contents thereof. Ex. PW3/2 is her affidavit, executed in Delhi before the Notary Public on 6th October, 1999, wherein she has categorically deposed that Will dated 13th December, 1994 was left behind by the deceased allottee/owner (Testator). She accepts the contents of Will dated 13th December, 1994 left behind by the testator and had no objection if the said house was mutated in favour of Smt. Krishna Kaura, legatee as per the Will. In Ex. PW4/1 also she has stated that her father Late Major Jagdish Lal Kaura expired on September 19, 1999 leaving behind a duly registered last and final Will dated December 13, 1994, in respect of his properties, including an immovable property situated at C-428, Defence Colony, New Delhi. She further stated that this was his last valid and subsisting Will and that the same had not been revoked by any other subsequent Will.

17. In the light of the above discussions, I do not find the impugned order to be erroneous, contrary to law or perverse. Accordingly, appeal is dismissed.

A.K. PATHAK, J.

NOVEMBER 18, 2014

rb