

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

% Judgment delivered on: 11th April, 2022

+ **FAO 192/2020**

USHA VIJAY Appellant

versus

THE STATE (NCT DELHI) & ANRRespondent

Advocates who appeared in this case:

For the Appellant: Mr. Shrey Mehta, Advocate.

For the Respondents: Mr. Sanjeev Sindhwani, Senior Advocate with Ms. Sujata Kashyap, Advocate for R-2.

CORAM:-

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

JUDGMENT**SANJEEV SACHDEVA, J.**

1. Appellant impugns Judgment dated 23.11.2019 whereby the Trial Court has granted probate to the Executor of the Will dated 22.11.1997 of Late Smt. Sushila Khanna.

2. Both Appellant (Smt. Usha Vijay) and Respondent No. 2 (Smt. Uma Varma) are real sisters and daughters of Late Smt. Sushila Khanna.

3. Respondent No. 2 applied for grant of Probate contending that



she was appointed as the executor of the Will by her late mother. The Will is stated to have been attested by the respective husband's of the Appellant and the Respondent No. 2. Appellant filed objections to the said Will.

4. The Trial Court has dismissed the objections and held that the Will has been duly signed by the Testatrix and has been duly attested and that she was having a sound disposing and consequently the Will has been duly proved and as such granted the Probate of the Will. Trial Court has also noticed that no evidence has been led by the Objector in support of her objections.

5. Appellant has impugned the order primarily on the ground that the will is surrounded by suspicious circumstances. In addition it is contended that the Appellant could not lead any evidence as she was unwell.

6. Trial Court in the impugned Judgment has noticed, that despite publication of citation in the newspaper, no objections were received from the public or state except the ones filed by the Appellant.

7. With regard to the execution of the Will, the Trial Court after noticing the law as laid down by the Supreme Court, has held as under:

“39. The petitioner side has contended that the examination of one of the attesting witness - PW -2



Sohan Lal Verma had already discharged their initial onus and the witness has categorically proved the valid execution of the Will by Smt. Sushila Khanna. It has also been contended that the other witness, who had been the witness No.1 to the will is the husband of the objector and the objector had denied the signatures of Sh. Hari Kishan Vijay on the Will, which clearly implies that the said witness has been won over by the respondent and as such his examination was neither necessary, nor is his non-examination, available as a ground or an argument by the respondent side. The petitioner has further contended that though the witness-PW2 has been cross examined at length on' different occasions but nothing has come on record which could be claimed as suspicious, by the objector side.

40. Having regard to the objections raised by respondent No.2, wherein respondent No.2 has claimed that the signatures of the testator as well as the witness No.1 are forged and fabricated, the Will needs to be examined from this perspective before proceeding to the other aspects. While the narrative of the petitioner side is that the Will was signed by the testator in the presence of respondent No.2 herself, her husband Hari Kishan Vijay, who is attesting witness No.1 to the Will and Sh Sohan Lal Verma, the husband of the petitioner, the counter narrative is that the Will is a forged and fabricated document as neither the testator had signed the document, nor the document signed by Sh. Hari Kishan Vijay as an attesting witness No. 1.

41. Sh. Hari Kishan Vijay has neither been called upon by the petitioner nor by respondent side and having regard to the peculiar circumstances of the case where the Will is shown to have been executed at the residence



of the objector/ respondent No.2 as well as her husband Sh. Hari Kishan Vijay and further considering the nature of the objection as to the signatures of Sh. Hari Kishan Vijay being forged and fabricated, the examination of Sh. Hari Kishan Vijay would have clinched the issue. The question, thus, crops up that whose responsibility would it have been to summon Sh. Hari Kishan Vijay for the said purpose. In this respect, the petitioner had examined one of the attesting witness, who had categorically stated in no unclear terms, that the other attesting witness Sh. Hari Kishan Vijay was present and had signed the Will Ex.PW2/1, as an attesting witness. The petitioner side has also placed on record the original letters Ex.PW1/6 and Ex.PW1/7 which are claimed to have been signed by Sh. Hari Kishan Vijay. There is no evidence from the respondent side that these documents were not written, signed or issued by Sh. Hari Kishan Vijay. A comparison of the signatures of Sh. Hari Kishan Vijay as are apparent on Ex.PW1/6 and Ex.PW1/7 with the signatures on the Will clearly show that the signatures are of the same person. There is no cross examination or any other evidence, which could tend to destruct his inference or observation. Besides, considering the settled proposition of law that the parties must bring the best evidence available, it was incumbent upon respondent No.2 to have produced Sh. Hari Kishan Vijay himself to say that he did not sign the document as an attesting witness. On the contrary, respondent No.2 did not even herself enter the witness box, and an inference as to the genuineness of the signatures of the attesting witness No.1 can successfully be drawn.”

8. With regard to the signatures of the testatrix Smt. Sushila Khanna, the trial court has, after examining the testimony of the



witnesses produced by the Petitioner/Respondent No. 2 as well as the cross examination and the report of the handwriting expert also produced by the Respondent No. 2 categorically returned a finding that the Will bears the initials and signatures of the testatrix Smt. Sushila Khanna.

9. The trial court has also returned a finding that the Petitioner/Respondent No. 2 had been able to discharge its initial onus, in so far as the physical and mental capabilities of the Testatrix were concerned and that there was conspicuous absence of any evidence to the contrary which could suggest that she had any mental incapability or infirmity, so as to disable her from making any rational decision or that she suffered from such physical disability which could impair her testamentary capacity. The trial court has also placed reliance on the letters written by the Testatrix during the period around the time when the Will was executed from which the Trial court has drawn an inference that she was mentally and physically capable of making any rational decision, and that she understood the contents of the Will, which is written in English.

10. It may be further noticed that the husband of the Respondent No. 2 (Shri Sohan Lal Varma) who is one of the attesting witness, appearing as PW2, has categorically deposed that Smt. Sushila Khanna was in a sound disposing mind and she had put her signatures



on the said Will in his presence as well as in the presence of the other attesting witness Shri Hari Krishan Vijay (i.e. husband of the appellant). The Witness further repeatedly deposes that she signed in presence of Shri Hari Krishan Vijay and he thereafter signed at the asking of Smt. Sushila Khanna as one of the attesting witness. He in his examination in chief has also identified the signatures of Shri Hari Krishan Vijay on the Will.

11. During Cross examination the said witness has stated that the Will was given to Shri Hari Krishan Vijay to read. He states that Smt. Sushila Khanna did not ask Smt. Usha Vijay to sign the Will as a witness but asked Shri Hari Krishan Vijay and him to sign the Will as attesting Witness.

12. During the cross examination of the Husband of the Respondent No. 2, there is not even a suggestion that the other attesting witness Shri Hari Krishan Vijay has not signed the Will. This clearly goes to establish that the husband of the appellant has signed the Will as the other attesting witness.

13. Trial Court record also shows that an opportunity was given to the appellant by order dated 14.12.2018, to lead evidence by appointment of a local commissioner, however the same was declined by the Appellant and the evidence was voluntarily closed on 11.01.2019 by the counsel for the appellant stating that she would not



be in a position to lead evidence. No efforts were made to examine the husband of the appellant who is the other attesting witness to the Will.

14. Though some medical certificates have been filed in appeal to show that appellant was unwell. However, no medical record or evidence has been produced to show that the husband was also unwell and as such could not appear as a witness.

15. In this appeal an application was filed by the Appellant under Order 41 Rule 27 of Code of Civil Procedure was filed by the appellant contenting that the husband of the appellant is 90 years old and his deposition is germane to the case as he is allegedly one of the attesting witnesses.

16. However, on 25.11.2021, said application was withdrawn contending that the husband of the appellant, who was sought to be produced as a witness, cannot now be produced in view of his present medical condition. As noticed hereinabove, no medical record was produced in support of the submission of his ill health.

17. Accordingly, there is no infirmity in the findings returned by the Trial Court that the Testatrix Smt. Sushila Khanna was in a sound disposing mind and that the Will dated 22.11.1997 was duly signed by her, has been duly attested by the attesting witnesses and has also been duly proved in accordance with law.



18. In view of the above, there is no merit in the appeal and the appeal is consequently dismissed.

19. The question as to the effect and validity of the clauses in the Will putting fetters on the bequest in favour of the Appellant does not arise for consideration in these probate proceedings and is accordingly not being commented upon and is left open for determination in appropriate proceedings, if so required.

SANJEEV SACHDEVA, J.

APRIL 11, 2022

HJ

