

Rajesh Sharma Vs. Krishan Kumar Sharma

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Court : Delhi

Decided On : Mar-31-2014

Judge : Valmiki J. Mehta

Appellant : Rajesh Sharma

Respondent : Krishan Kumar Sharma

Advocate for Def. : Ms. Geetanjali Mohan

Advocate for Pet/Ap. : Mr. Aseem Malhotra

Judgement :

7 * IN THE HIGH COURT OF DELHI AT NEW DELHI + FAO6412002 31st March, 2014 % RAJESH SHARMAAppellant Through: Mr. Aseem Malhotra, Advocate VERSUS KRISHAN KUMAR SHARMA Respondents Through: Ms. Geetanjali Mohan, Advocate CORAM: HONBLE MR. JUSTICE VALMIKI J.MEHTA To be referred to the Reporter or not?. VALMIKI J.

MEHTA, J (ORAL) 1. This first appeal is filed under Section 299 of the Indian Succession Act, 1925 challenging the judgment of the probate court dated 3.8.2002 dismissing the probate petition as barred by time. I may note that probate court has otherwise held that the Will in question dated 13.7.1989 of the deceased testatrix Smt. Sneh Prabha Sharma was duly executed and attested, and the deceased testatrix Smt. Sneh Prabha Sharma was of sound disposing mind at the time of making of the Will. In this appeal cross-objections have also been filed by

the respondent, and who was respondent No.2/objector before the probate court. Cross-objections challenge the findings of the probate court that the Will has been proved as the same was duly executed and attested and the deceased testatrix Smt. Sneh Prabha Sharma was of sound disposing mind at the time of making of the Will.

2. Learned counsel for the appellant has argued that the probate court has committed an error in dismissing the petition as barred by time because in the present case limitation does not arise from the date of the death of the testatrix and limitation only arises on arising of a cause of action under Article 137 of the Limitation Act, 1963 and which would be in knowledge of the appellant that the objector/respondent is disputing the Will, and since no such objection has been proved to have been raised by the objector/respondent by leading of any evidence that the Will in question was disputed to the knowledge of the appellant/petitioner three years prior to filing of the probate petition, the probate petition cannot be dismissed as being barred by time.

3. The Supreme Court has now held in the judgment passed in this very case in Civil Appeal No.1967/2009 that Limitation Act, 1963 applies to filing of a probate petition. The first appeal filed in this Court was allowed by a judgment of a learned single Judge of this Court on 5.7.2007 and it was also held therein that Limitation Act, 1963 does not apply to a probate petition. This judgment of the learned single Judge dated 5.7.2007 was challenged in the Supreme Court, and the Supreme Court vide its judgment dated 27.3.2009 in Civil Appeal No.1967/2009 held that Article 137 of the Limitation Act, 1963 applies to filing of a probate petition.

4. It is not disputed before me that there is no specific written notice or any oral objection by the respondent/objector to the appellant that Will in question has been disputed prior to three years of the filing of the petition. The only argument urged on behalf of the respondent/objector is that since the objector/respondent is living in 65 square yards of the property of the testatrix situated at 51-A, East Azad Nagar, Delhi-110051, on this very aspect itself that the objector was in possession of a part of the property is sufficiently deemed objection to the Will of the deceased testatrix Smt. Sneh Prabha Sharma to the knowledge of the appellant/petitioner for

limitation to commence on the death of Smt. Sneh Prabha Sharma on 9.7.1990. Reliance is placed by the respondent upon a judgment of a learned single Judge of this Court (Vikramajit Sen, J., as he then was) in the case of Pamela Manmohan Singh Vs. State & Ors., 83(2000) DLT469 and the judgment of a Division Bench of this court in the case of Pratap Singh & Anr. Vs. State & Anr., 173(2010) DLT132(DB).

5. In the case of Pamela Manmohan Singh (supra) para 7 of the judgment is relied upon and which reads as under :

7. In a decision of a Division Bench rendered in Hari Narain Vs . Subhash Chander, AIR1985 Punjab & Haryana 211, the argument that no limitation had been prescribed in filing of an application for revocation of a probate granted under the Succession Act was referred to as an "astounding proposition of law put forth by the learned counsel for the Applicant". After discussing the law as enunciated by the Supreme Court, it was held by the learned Division Bench that Article 137 of the Limitation Act, 1963 would apply to any petition or application filed in a Court where no other period of limitation had been prescribed. After careful consideration I would extend the ratio of this decision mutates mutans to also cover cases pertaining to the grant of probate, where it can be fairly assumed that the Petitioner had knowledge that the Will was likely to be disputed. Article 137 of the Limitation Act, 1963 reads as under : Description of suit Period of Limitation Time from which period begins to run 137. Any other application for which no period of limitation is provided elsewhere in this Division. three years When the right to apply accrues The period of three years would surely commence atleast from the date on which a legatee under a Will could be justifiably ascribed with the knowledge that the Will on which his claim is founded is likely to be disputed by other persons especially the natural heirs of the Testatrix. By way of adumbration, hypothetically, a Will may have been executed in Delhi in 1950. The bequests made and dealt with therein may not have come into any dispute for several decades. It could be that some legatees were in possession of the properties with the tacit permission or approval of the other legatees, which approval was subsequently withdrawn. So long as the rights of any particular legatee are to emanate and flow from the Will, probate proceedings ought to be filed atleast

within three years from this conjectured withdrawal of permission. That would then be the latest date on which "the right to apply accrues". This would be the most appropriate and meaningful interpretation given to the words "when the right to apply occurs". The applicant in the present case must surely have been well aware that the Will would be indefatigably contested. His right to apply surely accrued on the death of the alleged Testatrix Dr. Raseel Kohil on 11.10.1987. Yet he chose not to initiate probate proceedings, and over a decade has passed thereafter.

6. It is argued that it must be held in the facts of the present case that the right to sue for probate of the Will in question dated 13.7.1989 of the deceased testatrix Smt. Sneh Prabha Sharma arose on her death on 9.7.1990, and since the probate petition was filed on 12.4.1994, the probate petition is barred by time. For the completion of narration I would like to state that firstly the probate petition was filed on 12.4.1994, and the same was dismissed as withdrawn with liberty to the appellant/petitioner to file a fresh probate petition subject to payment of costs of Rs. 5,000/- to the respondent/objector and the present probate petition was thereafter filed on 1.10.1996 after payment of costs to the respondent/objector. The order by which the earlier probate petition was dismissed as withdrawn with permission to file fresh is dated 25.9.1996 i.e the present probate petition has been filed within a week of withdrawal of the earlier probate petition.

7. A right to sue accrues as per Article 137 of the Limitation Act, 1963 depending upon the facts of each case. Whereas in a particular case right to sue may arise on the death of the testatrix inasmuch as circumstances would show objections existing to a Will of the deceased even on the date of death of the testatrix, in other cases merely from the date of death it is not necessary that the right to sue accrues. The mere fact that the respondent/objector was in possession of some part of the property cannot mean that the petitioner/appellant has a deemed notice of objection to the Will inasmuch as mere possession does not necessarily lead to an inference of possession being claimed in derogation of a Will of a deceased testatrix/ Smt. Sneh Prabha Sharma in this case. I have already noted above that there is no written document, whether of a legal notice or a letter or any other documentary evidence such as a pleading in a court case, showing that three years prior to filing of the probate petition the respondent/objector had objected to

the Will dated 13.7.1989 of the deceased testatrix Smt. Sneh Prabha Sharma. Therefore, in the facts of the present case I am not inclined to hold that cause of action accrued on the death of testatrix Smt. Sneh Prabha Sharma.

8. So far as the judgment relied upon in the case Pratap Singh & Anr. (supra) is concerned, the facts of that case are totally different because in the said case sufficient evidence existed of the Will dated 11.3.1983 in that case being disputed as early as in 1984 when a Civil Suit No.1355/1984 was filed, but, the probate petition was filed almost 14 years later on 5.9.1997 and hence held to be time barred. Therefore, the judgment in the case Pratap Singh & Anr. (supra) will have no application to the facts of the present case.

9. In view of the above, I hold that the probate petition cannot be dismissed as being time barred having been filed three years after arising of the cause of action inasmuch as the mere death of testatrix Smt. Sneh Prabha Sharma on 9.7.1990 cannot be said to be arising of a cause of action for filing of the probate petition in this case.

10. So far as the issue with respect to execution, and attestation of the Will and soundness of mind of the deceased testatrix is concerned, as already stated above, the probate court has held that these aspects are in favour of the appellant/petitioner. The relevant paras of the judgment of the probate court are paras 9 to 14 and the same read as under :

The onus to prove that the Will dated 13.7.89 was made by the testatrix legally and validly in a sound disposing state of mind in presence of two attesting witnesses, was on the petitioner. In this regard the petitioner has examined Shri Ved Prakash Gupta, one of the attesting witnesses to the Will. Shri Ved Prakash Gupta testified that Smt. Sneh Prabha Sharma was his neighbour. On 13.7.1989 she had executed a Will in his presence without any pressure, coercion or inducement, while in sound disposing mind. She had signed the Will in his presence at point-A. He signed the same at point-B and Miss Vijay Laxmi had signed it at point-C. He deposed that this Will was registered in the office of the Sub Registrar, Asaf Ali Road, Delhi, on 11.9.1989. At the time of registration, he had put his signature at point-D. Smt. Sneh Prabha Sharma, the testatrix signed at

point E and affixed her thumb impression at point-F. He added that one Advocate Mr. Kapoor had also signed the Will at point-G. The contents of the said Will were read over to the testatrix in vernacular. The Will was proved as Ex. PW1/A. The witness was cross-examined at length. During cross-examination, the witness stated that the Will was drafted by Shri Sushil Chaddha Chartered Accountant and that he had not appended his signatures on the Will. He also clarified that he had read the contents of the said Will before he had signed the same. He stated that he could not give the full name of the Advocate Mr. Kapoor and his address, who had signed at point G. He denied the suggestion that he had not signed the Will at point-B in presence of Smt. Sneh Prabha Sharma, the testatrix and Vijay Laxmi, another attesting witness to the Will. He also denied the suggestion that the Will Ex. PW1/1 was forged by him in collusion with the petitioner and Smt. Vijay Laxmi. He denied the suggestion that Smt. Sneh Prabha Sharma remained bed-ridden for the last about 12 years prior to her death. On this point, RW-6 Sh. Krishan Kumar Sharma (Respondent No.2) deposed that Will Ex. PW1/1 was not signed by his mother at point-A. He stated that Vijay Laxmi, one of the attesting witnesses to the Will was his step-sister. He testified that his step-brother Umesh Kumar died at a young age as a result of which, his mother suffered a great mental shock and therefore, she used to remain ill. He stated that his mother was suffering from epilepsy even before the death of his step-mother. During cross-examination, the witness stated that he met his stepmother last in the year 1972-73, when she had herself come to him.

10. It has been urged by the learned counsel for the respondents that execution of the Will was done under suspicious circumstances and that is why, only one of the attesting witness has been produced in the court. The other attesting witness to the will was Smt. Vijay Laxmi, step-sister of the respondent and natural sister of the petitioner. A perusal of the Will Ex. PW1/1 shows that the Will was presented for registration by Shri J.C. Chopra Advocate, who identified the testatrix, but the Will does not contain the signatures of said Shri J.C. Chopra. It has been argued that Vijay Laxmi also did not appear before the Sub Registrar at the time of registration of the Will and therefore, the execution of the Will is shrouded in mystery, the petitioner has not been able to dispel the suspicious circumstances and therefore, Will Ex. PW1/1 cannot be acted upon.

11. Of course, it is true that the Will has to be attested by two witnesses, however Section 68 of the Evidence Act permits the execution of the Will, to be proved by only one attesting witness, being called. If any authority is needed on the point, a reference can be made to Vishnu Ram Krishana & Ors. Vs. Nathu Vithal and Ors., AIR1949 Bombay 266. Similarly, it is not the requirement of law that both the attesting witnesses to the Will must appear before the Sub Registrar at the time of registration of the Will. The contention of the learned Counsel for the petitioner that Shri J.C. Chopra, Advocate, has not signed the Will Ex. PW1/1 as a person, identifying the testatrix, is also without any substance. PW1 Shri V.P. Gupta in his statement, made reference to the advocate Shri Kapoor, who had presented the Will for registration signed it at point-G. It appears that Shri Ved Prakash Gupta, PW1, had confused the name of Mr. Kapoor with Mr. Chopra Advocate, and it is the signature of Shri J.C. Chopra, which appears at point-G on the back of page 1 of the Will. Otherwise also, it is would not be very material if two or three persons are present at the time of registration of the Will and one of them fails or does not sign the same in proof of presentation of the Will or identifying the testator.

12. Of course death certificate Ex. PW2/1 gives the duration as 12 years yet this by itself would not show that the testatrix was not in a sound disposing mind at the time of execution of the Will. PW1 V.P. Gupta attesting witness to the Will has categorically stated that the Will was made by the deceased Sneh Prabha Sharma, without any pressure and in a sound disposing mind. Nothing has been brought on record to shatter this part of testimony of PW1 Shri V.P. Gupt. No motive has been imputed to his as to why Shri V.P. Gupta would be making a false statement. Moreover, respondent Krishan Kumar Sharma had himself admitted during his crossexamination that he had met his step mother last in the year 1972-73; then how could he depose about the state of mental condition of the testatrix at the time of execution of the Will in the year, 1989.

13. It is true that the second attesting witness to the Will Smt. Vijay Laxmi, is the daughter of the testatrix. But that by itself also, does not create any suspicion about the execution of the Will. It would be natural for a person, to make arrangement with regard to his/her properties in presence of close relations and neighbours.

14. I do not find any suspicious circumstance regarding Will Ex. PW1/1. On the other hand, from the testimony of Shri V.P. Gupta, PW1, I am convinced that the Will Ex. PW1/1 was made by testatrix Smt. Sneha Prabha Sharma in sound disposing mind, which was duly registered in the office of Sub Registrar, Asaf Ali Road, Delhi on 11.9.1989 and that this was the last Will of the testatrix. The issue is decided accordingly.

(underlining added) 11. I completely agree with the aforesaid conclusions of the probate court and I am of the opinion that the Will has been proved to have been duly executed and attested and the deceased testatrix was of a sound disposing mind at the time of making of the subject Will. Also no unnatural suspicious circumstances have been proved to discard the subject Will.

12. Learned counsel for the respondent/cross-objector argued before this Court the following cross-objections and which are stated in the crossobjections filed before this Court :

ii) The testimony of PW-1, Ved Prakash Gupta who is a witness to the Execution of the WILL and its registration is shaky and is surrounded by suspicious circumstances. He has deposed that the Testator has four sons and two daughters, whereas the Testator had four sons and three daughters, as per probate petition. He has deposed in his testimony that he has visited the suit property on many occasions, but he does not know whether K.K. Sharma, Objector No.2 is residing in the rear portion of the plot. The PW-1 has further deposed that the Testator was not bed-ridden for 12 years prior to death which is selfcontradictory to her death certificate Ex. PW-2/1. Further he has failed to depose how the witness to registration Sh. J.C. Chopra, Advocate had signed below the witnesses during the execution of the said WILL, to whom he has referred one advocate Mr. Kapoor in his Chief Examination. Hence PW/1 is a procured witness. iii) The PW-1 has further deposed that the WILL was drafted by Sh. Sushil Chaddha, C.A., but admit that he did not sign the said WILL. iv) 13. The second witness Ms. Vijaya Laxmi, who is the sister of the present appellant and alive till date, was neither examined by the present appellant to prove the execution of the WILL, nor the said Sh. J.C. Chopra, Advocate, nor Shri Sushil

Chadha, C.A. have been examined on behalf of the appellant to prove the genuineness of the WILL.

The respondent/objector has also argued that since the Will does not mention the details of the properties, probate of such a Will cannot be granted.

14. Taking the last objection first in this regard, I would seek to refer to the relevant observations of the probate court and which are contained in paras 15 and 16 of the impugned judgment, and which read as under :

15. ISSUE No.3 3. Whether the petition is not maintainable for the reasons, stated in the preliminary objection No.1 ?. OPR It has been urged by the learned Counsel for the respondent No.2 that the petitioner has not given the details of the amount of the assets, which were likely to come to the petitioners hand as required under Section 276 of the Act. The valuation of the property has also not been correctly made and therefore, the petition is not maintainable.

16. I have perused the Will Ex. PW1/1. It does make mention that the deceased had also bequeathed gold ornaments and bank deposits, which may be held single or jointly with any person, whatsoever. The petitioner was not cross-examined as to the other properties i.e. jewellery etc., left by the deceased. In any event when the petitioner is seeking probate in respect of immovable property, the petition cannot be dismissed simply on the ground that the amount of assets, which are likely to come to the hands of the petitioners, have not been given. Similarly tentative valuation of the property is to be done at the time of filing the petition and the final valuation is to be obtained at the time of grant of probate or letters of administration, if any, by the Collector of the area. It cannot be said that the petition is not maintainable. This is decided accordingly against the respondent No.2.

15. I completely agree with the observations of the probate court because final valuation is obtained at the time of grant of letters of administration and merely because the Will does not contain the details of valuation cannot mean that probate cannot be granted on such a Will. This objection urged on behalf of the respondent/objector is, therefore, rejected.

16. So far as the objection that the attesting witness PW-1, Sh. Ved Prakash Gupta had wrongly mentioned that the deceased testatrix had four sons and two daughters and whereas she has four sons and three daughters is concerned, all that needs to be said is that such minor contradictions cannot take away the factum of the Will otherwise having been duly proved to have been executed and attested, and more so because Will in question is a registered Will.

17. The second argument that the attesting witness PW-1, Ved Prakash Gupta admitted in cross-examination that he did not know that respondent/objector was living in the back portion of the property, and therefore, it must be held that the witness lacks credibility, all that requires to be stated is that on such minor issues a proved Will cannot be held not to have been validly proved. After all, it is perfectly possible that the attesting witness may only have visited the deceased testatrix and would not have been interested to know who all are the other persons living in the different portions of the property. Visiting to the testatrix and by virtue of being an ex-neighbour continuing to have good terms, there is nothing unnatural in only talking to the testatrix during the life time and not enquiring from the testatrix or making other enquiries as to who are in possession of the different parts of the property. Accordingly, this objection urged on behalf of the respondent/objector is also rejected.

18. So far as the objection that Sh. J.C. Chopra, Advocate who was present at the time of the registration, and Sh. Sushil Chadha, who had drafted the Will, should have been called in the witness box is concerned, I may note that the probate court has rightly dealt with the same that a Will is proved through the testimony of one attesting witness and it was not necessary in the facts of the present case to have summoned Sh. J.C. Chopra, Advocate who was present at the time of registration of the Will before the Sub-Registrar and nor was Sh. Sushil Chadha who had drafted the Will required to be called in the witness box. At this stage, I would like to state that learned counsel for the respondent argued that presence of Sh. J.C. Chadha was required for proving registration of the Will inasmuch as no one was called from the office of the Sub-Registrar for proving registration of the Will, Ex. PW-1/1, but in my opinion, this objection is misconceived because a court takes judicial notice of official seals as per Section 57 of the Evidence Act, 1872

and if the respondent/objector wanted to prove that the Will was not duly registered the onus was upon the respondent/objector to summon the record of the Sub-Registrar to establish that the Will was not duly registered. Obviously, this respondent/objector did not do so because he was fully aware that the Will stands duly registered before the SubRegistrar. Accordingly, this objection urged on behalf of the respondent/objector is also rejected.

19. One other objection which was urged on behalf of the respondent/objector was that the other attesting witness Smt. Vijaya Laxmi, and who is the sister of the appellant and the step-sister of the respondent ought to have been called as a witness but was not called, and nor was any reason given for not calling her as the attesting witness. It is argued that the Will therefore should not have been believed. Even this argument urged on behalf of the respondent lacks any substance because the other attesting witness Smt. Vijaya Laxmi was in fact the respondent No.6 in the probate petition but she after service did not file any objection to the probate petition. Therefore, in addition to the fact that only one attesting witness was required to prove the Will, the very fact that the other attesting witness did not file any objection shows that there was no need of calling of this second attesting witness Smt. Vijaya Laxmi.

20. Finally, on behalf of the respondent/objector it was argued that the deceased objector should be held not to be of sound disposing mind inasmuch as the death certificate Ex. PW-2/1 shows that the deceased was suffering for 12 years prior to her death. In my opinion, this argument urged on behalf of the respondent/objector is misconceived because illness of 12 years cannot be equated to mental illness of 12 years for holding lack of soundness of mind by the deceased testatrix at the time of making of Will. Probate court has rightly rejected this contention in para 12 of the impugned judgment. It is relevant to note that the probate court has noted that the objector met the deceased testatrix for the last time in the year 1972-73, and therefore, he was in no position to depose about mental condition of the testatrix at the time of execution of the Will in the year 1989. Also, before holding that a person is of unsound mind, in my opinion, that there must be sufficient medical record showing on preponderance of probabilities any lack of soundness of mind, but in the present case I note that the respondent/objector has not filed

any medical record showing unsoundness of the deceased testatrix, much less at the time of the execution of the subject Will dated 13.7.1989.

21. In view of the above, appeal is allowed. It is held that the probate petition is within limitation. The cross-objection of the respondent/objector are meritless hence dismissed and the judgment of the probate court below dated 3.8.2002 is upheld to the extent that it holds that the subject Will dated 13.7.1989 of the deceased testatrix Smt. Sneh Prabha Sharma has been duly executed and attested and that the deceased testatrix Smt. Sneh Prabha Sharma was of sound disposing mind at the time of making of the subject Will. Petitioner/appellant be granted probate on completion of the requisite formalities before the probate court below. MARCH31 2014 godara FAO6412002

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