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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on :6th February, 2018

Date of decision :15th May, 2018

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RFA 241/2013

SATYA PAL SOBTI

..... Appellant

Through: Mr. Arun Baali and Mr. Jaskaran
Singh, Advocates. (M:9999315171)

versus

ACHRAJ NATH & ORS.

..... Respondents

Through: Mr. Deepak Khadaria, Advocate.
(M:9811057358)
Mr. Arun Birbal, Advocate for DDA.
(M:9810029802)

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. Smt. Kailash Wati Sobti was a perpetual lessee of the suit property bearing no. H-376. Vikas Puri, New Delhi, measuring 207 sq. mts. (earlier known as Bodella Residential Scheme located in Village Bodella Hostel Possingipur and Keshopur Revenue Estate). The lease was executed on 8th February, 1980 by the Delhi Administration. This lease was duly registered. Smt. Kailash Wati was the wife of Sh. Kundan Lal who had passed away on 19th March, 1973. She was blessed with 6 sons and two daughters:

1. Sh. Achraj Nath Sobti – Defendant no.1 through LRs.
2. Sh. Trilok Nath Sobti – Passed away. LRs are Defendants 5-8
3. Sh. Satya Pal Sobti – Plaintiff
4. Sh. Krishan Kumar Sobti – Defendant No.2
5. Sh. Vinod Kumar Sobti – Defendant No.3

6. Sh. Yog Raj Sobti – Defendant No.4

7. Smt. Satya Khuller – Defendant No.9

8. Smt. Usha Bhasin – Defendant No.10

2. The present suit has been filed by Sh. Satya Pal Sobti against all the Defendants claiming partition of the suit property and declaration. Initially, the suit was one for partition and injunction, however, later on the relief of declaration has been added. Defendants No. 2, 3, and 4, are in possession of the suit property, and they are the contesting Defendants. Sh. Trilok Nath Sobti passed away on 29th May, 1981, and his family has been impleaded as Defendants No. 5, 6, 7 and 8. Defendants No. 9 and 10 are the two daughters of Smt. Kailash Wati, one of whom is deceased. Defendant No.11 is the Delhi Development Authority (*hereinafter DDA*).

3. Except Defendant No.2, 3, and 4, none of the others contest the suit. In fact the Written Statement filed on behalf of Defendants No.1, 5 to 10 supports the case of the contesting Defendants that Smt. Kailash Wati had left a registered Will date 16th June, 1981 by which she had bequeathed the property in favour of Defendants No.2 to 4. Thus, the present dispute in respect of the suit property is only between the Plaintiff and Defendant Nos. 2, 3, and 4 all of whom are brothers.

4. Suit of the Plaintiff is premised on the fact that the Plaintiff is one of the sons of Smt. Kailash Wati and he resides in Sri Ganganagar, Rajasthan, where the family home is located. It is the Plaintiff's case that Smt. Kailash Wati sold the property which was in Ganga Nagar in her name and thereafter purchased the suit property. The Plaintiff avers that Smt. Kailash Wati died intestate on 19th May, 1987 and that all the Defendants are class-1 legal heirs. The case in the plaint is that Smt. Kailash Wati was unwell for five to

six years prior to her death and that no Will was executed by her in a sound state of mind. The Plaintiff claims that after the death of his mother, he repeatedly sought partition of the property amongst the legal heirs equally but the Defendants refused partition. Accordingly, the Plaintiff prayed for the following reliefs: -

“a. pass a preliminary decree/decreed of partition in respect of property No.H-376 Vikaspuri, New Delhi, to the extent of 1/8th share each of the Plaintiff and the Defendants. (the Defendant no.5, 6, 7 and 8 are entitled to 1/8th share jointly being the legal heirs of late Sh. Trilok Nath Sobti) and order for partition of property by metes and bounds in favour of the parties to the suit.

b. appoint a local commissioner to suggest mode of partition of the property in case the property is not capable of partition by way of metes and bounds.

c. in the alternative, if the property can not be partitioned by metes and bounds, in that eventuality the property may be sold in public auction and the sale proceeds thereof, may kindly be ordered to be distributed amongst the legal heirs in terms of prayer (a).

d. pass a decree of injunction against the Defendants no.2, 3 and 4, from creating any third party interest in respect of the property(ies) i.e. H.-376, Vikas Puri, New Delhi of the deceased.”

5. The Defendants No. 2, 3 and 4 (hereinafter ‘contesting Defendants’) took the plea that Smt. Kailash Wati had executed a registered Will dated 16th June, 1981 in favour of the contesting Defendants and that this fact was in the knowledge of the Plaintiff. They contended that after the death of Smt. Kailash Wati, the Plaintiff was informed of the execution of this Will, and it was for this reason that though Smt. Kailash Wati died in 1987, the suit was

filed almost 17 years later in 2004. Thus, the contesting Defendants pleaded that the suit was barred under the Limitation Act. They also contended that the DDA had already mutated the property in their name.

6. The DDA filed its written statement and informed the court that vide letter dated 1st August, 1991, the plot was mutated in favour of the contesting Defendants. The DDA further stated that the conveyance deed in favour of the contesting Defendant was executed on 19th April, 2002. The following issues were framed on 2nd February, 2005 by the Court, read with order dated 5th November, 2011, by which issue number 5 was reframed.

The issues finally framed are:

- 1. Whether the suit of the plaintiff is properly valued for the purpose of Court fee and jurisdiction? OPP.*
- 2. Whether notice under section 53(B) of Delhi Development Act has been served upon DDA, if not, its effect? OPP.*
- 3. Whether the suit of the plaintiff is time barred? OPD.*
- 4. Whether the suit of the plaintiff is maintainable in the present form? OPD.*
- 5. Whether Smt. Kailash Wati had executed Will dated 16.06.1981 in favour of defendant No. 2,3&4 and if yes its effect? Onus to prove this issue would be on both the parties.*
- 6. Whether the plaintiff is entitled for the relief of partition as claimed in para (a) and (b) of prayer clause? OPP.”*

7. On behalf of the Plaintiff, he examined himself as PW-1. The Defendants examined three witnesses i.e., Sh. K.K. Sobti, Defendant No.2 as DW-1, Sh. S.K. Sharma, attesting witness as DW-2, Sh. D.C. Tuteja as DW-3 and the official from the Sub-Registrar's office Sh. Indraj Singh who

is also named as DW-3. The Trial Court after examining the pleadings and the evidence held that the suit is barred by limitation as the Plaintiff had acquired knowledge of the Will in 1987 itself. The Trial Court further held that the execution of the Will does not raise any suspicion and the attesting witness and the official from the Sub-Registrar's office having appeared, the Will stands proved.

8. In the present appeal, the only two questions that have been assailed and argued are in respect of the validity of the Will and limitation. On the issue of validity of the Will, it is the submission of the Appellant that there are several suspicious circumstances surrounding the execution of the Will which ought to render the Will invalid. The same are enumerated below:

- That Smt. Kailash Wati was 65 yrs of age and was not keeping in good health;
- The Plaintiff argues that the date of the Will i.e., dated 16th June, 1981 creates a suspicion inasmuch as Smt. Kailash Wati had lost her 43 years old son on 29th May, 1981 and within 15 days of her death, she could not have executed the Will.
- That the testator could read and write but had only affixed her thumb impression on the Will and not signed;
- She was accompanied to the Sub-Registrar's office by Sh. K. K. Sobti who was the beneficiary of the Will and who remained with her all along;
- Even the attesting witnesses were not known to Smt. Kailash Wati but to Sh. K. K. Sobti who was the beneficiary;

- The Will was not explained to her in the vernacular language;
- The Will has not been signed by the attesting witnesses on the rear page;
- The name of Smt. Kailash Wati has been written below her thumb impressions after she has affixed it.
- Smt. Kailash Wati had bank Accounts, and was operating them, but still did not sign the Will;
- Out of the two witnesses, only one was deposed as the attesting witness. It is submitted by the Plaintiff that the deposition of Sh. S.K. Sharma, the attesting witness in fact has credence to the fact that he was not known to the testator.

9. Heavy reliance is placed on the testimony of the officials from the Sub-Registrar's office who stated that the name cannot be written after the registration of the Will. The Plaintiff also relies on the testimony of the lawyer Mr. D.C. Tuteja that he did not explain the Will in vernacular language to the testator. On the other hand, counsel for the contesting Defendants has submitted that the Will is a registered Will. The attesting witnesses have categorically stated that Smt. Kailash Wati had appeared before the Sub-Registrar's Office. It was also contended that the testimony of the lawyer who drafted the Will, the attesting witness and Mr. K.K. Sobti goes to show that the Will was properly executed and registered. It is further contended that the death of Smt. Kailash Wati took place in 1987. The mutation was carried out in the name of the contesting Defendants in 1981

and the conveyance deed was also executed in 2002. The Plaintiff all along had knowledge of the Will and chose not to ascertain his right. Moreover, even in the perpetual lease, Smt. Kailash Wati has affixed her thumb impression which goes to show that there is no suspicious circumstance because of the thumb impression.

Analysis and Findings

10. The original Will, the perpetual lease and the conveyance deed were produced before the court in original. The same were duly exhibited but were later returned to the contesting Defendants on 6th April, 2013. The documents that have been exhibited by the parties are as under: -

- Death Certificate of Smt. Kailash Wati Sobti (Ex. PW1/1)
- Legal Notice Dated 15th December, 2003 (Ex. PW1/2)
- Postal Receipts (Ex. PW 1/3)
- Original A.D. Card (Ex. PW 1/4)
- Conveyance Deed (Ex. DW 1/1)
- Perpetual Lease (Ex.DW1/2)
- Will dated 16th June, 1981(Ex.DW2/1)

11. A perusal of the testimony of the Plaintiff shows that the Plaintiff was not able to show any documents to support his plea that his mother, Smt. Kailash Wati was unwell. Plaintiff admits in his cross-examination that immediately upon the death of his mother, he asked for his share of the property. According to his version, the contesting Defendants informed him that they will give him the share. His testimony is very relevant and is extracted herein below: -

“I came to Delhi immediately after the receipt of intimation of death of my mother. I immediately asked

for the share in the property after the death of my mother when I came to Delhi. I asked for my share in the property in the year 1987 itself although I cannot tell the date and month of asking my share. I asked my share in the property from defendant no.2 to 4. I did not ask my share from defendant no. 1 as defendant no.1 was not residing there. The suit property belongs to my mother. In the year 1987, defendant no.2 to 4 said that they will give the share. It is incorrect to suggest that defendant no.2 to 4 made any promise that my share will be given. I used to ask for my share in the property at every function. I used to ask for my share once or twice in a year.”

12. From the above testimony, it is clear that having demanded the share in 1987 the Plaintiff ought to have been watchful and conscious of his rights. The submission of the Plaintiff that he was satisfied with the assurances given by the Defendants for almost 17 years shows that he was not serious about asserting his rights. His admission that he demanded his share in 1987 lends credibility to the Defendant's plea that they informed him about the Will in 1987 itself. Thus, the complete inaction of the Plaintiff for 17 yrs clearly debars him from seeking relief. It also makes another thing crystal clear i.e., that he knew of the execution of the Will of his mother.

13. The manner in which the plaint is also worded in respect of the Will i.e. use of the sentence “Smt. Kailash Wati Sobti had not executed any Will while possessing sound state of mind, died interstate on 19.5.1987”, clearly goes to show that he had complete knowledge of the Will of 1987. The testimony of the Plaintiff is very telling as he seeks to assert in his cross examination “*my mother had not executed any will in her lifetime*”. This plea is contrary to the plea in the plaint, where the Plaintiff states that Smt.

Kailash Wati had not executed any Will with a sound mind. Further, despite being given repeated opportunities in the cross examination, the Plaintiff conceded *“I have no medical proof of the ailment of my mother nor I have any medical proof to show that there was loss of memory of my mother.”* In respect of the nature of ailments suffered by his mother, the Plaintiff stated *“My mother was suffering from cataract and she was hard of hearing and she was loss of memory”*. Thus, it is clear from the Plaintiff’s own testimony is that Smt. Kailash Wati did not suffer from any major ailments. She was regularly visiting Rajasthan to get her husband’s pension, and that she was not of unsound mind.

14. The Defendant’s testimony, on the other hand, shows that Smt. Kailash Wati went to the office of the Sub-Registrar at Asaf Ali road on 16th June 1981 accompanied by her son Sh. K. K. Sobti (DW-1). The attesting witness, DW-2 stated that he was a colleague of Sh. Yog Raj Sobti, one of the contesting Respondents, and that he knew some of the other brothers of Sh. Yog Raj Sobti and one of the sisters. His familiarity was to the extent that he had even attended the cremation of Sh. T. N. Sobti. He stated categorically, *“I happened to be nearby when the contents of the Will were being explained to Smt. Kailashwati Sobti in vernacular.”* He knew that the other attesting witness to the will Sh. D. K. Nayyar was related to the testator. He stated that the Will bears the thumb impression of the testator at point B and C, and he also stated that the whole process of drafting of the Will took a minimum three to four hours. He denies the suggestions that the Will is a bogus document, and also confirms that Mr. D. K. Nayyar had gone to the Sub-Registrar’s office before registration of the Will. He stated that neither he nor Mr. Nayyar was asked to sign on the back page of the

Will.

15. The official from the Sub-Registrar's office produced the records and confirmed the contents of the Will. He also confirms that the contents of the same are correct. He did however state that if any witness appears before the Sub-Registrar's Office, his signatures are taken at the back of the document as well.

16. The lawyer Mr. D.C. Tuteja has confirmed that he had drafted the Will and stated that the mentioning of the enrolment number was not the practice prevalent at the relevant time. He stated that though the Will does not have any certificate, he had explained the Will in vernacular, he said that "*normally we do explain the documents*". He denied the suggestion that the Will was not drafted by him.

17. A perusal of the Will which is on record as DW-2/1 clearly shows that the left-hand thumb impression of Smt. Kailash Wati appears on several pages of the Will, two impressions on the back page and one thumb impression on the second page. The signatures of Mr. Tuteja appears on the second page and showed that the name address and signatures of the two witnesses. The Sub-Registrar's seal appears at the back page of the Will with all the details having been filled therein. The Sub-Registrar notes that Mr. Tuteja, Advocate is present with Mr. H.V. Chauhan, Advocate. Mr. Tuteja has also signed the back page of the Will where the seal of the Sub-Registrar appears. The testimony of Mr. K.K. Sobti (DW-1), also goes to show that Smt. Kailash Wati had visited the Sub-Registrar's office and was present during the entire process of registration. He also states that the execution of the Will was disclosed to the Plaintiff before the 13th day ceremony (*Tehervi*) after the death of the mother. The mere fact that the

lawyer did not recall as to whether he explained the Will in vernacular to the testator, does not take away the fact that at the back of the Will, there is a clear endorsement by the Sub-Registrar that the Will has been explained to the testator. In the face of the registered Will duly proved by an attesting witness, the contents of which are not disputed, the so called suspicious circumstances which are not established by the Plaintiff cannot render the Will unenforceable. Though, Mr. K. K. Sobti is one of the beneficiaries, he is not the sole beneficiary of the Will. The fact that he accompanied his mother does not render the Will suspicious by itself. The property in question has been bequeathed to three brothers. The first floor has been bequeathed to Mr. K. K. Sobti. Sh. Yog Raj Sobti has been given ownership of the front portion of the Ground Floor and Mr. V. K. Sobti has been given ownership of the back portion of the ground floor which was yet to be constructed at the time of the execution of the Will. Thus, Mr. K. K. Sobti was not the only beneficiary. DW-3 the attesting witness, though may have been known to Mr. K. K. Sobti, was a colleague of Mr. Yog Raj Sobti. The attesting witness being a known person to the family, there is nothing unnatural in him being made an attesting witness. This circumstance is not suspicious but actually the contrary. Strangers would not be called to attest wills. The lawyer, Mr. Tuteja who appeared categorically asserted that it is the normal practice to explain the Will in vernacular language. All this goes to show that the Will was not executed under suspicious circumstances. The Plaintiff has not been able to prove that Smt. Kailash Wati was in such a state of mind, so as not to understand her actions by executing the Will. It is clearly proved on record that she has not only visited the Sub-Registrar's Office but remained there all through while the Will was drafted and

registered which could have at least been a process of one full day. There is nothing on record to show that she was not in a sound state of mind at the time of execution of the will. Thus, the Trial Court's finding, that there are no suspicious circumstances, is correct. Notice can also be taken of the fact that the conveyance deed in favour of Smt. Kailash Wati also bears her Thumb impression and not her signature. Thus, it appears that Smt. Kailash Wati used her thumb impression on official documents and the use of same does not constitute a suspicious circumstance. The Will has been proved as per Section 68 of the Evidence Act. The testator was not incapacitated in any manner. What is crucial is the lack of testamentary capacity and not ill health alone as per ***Judah v. Isolyne Shrojbashini Bose & Anr. AIR 1945 PC 174***. This judgment has also been reiterated in ***K. L. Malhotra v. Sudershan Kumari 2008 (149) DLT 783*** – where the Ld. Single Judge of this Court held:

“32. As the wills are too frequently made by the sick and dying, the degree of understanding and memory which the law requires is such as may be reasonably expected from persons in that condition. Therefore, it is wrong to suppose that those qualities of mind should be possessed by the testator in the highest degree, position or to the same extent as before the illness in order to enable him to validly make his will. Section 59 of the Indian Succession Act requires that the testator should have a sound mind. The sound mind referred to does not mean that the testator should have his mental faculty in their fullest vigour, but means that he should have the capacity to understand the nature of his property; memory to remember the relations and persons normally having claims on his bounty and has also a judgment. As observed by their Lordships of Privy Council in the decision reported as Judah v.

Isolyne AIR 1945 PC 174, the fact that the testator was unwell when he executed the will is a long way from saying that he had no testamentary capacity. The testator does not have to be found in perfect state of health to have his will declared valid. It is sufficient to prove that he was able to outline the manner in which his estate was to be disposed of.

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36. *The golden rule in interpreting a will is to give effect to the testator's intention as ascertained from the language, which he has used. The overriding duty of a Court is to construe the language which the testator has in fact employed giving due weight to all the words and rejecting none to which a meaning can reasonably be assigned. The Court is entitled to put itself into the testator's arm chair to construe a will and to form an opinion apart from the decided cases and then, to see whether those decisions require any modification of that opinion and not to be beckon by considering as to how far the will in question resemble other will upon which the decisions have been given. The proposition that the will has to be read as a whole cannot be disputed. Whether there is a will on the basis of the document, the probate Court certainly will not proceed to consider as to whether or not the disposition of the property was good or bad. The primary duty of the probate Court is to see first whether Prima facie the document constituted a will."*

In ***Madhukar D. Shende v. Tarabai ABA Shedage (2002) 2 SCC 85***, (hereinafter ***Madhukar***) the Supreme Court laid down the requirements of proof of a Will as under: -

"8. The requirement of proof of a will is the same as any other document excepting that the evidence tendered in proof of a will should additionally satisfy the requirement of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act,

1872. If after considering the matters before it, that is, the facts and circumstances as emanating from the material available on record of a given case, the court either believes that the will was duly executed by the testator or considers the existence of such fact so probable that any prudent person ought, under the circumstances of that particular case, to act upon the supposition that the will was duly executed by the testator, then the factum of execution of will shall be said to have been proved. The delicate structure of proof framed by a judicially trained mind cannot stand on weak foundation nor survive any inherent defects therein but at the same time ought not to be permitted to be demolished by wayward pelting of stones of suspicion and supposition by wayfarers and waylayers. What was told by Baron Alderson to the jury in R. v. Hodge may be apposite to some extent:

“The mind was apt to take a pleasure in adapting circumstances to one another and even in straining them a little, if need to be, to force them to form parts of one connected whole, and the more ingenuous the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact inconsistent with its previous theories and necessary to render them complete.”

The conscience of the court has to be satisfied by the propounder of will adducing evidence so as to dispel any suspicions or unnatural circumstances attaching to a will provided that there is something that is unnatural or suspicious about the will. The law of evidence does not permit conjecture or suspicion having the place of legal proof nor permit them to demolish a fact otherwise proved by legal and convincing evidence. Well-founded suspicion may be a ground for closer scrutiny of evidence but suspicion

alone cannot form the foundation of a judicial verdict-positive or negative.

9. It is well settled that one who propounds a will must establish the competence of the testator to make the will at the time when it was executed. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the will in the manner contemplated by law. The contestant opposing the will may bring material on record meeting such prima facie case in which event the onus would shift back on the propounder to satisfy the court affirmatively that the testator did know well the contents of the will and in sound disposing capacity executed the same. The factors, such as the will being a natural one or being registered or executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of "not proved" merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties would be relevant and of significance."

18. In the present case, the Plaintiff has remained quiet for 17 years. He clearly knew of the execution of the Will after the demise of his mother. He chose not to approach the court till 2004, by which the time the mutation and conveyance deed were already executed in favour of the contesting Defendants. The long gap between the acquisition of knowledge and the filing of the suit itself shows the reluctance of the Plaintiff in asserting his right. The conjectural theories as to the mental state of mind after the demise

of her son cannot shake the foundation of the registered Will. It is very much possible that the mother, faced with the demise of her son may have felt to execute the need to execute a Will on the face of such demise. Either reason would be a surmise. The allegations of ill health against his mother, who was only 65 years old at the time of her death, also appeared to be in bad taste, as there is not a shred of evidence to establish her ill health. Suffering from cataract in the eye or some agony for the demise of her son does not render a person of unsound mind. The contesting Defendants have established the legitimacy and the validity of the Will. They have discharged their onus by producing the attesting witness, the lawyer and the official from the Sub-Registrar's Office. The onus shifted to the Plaintiff to establish that the Will was invalid or was executed under suspicious circumstances, which has not been discharged. The bequest in the Will also appears to be natural inasmuch as the Plaintiff has always been a resident of Sri Ganganagar, Rajasthan and has never lived in the suit property. On the other hand, the contesting Defendants have always occupied the suit property that has been bequeathed to them. The mother Smt. Kailash Wati was living in the suit property and she has not merely divested the Plaintiff from the suit property but also the other sons and two daughters as well. Thus, there is nothing unusual in the bequeath made in the Will. The attempt by the Plaintiff constitutes nothing more than "*wayward pelting of stones of suspicion*" as observed by the Supreme Court in ***Madhukar (supra)***.

19. The authorities relied upon by the Plaintiff lay down the principle that if a propounder takes active part in the execution of the Will that may constitute a suspicious circumstance but the said suspicion can be removed by clear and satisfactory evidence. The judgment in ***Rabindra Nath***

Mukherjee and Anr v. Panchana Banerjee (dead) by L/Rs. and Ors. AIR 1995 SC 1684 is the authority to the proposition that in such cases, “*some eye-brow is bound to rise*”. However, this judgment goes on to hold that there may be other circumstances to show the character of the documents in which case *the eye-brows should get dropped down*.

20. In the present case, the mere fact that Sh. K. K. Sobti accompanied his mother for the execution of the Will does not render any suspicion as there is sufficient, cogent and independent evidence to prove the execution of the Will and that Smt. Kailash Wati was of a sound mind.

21. Under these circumstances, the appeal is bereft of any merit and the same is dismissed with no order as to costs.

**PRATHIBA M. SINGH, J.
JUDGE**

MAY 15, 2018/Rahul