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

Date of decision: 19th July, 2019.

+ **TEST.CAS. 104/2014 & I.A.1551/2015 (u/o VII Rule 11 CPC)**

PRADEEP KHULLAR Petitioner
Through: Mr. A. K. Tewari, Ms. Nistha Gupta
and Mr. Mayank Wadhwa,
Advocates. (M:9415152494)
versus

THE STATE & ORS. Respondents
Through: Ms. Yashmeet Kaur, Advocate for R-
2. (M:9810788943)

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. None appears for Respondent No.3 for the last several hearings.
2. The Present Test. Case has been filed seeking probate of Will dated 4th May, 1986 and Codicil dated 5th May, 1986 executed by Late Shri Krishan Lal Khullar. The petition has been preferred by Shri Pradeep Khullar, one of the sons of Late Shri Krishan Lal Khullar against his brother - Shri Virendra Khullar (Respondent No.2) and sister - Smt. Neelam Khanna (Respondent No.3). The reliefs sought in the petition are as under:

“(i) Grant a Probate of the Will dated 04.05.1986 and Codicil dated 05.05.1986 of late Krishan Lal Khullar, in favour of the Petitioner in respect of the immovable properties and assets stated in Annexure P3 annexed hereto and also as stated in the Will dated 04.05.1986 and Codicil dated 05.05.1986 of late Krishan Lal Khullar and to deal with them without any restriction;

(ii) Declare that the purported Will dated 07.02.2014 of late Smt. Padmawati Khullar bequeathing the immovable estate in favour of the Respondents No.2 & 3 as mentioned in Annexure P3 is illegal, void, non-est and is liable to be declared void and illegal being in violation and contravention of the Will dated 04.05.1986 and Codicil dated 05.05.1986 of late Shri. Krishan Lal Khullar and provisions of Section 14 of the Hindu Succession Act since late Smt. Padmawati Khullar who was not the owner but only had right of life time enjoyment of the immovable estate as stated in Annexure P3 in terms of the Will dated 04.05.1986 of late Krishan Lal Khullar and could not bequeath away the same to the Respondent No.2 & 3 to the exclusion of the Petitioner;

(iii) That the Petitioner be exempted from furnishing any security on the aforesaid account;”

3. Insofar as the Will dated 4th May, 1986 is concerned, ld. counsel for Respondent No.2 submits that neither of the Respondents have challenged the said Will and they agree to a probate being granted in respect of Will dated 4th May, 1986. However, the Respondents do not admit the Codicil dated 5th May, 1986. Further, ld. counsel for Respondent No.2 has placed on record the final judgment of the Ld. Additional District Judge in CS No.392/2018 between Shri Pradeep Kullar and his mother and brother namely Smt. Padmavati Khullar and Shri Virendra Khullar respectively. In the said suit, one of the issues which was framed was as under:

“1. Whether the alleged codicil dated 5.5.1986 was executed by late Shri Krishan Lal Khullar? OPP”

4. In respect of the said issue, the final judgment of the ld. ADJ is that the issue is decided against the Plaintiff therein, who is also the Petitioner in

the present case. The findings of the court in the said suit are as under:

“Issue No. 1. Whether the alleged codicil dated 5.5.1986 was executed by late Shri Krishan Lal Khullar? OPP

8. *It is the case of the plaintiff that his father executed a Will on 04.05.1986 and on the next day of its execution executed codicil to the said Will in his favour directing that he will takeover the complete charge of his cold storage and other properties for entire operation and financial control and will also attend to and look after his day to day working of the business of cold storage etc. and the cases relating to the business with the authorities and operation of the bank accounts. It is contended on behalf of plaintiff that the witnesses before whom the said codicil was executed by father of the plaintiff have proved that the codicil was executed by late Sh. Krishan Lal Khullar on 05.05.1986.*

9. *On the other hand it is the contention of the learned counsel for the defendant that the said codicil is false and fabricated by the plaintiff and the witnesses examined by the plaintiff are interested witnesses being the known person to the plaintiff. It is further contended that the plaintiff was having a blank letter head of the firm having signatures of his father and the same has been used for preparation of the codicil and the manner in which it is typed and the mentioning of the attesting witnesses on it shows that the material is typed in such a manner to adjust the same within the blank space above the signatures of father of the plaintiff. It is contended that the affidavits filed for the chief*

examination of the witnesses are not prepared as per instructions of the witnesses rather they have been prepared by the counsel for the plaintiff and the witnesses have merely signed the same without knowing their contents.

10. It is further submitted that the plaintiff has not appeared in the witness box only to avoid the cross examination and if he had appeared in the witness box his fabrication would have been exposed. It is stated that the plaint has not been proved by the plaintiff as he has not appeared in the witness box. On this aspect, it is the contention of the learned counsel for the plaintiff that the plaintiff is not a witness to the codicil and his non-appearance in the witness box does not affect the codicil and as the attesting witnesses have been examined by the plaintiff the codicil has been proved.

11. In case of Bhagat Ram & Another Vs. Suresh and Others reported as (2003) 12 SCC 35 the Hon'ble Supreme Court of India considered the matter of codicil and held that "Codicil, as defined, is an instrument made in relation to a Will. It has the effect of explaining, altering or adding to the disposition made by a Will. By fiction of law the codicil, though it may have been executed separately and at a place or time different from the Will, forms part of the related Will. That being the nature and character of codicil, flowing from the definition itself, it would be anomalous to accept the contention that though a Will is required to be executed and proved as per the rules contained in the Succession Act and the Evidence Act but a document explaining, altering or adding to

the will and forming part of the will is not required to be executed or proved in the same manner. Section 70 of the Succession Act re-enforces this proposition inasmuch as revocation of an unprivileged Will or codicil is placed at per in the matter of manner of execution.

We hold that the same rules of execution are applicable to a codicil which apply to a will to which the codicil relates. So also, the evidence adduced in proof of execution of a codicil must satisfy the same requirements as apply to proof of execution of a will.”

12. In the case in hand, it is to be seen whether the witnesses examined by the plaintiff have proved the execution of codicil by the father of the plaintiff beyond suspicion. PW-1 Sh. D.C. Mathur has deposed that he as a typist working with Sh. Harbans Singh Mac typed the codicil and it was signed before him by the executor and other attesting witnesses. His chief examination is by way of affidavit and in the cross examination he stated that affidavit was prepared by Sh. Tiwari his advocate. When he was confronted with the mentioning of residence of Mr. Khullar in the affidavit he stated that since he has not prepared the affidavit and it was prepared by his advocate the address of Mr. Khullar was recorded in the affidavit. This witness has not deposed that the affidavit was prepared by his advocate on his instructions.

13. Similar is the testimony of PW 3 Dr. Atul K. Luthra in respect of the affidavit filed for his chief examination that the counsel Sh. A K Tiwari drafted his affidavit and he went

through it carefully along with copy of Will and codicil. He further stated that he did not make modifications in legal document and that he just went through the document his affidavit to find any discrepancy or not and then he signed the already drafted affidavit by learned counsel for the plaintiff Mr Tiwari. He has also not deposed that the affidavit was drafted by the counsel on his instructions. Considering the testimony of these two witnesses where the affidavits filed for the chief examination have not been prepared on their instructions the affidavits are of no value and cannot be relied upon in the case.

14. The codicil is claimed to be typed by PW1. He admitted in the cross examination that the typing of the same and of the Will which was also typed by him are not same and different spaces have been given by him between the lines. In the Will he has given the certificate of the attesting witnesses that testator has signed in their presence and they have also signed it in the presence of testator and in the presence of each other at the same time but no such certificate is given in the codicil. The doctor has also not given his certificate about the state of mind of the testator upon the codicil. It is deposed by Dr Luthra in this regard that as he has given his certificate at the time of execution of Will there was no need for furnishing the certificate again within 24 hours of the earlier certificate. If his certificate was not required at the time of execution of codicil then it is not explained as to why he was called at the office of the advocate by the testator when other people were available to attest the execution of

codicil.

15. It is pleaded by the defendant that his father also executed power of attorney in favour of both brothers at the time of execution of the Will and as after the death of executor a power of attorney has no value so the plaintiff has prepared a false codicil. The plaintiff has not explained if power of attorney was executed in his favour to deal with the properties and business of the testator and that he was appointed as executor in the will by his father why there was need of execution of codicil. The format of typing of the codicil is not similar to the Will which is also typed by the same person it may be possible that the material which is typed on codicil is typed in such a manner to adjust the same within the space available above the signatures of the testator which were already available on the paper. Considering the testimony of the witnesses it may be said that the plaintiff is not able to prove the execution of codicil beyond suspicion. His non-appearance in the witness box also gives an occasion to raise adverse inference against him as the need for execution of the codicil and the manner in which it was executed was to be explained by him as he was accompanying his father at the time of preparation of the codicil as per the testimony of witnesses. In this regard the case of Vidhyadhar vs Manikrao & Anr : AIR 1999 SC 1441 may be referred in which the Hon'ble Supreme Court of India has dealt with the situation where a party has not appeared personally in the witness box in support of its case and held that 'Where a party the suit is not appear into the witness box and states his

own case on oath and does not offer himself to be crossed-examined by the other side, a presumption would arise that the case set up by him is not correct.

16. The PW 2 Sh. Brij Chopra is the school friend of the plaintiff and PW 3 Dr. Atul K Luthra is brother in law of PW2. Both are cross examined much after the cross examination of PW1 and considering their testimony chances of improvising the evidence and the sequence of the execution of the codicil can not be ruled out.

17. It is also contended for the plaintiff that the copy of the codicil was used by the mother and was sent to DDA. As per testimony of PW4 the will and codicil received by the DDA was sent by Sh. A.K. Tiwari Advocate by post. Sh. A.K. Tiwari is the Advocate who has represented the plaintiff in this case and he has not appeared in the witness box to give the link evidence that he sent the notice as per instructions of the defendants and that the copy of the codicil was provided to him by them. Considering the facts and circumstance discussed above, the issue is decided against the plaintiff.”

5. Thus, the Ld. ADJ clearly held that the codicil was not proved in accordance with law. Ld. counsel for Petitioner submits that this judgment dated 30th March, 2019 is under appeal before this Court and a RFA is pending.

6. Insofar as the second prayer is concerned, ld. counsel for the Petitioner submits that the declaration has been sought in respect of his mother's Will dated 7th February, 2014.

7. A perusal of the prayers in the present Test. Case shows that in

respect of the Will dated 4th May, 1986, the probate can be issued as the Respondents do not object to the said Will. However, insofar as the Codicil is concerned, since in the suit involving the same very parties, the Codicil has not been accepted by the Court by a final judgment, though in appeal, the probate of this Codicil cannot be granted at this stage.

8. Insofar as the declaration, which has been sought, in a testamentary case, such a declaratory prayer in respect of the mother's Will would not be maintainable. In ***Kanwarjit Singh Dhillon vs. Hardy Singh Dhillon and Others***, (2007) 11 SCC 357 the Supreme Court held as under:-

“12. In Chiranjilal Shrilal Goenka v. Jasjit Singh [(1993) 2 SCC 507] this Court while upholding the above views and following the earlier decisions of this Court as well as of other High Courts in India observed in para 15 at SCC p. 515 which runs as under:

“15. In Ishwardeo Narain Singh v. Kamta Devi [AIR 1954 SC 280] this Court held that the court of probate is only concerned with the question as to whether the document put forward as the last will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the Probate Court. Therefore, the only issue in a probate proceeding relates to the genuineness and due execution of the will and the court itself is under duty to determine it and preserve the original will in its custody. The Succession Act is a self-contained code insofar as the question of making an application for probate, grant or refusal of probate or an appeal carried against the decision of the Probate Court. This is clearly

manifested in the fascicule of the provisions of the Act. The probate proceedings shall be conducted by the Probate Court in the manner prescribed in the Act and in no other ways. The grant of probate with a copy of the will annexed establishes conclusively as to the appointment of the executor and the valid execution of the will. Thus it does no more than establish the factum of the will and the legal character of the executor. Probate Court does not decide any question of title or of the existence of the property itself.”

That being the position and in view of the nature of allegations made in the plaint, we do not find any reason as to how the High Court as well as the civil court could come to a conclusion that after the probate of the will executed by late S. Kirpal Singh was granted, the suit for declaration for title and injunction on the above allegation could not be said to be maintainable in law. The High Court also while holding that the suit was not maintainable, in view of the probate granted of the will of late S. Kirpal Singh had relied on a decision of this Court, as noted herein earlier, in *Rukmani Devi* [(1985) 1 SCC 144]. We are not in a position to agree with the High Court that this decision could at all be applicable in the facts and circumstances of the present case. A plain reading of this decision would not show that after the grant of probate by a competent court, the suit for title and permanent injunction cannot be said to be maintainable in law. What this Court held in that decision is that once a probate is granted by a competent court, it would become conclusive of the validity of the will itself, but, that cannot be decisive whether the Probate Court would also decide the title of the testator in the suit properties which, in our view, can only be decided by the civil court on evidence. It is true that the probate of the will granted by the competent Probate Court would be admitted into

evidence that may be taken into consideration by the civil court while deciding the suit for title but grant of probate cannot be decisive for declaration of title and injunction whether at all the testator had any title to the suit properties or not.”

Thus, in probate proceedings, no declaratory relief in respect of title of the property can be sought – especially that the Will of the mother is invalid and void for whatsoever reasons. The said issue is alien to the present Petition seeking probate of the Will and codicil of the father. The remedies of the Petitioner, for seeking declaration and any other reliefs in accordance with law are, however, left open.

9. Under these circumstances, the present petition is disposed of with the following directions.

- 1) Probate be granted in respect of the Will dated 4th May, 1986 executed by Late Shri Krishan Lal Khullar.
- 2) Insofar as the Codicil is concerned, subject to the decision in the appeal, if the Petitioner succeeds therein, then liberty is granted to the Petitioner to seek a probate in respect of the Codicil.
- 3) In respect of the declaratory relief and other movable or immovable assets are concerned, the Petitioner is permitted to avail of his remedies, in accordance with law.

10. The petition is disposed of in the above terms. Miscellaneous application also stands disposed of.

PRATHIBA M. SINGH
JUDGE

JULY 19, 2019/dk