

* **HIGH COURT OF DELHI AT NEW DELHI**

+ **F.A.O. No.176/2011**

Decided on : 11th February, 2016

NEERAJ KATYAL & ORS Appellants
Through: Mr. P.K. Aggarwal & Ms. Mercy
Hussain, Advocates.

Versus

STATE & ORS. Respondent
Through: Mr. Sanjeev Anand, Mr. Arush Khanna
and Ms. Anubha Surana, Advs. for R-2.

CORAM:
HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J.

1. This is an appeal filed by the appellants against the judgment dated 17.1.2011 passed by learned Additional District Judge-06, Delhi in Probate Case Nos.258/2006 titled *Ramesh Katyal vs. State* and 562/2006 titled *Neeraj Katyal & Ors. vs. State & Ors.*

2. Briefly stated the facts leading to filing of the present appeal are that one Hari Narain Katyal, father of Ramesh Katyal and grandfather of Neeraj Katyal and Gourav Katyal is purported to have made a Will dated 21.7.1998 in respect of a house bearing No.A-284, Derawal Nagar, Delhi

measuring 500 square yards in favour of his three grandsons. Two cases came to be filed; one by Ramesh Katyal s/o Hari Narain Katyal bearing No.258/2006 in which he claimed letter of administration in respect of the aforesaid house on the ground that his father had died intestate and therefore, he and his brother Yashpal Katyal had inherited the property in the proportion of one-half each. As against this, Neeraj Katyal and two others, who are the sons of Yashpal Katyal had filed a separate probate case bearing No.562/2006 making Ramesh Katyal, their uncle and their own father Yashpal Katyal as respondents by setting up a Will dated 21.7.1998 purported to have been executed by their grandfather. Both these matters were clubbed together and following issues were framed :-

Issues framed in P.C. No.562/2006

- “1. Whether the Will dated 21.7.1998 of Sh. Hari Narain Katyal is proper and valid ? OPP*
- 2. Whether the petition has not been properly verified ? OPR-2*
- 3. Whether the Will dated 21.7.1998 of Sh. Hari Narain Katyal is forged and fabricated ? OPR-2*
- 4. Whether the petitioner is entitled to the grant of probate and letter of administration in respect of the Will dated 21.7.1998 of Sh. Hari Narain Katyal ? OPP*
- 5. Relief.”*

Issues framed in P.C. No.258/2006

- “1. Whether the deceased Sh. Hari Narain Katyal died intestate as claimed by the petitioner ? OPP*
- 2. Whether the petition is not maintainable in view of preliminary objections taken by the respondents/objectors Yashpal Katyal, etc. in their written statement/objections? OPR*
- 3. Relief.”*

3. The case filed by Ramesh Katyal was treated as a lead case and he filed his affidavit Ex. PW1/A. Apart from his examination, one R.S. Verma is examined as PW-2, Manish Narang is examined as RW-1, the respondent/objector, Neeraj Katyal examined himself as RW-2, Naresh Kumar Parashar as RW-3 and Q.L. Kanijow, Advocate as OW-1. Both RW-1 and OW-1 are the attesting witnesses to the Will (Ex. RW 2/2).

4. The trial court dismissed the probate petition filed by Neeraj Katyal and two other holding that the Will purported to have been set up by Neeraj Katyal was fraught with suspicious circumstance and cannot be relied upon. It granted letter of administration to Ramesh Katyal to share the property in the proportion of one-half each in his favour and his brother Yashpal Katyal. The reason for saying that the Will of the

deceased testator was surrounded with suspicious circumstance was that the deceased testator Hari Narain Katyal, had stated in the Will dated 21.7.1998 that he is creating a life interest to the extent of 1/3rd in the property in favour of his wife Vidya Wati while as admittedly Vidya Wati had died on 21.11.1997, much before the Will was made.

5. The appellant, Neeraj Katyal and others feeling aggrieved by the said findings of the learned Additional District Judge have filed the present appeal.

6. I have heard Mr. P.K. Aggarwal, the learned counsel for the appellant and Mr. Sanjeev Anand, the learned counsel on behalf of the respondent, Ramesh Katyal and have also gone through the record.

7. Mr. Aggarwal, has contended that learned Additional District Judge has passed an erroneous finding by rejecting the Will dated 21.7.1998 without deciding upon the genuineness of the Will. It was contended by him that the probate court has to consider the proof of Will in order to see whether it is genuine or not. It was contended that it does not lie within the domain of the learned trial judge to comment upon the contents of the Will and state that the same is surrounded with suspicious

circumstance. Mr. Aggarwal has stated that the reason for inclusion of name of Vidya Wati in the Will in question, was an inadvertent mistake which had occurred on account of the fact that before making the Will dated 21.7.1998, the respondent had executed a Will dated 12.3.1997 (Ex. PW 2/DC in favour of the present appellant when his wife was alive. Mr. Aggarwal has further stated that as the deceased testator was informed that in case the Will is registered, it has a greater probative value, therefore, he asked the entire Will to be re-typed in verbatim which was subsequently got registered with the office of the Sub-Registrar on 21.7.1998. But in the meantime, his wife had died and therefore, this inadvertent mistake had occurred in the Will.

8. It is further contended by Mr. Aggarwal that the learned trial court had framed two issues. First, whether the Will dated 21.7.1998 of Sh. Hari Narain Katyal is proper and valid? OPP and second whether the Will dated 21.7.1998 of Sh. Hari Narain Katyal is forged and fabricated? OPR-2.

9. It was contended that the learned trial court deleted issue No.3 and did not adjudicate on the question of forgery and fabrication of the Will

in question. It is stated that as a matter of fact, neither any evidence was produced by respondent No.2 in order to prove this forgery and fabrication nor was any suggestion given to any of the attesting witnesses that the Will in question is forged and fabricated. It was contended that the probate court is not to comment on the contents of the Will but has to only see as to whether the Will in question was validly and properly executed or not. It has been contended that in the instant case, not only RW-1, Manish Narang, attesting witness but even the second attesting witness OW-1, Q.L. Kanijow had stated that the deceased testator had signed the Will in their presence and both of them had put their signatures on the Will. It was stated that this statement of the two attesting witnesses, whose testimony has not been demolished, clearly establish the Will in question being a genuine Will and properly executed by the deceased testator. Merely because the wife of the testator had predeceased him and this fact was not mentioned in the Will or that the life interest in the Will in question was created in favour of the wife of the deceased testator would not make the Will as invalid as it has been exhibited also.

10. It was also contended that it is essentially for the propounder to explain any suspicious circumstance in the execution of the Will and in the instant case, the propounder has given a reasonable explanation in the petition itself as well as in the submissions that it happened because of simply copying the earlier Will dated 12.3.1997. It is, therefore, contended that the judgment and the decree of dismissal of the probate petition in respect to the Will dated 21.7.1998 of the appellants is totally unsustainable in the eyes of law.

11. In support of his contention the learned counsel has placed reliance on *Smt. Indu Bala Bose and Others vs. Manindra Chandra Bose and Another*; AIR 1982 SC 133, *Harmes and Another vs. Hinkson*; AIR (33) 1946 Privy Council 156, *Madhukar D. Shende vs. Tarabai Aba Shedage*; AIR 2002 SC 637, *P.P.K. Gopalan Nambiar vs. P.P.K. Balakrishnan Nambiar & Others*; 1995 Supp. (2) SCC 664, *Hari Singh & Anr. vs. State & Anr.*; 2010 (120) DRJ 716 (DB), *Sridevi & Others vs. Jayaraja Shetty & Others*; (2005) 2 SCC 784 and *Leela Rajagopal & Ors. vs. Kamala Menon Cocharan & Ors.*; 2014 (10) SCALE 307.

12. Most of the judgments which are relied upon are on the question of proof of Will and the fact that if there is any suspicious circumstance, it is for the propounder to explain the same. It has been also observed that every circumstance may not be a suspicious circumstance. There cannot be any quarrel with regard to the proposition of law laid down in these judgments. But the question which arises for consideration is as to whether any of these judgments is helpful to the appellants, remains to be seen.

13. It has also been contended by Mr. Aggarwal that the son Ramesh Katyal was excluded from the normal devolution to the property because he was sufficiently compensated by the deceased. Further, his relations with his parents were not good which he tried to show from his cross-examination.

14. Mr. Sanjeev Anand, the learned counsel for the respondent has contested the submissions made by the learned counsel for the appellants. It has been contended that the Will is shrouded with mystery and suspicious circumstance and therefore, notwithstanding the fact that the attesting witnesses have come and testified with regard to their signatures

on the Will in question does not *ipso facto* be taken as the proof of the Will. It has been stated that every suspicious circumstance in the execution of the Will has to be explained by the propounder or the beneficiary. It is contended that in the instant case, no reasonable explanation has been furnished by the propounder of the Will as to why the name of wife was included in the Will when the wife of the appellant had died much earlier than the death of the deceased testator. In this regard, the learned counsel has relied upon *H. Venkatachala Iyenger vs. B.N. Thimmajamma & Ors.*; AIR 1959 SC 443, *Guro (Smt.) vs. Atma Singh & Ors.*; (1992) 2 SCC 507, *Bharpur Singh & Ors. vs. Shamsher Singh*; (2009) 3 SCC 687, *S.R. Srinivasa & Ors. vs. S. Padmavathamma*; (2010) 5 SCC 274 and *Babu Singh & Ors. vs. Ram Sahai alias Ram Singh*; (2008) 14 SCC 754.

15. I have carefully considered the submissions made by the learned counsel for the parties and have also gone through the judgments cited by the respective sides. However, I find myself unable to accept the contention of the appellants that the suspicious circumstance with regard to the life interest having been given to the wife of the deceased testator,

when she was already dead was because of inadvertent mistake of copying the Will made earlier on 12.3.1997. It cannot be accepted that this was on account of an inadvertent mistake as the deceased testator had got the Will typed out afresh in verbatim because it was conveyed to him that the Will which is registered with the Sub-Registrar's office has a greater credibility. The probate court is to see as to whether the Will has been proved in accordance with Section 63 of the Indian Succession Act, 1925 and Section 68 of the Evidence Act, 1872 which read as under :-

“Section 63 of the Indian Succession Act:-

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 given 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 not particular form of attestation shall be necessary.

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Section 68 of the Evidence Act:-

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 the execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.”*

16. I do not agree with this contention of Mr. Aggarwal that the suspicious circumstance of the Will stand explained by the testimony of the propounder of the Will or by the circumstance. First of all, the propounder in his probate petition has tried to give this explanation that as the second Will was got typed out in verbatim with a view to get the same registered with the Sub-Registrar, therefore, this bequest of life interest in favour of his wife inadvertently got reflected inasmuch as she had in the meantime died. Though his explanation is stated to have been given in the petition but there is no statement to that effect when testified

before the court. Further, the question is even if this explanation is accepted, the deceased testator was expected to read the Will after re-typing afresh and understand the contents and then put his signatures while as he seems to have done the same blindly without knowing the implications about the factum of his wife's death. The contention of Mr. Aggarwal that the testator was of sound state of mind also gets demolished by the fact alone. Merely because the attesting witnesses have identified their respective signatures and the signatures of the testator alone does not prove the Will. Both the witnesses ought to have or at least one of them should have stated that the testator read the Will, understood the same and then put his signatures. In my view, this singular fact is fatal to the case of the grant of probate to the appellants because the very fact that the name of the deceased testator's wife is included and life interest is given to her while as she was actually dead, it only cuts at the root of the Will itself and makes the Will a suspect. Under these circumstances, it is not safe to rely upon the Will. One of the earlier judgment of Justice P.B. Gajendragadkar in *H. Venkatachala's* case (*supra*) is squarely covering the facts of this case as to how the Will is to be proved and what is the effect of a suspicious circumstance.

Further, it is not necessary that there should be series of suspicious circumstances before a Will is discarded. A circumstance like the present one in the instant case, makes the court to draw an inference that either the Will was not read by testator or that he was not in a sound state of mind because he did not comprehend what he was doing.

17. The contention of the learned counsel for the appellants that the learned trial court ought to have considered the second issue, namely, the forgery and fabrication of the Will as alleged by him, is of no consequence because this question of forgery and fabrication would arise only when the Will itself was proved in accordance with law which, in the instant case, has not been done because of the fact that there were suspicious circumstances and the court considered it to be safe not to rely on the Will and grant a probate. Therefore, this argument of the appellant is without any merit. The judgment of *Smt. Indu Bala Bose (supra)* relied by Mr. Aggarwal supports the case of the respondent because the suspicious circumstance of giving life interest to the deceased's wife of the testator is not cogently and convincingly explained.

18. The contention of the learned counsel for the appellants that relation of Ramesh Katyal was not good with his father or mother is also of not much importance. This is because of the fact that almost in all the families there would be some kind of friction/difference in perception of the parents and the children but unless and until there is something fundamentally wrong with the child, a parent would not exclude his son from getting the benefit of his property. Merely because the testator had not permitted Ramesh Katyal, his son, not to see his mother, in my view, is not a sufficient circumstance to deprive him of this benefit.

19. It was also contended by Mr. Aggarwal that both the Wills dated 12.03.1997 Ex. PW-2/DC and the second Will dated 21.07.1998 Ex. RW2/2 having been proved, therefore, the court could not have dismissed the petition.

20. Mr. Sanjeev Anand had cited the judgments of *Sudir Engineering Company v. Nitco Roadways Ltd.*; 1995 (34) DRJ and *Narbada Devi Gupta v. Birendra Kumar Jaiswal & Anr.*; (2003) 8 SCC 745 to contend that merely because the document has been exhibited does not tantamount

to the proof of the said document. The court still has to see the modality as to whether the document has been rightly proved or not.

21. I fully agree with the contention of Mr. Anand that merely because of the exhibit mark having been put on the document does not mean that the contents of the document gets established. On the contrary, the court still has to see as to whether the document has been proved in accordance with law or not.

22. In my considered opinion, in the instant case, the document has not been validly proved by the witnesses. Even the testimony of both the attesting witnesses is not worth credence. To give an illustration, RW-1, Manish Narang, says that Neeraj Katyal is his friend while as the beneficiary Neeraj Katyal, who examined himself as RW-2 denies that Manish Narang (RW-1) is his friend. He only calls him as acquaintance. Similarly, each attesting witness does not know the name of the other attesting witness nor this fact is reflected from the testimony. Therefore, it cannot be said that the Will is validly proved and the question of discharging the onus by respondent No.2 to prove that the Will is forged or fabricated does not arise. This question would have arisen only if the

Will had been proved in accordance with law then only the onus would have shifted on to respondent No.2 to prove the said issue.

23. For the reasons mentioned above, I am fully satisfied that the appeal of the appellant is totally misconceived and accordingly, I dismiss the same.

V.K. SHALI, J.

FEBRUARY 11, 2016
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