

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

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Judgment reserved on: 07.09.2015

Judgment delivered on: 29.10.2015

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FAO 361/2010

KULDIP SINGH

..... Appellant

Versus

SAVITRI DEVI & ORS.

..... Respondents

Advocates who appeared in this case:

For the Appellant : Mr N.S. Dalal & Ms Suman Chaudhary, Advocates.

For the Respondents: Ms Sangeeta Chandra, Advocate for R-1.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER,J

1. The instant appeal is directed against the judgement dated 03.07.2010, passed by the ADJ (Central), Delhi in a Probate Petition preferred by respondent no.1.

1.1 Respondent no.1 approached the trial court for seeking probate of a Will dated 19.10.2005 executed by Late Mr Kismat s/o Mr Brahmanand.

1.2 The appellant herein, who was arrayed as respondent no.2 in the probate petition, was the only objector to the Will, though two other persons were impleaded as respondents in the said action filed by respondent no.1. The other two persons, who were impleaded as respondents in the probate petition, were Smt. Usha Devi (original respondent no.3) and Smt. Babli (original respondent no.4).

2. It would be pertinent to note at this stage itself that Usha Devi, who was a legal representative of the deceased/ testator Mr Kismat, had made a

statement in the trial court, on 17.09.2008, that she had no objection to the issuance of letters of administration in favour of respondent no.1.

2.1 Therefore, as indicated right at the outset, the appellant (i.e. the original respondent no.2), was the only person who had preferred objections to the probate petition.

3. Both before this court, as well as the court below, the objections of the appellant (RW-2), were briefly as follows:

(i) The Will has been executed under suspicious circumstances; these being:

(a) The young age of the testator. The testator was around 23-24 years of age at the time of execution of the Will;

(b) The failure to refer to relatives and legal heirs in the Will.

(c) No good reason as to why legal heirs were dis-inherited. This assertion sought to be supported by bringing to fore the plea that the appellant (RW-2) was the real brother of the deceased/ testator (i.e. Mr Kismat), who had looked after his needs, and therefore, his disinheritance did not stand to reason.

(d) One of the attesting witnesses, namely, Mr Sonu (RW-1) had in his testimony clearly stated that he was told that he had to append his signatures on a General Power of Attorney (GPA) and not on the Will in issue. Mr. Sonu's (RW-1's) testimony reveals that the contents of the Will were not proved. Mr Sonu's (RW-1's) testimony should have been preferred over that of the other witness, who had attested the Will i.e. Mr. Dharam Pal (PW-2).

(e) Lastly, Mr. Dharam Pal (PW-2) was a close relative of respondent no.1, and thus, had every interest in the probate action succeeding.

(e.1) This aspect gains traction according to the appellant (RW-2) by virtue

of the fact that in the criminal trial concerning the murder of Sh. Kismat, Mr Dharam Pal (PW-2) though cited as a witness, was declared hostile by the prosecution.

4. Before I proceed further, it may be important to note certain broad facts which have emerged from the record, which includes the testimony of witnesses, who deposed before the trial court.

4.1 Late Mr. Kismat, it appears, being in need of finances had taken a decision to sell the subject property which was his 1/4th share, out of a total area of 72 bighas 7 biswas, falling in Khata No. 76/56 and 224/200, situate in, Village Kair, Tehsil Najafgarh, Delhi. This parcel of land admeasured 4.75 acres in respect of which respondent no.1 claims, she had paid Rs. 40 lacs to the deceased/ testator i.e. Late Mr. Kismat.

4.2 To effectuate the transaction, documents, such as, the Will in issue (Ex. PW1/1), agreement to sell, and irrevocable GPA were executed, and registered in the office of the Sub-Registrar-IX at New Delhi. The fact that respondent no.1 [i.e. Ms. Savitri Devi (PW-1)], Mr Dharam Pal (PW-2) and Mr Sonu (RW-1) were present in the office of the Sub-Registrar, along with Late Mr. Kismat, has clearly emerged in the testimonies.

4.3 Mr. Kismat was murdered on 30.12.2005. A criminal case was instituted in this regard, whereupon vide judgement dated 22.01.2008 three persons, namely, Mr. Krishan and Mr. Rakesh, both sons of Mr. Tej singh and Mr. Sanjay, son of Mr. Mange Ram, stand convicted.

4.4 In the meanwhile, on 09.01.2006 respondent no.1 applied for mutation in her favour in respect of the subject property. The concerned authority, on 31.01.2006, mutated the property in favour of respondent no.1.

4.5 Apparently, the appellant (RW-2) has challenged the mutation which is pending adjudication with the concerned authority.

4.6 A probate petition was filed with the trial court on 26.03.2008, which resulted in passing of the impugned judgement. Before the trial court, respondent no.1 had cited one more witness besides herself. The other witness being, one, Mr. Dharam Pal (PW-2), who had attested the Will. The appellant (RW-2), on the other hand, cited two other witnesses, besides himself. One of them being, Mr Sonu (RW-1), to whom I have made a reference above; the other being, one, Mr. Amar Singh (RW-3).

5. The trial court in the impugned judgement has returned the following findings of fact.

(i) That the testator i.e. Mr Kismat was in sound disposing mind at the time of execution of the Will.

(ii) There is no dispute that the Will was signed by the testator i.e. Mr Kismat.

(iii) That the Will was registered in the office of the Sub-Registrar-IX, New Delhi on 19.10.2005.

(iv) Mr. Sonu (RW-1) had admitted that the signatures at point 'X' on the Will (Ex.PW1/1), were his signatures.

5.1 Having regard to the aforesaid, the trial court concluded that the Will (Ex.PW1/1) was validly executed by the testator (i.e. Mr Kismat) in a sound disposing mind and, thus, proceeded to allow the petition filed by respondent no.1.

6. Being aggrieved by the said decision of the trial court, the instant appeal has been preferred by the appellant/ the objector. Mr Dalal addressed arguments on behalf of the appellant (RW-2), while Ms Sangeeta Chandra advanced submissions on behalf of respondent no.1.

7. Mr Dalal's argument principally veered around the aspect of suspicious circumstances in which the Will in issue was executed. The

suspicious circumstances, to which Mr Dalal adverted to, have been set out in detail in the foregoing part of my narration. In support of the circumstances to which Mr Dalal made a reference reliance was placed on the following judgement:

Lalitaben Jayantilal Popat vs Pragna Ben Jamna Das Kataria & Ors., 2008 (15) SCC 365.

8. On the other hand, Ms Chandra largely relied upon the trial court judgement to contend that the Will in issue was validly executed. It was Ms Chandra's contention that the factum of the execution of the Will in the instant case had to be seen in the background of the fact that Late Mr. Kismat had executed the said instrument as he intended to sell the subject property to respondent no.1 for which he had been paid a sum of Rs. 40 lacs. It was the learned counsel's submission that this fact emerged in the testimony of both respondent no.1, PW-1 and Mr. Dharam Pal (PW-2) when, suggestions were made in cross-examination to them. Learned counsel submitted that despite this fact emerging there was no suggestion made for production of documents which included the GPA and the agreement to sell, as also a receipt generated in that behalf.

8.1 It was Ms Chandra's contention that, therefore, the suspicious circumstances sought to be brought into play by the appellant (RW-2) were a mere spectre, which, in point of fact, did not exist. The young age of Mr. Kismat, according to the learned counsel, had to be seen in the light of these circumstances. The record, according to Ms Chandra, showed that Late Mr. Kismat was in need of financial assistance, which is why, perhaps, he had taken a decision to sell the property to a relative. Ms Chandra contested the fact that the appellant (RW-2) was the real brother of the testator i.e. Sh. Kismat, or that the relationship between the two was cordial.

8.2 In support of her submissions Ms Chandra relied upon the following judgement: *Rajkumar Singh & Ors. Vs Jagjit Singh Chawla & Ors., 183 (2011) DLT 418* .

REASONS

9. Having heard the learned counsels for the parties and perused the record, what emerges is as follows:

(i) The appellant (RW-2) was the step brother of Late Mr. Kismat i.e. the testator; a fact which has been admitted by him in his cross-examination. The record shows that both were sons of, one, Mr. Brahmanand, and may perhaps have been born from separate mothers. In that sense, they may have been half-brothers.

(ii) Even according to the appellant (RW-2) Late Mr. Kismat resided with him till 27.02.2000, and thereafter, ran away from the house. According to the appellant (RW-2), Mr. Kismat was arrested on 19.07.2000 at Bhiwani and, consequently, remained in custody till 05.02.2005. Late Mr. Kismat, as per the testimony of the appellant (RW-2), lived with him till 13.03.2005, and thereafter, started living in village Daboda, in Haryana, with one Sh. Surinder @ Nitu, till his death on 30.12.2005. The aforesaid aspects have come through in the examination-in-chief of the appellant (RW-2). In his cross-examination though, the appellant (RW-2) stated that Late Mr. Kismat had left the house on 27.02.2002.

(iii) The appellant (RW-2) in his testimony indicated that Mr. Dharam Pal (PW-2) was a distant relative of Late Mr. Kismat and that the FIR qua his murder was lodged at the behest of Mr. Dharam Pal.

(iv) Mr Sonu (RW-1) has also stated in his cross-examination that Late Mr. Kismat was in jail. The date of his release though, Mr Sonu has indicated as, 19.10.2005, which is in contradiction to what has been stated

by the appellant (RW-2). Mr Sonu (RW-1), however, has identified his signatures at point 'X' while failing to identify the signatures of the testator Late Mr. Kismat at point 'Y' on the Will (Ex. PW1/1).

(v). Mr Sonu (RW-1) has admitted that he visited the office of the Sub-Registrar on 19.10.2005, albeit to execute a power of attorney. It is claimed by the said witness that he was unaware of the contents of the documents i.e. the GPA, agreement to sell, and the Will (Ex. PW1/1).

(vi) In his examination-in-chief, Sonu (RW-2) while stating that Late Mr. Kismat never executed the Will (Ex. PW1/1), contradicted himself by stating that Late Mr. Kismat was not told about the contents of the Will (Ex. PW-1/1) or that he was executing Will with respect to his share in the subject property. There is, however, an admission in Mr. Sonu's (RW-2) examination-in-chief that he had attested the Will albeit without knowledge that the document on which he was putting his signatures was infact a Will.

(vii). On the other hand, respondent no.1 (PW-1) in her deposition stated that she was the paternal aunt of Late Mr. Kismat's father, Mr. Brahmanand. She indicated in her testimony that the Will in issue was executed on 19.10.2005 by Late Mr. Kismat in respect of the subject land. The witness further went on to state that Mr. Dharampal (PW-2) and Mr. Sonu (RW-1) attested the said Will, as witnesses, which was duly registered before the Sub-Registrar-IX, New Delhi.

(viii). Respondent no.1 (PW-1) went on to state that at the time of the execution of the Will, Late Mr. Kismat was in a sound disposing mind. The factum of the murder of Late Mr. Kismat and the consequent prosecution of the accused, their sentencing, and imprisonment, is also, adverted to in her testimony. Furthermore respondent no.1 (PW-1) also accepted the fact that qua the subject land she had filed for mutation on 09.01.2006, which was

sanctioned by the concerned authority on 31.01.2006. The original khasra girdhawari for the years 2005-2006 and 2006-2007 (Ex.PW1/4 and PW-1/5) has been proved by her. The letter of possession (Ex.PW1/6) was also proved by her.

(ix) In her cross-examination, respondent no.1 (PW-1) did not veer away from the fact that an agreement to sell, a Will and a GPA, had been executed on 19.10.2005 by Mr. Kismat in her favour. On a suggestion made, she deposed that Late Mr. Kismat was paid a sum of Rs.40 Lakhs by her husband. Respondent no.1 (PW-1) went on to allude to the fact that she had known to the appellant (RW-2), the factum of sale of the subject property, the payment of Rs.40 Lakhs as consideration, as also, the fact regarding the execution of the Will in her favour by Late Mr. Kismat. According to respondent no.1 (PW-1), the appellant (RW-2) had given his consent to the transaction. It was respondent no.1's (PW-1's) say that Late Mr. Kismat had disclosed to her and her husband that he intended to purchase another parcel of land from the consideration received by him against the sale of the subject land. Respondent no.1 (PW-1) had also alluded to the fact that Late Mr. Kismat was a matriculate and resided with the appellant (RW-2). However, respondent no.1 (PW-1) denied the suggestion made to her that Late Mr. Kismat was treated affectionately by the appellant (RW-2). More importantly, respondent no.1 (PW-1) emphasised the fact that a receipt was generated in respect of the sum of Rs.40 Lakhs paid to Late Mr. Kismat towards the purchase price of the subject land.

10. A perusal of the evidence would show that Late Mr. Kismat was at times in need of legal assistance because of his close shave with the law. His relationship with the appellant (RW-2) did not seem to be on an even keel contrary to what is sought to be portrayed. The appellant (RW-2), in

fact, in his cross-examination accepted the fact, contrary to his plea, both before the trial court and, in this court, that Late Mr. Kismat was his step brother, and not, his real brother.

10.1 In fact, the appellant (RW-2) clearly stated in his deposition that till 13.03.2005, Late Mr. Kismat had lived with him, and that, thereafter, he had started living in village Daboda, Haryana with one, Mr. Surender @ Nitu till his death on 30.12.2005. The record has shown that Mr. Surender @ Nitu was the brother of Mr. Sonu (RW-1) and that Late Mr. Kismat was a close friend of Mr. Surender @ Nitu. Quite clearly, the appellant (RW-2), to say the least, did not share a warm relationship with Late Mr. Kismat. It appears, because of Late Mr. Kismat's circumstances, which included his infractions of the law, placed him in a position which, required him to sell the subject land.

10.2 The Will in issue, the GPA, and the agreement to sell, it appears, were executed to effectuate the transaction qua the subject land. The record shows that the possession letter (Ex. PW1/6) has also been executed in favour of respondent no.1 (PW-1) which bears the signatures and thumb impressions of Mr. Dharampal (PW-2) and Mr. Sonu (RW-1).

10.3 Respondent no.1 (PW-1) has also obtained a mutation in her favour on 30.01.2006, and has had, the details of the subject land entered in the khasra girdhawari for the years 2005-2006 and 2006-2007. This is apparent from Ex. PW1/3 to PW1/6.

10.4 In these circumstances, the young age of Late Mr. Kismat cannot be said to be a suspicious circumstance. It is quite clear that on 19.10.2005, that is the date when the Will was executed, Mr. Sonu (RW-1), Mr. Dharampal (PW-2), respondent no.1 (PW-1) were present in the office of the Sub-Registrar. Respondent no.1 (PW-1) in her testimony has indicated that

her husband was also present, which is something, which has not emerged in the testimony of other witnesses. This according to me, is a minor discrepancy, which does not affect the consistent testimony of the witnesses, which includes, Mr. Sonu (RW-1), that documents were presented for registration before the Sub-Registrar. Mr. Sonu's (RW-1's) testimony that he did not know that his signatures were being taken on a document, which was a Will, seems unbelievable, especially given the fact that he accepts knowledge of execution of the GPA and has identified his signatures at point X on the Will in issue (Ex. PW1/1). Surely, Mr. Sonu (RW-1) was aware of the fact that he had executed more than one document.

10.5 In so far as Mr. Dharampal is concerned, he has identified not only his signatures on the Will but has also stated in his testimony that Late Mr. Kismat executed the Will in his presence without coercion, and that, at the time of execution of the Will, Late Mr. Kismat was in a sound disposing mind.

10.6 Therefore, to my mind not only the ingredients for execution of the Will are established but also the spectre of suspicious circumstances is removed.

10.7 The submission of Mr. Dalal, the learned counsel for the appellant (RW-2), that because there was failure to refer to the relatives and legal heirs in the Will, should cause the court to suspect the factum of execution of Will, in my view, is untenable. There is no legal requirement of giving details of legal heirs in a Will.

10.8 Similarly, the argument of Mr. Dalal that there was no good reason to disinherit the appellant (RW-2) as he was his real brother does not stand to reason. As indicated above, the appellant (RW-2) in his own testimony has stated that he was Late Mr. Kismat's step brother, though, in my view, on an appreciation of the record, it appears, the relationship would be that of a

half-brother. That apart, the testimony of the appellant (RW-2) itself demonstrates that Late Mr. Kismat had left the appellant's (RW-2) house at least ten months before his death. Late Mr. Kismat had, it appears, started residing with his friend, Mr. Surender @ Nitu, the brother of Mr. Sonu.

10.9 Furthermore, the submission of Mr. Dalal that the fact that Mr. Dharampal (PW-2) [who was cited as a witness in the criminal trial pertaining to the murder of Late Mr. Kismat] had turned hostile, should be taken as a circumstance suggestive of the fact that the Will (Ex.PW1/1) was not executed by Late Mr. Kismat is, in my view, a misconceived submission. The reason for the same being that the judgment of the concerned criminal court, which is, dated 22.01.2008, is suggestive of the fact that there was an inter-gang rivalry which led to the murder of Late Mr. Kismat. Mr. Dharampal was instrumental in the lodgement of the FIR. Except for the fact that the said judgment notices the factum of Mr. Dharampal turning hostile, there is no adverse comment qua him. There is a gap of nearly two and a half months between the execution of the Will and the murder of Late Mr. Kismat.

11. Mr. Dalal's attempt at obliquely indicating that Mr. Dharmapal may have had a role to play in the murder of Late Mr. Kismat is not only far-fetched but also has the effect of setting at naught the judgment of the concerned criminal court by a side-wind. In so far as respondent no.1 was concerned, she had, in a sense, acquired interest in the subject property by being put in possession of the same, with the execution of the GPA and the agreement to sell. The Will, in the instant case, was executed, it appears, as an additional document to secure the interest of respondent no.1 (PW-1) lest a claim is made by the legal heirs of the testator i.e. Late Mr. Kismat, post his death.

12. As to the manner in which a court should proceed when an argument is raised with regard to a Will being executed in suspicious circumstances, the following observations made in a judgment titled: ***Narender Nath Nanda Vs. State 2010 (118) DRJ 719***, come to mind. For the sake of convenience, the same are extracted hereafter:

“..9.1. If, there is any doubt as to the execution of the Will, the Court should examine the explanations offered by the propounder of the Will, by applying the test of a "prudent mind". By that the Courts have meant that the requirement is not that the propounder of the Will is called upon to adduce "mathematical proof". The propounder must, "remove the suspicion, if any, attaching to the execution of the Will and if there be any doubt regarding the due execution, he must satisfy the conscience of the Court that the testator had a sound and disposing state of mind and memory when he made the Will". "Reasonable scepticism, not an obdurate persistence in disbelief nor a resolute and impenetrable incredulity is demanded of the testamentary judge. He is never required to close his mind to the truth." [See *Seth Beni Chand vs Smt Kamla Kunwar & Ors.*: (1976) 4 SCC 554]

9.2. Before arriving at a conclusion that the dispositions made under a Will are unnatural, the improbability of such dispositions should be weighed against the evidence led by the propounder of the Will as regards the due execution of the Will by the testator by putting his signatures, and its attestation, as required by law. The evidence placed before Court as regards improbability of disposition should not only be "clear" and "cogent" but must altogether constitute an "impossibility". [See *Vrindavanibai Sambhaji Mane vs Ramchandra Vithal Ganeshkar & Ors.*: (1995) 5 SCC 215 at Para 14]

9.3. The propounder of the Will, while satisfying the court's "conscience" should attempt to dispel any suspicious or unnatural circumstances surrounding the execution of the Will provided such unnatural suspicious circumstances attach to the Will. The law does not permit conjecture or suspicion to take place of "legal proof". Well grounded suspicion can be a ground for closer scrutiny of evidence but suspicion alone, cannot be the basis for arriving at a conclusion one way or the other. [See *Madhukar D Shende vs Tarabai Aba Shedage*: (2002) 2 SCC 85]

13. Based on the aforesaid principles and the state of the evidence placed before me, I am of the view that no interference is called for, with the impugned judgment. Accordingly, the appeal is dismissed. Parties shall, however, bear their own costs.

RAJIV SHAKDHER, J

OCTOBER 29, 2015

kk/yg