

**The Maharashtra Executor and Trustee Co. Ltd.**

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**Court :** Mumbai

**Decided On :** Oct-18-2013

**Judge :** R.D. Dhanuka

**Appeal No. :** Testamentary Suit No. 46 of 1997 In Testamentary Petition No. 308 of 1997

**Judgement :**

Oral Judgment:

The matter is placed on board for marking of Will dated 9th August, 1995 executed by the testator Mr. Raju M. Shetty. Some of the relevant facts for the purpose of marking this Will are as under :

2. It is the case of the petitioner that Raju Shetty, the testator who died on 29th November, 1996 had executed will and testament dated 9<sup>th</sup> August, 1995. Petitioner was named as sole executor in the said Will. It is the case of the petitioner that the said will was attested by two attesting witnesses. The said will has been marked as X2 for identification.

3. The caveators have disputed the execution of the said will. According to the petitioners, the said Will was attested by Mr. Dayanand Karkera and Mr. Mangesh Mulye, Officer of the petitioner. Mr. Dayanand Karkera died on 23rd April, 1999 which is prior to the filing of this petition. Mr. Mangesh Mulye had filed his affidavit regarding attestation on 10<sup>th</sup> December, 1997. On behalf of the petitioner, 5

witnesses have been examined. Mr Shah, learned senior counsel appearing for defendant nos. 4 and 5 who are supporting petitioners and who are beneficiaries under the said alleged will, invited my attention to the oral evidence led by the witnesses examined by the petitioners. It is not in dispute that signature of the testator has been marked as Exh. P5. The signature of the attesting witnesses are marked as Exh. P6 and P7. The date mentioned in the Will however, is not marked. Mr. Shah, learned senior counsel invited my attention to the cross examination of Mr. Sudhir Joshi who had participated in the preparation of the Will. In Para 6 of the cross examination of Mr. Sudhir Joshi held on 2/3/2009 of Mr. Sudhir Joshi, he has deposed that after the original will was engrossed on the basis of the approved draft and delivered to the testator, he directly met the witness on the date when the will was executed i.e. on 9th August, 1995. The testator came to him at about 10.00 a.m., on 9th August, 1995 and told him that the will was to be executed on the same day itself. The witness has also deposed that the testator has tendered his signature on the original will on page 5. The witness denied the suggestion that Mr. Karkera was not with the testator in the office of the petitioner in the morning on 9th August, 1995. The witness stated that Mr. Karkera had signed the Will in his presence.

4. Mr. Shah, learned senior counsel also invited my attention to the examination in chief and cross examination of Mr. Mangesh Mulye who was one of the attesting witnesses. The said witness has also deposed that he had seen the testator tendering his signature. The said witness however, could not say as to who had filled in the blank portion in the will 9th August, 1995 filled in hand. Witness has deposed that prior to 9th August, 1995, he had no occasion to personally interact with the deceased. He has deposed that he had tendered his signature on 9th August, 1995 on the document. He has further deposed that Dayanand Karkera has tendered his signature in his presence. In reply to the question as to how could he say that the Will was executed on 9th August, 1995, the witness replied that he stated so because the date 9th August, 1995 appeared on the document when the testator has tendered his signature in his presence.

5. Mr. Shah, learned senior counsel also invited my attention to other documents which are exhibited. The application cum proposal form which was filled in by the

said deceased on 3rd August, 1995 has been marked as Exh. P3. Receipts/vouchers are marked as P4 collectively. The witness examined by the petitioner had also produced register showing the last entry in the said register showing the name of the deceased which is marked as Exh. P2. Mr. Shah, learned senior counsel placed reliance on the judgment of the Supreme Court in the case of Gopal Swaroop Versus Krishna Murari Mangal and Others (2010) 14 SCC 266 and in particular paragraph 17 which reads thus :

17. A careful analysis of the provisions of Section 63 would show that proof of execution of a Will would require the following aspects to be proved:

(1) That the Testator has signed or affixed his mark to the Will or the Will has been signed by some other person in the presence and under the direction of the Testator.

(2) The signature or mark of the Testator or the signature of the persons signing for him is so placed has to appear that the same was intended thereby to give effect to the writing as a Will.

(3) That the Will has been attested by two or more witnesses each one of whom has signed or affixed his mark to the Will or has been seen by some other person signing the Will in the presence and by the direction of the Testator or has received from Testator a personal acknowledgement of the signature or mark or the signature of each other person.

(4) That each of the witnesses has signed the Will in the presence of the Testator.

6. Learned senior counsel submits that the contents of the Will are not required to be proved. It is submitted that there is no requirement of the law that each page of the Will is required to be signed. Mr. Sudhir Joshi one of the witness examined by the petitioner has identified the signature of the testator on all pages. The signatures of the witnesses are also identified by the said witness. In support of his submission that the signature of the testator is not necessary on each page of the will, learned senior counsel placed reliance on the judgment of Ammu Balchandran Vs. Mrs. O.T. Joseph and Ors. AIR 1996 MADRAS 442 and in

particular Paragraph 49 thereof. Madras High Court has held that merely because the will is not signed on all the pages, it cannot be said to be suspicious circumstance. Since the will is only declaration of the last will of the testator, the law does not say that every page should be signed. The signature or mark of the testator can be either at the commencement or at the end. But it must be so placed that it shall appear that it was intended to give effect to the instrument as Will.

Paragraph 49 of the said judgment reads thus:

49. The other suspicious circumstances are, that there is no signature in pages 1 and 2 and those pages are also not numbered in the Will. The argument that is taken is that pages 1 and 2 must have been subsequently substituted, and that is why page number is not found in those pages. If pages 1 and 9 have been subsequently substituted, in that attempt, the numbering of pages 1 and 2 would not have been forgotten as it is an obvious thing. Again, pages 1 and 2 are appearing on a single sheet of paper, and as such, there is no necessity for numbering the first sheet and there was only one more sheet and since it was a separate sheet, the page number was given. We must also remember that P.W. 2 has stated that when he signed in the Will, there were two sheets pinned together. In the absence of any other positive evidence, no inference can be drawn that pages 1 and 2 were subsequently substituted. The other suspicious circumstance alleged is that the Will is not signed in all the pages. That also cannot be said to be a suspicious circumstance since the Will is only a declaration of the last Will of the testator. Law does not say that every page should be signed. In paruck on The Indian Succession Act, Eighth Edition, 1993, the learned Author has commented on this point, at pages 118 and 119 of that book. The learned Author says that if a Will is written on several sheets of paper, it is not necessary that all the pages should be severally signed. One signature on the last sheet, made with the intention of executing the Will is sufficient. Section 63 of the Indian Succession Act only says that the signature or mark of the testator or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as Will. The signature or mark of the testator can be either at the commencement or at the end, but it must be so placed that it shall

appear that it was intended to give effect to the instrument as a Will. Under the English Law, there is a slight difference. At pages 118 and 119 of the said book, the learned Author has said thus:-

"... In England the Law is different. The Will Act, 1837, Sec. , enacted that no Will was valid unless it was signed "at the foot or end thereof. The Will Act Amendment Act, 1852, Section , provided that "every Will shall, so far as regards the position of the signature of the testator be deemed to be valid if the signature shall be so placed at or after or following or under or beside or opposite to the end of the Will, that it shall be apparent on the fact of the Will that the testator intended to give effect by such his signature to the writing signed as his Will... but no signature shall be operative to give effect to any disposition or direction which is underneath or which follows it". The signature on the top right hand corner of the Will is not valid according to English law."

In so far as the Indian Succession Act is concerned, the learned Author has stated (at page 119) thus:--

"... the signature need not necessarily be at the end of the Will. It does not matter in what part of the Will the testator signs. In the Wills executed in vernacular language it is usual to put the signature on the top of the Will. This is valid execution."

All the suspicious circumstances alleged by the appellant are no circumstances which vitiate the Will.

7. Mr. Shah, learned senior counsel invited my attention to the order passed by R.Y. Ganoo,J., on 21st March, 2011 holding that as on the date of the passing of the said order, there was no evidence as to who had incorporated the figures 9.08.1995 and that omission was the material omission in the matter of proving the document of Will. In Paragraph 13 of the said order, this court observed that the plaintiffs have failed to prove the document of Will as having been duly executed on 9th August, 1995 by the testator. This court has held that since the plaintiff had closed the case and the defendants have not examined their witnesses on the ground that the document of the Will is not proved, it would be necessary for the

court to hear arguments in the suit on merits.

8. Plaintiffs thereafter filed Chamber Summons (60 of 2011) in this proceedings for recalling the witness which was vehemently opposed by the defendants. By an order dated 10th June, 2011 passed by Smt.R.S. Dalvi, J., this court observed that in this case the witness who proved his Will is required to depose about the date of his Will and that must be allowed. This court directed the plaintiff to file further affidavit of examination in chief within one week only to that limited aspect. This court granted liberty to the contesting defendants to further cross examine the plaintiffs' witness. Being aggrieved by the said order passed by the learned Single Judge, defendant nos. 1, 2 and 3 filed appeal (Appeal Lodging No. 393 of 2011) before the Division Bench of this court. By an order dated 4th July, 2011 passed by the Division Bench, this court observed that after hearing the learned counsel for the parties and after holding that the witness who proved the Will is required to depose about the date of the Will, learned Trial Judge had allowed the said chamber summons. The Division Bench however, dismissed the said appeal summarily on the ground that it is not maintainable as the said order did not amount to a judgment.

9. Mr. Shah, the learned senior counsel then invited my attention to the additional affidavit filed the witness Sudhir Joshi. My attention is invited to paragraph 5 and 6 of the said affidavit. It is stated in the affidavit that the said additional affidavit was made as further examination in chief in continuation of his earlier affidavit dated 13th January, 2009. In Paragraph 5 of the said affidavit, it is stated that the writing tendered by the petitioners in his evidence is taken on record which was submitted in his presence on 9<sup>th</sup> August, 1995. It is stated in paragraph 6 that the deceased had visited the plaintiff's office for the purpose of executing his last will and testament. The witness at the request of the deceased had filled the particulars i.e. 9th and August in ink in testimonial clause at the bottom of page 5 of the Will. The witness has also mentioned the date as 9th August, 1995 in ink below the said clause of the Will. He has deposed that 3 particulars in ink mentioned therein were in his own hand writing and has identified the same. It is further stated that due to inadvertence, reference pertaining to the particulars written in ink was not mentioned in his affidavit in examination in chief dated 13th January, 2009. Mr.

Shah, learned senior counsel also invited my attention to the cross examination of this witness conducted by defendant nos. 1, 2 and 3 on 26th September, 2011.

10. My Attention is invited to the reply given by the witness to question no. 30 Whether the said witness had seen the figures 9th August and 9.08.95 at the time when he made the additional affidavit. Witness answered in negative. Learned senior counsel submits that there was no suggestion put to the witness that the Will was not executed on 9th August, 2005. Various documents have been marked as exhibits by this court such as application cum proposal form, receipt vouchers, draft Will, register showing the name of the testator. Learned senior counsel submits that Mr.Sudhir Joshi has identified signature on all pages. Signature of the witness are also proved. Printed form is already exhibited. It is submitted that this court by an order dated 10th June, 2011 has already held that the Will has been proved by the witness, already examined. Only date was not proved. Learned senior counsel submits that in paragraph (6) of the additional affidavit of the witness, he has categorically deposed that he had mentioned the date as 9.08.95 in ink below the testimonium clause of the Will and all the three particulars in ink mentioned were in his own handwriting and he had identified the same. Witness had also deposed that at the request of the deceased, he had filled the particulars i.e. 9th and August in ink in the testimonium clause at the bottom of page 5 of the said Will. Learned counsel submits that there was no cross examination on this deposition made in paragraph (6) except question no.30. Figures were in the handwriting of the witness examined by the petitioner is not disputed. There is no cross examination on that part of the evidence. On what basis the witness had deposed about his handwriting, no further questions are pursued by defendant nos. 1, 2 and 3 in cross examination. No case is put to the witness about the handwriting about the date. It is submitted that thus deposition of the witness in additional affidavit about the date having been put in his own handwriting remained uncontroverted and is proved. It is submitted that the identification of the date and handwriting is already done by the witness, hence Will of the deceased stands proved. Identification is completed. It is submitted that the same witness has also signed the petition who was cross examined by defendant nos. 1, 2 and 3 at length on other issues.

11. Mr. Shah, learned senior counsel submits that the original of the Will was in custody of the Court. The witness could also see the photocopy to ascertain the date and to verify the handwriting thereon. It is submitted that the said witness has also deposed that the draft was approved by the witness. Witness has further deposed that he had seen the Will when the Will was executed. Presence of the witness at the time of execution of Will is not disputed in cross examination. In paragraph (2) of the affidavit, the witness has deposed that he had seen the papers and documents before signing the affidavit. Mr. Shah submits that witness can remember date and handwriting who had put the date, even without seeing the original of the Will. Witness has not replied on the basis of his memory test. He has only replied that he has seen before signing affidavit. It is submitted that the witness examined by the petitioner was an independent witness and had no vested interest. Learned senior counsel submits that in any event, whether the witness has put the date or not would be appreciation of evidence. Since identification of the document/date on the document is complete for the purpose of marking, appreciation of the evidence would be at later stage. Learned senior counsel thus submits that Will is proved and shall be marked as exhibit by this Court.

12. Mr. Makhija, learned counsel appearing on behalf of the defendant nos. 1, 2 and 3 on the other hand submits that when the form was shown to the witness, he could not recognize the same. It is submitted that by an order dated 21st March, 2011 passed by R.Y. Ganoo, J. it is held that Will was not proved and was marked 'X'. Learned counsel submits that the witness Mr. Sudhir Joshi examined by the petitioner, admitted in cross examination that instructions to prepare both the affidavits were not given by him. Learned counsel invited my attention to some of the paragraphs of the cross examination of the witness on the additional affidavit in lieu of examination in chief. Learned counsel then invited my attention to the reply given by the witness in cross examination that the instructions to draft first affidavit was given by Pune office and for second affidavit instructions to draft was given by Bombay Office of the petitioners. It is stated that according to the witness, instruction was given by Mr. Deshmukh whom the said witness did not know. Witness has also deposed that he was not aware as to where the Will was after its execution. Learned counsel submits that in paragraph (6) of the additional affidavit

in lieu of examination in chief witness has not deposed whether he had seen the handwriting. Learned counsel laid emphasis on the reply given by the witness in reply to the question no.30 and submits that witness has admitted that he did not see the figure 9th August and 9.08.95 at the time when he made additional affidavit. Learned counsel thus submits that since he had not seen the figures before filing his additional affidavit, he could not have deposed on such figures and handwriting in the said additional affidavit. It is submitted that the original Will was submitted in this court since 1997 and thus during the period between 1997 and 2nd June, 2011, the witness did not see the original Will. Learned counsel also invited my attention to the cross examination of the same witness conducted on 2nd March, 2009. It is submitted that when the witness was shown the form, after seeing the documents, witness answered that the form was in whose handwriting was not known to the witness. In reply to the question no.14, the witness replied that the form was in his handwriting. Learned counsel submits that the witness changed his answer within 10 minutes during the course of the cross examination conducted on 2nd March, 2009 and thus without seeing the original Will, after 14 years the witness could not say that he had seen figures in Will in his own handwriting. Learned counsel submits that on such evidence before the court, this court shall not believe such witness and shall not mark alleged Will.

13. On perusal of the oral evidence and the order passed by this court on 10th June, 2011, it is clear that the finding is recorded that the witness who proved his Will is required to depose about the date of the Will. The same observation is also made by the Division Bench in order dated 4th July, 2011 in Appeal (L) No. 393 of 2011. It is not in dispute that the draft Will, application cum proposal form, requisite register mentioned by the petitioner showing the name of the testator are already marked exhibits. Witness has identified the signature of the testator as well as both the witnesses. Pursuant to the liberty granted by this court by an order dated 10th June, 2011, petitioner filed additional affidavit of Mr.Sudhir V.Joshi on 13th June, 2011. On perusal of paragraph (3), it is clear that the additional affidavit was in continuation of his earlier affidavit dated 13th January, 2009. In paragraphs (5) and (6) of the additional affidavit, the witness has deposed that the deceased had executed the Will in his presence on 9th August, 1995. It is further deposed that the witness himself had filled the particulars i.e. 9th and August in ink in the

testimonium clause at the bottom of page 5 of the said Will. He had also mentioned the date as 9.08.95 in ink below the said testimonial clause of the Will. It is deposed that all the three particulars in ink mentioned in paragraph (6) were in his own handwriting and he had identified the same. Witness has also deposed that inadvertence reference pertaining to those particulars written in ink was not mentioned in his earlier affidavit in examination in chief dated 13th January, 2009. In cross examination of this witness and in particular in paragraph (30), the only question asked to the witness was whether he had seen the figure 9th August and 9.08.95 at the time when he had made additional affidavit to which the witness answered in negative. On perusal of the cross examination of this witness, it is clear that the witness has deposed that all these figures and particulars were in his own handwriting of the Will and the deceased testator had executed the said Will in his presence on 9<sup>th</sup> August, 1995. In my view for the purpose of remembering the date and handwriting, the witness could see even the photocopy. This part of the evidence deposed in paragraph (6) in my view remained uncontroverted. The witness has thus proved the date in ink below the testimonium clause of the Will in his own handwriting. Evidenciary value of the evidence laid by the parties shall be considered at the time of trial. Since the witness has proved the Will, the said Will and testament dated 9th August, 1995 is marked as **Ex. A**.

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