

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

+ **FAO No. 182/2017**

% **Reserved on: 8th May, 2017**
Pronounced on: 15th May, 2017

AVINASH SHARMA Appellant

Through: Mr. Sanjay Mishra, Advocate.

versus

RAGHUNANDAN BHAKRI (NOW DECEASED) THROUGH HIS
LRS. AND ORS. Respondents

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J

CM No. 15161/2017 (for condonation of delay)

For the reasons stated in the application, the delay of 20 days in
filing the appeal is condoned.

The application is disposed of.

FAO No. 182/2017 and CM No. 15160/2017 (for stay)

1. This first appeal under Section 299 of Indian Succession
Act, 1925 impugns the judgment of the court below dated 22.10.2016
by which the petitioners in the probate case below have been held

entitled to grant of the Letters of Administration with the Will annexed. The Will in question is the Will dated 23.5.1988 executed by Sh. Madan Lal, who died on 2.1.1990.

2. The facts of the case are that two sons of late Sh. Madan Lal as petitioners had filed the subject probate petition for grant of the Letters of Administration with the Will annexed. The Will was attested by two attesting witnesses, namely, Sh. Daulat Ram and Sh. L.N. Babbar. Sh. Daulat Ram had already expired. The subject matter of the Will was House Property no. 4/171, Subhash Nagar, Tihar-1, New Delhi and which was bequeathed jointly to the two sons/petitioners in the probate case, namely, Sh. Raghunandan Bhakri and Sh. Ram Kumar Sharma both sons of late Sh. Madan Lal. Sh. Raghunandan died during the pendency of the petition and was therefore represented by his legal heirs. Reference to petitioners in this judgment includes reference to the original petitioners and/or their legal heirs as per the context.

3. There were three respondents in the probate case with respondent no. 2 being Smt. Shyama Rani, the daughter of late Sh. Madan Lal and respondent no. 3 being Sh. Avinash Sharma, the son of late Sh. Madan Lal. Smt. Shyama Rani, the daughter, did not file

objections and objections were only filed by the respondent no. 3 to the probate petition, namely, Sh. Avinash Sharma, the appellant herein. The objector denied the pleadings in the probate petition as per which the objector Sh. Avinash Sharma had separated from the family in the year 1987 after relinquishing his share in the family property in lieu of receipt of Rs. 40,000/- in cash which was arranged by the petitioners. It was contended by the appellant/objector that on 23.5.1988, the date of the Will, the deceased Sh. Madan Lal was seriously ill and completely bed ridden.

4. The trial court framed the following issues:-

- “i) Whether Will in question is valid and executable? OPR
- ii) Whether petition in hands is not maintainable in present form? OPR.
- iii) Whether petitioner is entitled for probate of Will in question as prayed for? OPP.
- iv) Relief.”

5. The Will in question was proved and exhibited as Ex. PW1/3. One attesting witness to the Will Sh. L.N. Babbar deposed as PW-3. He identified the signatures of the testator late Sh. Madan Lal as also the signatures of the witnesses. Sh. L.N. Babbar deposed that he is an Advocate and was registered with the Bar Council of Delhi. He further deposed that he had a sitting chair in the complex of Sub-

Registrar-II, at Kashmere Gate, Delhi and where he normally practiced. He deposed that deceased Sh. Madan Lal had approached him on 23.5.1988 for making of the Will and late Sh. Madan Lal had discussed the same with him and that the testator had desired to bequeath the Subhash Nagar property to his two sons who are the petitioners in the probate petition. Sh. L.N. Babbar also deposed that the deceased Sh. Madan Lal had informed the attesting witness Sh. L.N. Babbar that the two sons of the testator being the petitioners were looking after him and that the appellant/objector was living separately from the family after taking considerable money from the two petitioners in the probate petition. Sh. L.N. Babbar further deposed that as per the instructions of the testator late Sh. Madan Lal he got the Will typed and contents of which were explained to Sh. Madan Lal in Hindi in the presence of the other attesting witness Sh. Daulat Ram. The witness has deposed to the signatures appearing of late Sh. Madan Lal on the Will as also the signatures of the other witness Sh. Daulat Ram as attesting witness and the Will after being executed was presented for registration and was registered in Register No. 17974, Book No. 3, Volume No. 737, Page No. 19-20 on the same date i.e 23.5.1988. Attesting witness Sh. L.N. Babbar has also deposed that the deceased testator Sh. Madan Lal was in sound and healthy disposing

mind at the time of execution of the Will and the Will was said to have been executed with free will and without any coercion and undue influence from anyone.

6. This attesting witness Sh. L.N. Babbar was cross examined on behalf of the appellant/objector and his cross-examination tendering his examination-in-chief reads as under:-

“PW3: Sh. L.N. Babbar, S/o Sh. D.N. Babbar, R/o. 84, Manu Apartments, Mayur Vihar, Phase-I, Delhi.

On S.A.

I have already filed affidavit in evidence, same is ext. PW3/A, which bears my signatures at points A. Will executed by testator Sardari Lal is ext.PW1/3. I identify my signatures on it at point C and signatures of testator at points A & B and of other witness Sh. Daulat Ram at point D. XXXXXXXX by Sh. N.K. Kapoor, advocate for respondent no. 4.

I am not a summoned witness and have come to depose in this case on the request of petitioner. The testator came to me on 23.5.1988 itself. He was accompanied by one other person namely Daulat Ram. I do not know whether Daulat Ram is still alive. I cannot identify him now and I have no photograph of same with me. I had got this will prepared from some typist. Testator knew Urdu language. It is true that he did not know English. It is wrong to say that testator never came to me or that the testator was bed ridden on that day being paralyzed. I did not affix the photograph of the testator on the will as it was not mandatory. It is wrong to say that I did not affix it deliberately as testator had never come to me. The testator had disclosed that he had three sons but wanted to bequeath his property in favour of two. I had inquired from the testator as how many children he had. It is wrong to say that I deliberately did not give detail of all the children in the will at the instance of son of testator Raghunandan Bhakri. This will is about a property situated at Subhash Nagar, detail of which I do not remember now. It is wrong to say that I got prepared this will at the instance of pet\ and not on the asking of testator.

sd/-

RO&AC
25.11.2010

Rajender Kumar Shastri
ADJ-06 (Central)/Delhi”

7. It is seen that therefore the Will was duly proved through the attesting witness Sh. L.N. Babbar and his cross-examination

elicited nothing which in no manner would detract from due execution, attestation and registration of the Will as also the factum that the deceased was in sound disposing mind. The attesting witness also clarified that at the relevant point of time since fixation of photograph on the Will was not mandatory and hence the photograph of Sh. Madan Lal was not affixed on the Will. The attesting witness reiterated the contents of his affidavit by way of evidence filed as examination-in-chief.

8. In my opinion, the court below has rightly held that the deceased Sh. Madan Lal had executed his Will Ex. PW1/3. It is noted that the appellant had argued with respect to lack of sound disposing mind of the deceased Sh. Madan Lal but no evidence whatsoever was led that the deceased Sh. Madan Lal was seriously ill and bed ridden on the date of execution/registration of the Will. The relevant findings and conclusions of the trial court are contained in paras 17 to 22 of the impugned judgment, and which read as under:-

“17. I have carefully perused the Will and testament of PW3. The Will is signed by Advocate *Sh. L.N.Babbar* at point C as an attesting witness. Same is the place where the attesting witness no.2 was to put his signatures. Besides the *Sh. L.N.Babbar* has also put his rubber stamp and has signed at another place on the Will just below signatures of testator appearing at point B. It is therefore clear that these signatures were put being a scribe whereas signatures at point C were put by PW3 as an attesting witness in the presence of the testator as well as in the presence of other attesting witness *Sh. Daulat Ram* and this satisfies the requirement of Section 68 of the Indian Evidence Act.

18. PW3 has been merely suggested that the testator never came to him as he was bed ridden. I have already stated that this averment has remained not proved. Non-fixation of the photograph on the Will has been also explained by PW3 being not a mandatory requirement of law. No reason has been imputed as a motive for PW3 to give a false testimony on behalf of the petitioners. I further find that in the chief examination PW3 has referred to the name of the testator as “**Sardari Lal**”. However, he has deposed the name correctly in his affidavit **Ex.PW3/A**. The remaining cross examination also reveal that the witness had been speaking of facts relatable to deceased *Sh. Madan Lal* and not some *Sardari Lal*. The same, at best, may be a typographical error. So far as PW1 is concerned, he admits that his father suffered with paralytic attack but when it is only on the day when he had died, nothing was put to this witness to show that on **23.05.1988**, his father was unable to ambulate. Regarding second witness *Sh. Daulat Ram*, the respondent himself suggested PW1 that said *Sh. Daulat Ram* had died prior to filing of the petition.

19. There is nothing in the testimony that he accompanied the testator for execution/registration of the Will or played a major part in preparation of the Will.

20. PW2 stated that his father suffered with paralytic attack in 1989. However, even if it was so no such incident has been proven to have occurred on the relevant date i.e. **23.05.1998**. True that PW2 gives one reason of respondent no.3 vacating the family house as shortage of accommodation but he also refers to a dispute. Nothing in his cross examination as of such nature that would even indicate that the Will in question could be a forged and fabricated document has arisen. It is signed in Urdu language and the said signatures have not been scientifically challenged. Respondents have not produced any other counter signatures different that the one appearing on the Will whereas one attesting witness has duly identified the signatures as that of the testator *Sh. Madan Lal*.

21. Qua PW4 namely *Sh. Raj Kumar*, Clerk, office-Sub-Registrar-II, Kashmiri Gate who proved the registration of the Will **Ex.PW1/3**, it was urged that this witness was not posted in the SR office at the relevant time and had not brought any document to verify identity of the testator including his photograph. This argument is merely namesake as the witness was called merely to prove the registration of the Will and not to prove the identity of the persons who presented the Will for registration. **The aspect to registration of the Will stands duly proved from testimony of PW4.**

22. The above discussion is in accordance with the case law cited above and it is clear that there are no such suspicious circumstances attending to the execution and registration of the Will that would cast such doubts on the same that would oust the case of the petitioners. This issue is therefore decided in petitioners favour and against the respondent.”

9. In my opinion, therefore the probate court has rightly granted Letters of Administration with respect to the subject Will of late Sh. Madan Lal.

10. Learned counsel for the appellant had argued that Sh. L.N. Babbar's signatures appearing on the Will are different than those appearing in his affidavit by way of evidence and therefore Sh. L.N. Babbar who deposed as the attesting witness is not the same L.N. Babbar who had signed as an attesting witness to the Will. However, learned counsel for the appellant could not, show that any cross examination was done of the attesting witness Sh. L.N. Babbar that he is not the same person who had prepared the Will and attested the same. Also, on a query put to the counsel for the appellant, the counsel for the appellant could not show any such ground urged in the grounds of appeal filed in this Court that the Sh. L.N. Babbar who deposed was not the same L.N. Babbar who was the attesting witness to the Will.

11. (i) Learned counsel for the appellant then contended that the appellant had never separated from the family and that the appellant had not received an amount of Rs.40,000/- as averred by the respondents/petitioners, but had only received Rs.20,000/-. It is argued that original of the so called receipt has not been filed and therefore it

cannot be held that the appellant had separated from the family and hence it should be held that the Will has not been validly executed.

(ii) I cannot agree with the argument urged on behalf of the appellant that the appellant was not separated from the family, inasmuch as, admittedly the appellant was not living with the deceased Sh. Madan Lal when he died, and it has come on record that the deceased Sh. Madan Lal was living with his two sons (who are the petitioners) at the property in question which was bequeathed to the two sons/petitioners. There may be dispute with respect to the appellant receiving the particular amount, however, the said aspect is not determinative of the due execution and attestation of the Will, inasmuch as, the fact that deceased Sh. Madan Lal was living with his two sons/petitioners, namely, Sh. Raghunandan Bhakri and Sh. Ram Kumar Sharma in the property in question and therefore late Sh. Madan Lal was being taken care of by his two sons/petitioners in his old age, and therefore to whom the property at Subhash Nagar was bequeathed. There is therefore no reason why the deceased Sh. Madan Lal would not have bequeathed the property to his sons who were living with him and looking after him. Separation of the appellant from the family by receiving money is only an incidental fact which

cannot upturn the correct findings and conclusions with respect to due execution and attestation of the Will.

12. In view of the above there is no merit in the appeal and the same is therefore dismissed.

MAY 15, 2017
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VALMIKI J. MEHTA, J

