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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision :4th September, 2018
+ **TEST. CAS.95/2014**

DINESH AGGARWAL & OTHERS Petitioners

Through: Mr. D.R. Bhatia, Mr. Subirja Akbar
Warsi & Mr. Sandeep Thukral,
Advocates (M-9971265222).

versus

STATE & OTHERS Respondents

Through: Mr. Harish Malhotra, Senior
Advocate with Mr. R.K. Modi & Mr.
Rajinder Aggarwal Advocates.
(M: 9810006989)

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present testamentary case has been filed under Section 276 of the Indian Succession Act, 1925 in respect of Will dated 19th February, 2009 of Late Sh. Bishan Chand Aggarwal. The Petitioners are the brothers of the deceased and claim to be the executors of the said Will. As per the Will, the deceased claims to be the owner of the following property:

“ I am have full rights and title to and am possessed of One Half undivided share of BUILT UP PROPERTY BEARING NO. G-92, AREA MEASURING 370 Sq. Yds. I.E. I AM ENTITLED TO UNDIVIDED 185 SQ. YDS, CONSISTING OF WHATSOEVER THEREIN, WITH THE RIGHTS OF UPPER STOREY CONSTRUCTION UP TO THE LAST STOREY, FITTED WITH ELECTRICITY AND WATER CONNECTION, BOTH IN

RUNNING CONDITION, WITH THEIR SEPARATE METERS INSTALLED THEREON, WITH ALL FIXTURES AND FITTINGS FITTED THEREON, SITUATED IN THE LAYOUT PLAN OF PREET NAGAR, CO-OPERATIVE HOUSE BUILDING SOCIETY, COLONY KNOWN AS PREET VIHAR, DELHI-92. ”

The deceased is claimed to have bequeathed 40% of his share to one of his brothers – Sh. Dinesh Aggarwal and 15% each to his other brothers – Mr. Mukesh Kumar Aggarwal, Mr. Rakesh Kumar Aggarwal, Mr. Umesh Aggarwal and Mr. Amit Aggarwal. The Will is claimed to have been registered with the Sub-Registrar’s Office on 19th February, 2009 and is stated to have been witnessed by two witnesses, namely, Mr. Mahesh Chand Jain and Mr. Chandra Prakash Srivastava.

2. Respondent No.1 is the State. Respondents No.2 to 6 are the wife, two sons and two daughters of the deceased. Respondents No.2 to 6 have filed objections to the grant of probate. It is the case of the Respondent that the Will is surrounded by suspicious circumstances as it does not even mention the immediate family of the deceased or the reasons for disinheriting them. Considering the nature of the objections, the following issues were framed on 13th July, 2015:

(i) Whether the Will propounded by the petitioner dated 19.2.2009 is the last validly executed Will of late Shri Bishan Chand Aggarwal in his sound disposing mind? OPP.

(ii) Whether the Will has not been attested by two witnesses as mandatorily required in law? If so,

whether the alleged Will can be acted upon?

(iii) Whether late Shri Bishan Chand Aggarwal as not competent and empowered to execute the Will, as alleged in the objection petition? OPR.

(iv) Relief.

3. Petitioner No.1 appeared as PW-1, the record keeper from the Sub-Registrar's Office appeared as PW-2 and Sh. Mahesh Chand – the attesting witness appeared as PW-2(A). On behalf of the Respondent, one of the sons – Sh. Deepak Aggarwal, Respondent No.4 appeared as RW-1. The following documents have been exhibited by the witnesses:

- i) Death certificate of Late Sh. Bishan Chand Aggarwal – Ex. PW-1/1;
- ii) Certified copy of Will dated 19th February, 2009 – Ex. PW-1/2;

4. Learned counsel for the Petitioner submits that the original Will could not be produced as the same has been lost. It is submitted that the Will is a registered Will, which has been confirmed by the official from the Sub-Registrar's Office. The attesting witnesses have also deposed about the authenticity of the same. According to him, the deceased was in proper frame of mind and had accordingly executed the Will. He relies on the testimony of the attesting witnesses. There was a criminal case which was pending against Respondent No.3 – Mr. Manoj Aggarwal. RW-1 clearly admits that no criminal complaint has been filed by him in respect of forgery, fabrication or manipulation of the Will dated 19th February, 2009. The testator being in good health and having executed a registered Will, the

probate is liable to be granted.

5. Ld. Senior Counsel for the contesting Respondent, on the other hand submits that he objects to the grant of probate on the following grounds:

i) The original Will has not been produced and there is neither a plea nor a statement in the evidence as to the destruction or loss of the original or the circumstances leading to the alleged destruction or loss. Since it has not been proved that the primary evidence is lost or destroyed, secondary evidence cannot be led;

ii) The Will has not been proved in accordance with law inasmuch as the attesting witness does not identify the signatures of the deceased on the Will;

iii) It is compulsory for a Will to have two attesting witnesses. The second witness – Mr. Srivastava, was in fact not an attesting witness and was only a scribe i.e. a lawyer who drafted the Will;

iv) The will is surrounded by suspicious circumstances as there is not even a mention of the wife and children. Even if it is presumed that the deceased did not have a good relationship with one of the sons i.e. Respondent No.3, there cannot be any reason to completely disinherit the wife, daughters and other sons.

v) The cross-examination of the official from the Sub-Registrar's Office reveals that the second witness i.e. Mr. Srivastava had attested/signed a large number of Wills on the same day, as the day when the Will was registered before the Sub-Registrar's Office.

vi) The title of the deceased is itself suspect as the same is the subject matter of a pending suit.

6. Ld. Sr. Counsel for the Defendant relies upon the following

authorities in support of the above propositions:

i) *S.S. Srivastava v State & Ors.* 2007 (95) DRJ 377

ii) *Jai Prakash Aggarwal v State and Others* 236 (2017) DLT 632

iii) *Rajender Kumar Saini v Krishan Kumar Saini & Ors.*
232 (2016) DLT 83

iv) *Karamjeet Singh Bedi v State and Another* 2000 (53) DRJ 605

v) *N Kamalam (dead) and Another v Ayyaswamy and Another* AIR
2001 SC 2802

It is thus submitted that the probate is not liable to be granted.

7. This Court has heard the submissions of the parties and perused the pleadings and evidence on record. The first and foremost fact to be recorded is that the original Will has not been produced. A certified copy of the same issued from the Sub-Registrar's office has been exhibited as Ex. PW 1/2. Counsel for the Petitioner admits that the original Will is not available. A perusal of the petition, the affidavit in evidence and the cross-examination of the witnesses shows that there is no mention whatsoever as to the circumstances under which the original is stated to have been lost or destroyed. The reliance placed by the counsel for the Petitioner on Section 237 of the Indian Succession Act is therefore misplaced inasmuch as in order to obtain benefit under the said provision, it has to be established on the record that the Will was lost misplaced or destroyed. This is the settled position as per *Benga Behera and Ors. v Braja Kishore Nanda and Ors.* AIR 2007 SC 1975. The Supreme Court observed therein as under:

“29. Another vital aspect of the matter cannot also be ignored. Respondent No. 1 in his evidence accepted that he had obtained the registered Will from the office of the Sub-Registrar upon presenting 'the ticket' on

30.1.1982. After receipt of the Will, he had shown it to Sarajumani Dasi. He did not say how the Will was lost, particularly when he had not only shown the original Will to the testatrix but also had consulted a lawyer in relation thereto. No information was lodged about the missing of the document before any authority. Even approximate point of time the Will was lost, was not stated. In his cross-examination, he stated: "I cannot say where and how the original will was lost."

30. Loss of the original Will was, thus, not satisfactorily proved.

31. A document upon which a title is based is required to be proved by primary evidence, and secondary evidence may be given under Section 65(c) of the Evidence Act. The said clause of Section 65 provides as under:

When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time.

Loss of the original, therefore, was required to be proved.

32. In a case of this nature, it was obligatory on the part of the first respondent to establish the loss of the original Will, beyond all reasonable doubt. His testimony in that behalf remained uncorroborated."

8. It is rightly argued that the certified copy of a Will would only constitute secondary evidence under Sections 63 and 65 of the Indian Evidence Act, 1872. Unless and until the primary evidence is destroyed, no secondary evidence can be accepted by the Court. Thus, the Petition fails on

this sole ground itself.

9. However, further examining the merits of the matter, if benefit has to be given to the Petitioner, of the registration of the Will, even then, the Will has not been proved in accordance with law. Every Will is required to have two attesting witnesses. The cross-examination of PW-2, the official from the Sub-Registrar's Office, clearly shows that several documents bear the signatures/stamp of Sh. Chander Prakash Srivastava. His cross-examination is extremely relevant and the same is set out below:

"PW-2 Statement of Sh Virender Kumar, record keeper, office of Sub Registrar-VIII, Preet Vihar, Delhi"

On SA

I have brought the summoned record pertaining to the certified copy of the Will executed by Bishan Chand s/o Kishan Chand Murari, R/o G-92 Preet Vihar dated 19.02.2009 same is entered in the book No.III Vol 896, registration No. 684 page 60 to 63 and same is exhibited as Ex PW1/2. I have compared the certified copy which I have brought to the Ex PW1/2 and same is correct.

XXXX by Mr Rajinder Agarwal, Advocate for the respondents/objectors.

The document i.e. Will dated 19.02.2009 having a photocopy of photograph of the Executor. I do not know Sh Chander Prakash. I have brought the document in the Sub Registrar Office. All the documents containing the register are being prepared under the process established by the office. I am a graduate and I know a little bit English. It is correct that the document No. 685 which is also Will lying in the file bears the stamps of Chander Prakash. The documents 687, 689, 690, 691, 692, 693, 695, 696, 699, 700, 702, 703, 706, 712, 713, 714, 715, 717, 718,

720, 721, 722, 723, 724, 726, 727, 729, 734, 738, 740, 742, 745, 746 had been signed by Mr C. P. Srivastava (Chander Prakash as witness No.2) under his stamp. Vol I am record keeper and I have received the document from the record Incharger I do not know anything about the document. It is correct that likewise document registration No.666 and 669, 674, 677, 678, 679, 680, 681, 683 have been stamped by Chander Prakash. Vol but I cannot identify his signature as witness No.2. It is correct that the file are brought started from document page No. 660 to 747. It is correct that register I have brought Vol III it contained only the Will of different persons. I have no knowledge whether CP Srivastava or any other advocate who are practising in Sub Registrar Office. It is wrong to suggest that initial in the form of signature appearing on the stamp of Mr C. P. Srivastava although appearing on the above all documents as mentioned but I cannot identify his signature and stamps. Vol I am not aware about the stamp and signature and I never worked with the office of Sub Registrar. I am just a record keeper.”

A perusal of the same shows that there is serious doubt as to whether Sh. Chander Prakash Srivastava @ S.P.Srivastava, actually signed as an attesting witness or merely affixed his stamp and initialled the Will, which he had drafted. His signatures cannot be taken as being those of an attesting witness. Thus the Will could be said to contain only one attesting witness i.e. Sh. Mahesh Chand and it does not fulfil the requirements under Section 63 of the Indian Succession Act.

10. Even if the said lawyer who put his initials and stamp on the will is taken to be an attesting witness, he has not been deposed. The only attesting witness who appeared before the Court i.e., PW-2(A) Sh. Mahesh Chand does not exhibit the Will. He neither identifies the signatures of the deceased

on the Will, nor does he say that the second witness signed in his presence. He also does not state that the Will was read over to the deceased and was understood by him. In his evidence by way of affidavit, he merely states that he is one of the attesting witnesses and that he affixed his signatures below the word ‘witness no.1’ in presence of the deceased. He does state in cross-examination that the deceased was his friend and that at the time of execution of the Will he was “*perfectly all right*”. From his cross-examination, it is also clear that he was also familiar with the family of the deceased i.e. the brothers but did not know the wife and children of the deceased. Thus, though the attesting witness may be a genuine person, his testimony does not satisfy the requirements of law, as he failed to identify the signatures of the deceased, did not exhibit the Will and was not shown the exhibited certified copy of the Will in his examination-in-chief. All these are fundamental flaws in the testimony of the attesting witness. Thus, the Will cannot be taken to be proved in accordance with law as per Section 68 of the Indian Evidence Act. The requirements of the proving of the Will are not satisfied. As held in ***Lalitaben Jayantilal Popat v Pragnaben Jamnadas Kataria and Ors. AIR 2009 SC 1389***, these facts have to be proved in order for the Will to be held to be genuine and valid. In a case involving an appeal wherein the High Court had dismissed an appeal against a judgment of the District Judge by which probate of a will had been granted, the Supreme Court allowed the appeal with the following observations:

“22. The question which, thus, arises for consideration is as to whether execution of the Will has been proved. In our opinion, it has not been.

The requirements for proving a Will have been laid down in a large number of decisions. We would, however, refer to only a few of them.

23. In Janki Narayan Bhoir (supra), while dealing with the question elaborately, this Court held :

“8. To say will has been duly executed the requirement mentioned in Clauses (a), (b) and (c) of Section 63 of the Succession Act are to be complied with i.e., (a) the testator has to sign or affix his mark to the will, or it has got to be signed by some other person in his presence and by his direction; (b) that the signature or mark of the testator, or the signature of the person signing at his direction, has to appear at a place from which it could appear that by that mark or signature the document is intended to have effect as a will; (c) the most important point with which we are presently concerned in this appeal, is that the will has to be attested by two or more witnesses and each of these witnesses must have seen the testator sign or affix his mark to the Will, or must have seen some other person sign the Will in the presence and by the direction of the testator, or must have received from the testator a personal acknowledgement of signature or mark, or of the signature of such other person, and each of the witnesses has to sign the Will in the presence of the testator.

9. It is thus clear that one of the requirements of due execution of will is its attestation by two or more witnesses which is mandatory.

10. Section 68 of the Evidence Act speaks of as to now a document required by law to be attested can be proved. According to the said Section, a document required by law to be attested shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving an evidence. It flows from this Section that if there be an attesting witness alive capable of giving evidence and subject to the process of the Court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the will was that of the testator but must also prove that attestations were also made properly as required by Clause (c) of Section 63 of the Succession Act. It is true that Section 68 of Evidence Act does not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the Will as envisaged in Section 63. Although Section 63 of the Succession Act requires that a will has to be attested at least by two witnesses, Section 68 of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due

execution if such witness is alive and capable of giving evidence and subject to the process of the Court. In a way, Section 68 gives a concession to those who want to prove and establish a will in a Court of law by examining at least one attesting witness even though will has to be attested at least by two witnesses mandatorily under Section 63 of the Succession Act. But what is significant and to be noted is that that one attesting witness examined should be in a position to prove the execution of a will. to put in other words, if one attesting witness can prove execution of the will in terms of Clause (c) of Section 63, viz., attestation by two attesting witnesses in the manner contemplated therein, the examination of other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attestation of a will by him and the other attesting witness in order to prove there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attention of the will by other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under Section 63 of the Succession Act. Where one attesting witness examined to prove the will under Section 68 of the Evidence Act fails to prove the due execution of the will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is

examined and he fails to prove the attestation of the will by the other witness there will be deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act.”

Following the said decision, as also the other decisions in Benga Behera (Supra), this Court held:

21. It was also not necessary for the appellants to confront him with his signature in the Xeroxed copy of the Will, inasmuch as the same had not appeared in the certified copy. Execution of a Will must conform to the requirement of Section 63 of the Succession Act, in terms whereof a Will must be attested by two or more witnesses. Execution of a Will, therefore, can only be proved in terms of clause (c) of Section 63 when at least one of the two witnesses proves the attestation. A Will is required to be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will. Section 68 of the Evidence Act provides for the requirements for proof of execution of the Will. In terms of said provision, at least one attesting witness has to be examined to prove execution of a Will.

24. Yet again, recently in Anil Kak v. Kumari Sharada Raje and Ors. AIR 2008 SC 2195 , it was opined :

“52. Whereas execution of any other document can be proved by proving the writings of the document or the contents of it as also the execution thereof, in the event there exists suspicious circumstances the

party seeking to obtain probate and/ or letters of administration with a copy of the Will annexed must also adduce evidence to the satisfaction of the court before it can be accepted as genuine.

53. As an order granting probate is a judgment in rem, the court must also satisfy its conscience before it passes an order.

54. It may be true that deprivation of a due share by the natural heir by itself may not be held to be a suspicious circumstance but it is one of the factors which is taken into consideration by the courts before granting probate of a Will.

55. Unlike other documents, even animus testandi is a necessary ingredient for proving the attestation.”

24. For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly. The appeal is allowed.”

11. A perusal of the Will further shows that the deceased does not even mention the existence of his wife or any of his children. This is an extremely suspicious circumstance in the context of the Will. There may be certain reasons why a person would choose to disinherit any of his heirs from his Will. However, it is expected that the deceased would mention the fact that legal heirs exist and the reason why he has disinherited them. It is possible that a person may wish to disinherit one of his legal heirs, but non-mention and absence of reference to all of them i.e., wife, daughters and sons, in the Will has been held to be a suspicious circumstance as per the settled law. In ***Bharpur Singh and Ors. v Shamsher Singh (2009) 3 SCC 687*** the Supreme

Court held that the non-mention of immediate family in a Will constitutes a suspicious circumstance.

“23. Suspicious circumstances like the following may be found to be surrounded in the execution of the Will:

i. The signature of the testator may be very shaky and doubtful or not appear to be his usual signature.

ii. The condition of the testator's mind may be very feeble and debilitated at the relevant time.

iii. The disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or absence of adequate provisions for the natural heirs without any reason.

iv. The dispositions may not appear to be the result of the testator's free will and mind.

v. The propounder takes a prominent part in the execution of the Will.

vi. The testator used to sign blank papers.

vii. The Will did not see the light of the day for long.

viii. Incorrect recitals of essential facts.

18. The circumstances narrated hereinbefore are not exhaustive. Subject to offer of reasonable explanation, existence thereof must be taken into consideration for the purpose of arriving at a finding as to whether the execution of the Will had duly been proved or not.

It may be true that the Will was a registered one, but the same by itself would not mean that the statutory requirements of proving the Will need not be complied with.”

A similar view was taken by a learned Single Judge of this Court in ***Rajender Kumar Saini v Krishan Kumar Saini & Ors.* 232 (2016) DLT 83.**

12. Without venturing into speculation, it is sufficient to make mention of the fact that the suit property is also claimed to be owned by the wife of Respondent No. 3, and litigation is stated to be pending. This renders the

authenticity and validity of the Will completely suspect.

13. In conclusion, it is held that the loss of the original Will cannot be deduced by implication by a Court. Loss or destruction of an original document, especially a Will has to be pleaded and proved in accordance with law. The Will which has been placed on record i.e. the certified copy has not been proved in accordance with law as the attesting witness who appeared did not identify the signature of the testator or the document itself. The execution of the Will is surrounded by suspicious circumstances. There is serious doubt as to whether the deceased even owned half share in the suit property as claimed. For all these reasons, the probate is not liable to be granted.

14. The petition is accordingly dismissed.

PRATHIBA M. SINGH
JUDGE

September 04, 2018
Rahul