

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

% *Judgment Reserved On : February 08, 2017*
Judgment Delivered On : February 15, 2017

+ **FAO (OS) 02/2011**

NARENDRA NATH NANDAAppellant
Represented by: Mr.Sacchin Puri, Sr.Advocate
instructed by Ms.Poorva Pant and
Mr.Udit Malik, Advocates

versus

STATE & ORS.Respondents
Represented by: Ms.Anju Bhattacharya, Advocate
with Mr.Elgin Matt John, Adv. for
R-2 & 3

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE YOGESH KHANNA

PRADEEP NANDRAJOG, J.

1. Appellant filed a petition under Section 278 of the Indian Succession Act, 1925 for grant of Letters of Administration for the estate left behind by his mother late Smt.Krishna Pyari Nanda, who died in New Delhi on March 08, 1994. It was pleaded by the appellant that the deceased was survived by four sons and had died intestate. The three siblings were impleaded as respondents. They set up a will, Ex.R-1, dated November 05, 1987 as the last legal and valid testament executed by Krishna Pyari Nanda. They filed a receipt issued by ANZ Grindlays Bank Branch Connaught Place, New Delhi and pleaded that the will was in custody of

the bank. A true English translation of the will propounded was filed with the reply.

2. Bank official being directed to be present with the will, appeared before the learned Single Judge on May 12, 1995. Receipt dated November 05, 1987 issued by the Chief Manager's Office of the Branch was handed over to him to facilitate such docket which was received in the office of the Chief Manager to be located. On July 21, 1995, the officer informed that in spite of best efforts made the docket could not be located and at that junction the Court permitted the respondents to place on record a carbon impression of the will Ex.R-1, which shows that the matters scribed thereon is a carbon print with signatures of the executor and the witnesses penned in original.

3. On the pleadings of the parties, on October 09, 1995, the following three issues were settled in Test Cas. No.13/1994 filed by the appellant:-

“1. Whether the deceased, Smt.Krishna Pyari, had executed the Will dated 5.11.1987? OPR

2. In case issue No.1 is proved in the affirmative, whether the petitioner is still entitled to grant of Letter of Administration? OPP

3. Relief.”

4. At the trial the respondents sought to examine three witnesses : (i) H.K.Sondhi, brother of late Smt.Krishna Pyari Nanda; (ii) Sh.Madan Lal Khanna, Advocate; and (iii) Sh.Arvind Khanna, the son of Madan Lal Khanna, latter two being attesting witnesses to the will. As per the practice direction, affidavits by way of evidence of said three persons were filed.

5. The appellant filed IA No.10182/1998 raising an objection to the examination-in-chief of the three witnesses being by way of affidavits.

Respondents agreed that the affidavits be ignored and the witnesses would be examined-in-chief orally.

6. The record of the proceedings before the learned Single Judge shows that Sh.H.K.Sondhi appeared as RW-2. He was examined in-chief. The appellant filed IA No.10023/2001 praying that till the propounder of the will stepped into the witness box, cross-examination of Sh.H.K.Sondhi be deferred. Notice of the application was issued on October 30, 2001. NO specific direction ultimately came to be filed in IA No.10023/2001. It appears parties lost track of the fact that Sh.H.K.Sondhi was never summoned for being cross-examined. Sh.Arvind Khanna was not examined. The sole witness of the respondents was therefore Sh.Madan Lal Khanna. The propounders of the will i.e. the respondents did not examine themselves as a witness.

7. The appellant examined Sh.Ashok Kashyap, a hand writing expert, who opined that signatures of the deceased on the will were forged.

8. In the aforesaid backdrop of the evidence the impugned decision has been rendered by the learned Single Judge noting Sections 59 and 63 of the Indian Succession Act, 1925 as also Section 68 of the Indian Evidence Act, 1871. In relation to said statutory provisions the learned Single Judge has held that a will should be in writing and should bear the signature or the mark of the testator or of any person who is/was directed to sign on the document. This should be with an intention to execute the will. It must be attested by two or more witnesses who have seen the testator sign the will or alternatively have received a personal acknowledgment from the testator of having appended the signature or the mark on the will. The attesting witnesses should have signed the will in the presence of the testator and the testator should be a person of sound disposing mind. The learned Single Judge has noted that once the propounder proves the execution of the will

the Court's duty is to look at the alleged suspicious circumstances put forth by the objector. If suspicious circumstances emerged, the onus shifts on the propounder to remove the doubts so created, as was held in the decision reported as 1973 (3) SCC 291 Pushpawati & Ors. vs. Chandraraja Kadamba. On the issue of doubts, the learned Single Judge has noted the law declared in the decision reported as (1976) 4 SCC 554 Seth Beni Chand vs. Smt.Kamla Kunwar & Ors., as per which explanations offered by the propounder of the will qua the doubts has to be tested with a prudent mind and not requiring mathematical proof. The conscience of the Court should be satisfied and the approach should not be one of scepticism, obdurate persistence in disbelief nor a resolute and impenetrable incredulity is to be demanded of the testamentary judge. With reference to the law declared in the decision reported as (1995) 5 SCC 215 Vrindavanibai Sambhaji Mane vs. Ramchandra Vithal Ganeshkar & Ors., the learned Single Judge has noted that the evidence placed before the Court as regards improbability of disposition should be clear and cogent but must altogether constitute an impossibility. The learned Single Judge has also noted a decision of the Supreme Court reported as (2002) 2 SCC 85 Madhukar D.Shende vs. Tarabai Aba Shedage to the effect that conjectures or suspicion cannot take place of legal proof.

9. The testimony of Madan Lal Khanna has been pen-profiled by the learned Single Judge in para 10.1 and 10.2 of the impugned decision which reads as under:-

“10.1 Therefore, in the instant case in so far as the respondent is concerned, we have only the testimony of Madan Lal Khanna (RW-1). In his testimony, Madan Lal Khanna (RW-1) has clearly adverted to the fact that he became acquainted with the testator late Smt.Krishna Pyari Nanda through H.K.Sondhi who was a retired Commissioner of Income Tax. He deposed that he had met

the testator late Smt.Krishna Pyari Nanda on two occasions. Once at the house of H.K.Sondhi, and the second time when she alongwith H.K.Sondhi had visited his office for the purposes of executing the Will (Ex R-1). Madan Lal Khanna (RW-1) in his testimony alluded to the fact that: in November, 1987 Smt.Krishna Pyari Nanda had visited his office. She had expressed her desire to execute a Will. Since she was conversant in Hindi, he had asked his assistant one, Mr.Y.K.Pandey to record the Will in Hindi. His assistant had used a carbon paper while writing out the Will of Smt.Krishna Pyari Nanda. He further deposed that his assistant Y.K.Pandey who had written out the Will, had died about five years back. After the Will had been recorded, the same had been read over to Smt.Krishna Pyari Nanda. The testator Smt.Krishna Pyari Nanda had signed the Will in his presence, and that he alongwith his son Arvind Khanna, who was the second attesting witness had also signed the Will, in the presence of the testator Smt.Krishna Pyari Nanda. He stated that the testator had signed the Will in his presence and that others in turn had signed the Will in her presence. He identified the signatures of the testator Smt.Krishna Pyari Nanda on the Will (Ex R-1) at Point 'A' on each page of the Will, and similarly, identified his own signatures at Point 'B' at Page 4 of the Will and his initials at Point 'B' on Pages 1, 2 and 3 of the Will (Ex R-1).

*10.2 Madan Lal Khanna (RW-1) also categorically stated in so many words that **"at the time when the Will was being dictated Smt.Krishna Pyari Nanda was in sound disposing mind"**. In his cross-examination Madan Lal Khanna (RW-1) clearly stated that both the original Will and the carbon impression of the Will had been taken away by H.K.Sondhi and Smt.Krishna Pyari Nanda. He expressed his inability to state as to where the original Will had been placed. Madan Lal Khanna (RW-1) specifically refuted the suggestion that he had any previous dealings with Smt.Krishna Pyari Nanda in his capacity as a lawyer. He also stated that the sons of late Smt.Krishna Pyari Nanda had not contacted him for the purposes of Will or for a copy thereof. On being confronted, he refuted the suggestion that the signatures on the Will (Ex.R-1) at Point 'A' were not those of Smt.Krishna Pyari Nanda. He volunteered that he was certain that the*

signatures were of late Smt.Krishna Pyari Nanda as she has signed in his presence. The witness, Madan Lal Khanna (RW-1), also refuted the suggestion that the carbon impression of the Will was brought to him in July, 1995, which is when, he signed and initialed the Will.”

10. At this stage it needs to be highlighted that the appellant examined himself as his witness and deposed that his mother did not execute any will. On being cross-examined, the appellant admitted that his relations with his brothers were not cordial. That as a director of a company M/s.Kidar Sons & Industry, he had sought winding up thereof. He admitted that his mother was a shareholder in the company. He admitted that the company had instituted a suit against him. Confronted with an affidavit marked ‘A’ filed by the mother in the suit by the company against him, he evaded recognizing signatures of the mother by saying that he was unable to say whether the signatures were those of his mother inspite of the fact that in his examination-in-chief he categorically said that he recognizes the signatures of his mother and that on the will Ex.R-1 the signatures were not those of his mother. He admitted that he was not present at his mother’s funeral, but claimed the reason being he was not informed of his mother’s death.

11. The handwriting expert obviously deposed in favour of his report Ex.PW-1/1 dated October 22, 2010 that the signatures of the deceased were forged.

12. The first issue argued before the learned Single Judge whether a signed carbon impression in a primary document, held against the appellant with reference to the decisions, was not raised before us and thus we proceed on the basis that the will Ex.R-1 was a primary document.

13. Indeed, the signatures of the testator in original are appended on each page. The will bears the original signatures of the two attesting witnesses.

14. We have noted hereinabove the statutory provisions and the applicable case law noted by the learned Single Judge to guide how a testamentary Judge should approach the consideration of the evidence in a testamentary case and we concur with the legal principles culled out by the learned Single Judge. Learned senior counsel for the appellant did not urge anything to the contrary, and rightly so.

15. The learned Single Judge had believed the testimony of Sh.Madal Lal Khanna. Having perused the testimony of Sh.Madan Lal Khanna, we find no reason to disbelieve him. As per the testimony of Sh.Madan Lal Khanna, Smt.Krishna Pyari Nanda was well-versed in Hindi. Therefore, he called his assistant Sh.Y.K.Pandey who scribed the will as dictated to him by Smt.Krishna Pyari Nanda. She executed the will by signing on each page thereof and at the end of the will. Thereafter Sh.Madan Lal Khanna and his son Sh.Arvind Khanna signed as an attesting witnesses. Sh.Madan Lal Khanna has deposed on oath that Smt.Krishna Pyari Nanda was in a sound state of mind and his testimony to this effect has not been challenged. Thus, prima-facie the execution of the will has been proved. The contention of learned counsel for the appellant that Sh.Y.K.Pandey ought to have been examined and an adverse inference should be drawn against the respondents by not producing the best witness, is noted and rejected by us because when he deposed, Sh.Madan Lal Khanna said that Sh.Y.K.Pandey had died two years back and this testimony of his was not challenged. Further, no adverse inference can be drawn against the respondents by not examining Sh.Arvind Khanna because law does not warrant oath attesting witnesses to be examined.

16. What are the suspicious circumstances concerning the will urged by the appellant? Firstly, that Sh.Mohinder Nath Nanda, the propounder of the will in question had not been examined. Secondly, the origin of the carbon impression of the will was suspicious. As per the appellant, in the reply filed, the respondents never claimed that they had a carbon impression of the will.

17. The two are intertwined, and suffice it to record that a propounder of the will need not examine himself, and especially if it is not the case of the propounder that he was present when the deceased executed the will. We find nothing suspicious in the propounders not pleading in the reply that the deceased had executed two wills in original. The first being the pages on which the scribe wrote with the pen and the second being the carbon impression thereof. As per the respondents, the original will dated November 05, 1987 was lodged by the testator in the safe custody of the Chief Manager, Grindlays Bank Branch, Connaught Place. A receipt of even date was produced. What is relevant is that an English translation of the will was filed along with the reply. Thus, it cannot be said that later on, i.e. after the reply was filed since the bank officers could not locate the will, the respondents created the carbon impression. When summoned from Grindlays Bank, the official did not dispute a docket being handed over in the office of the Chief Manager. Though not exhibited, we have seen the carbon copy of the application, which is pinned along with the carbon impression of the will. It bears the stamp of the Chief Manager's Office ANZ Grindlays Bank Branch Connaught Place. We have compared the signatures on the copy, which are in original. They are identical with the signatures on the will. The application refers to a will executed by Smt.Krishna Pyari Nanda, with a desire that it should be kept in safe custody with the bank. The learned Single Judge has reasoned this

controversy in paragraph 14.3 of the impugned decision which reads as under:-

“14.3 The third objection taken by Mr.Sahay was that since the propounder of the Will Mohinder Nath Nanda was not examined, no evidence could be led or indeed was led to establish as to how the carbon impression of the Will (Ex R-1) came in his possession. In my view, in the facts and circumstances of this case, this objection has lost much of its significance, as it has come through in the evidence of Madan Lal Khanna (RW-1) that the Will was prepared in two counterparts by using a carbon paper. He (RW-1) has also stated in his deposition in court, that both counterparts were taken away by H.K.Sondhi and late Smt.Krishna Pyari Nanda. It has also come through in the evidence of PW2, (i.e., the petitioner) that at the time of death of Smt.Krishna Pyari Nanda, he was not staying in the same house where the testator Krishna Pyari Nanda, died i.e., 41, Golf Links, New Delhi. In the reply filed in Court by the respondents, at the very first opportunity the respondents had stated that the first counterpart was in the custody of the Bank. When the Bank reported that they did not have the first counterpart of the Will in their custody, the respondents sought permission of the Court to place the carbon impression of the Will i.e., the second counterpart on record of the Court. It is not inconceivable in the instant circumstances, that the carbon impression of the Will (Ex R-1) which is the second counterpart was available in the house of the testator at the time of her death, or was with H K Sondhi who may have handed over the document to the respondents. The fact that such a document that is, the Will (Ex. R-1) was in existence has come through in the testimony of Madan Lal Khanna (RW-1). The due execution of the Will (Ex. R-1) having been proved in accordance with the law, the placement of Will (Ex.R-1) on record of the court would not have me believe that the Will was not a genuine document.”

18. We are in complete agreement with the reasoning of the learned Single Judge and supplement the same with our reasoning as per preceding

paragraph i.e. the propounders filing an English translation of the will. Further, where was the need for the propounders to claim that the deceased had entrusted the will to the Chief Manager of ANZ Grindlays Bank and then go about ensuring that the bank did not produce the docket containing the will, if they had to fabricate a will.

19. In the teeth of the evidence led by the respondents the learned Single Judge rightly did not give credence to the handwriting expert examined by the appellant. The learned Single Judge has rightly held that testimony of handwriting expert would be relevant if Sh.Madan Lal Khanna, the attesting witness of the will was a shaky witness.

20. The will records a reason to disinherit the appellant. The reason is the appellant not being obedient to his mother and causing to the mother and the family a lot of tension. Acting against the family prestige and appellant's strained relationship with his mother are evinced in the affidavit filed by the mother in the suit and the appellant not attending his mother's funeral.

21. We would be failing not to note an argument advanced by learned senior counsel for the appellant in the appeal that without obtaining probate of the will, the respondents could not predicate a defence under the will.

22. No such objection was raised before the learned Single Judge and even in the appeal we do not find any such objection taken. Only during arguments the objection was raised.

23. We negate the objection for the reason it was never taken before the learned Single Judge and even in the appeal no such objection is raised. Besides, the proceedings before the learned Single Judge related to the succession to the estate of Late Smt.Krishna Pyari Nanda who died at New Delhi and for all practical purposes the proceedings in the testamentary case instituted by the appellant took the form of a probate proceeding.

24. Finding no merit in the appeal, we dismiss the same with costs against the appellant and in favour of the respondents.

(PRADEEP NANDRAJOG)
JUDGE

(YOGESH KHANNA)
JUDGE

FEBRUARY 15, 2017
skb