

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

% **Date of decision: 23rd September, 2019.**

+ **TEST CAS No.74/2018**

SANTOSH NAYAR **Petitioner**

Through: Mr. Manoj Chauhan & Ms. Babita,
Advs.

Versus

STATE & ORS. **Respondents**

Through: Mr. M.A. Khan and Mohd. Jaid,
Adv. for R-4 with R-4 in person.

AND

+ **CS(OS) 212/2019**

VAISHALI KAPUR **Plaintiff**

Through: Mr. Manoj Chauhan & Ms. Babita,
Adv.

Versus

SANTOSH NAYAR & ORS. **Respondents**

Through: Mr. M.A. Khan and Mohd. Jaid,
Adv. for R-4 with R-4 in person.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Test.Cas. No.74/2018 has been filed by the widow of the deceased Satyapal Nayar, son of late Bishan Das, resident of property No.B-54, Sarvodaya Enclave, New Delhi-110017, seeking Letters of Administration on the basis of the document dated 7th June, 2006 stated to be the validly executed last Will of the deceased Satyapal Nayar.

2. The petition was entertained and notice thereof issued to the close relatives and citation thereof also ordered to be published.

3. Of the near relatives of the deceased Satyapal Nayar disclosed in the petition as respondents No.2 to 4, respondent No.2 Ravinder Nayar, son of the deceased Satyapal Nayar and respondent No.3 Amita Mehta, daughter of the deceased Satyapal Nayar, have filed their no objection, admitting the document dated 7th June, 2006 to be the validly executed last Will of deceased Satyapal Nayar. Only the respondent No.4 Vaishali Kapur @ Sangeeta Kapur has filed objections to the grant of Letters of Administration on the basis of document dated 7th June, 2006 and to which objections reply has been filed by the petitioner. No rejoinder to the said reply has been filed by the objector/respondent No.4 Vaishali Kapur.

4. The said objector/respondent No.4 Vaishali Kapur, besides filing objections aforesaid, also instituted CS(OS) No.212/2019 seeking partition of property No.B-54, Sarvodaya Enclave, New Delhi of the deceased Satyapal Nayar, claiming 1/4th share therein on the premise of the deceased Satyapal Nayar having died intestate.

5. Both proceedings came up before this Court on 2nd May, 2019, when finding the suit to have been instituted after the Test.Cas. and further finding both proceedings to be entailing only the question of validity of the document dated 7th June, 2006 as the validly executed last Will of the deceased Satyapal Nayar, the need to keep the suit proceedings pending was not felt and it was ordered that in the event of the Test.Cas. failing, a preliminary decree for partition of the property declaring the widow, son and two daughters of the deceased Satyapal Nayar to be having 1/4th undivided

share in the property would stand passed and conversely in the event of the Test.Cas. being allowed, the suit shall stand dismissed. The drawing up of the decree/preliminary decree for partition in the suit was deferred till the decision of the Test.Cas.

6. As far as Test.Cas. No.74/2018 is concerned, the following issues were framed on 2nd May, 2019 itself:

“(i) Whether the document dated 7th June, 2006 is the validly executed last Will of Late Satyapal Nayar? OPP

(ii) Relief.”

and the parties relegated to evidence on commission.

7. The proceedings have been listed on recording of evidence on commission having been concluded.

8. The counsels have been heard. Since passing of a decree in the suit aforesaid is also dependent upon the outcome of the Test.Cas., the file of the suit has also been requisitioned but is stated to be immediately not available. The suit file, on being found, be got listed today.

9. The document dated 7th June, 2006 subject matter of adjudication is as under:

“WILL

THIS WILL is executed at New Delhi on 7th date of June, 2006 by Satyapal Nayar s/o Late Bishan Das r/o B-54 (GF) Sarvodaya Enclave, New Delhi 110 017.

That I am a Senior Citizen aged about 81 years. My family comprises of:

- i) my wife namely Mrs. Santosh Nayar
- ii) my only son namely Ravinder Nayar
- iii) my first daughter Ms. Amita Mehta
- iv) my second daughter Ms Sangeeta Kapur

I have acquired out of my personal savings landed property comprising of House No. B-54, Sarvodaya Enclave, New Delhi 110 017 which is built upon plot of land admeasuring 456 sq.yds. It is self acquired property. Said property is comprising of ground floor, first floor and second floor together with Annexe Block. Out of entire property, I have sold first floor portion of said property and now I am seized and possessed of entire ground floor, second floor with roof atop and Annexe portion for which I am making the present Will.

I hereby demise and bequeath my property No.B-54 Sarvodaya Enclave, New Delhi 110 017 as follows:

After my death said property shall stand bequeathed unto my wife (Mrs. Santosh Nayar). She shall be entitled to enjoy all rental income and benefits by letting out second floor portion of said property. However, she shall be residing along with the family of my son Ravinder Nayar.

Post to death of my wife said property shall stand bequeathed unto my son Ravinder Nayar exclusively who shall be residing with his family and may at his option let out second floor portion.

Post to death of my son Ravinder Nayar, said property shall stand bequeathed upon my grandson Raveesh Nayar to the exclusion of his sister(s) namely Ms. Tanvi Nayar.

Bequeath is made by me for purposes of having perpetual succession of said property upto branch of my grandson.

Neither any of my daughters nor their children shall have any right to claim succession in said property. The succession is to

take place strictly according to my wishes expressed hereinabove.

Said property is meant for residential purposes and shall be so used by its beneficiaries. No one will have any right to convert the same into any Ashram or Religious Institution or Math.

In case if my daughters pay visit to their mother or brother after my lifetime, they shall have right to reside in Annexe portion (garage block) of the said property. My daughters shall have right to let out Annexe portion to any tenant, on any agreed terms and conditions, shall have right to collect, rent enjoy rent, share rent amongst themselves. However, all expenses towards electricity consumption, or water charges shall be borne by these daughters.

I have made this bequeath out of my free will and accord and in sensible disposition of state of my mind.

I revoke and cancel all my previous Will/Codicils made hereinbefore. This Will is my last testament and shall prevail over all other writings.

I have made and signed this Will on day, date and year aforementioned in presence of attesting witnesses to whom I have explained my last wishes who have fully understood my intent and after understanding have signed this Will in token of its attestation according to my intent and desire.

Sd.

TESTATOR

SATYAPAL NAYAR

ATTESTING WITNESSES:

1. *Sd.*
2. *Sd.”*

10. On enquiry, the counsel for the petitioner states that of the two purported attesting witnesses to the document aforesaid, only one namely Tuzy Puri has been examined as PW-2.

11. The said Tuzy Puri, in her affidavit by way of examination-in-chief proved as Ex.PW-2/A, (a) has given her address of Ludhiana, Punjab; (b) has deposed that she was one of the attesting witnesses to the Will and testament dated 7th June, 2006 of the deceased Satyapal Nayar; (c) that the deceased Satyapal Nayar had executed the said Will dated 7th June, 2006 on which already Ex.PW-1/2 has been put, with sound and disposing state of mind and without any coercion and influence and in her presence at point 'A'; (d) that since the deceased Satyapal Nayar had signed the said Will in her presence, she could identify the signatures of the deceased Satyapal Nayar at point 'A'; (e) that she had also seen the other witness Dr. Daisy Ahuja, who was also present at that time and had signed the Will at point 'B' and as such could identify her signatures; (f) that the said Dr. Daisy Ahuja signed in the presence of deceased Satyapal Nayar; (g) that her own signatures in the said document were at point 'C'; and, (h) that the deceased Satyapal Nayar, Dr. Daisy Ahuja and she herself had signed the document dated 7th June, 2006 on the same day, at the same place and in the presence of each other.

12. However, the said witness Tuzy Puri, when appeared before the Commissioner, deposed in her examination-in-chief, only as under:

"I tender my affidavit Ex.PW-2/A towards my examination in chief. I rely upon the documents mentioned therein. I have seen Ex.Pw-1/2 (already marked as Mark-A) and it is signed by me at Point 'C'"

13. It is worth pointing out that affidavits by way of examination-in-chief are prepared by Advocates and signed in Advocates offices and/or before the Oath Commissioner and in a Test.Cas., reference therein to various points on a document, original of which is before the Court, is meaningless. PW-2 Tuzi Puri, when appeared to tender affidavit by way of examination-in-chief before the commissioner, appointed to record evidence, identified only her signatures at Point 'C' on the document dated 7th June, 2006 on which Ex.PW-1/2 had been put earlier (during the evidence of petitioner examined as PW-1 prior thereto). PW-2, being an attesting witness to a Will, was also required to, when appearing in the court/before the Commissioner, identify points at which the deceased and the other witness had put their signatures and which she did not and which was/is a fatal error.

14. I have in *Manmohan Vs. Baldev Raj* MANU/DE/4137/2013 and *Satish Kumar Chojar Vs. Subhashni Chopra* 212 (2014) DLT 24 held that in most cases, the documents as Will, are found to have been proved, not in examination-in-chief but during lengthy, unnecessary, excessive cross-examination. So is it in this case also. The counsel for the objector/respondent No.4, instead of taking advantage of the aforesaid lacuna left in the examination-in-chief of the attesting witness, during the cross-examination drew attention of PW-2 Tuzi Puri to point 'A' and point 'B' mentioned by her in her affidavit and asked her when her signatures were taken and suggested to her that the said signatures were not of the deceased Satyapal Nayar or the other attesting witness Dr. Daisy Ahuja and which suggestion was denied. Thus, the lacuna which was left by the counsel for the petitioner in examination-in-chief of the attesting witness,

was covered with the assistance of the counsel for the objector/respondent No.4.

15. In the face of the aforesaid, I have enquired from the counsel for the objector/respondent No.4, how it could be said that the document dated 7th June, 2006 had not been proved as the validly executed last Will of the deceased Satyapal Nayar.

16. Before recording the contentions of the counsel for the objector/respondent No.4, I may deal with the aspect of pleadings by way of objections of the objector/respondent No.4. The counsel for the objector/respondent No.4, on enquiry, whether the contentions raised were backed by pleadings, has fairly stated that there are no pleadings in support of contentions argued.

17. An objector in a Test.Cas. premised on a document claimed to be the Will, has to specifically plead the suspicious circumstances if any, which can establish that the document claimed to be the Will is contrary to the trend of the contemporaneous events at the time of execution thereof. The rule of the Code of Civil Procedure, 1908 and otherwise generally of pleadings and evidence, that no evidence beyond pleadings can be looked at, is equally applicable to Test.Cas. based on Will and in the absence of any pleadings of suspicious circumstances, the evidence with respect thereto cannot be looked at.

18. The counsel for the objector/respondent No.4 has first drawn attention to paragraph 1 of the preliminary objections of the objector/respondent No.4, in which the objector/respondent No.4 has pleaded that from the very fact that proceedings with respect to the document dated 7th June, 2006, claimed

to be the Will of deceased Satyapal Nayar who died on 19th December, 2009, have been instituted in or about November, 2018 i.e. after nine years, the Will is unbelievable. The counsel for the objector/respondent No.4 has further drawn attention to the reply by the petitioner to the said objections, where the petitioner has pleaded that though the Will dated 7th June, 2006 was handed over to her by her husband and she had placed it along with important documents in her house, but after the demise of her husband she forget where she had placed the document, though all the heirs knew about the same and that she had found the Will only in September, 2018 and had immediately thereafter filed the Test. Cas. The counsel for the objector/respondent No.4 contends that though the objector/respondent No.4 did not press the issue of limitation but what was pleaded by the petitioner to explain the delay has been controverted by the petitioner while appearing as a witness. Attention is invited to the cross-examination on 26th August, 2019 of the petitioner appearing as PW-1, where she has deposed that her husband deceased Satyapal Nayar had not given the Will to her but had kept it in an Almirah and told her of the same and she had found the Will after about one week or ten days from the death of her husband and had showed it to her children at that time and she further deposed that she had found the Will along with the House Tax papers and she did not find it appropriate to file the papers related to house tax.

19. The counsel for the objector/respondent No.4 has argued that there is no explanation, what prevented the petitioner for nine years from filing Test.Cas. and what necessitated the filing of Test. Cas. in 2018.

20. The counsel for the objector/respondent No.4 has next drawn attention to the admission of the petitioner in her cross-examination, that she had not used the Will anywhere, neither in Municipal Corporation of Delhi (MCD) nor in Electricity Department, till the filing of the Test.Cas. Attention is drawn to Lease Deeds Ex.PW-1/R-4/6 & Ex.PW-1/R-4/7 admitted to have been executed by her with respect to one of the floors of property No.B-54, Sarvodaya Enclave, New Delhi and had further admitted to not mentioning of the Will in the said Lease Deeds. It is contended that had there been any Will, a mention would have been made.

21. The petitioner, in the said Lease Deeds has claimed the property to have been mutated in her name. I have enquired from the counsel for the objector/respondent No.4, whether the property was indeed mutated in the records of MCD in the name of the petitioner.

22. The counsel for the objector/respondent No.4 states that the petitioner herself in her cross-examination has stated that the Will was not used anywhere.

23. No merit is found in the aforesaid two contentions.

24. Rather, the aforesaid two contentions as also another contention of the counsel for the objector/respondent No.4, of the objector/respondent No.4 as the nominee of the deceased Satyapal Nayar with respect to certain Fixed Deposit Receipts (FDRs) of the deceased, having encashed the said FDRs and handed over the amount thereof to the petitioner by cheque, show that the objector/respondent No.4 also, since 2009 has been admitting the petitioner to be the sole beneficiary of the estate of her father. I may in this context notice that while the objector/respondent No.4 claimed to be the sole

nominee, the petitioner in cross-examination claimed that the petitioner and the objector/respondent No.4 were joint nominees. No document in this regard has come forward. The factum of the objector/respondent No.4, in spite of being the sole nominee as claimed by her, with respect to the monies in FDRs, paying the said money to the petitioner by cheque, shows that the objector/respondent No.4, whether knew of the Will or not, at least treated her mother i.e. the petitioner herein as the sole beneficiary of the entire estate of the father. Had there been no Will, the objector/respondent No.4 being desirous of a share, would have definitely demanded her share and the disputes as have arisen now would have arisen then only. The argument made against the petitioner, of not seeking Letters of Administration till now, equally applies to the objector/respondent No.4 i.e. of not claiming share, as is now being claimed, till now.

25. The contention, of the petitioner in the Lease Deeds executed by her with respect to the portions of the property as sole owner thereof not disclosing the Will, also is not such a suspicious circumstance which would invalidate a Will proved in accordance with law by the attesting witness thereof and in whose testimony no dent could be put and during whose cross-examination, the objector/respondent No.4 herself specifically drew attention to the various signatures appearing on the document and got confirmation from the witness of authenticity thereof. The factum of the petitioner exclusively dealing with the property to the knowledge of the objector/respondent No.4 also confirms the objector/respondent No.4's acceptance of the petitioner's right to do so.

26. The counsel for the objector/respondent No.4 however on enquiry draws attention to paragraph (g) of the preliminary objections, where pleadings in this respect have been made.

27. The next contention of the counsel for the objector/respondent No.4 is that the petitioner in her cross-examination has admitted the deceased Satyapal Nayar to have executed registered Lease Deeds Ex.PW-1/R-4/1, Ex.PW-1/R-4/2 and Ex.PW-1/R-4/3 and which is indicative of the deceased Satyapal Nayar always registering the documents executed by him. It is contended that non-registration of the document dated 7th June, 2006 is thus indicative of the same having not been executed by the deceased Satyapal Nayar and having been fabricated after his death.

28. I have however enquired from the counsel for the objector/respondent No.4, whether not the registration of the Lease Deeds is mandatory and on the contrary, of a Will, is optional.

29. The answer is in the affirmative.

30. Once that is so, no adverse inference can be drawn from the deceased having documents compulsorily required by law to be registered, registered and not having a document which was not compulsorily required by law to be registered, registered. Moreover, it cannot be forgotten that while a Lease Deed is executed with strangers, a Will is generally in favour of close family members or relatives and the considerations for having the document registered cannot thus be said to be the same.

31. The counsel for the objector/respondent No.4 has next drawn attention to admission in cross-examination of petitioner that the respondent No.2,

being the only son of the deceased Satyapal Nayar, used to go everywhere with the deceased Satyapal Nayar including to get documents registered.

32. However nothing turns on that also. Even if a son is always involved in all acts done by a parent, no adverse inference can be drawn from the son being not involved in execution of a Will and, which presence of the son can have adverse inferences. Advocates also, while advising clients in the matter of making of Will, do not advise in this respect and advise for Wills to be got attested by friends/relatives who have equal relationship to those in whose favour the bequest is being made as well as those being deprived therefrom.

33. I have in this context enquired, whether the objector/respondent No.4 in her objections has pleaded or in her evidence has given any reason for the purported attesting witnesses to the Will, who are informed to be equally related to the petitioner and respondents No.2 & 3 who are supporting the Will as well as to the objector/respondent No.4 who is objecting to the Will, having any motive or reason to support the petitioner and respondents No.2 & 3.

34. The answer is in the negative.

35. Once the document claimed to be the Will is alleged to be fabricated and which fabrication essentially has to be with the connivance of the attesting witness, it is imperative for the objector to not only disclose the obvious motive of the petitioner or other beneficiary but also disclose the motive of the purported attesting witnesses in being inimical to the objector, unless of course the purported attesting witnesses are related only to the propounder/beneficiary of the Will.

36. I am even otherwise of the view that the clause aforesaid in the document claimed to be the Will, wherein the daughters of the deceased have not only been granted a right to reside in the annexe portion of the property of the deceased but also the right to let out the said portion itself is demonstrative of the Will having not been fabricated for the benefit of the petitioner or for the respondent No.2. Had the document been fabricated for the benefit of the respondent No.2, being the son of the deceased and the petitioner, extra care would have been taken, as is generally taken in forgery/fabrication and such a clause would not have occurred in the document.

37. The only other argument of the counsel for the objector/respondent No.4 is that both the attesting witnesses are admittedly residing at Ludhiana and Gwalior and there is also an admission of a large number of other family members of the deceased residing at Delhi. It is contended that the same is a suspicious circumstance as it would have made more sense had one of the local relatives been attesting witnesses. Attention is also drawn to the cross-examination of PW-1 and PW-2 to suggest that there are inconsistencies in the versions of the visit of PW-2 Tuzi Puri.

38. A person, while making a Will, is cautious in choosing witnesses and if seeks advise of a legal professional, is also advised to be careful. The person/s chosen to be the witnesses are ones who enjoy the absolute faith of the testator and who in the event of the document being challenged, would not only depose but depose fearlessly. The two purported attesting witnesses as aforesaid are found equally related to those who are propounding/supporting the Will as well as those who are objecting and

there is no explanation or reason for their being inimical to the objector/respondent No.4. If the deceased choose them above the others, this Court cannot go into the question why one person was chosen as attesting witness and not the other who was easily available.

39. As far as the inconsistency is concerned, I do not find any in the versions of PW-1 and PW-2 qua visit of PW-2 from Ludhiana on the date of purported execution of the document.

40. No merit is thus found in the objections of the objector/respondent No.4 Vaishali Kapur to the document dated 7th June, 2006 propounded as the validly executed last Will of the deceased Satyapal Nayar. The objections are dismissed.

41. Test. Cas. 74/2018 is allowed.

42. Subject to the petitioner depositing the requisite stamp duty as per the valuation report of the property and further subject to the petitioner filing before this Court an Administration Bond of the said value with one surety of the like amount.; Letters of Administration with copy of the document dated 7th June, 2006 as the validly executed last Will of the deceased Satyapal Nayar, is ordered to be issued with respect to ground and second floors with roof at top with annexe situated at B-54, Sarvodaya Enclave, New Delhi belonging to the deceased Satyapal Nayar, to his widow/petitioner Santosh Nayar.

43. Test. Cas. No.74/2018 is disposed of.

44. CS(OS) No.212/2019 having been filed on the premise of intestacy of the deceased Satyapal Nayar and not on the basis of the Will dated 7th June, 2006, is dismissed.

45. It is made clear that this Court has not gone into the interpretation of the document dated 7th June, 2006 and it will be open to the parties to take appropriate proceedings in assertion of their rights, if any in the property.

46. Decree sheet be drawn up.

47. The parties are left to bear their own costs.

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 23, 2019

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(corrected & released on 5th November, 2019)

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