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Vijay Sethi and ors. Vs. State and ors.

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Court : Delhi

Decided On : Jul-02-2014

Judge : V.K.Shali

Appellant : Vijay Sethi and ors.

Respondent : State and ors.

Advocate for Def. : Mr. Prem Prakash

Advocate for Pet/Ap. : Mr. Sunil Malhotra, Ms. Sonali Malhotra

Judgement :

* HIGH COURT OF DELHI AT NEW DELHI + F.A.O. No.174/2008 Decided on :

2. d July, 2014 VIJAY SETHI & ORS. Through: Appellants Mr. Sunil Malhotra and Ms. Sonali Malhotra, Advocates. Versus STATE & ORS. Through: Respondents Mr. Prem Prakash, Advocate for D-2. CORAM: HONBLE MR. JUSTICE V.K. SHALI V.K. SHALI, J.

1. This is an appeal against the judgment dated 4.4.2008 passed by the learned Additional District Judge, Delhi in a probate case bearing No.377/06/00 granting probate in favour of the respondent No.2/Vidhya Devi on the basis of the Will dated 13.5.1986.

2. Briefly stated the facts of the case are that respondent No.2/Vidhya Devi filed a probate petition on the basis of the Will dated 13.5.1986 purported to have been made by one Mangu Ram Pahuja claiming him to be her grandfather. It was alleged that Mangu Ram Pahuja had died on 6.6.1987. He was survived by three sons namely Ram Chander Pahuja, Trilok Chand Pahuja and Krishan Kumar Pahuja. The pedigree showing the legal heirs of late Mangu Ram Pahuja is as follows: MANGU RAM PAHUJA | |

_____

RAM CHANDER PAHUJA TRILOK CHAND PAHUJA KRISHAN KUMAR PAHUJA | |(SON) |(SON) (A-4) | | | _____ | | | | INDERJEET POONAM | (R-3) (R-4) | | | _____ | | 1ST WIFE2D WIFE | | | | _____ _____ | | | | | VIDHYA DEVI MEGH NATH VIJAY SETHI JOGINDER ANJU (R-2) (R-5) (A-1) (A-2) (A-3) A STANDS FOR APPELLANT R STANDS FOR RESPONDENT3 It was alleged that by virtue of the aforesaid Will late Mangu Ram Pahuja had bequeathed property No.F-132, Mansarover Garden, Delhi in favour of respondent No.2/Vidhya Devi as it was his self-acquired property. Appellant Nos.1 to 3, that is, Vijay Sethi, Joginder and Anju respectively being the step sister and brothers of the respondent No.2/Vidhya Devi and Krishan Kumar Pahuja being the real cousin of respondent No.2/Vidhya Devi filed their objections challenging the genuineness of the Will of late Mangu Ram Pahuja.

4. The main objection which was raised with regard to the grant of probate was that the Will had surfaced after the expiry of fourteen years and that in itself caused suspicion regarding genuineness of the Will. Further late Mangu Ram Pahuja was in the habit of putting signatures apart from putting thumb impression while as the Will which was set up by the respondent No.2/Vidhya Devi was only bearing thumb impression and not signatures. In addition to this, late Mangu Ram Pahuja had made a Will on 3.4.1978 which was duly registered on which he had put his signatures apart from thumb impression while as the Will dated 13.5.1986 only bore the thumb impression. The Will dated 13.5.1986 in respect of which the probate was granted, was allegedly executed by him at Faridabad and not in Delhi

while as he was a man of 100 years of age and was not in a sound state of mind to execute the Will.

5. On the pleadings of the parties, the following issues were framed: i) Whether the Will dated 13.05.1986 as propounded by the petitioner was executed by the deceased Sh.Mangu Ram Pahuja in his sound disposing mind and with free consent and same is his last Will and testament?. OPP. ii) Relief.

6. Respondent No.2/Vidhya Devi examined PW-1, Sukh Ram Jakkar, an advocate who was one of the attesting witnesses of the Will, PW-2, Subhash Grover, who drafted the Will and herself as PW-3.

7. The respondents in the probate petition in support of their case examined RW-1, Jag Narain, Record Clerk form the Office of the Sub Registrar, Kashmiri Gate in order to prove the registration of the Will dated 3.4.1978. Vijay Sethi, the respondent No.3 in the probate petition, examined himself as RW-2 and RW-3, R.S.Rawat, an official of the Passport Office, who produced the record regarding the issuance of the passport to the deceased to show his address and age. RW-4, Ghasi Ram, was from the Punjab National Bank, who produced the record pertaining to one joint account of the deceased and his son Ram Chander Pahuja. The respondent No.8 in the probate petition also stepped into the witness box as RW-5.

8. The learned trial court held the Will to be genuine and brushed aside the objections. So far as the question of limitation is concerned, it was observed that there is no application of the Limitation Act, 1963 to the probate petition.

9. I have heard the learned counsel for the parties and also gone through the record. The first contention which has been raised by the learned counsel for the appellants is that the learned trial court has fallen into a grave error by observing that the provisions of the Limitation act, 1963 are not applicable to the probate petition. In this regard, the learned counsel for the appellants has contended that Article 137 of the Schedule of the Limitation Act, 1963 clearly prescribes that any suit which does not fall in any of the Articles of the Schedule where the period of limitation has been prescribed, the limitation period of that suit shall be governed

by Article 137 of Schedule of the Limitation Act, 1963 which prescribes for a period of three years. It was contended since in the instant case the deceased/testator had died on 6.6.1987, therefore, the Will ought to have been got probated within a period of three years from the date of his death while as the Will has seen the light of the day only after the expiry of 14 years. This in itself is indicative of the fact that the Will seems to be a procured one. In order to support his contention, with regard to the period of limitation being applicable to the probate proceedings, the learned counsel for the appellants has relied upon the case in Kunvarjeet Singh Khandpur v. Kirandeep Kaur; (2008) 8 SCC463 10. I have carefully considered the submission made by the learned counsel for the appellants and have gone through the judgment. The question as to whether the period of limitation applies to a probate petition or not is no more res integra in view of the fact that it has been observed in the aforesaid judgment, since the grant of probate or the obtaining of the letters of administration is a continuing cause of action, therefore, the petition moved even after three years from the date of accrual of cause of action be considered to be in time, but the delay will have to be explained by the party as otherwise it may cast suspicion on the Will. In the instant case, the probate petition has been filed after more than 14 years from the death of Mangu Ram Pahuja which occurred on 6.6.1987. No reasonable explanation has been given by the respondent as to why she kept silent for such a long period of time. Therefore, this raises prima facie a doubt regarding the genuineness of the Will. This fact further gets compounded by the fact that the deceased/testator was 100 years of age and no effort has been made to show that at the time of making the Will, he was in a sound state of mind and capable of knowing as to what he was doing.

11. So far as the merits of the case are concerned, the respondent No.2/petitioner (Vidhya Devi) had examined three witnesses in support of proof of Will, namely, PW-1, Sukh Ram Jhakkar, Advocate, District Court, Faridabad; PW-2, Subhash Grover and PW-3, Vidhya Devi, respondent No.2/petitioner herself. The appellants/objectors to the Will in support of their case examined RW-1 Jai Narain, record keeper of the Sub-Registrar, RW-2 (Vijay Laxmi Sethi), appellant No.1 herself, RW-3, R.S. Rawat, clerk from the passport office, Delhi, RW-4 Ghasi Ram, cashier from PNJ Branch, West Patel Nagar and RW-5, Krishan Kumar

Pahuja, son of the deceased.

12. The learned trial court, after analysis of the statement of the witnesses, returned a finding that the Will dated 13.5.1986 purported to have been executed by Mangu Ram Pahuja, mark A, is the genuine Will of the deceased/testator. The learned trial court has also referred to judgments of various courts on the question of proof of the Will.

13. There is no dispute about the fact as to how the Will of the deceased/testator is to be proved. In this regard, Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872 are relevant and read as under :

Section 63 of The Indian Succession Act, 1925 Execution of unprivileged Wills. - Every testator, not being a soldier employed in an expedition or engaged in actual warfare, 12 [or an airman so employed or engaged,]. or a mariner at sea, shall execute his Will according to the following rules:- (a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction. (b) 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 a Will. (c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary. xxxxxxxxxxxxxxxx Section 68 of The Indian Evidence Act, 1872 Proof of execution of document required by law to be attested.-If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.

14. The judgment of the Supreme Court in Sridevi & Ors. vs. Jayaraja Shetty & Ors.; (2005) 2 SCC784observed that the manner of proof of Will is no different than the manner of proof of other documents. In this regard, it was observed:

It is well settled proposition of law that mode of proving the will does not differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by Section 63 of the Indian Succession Act, 1925. The onus to prove the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and proof of the signature of the testator, as required by law, need be sufficient to discharge the onus. Where there are suspicious circumstances, the onus would again be on the propounder to explain them to the satisfaction of the court before the will can be accepted as genuine. Proof in either case cannot be mathematically precise and certain and should be one of satisfaction of a prudent mind in such matters. In case the person contesting the will alleges undue influence, fraud or coercion, the onus will be on him to prove the same.

15. Relying on the judgment of the Apex Court, the trial court has returned a finding that the Will mark A has been validly and genuinely executed by the deceased/testator and the respondent/petitioner has been able to discharge the onus by producing PW-1, Sukh Ram Jhakkar, who was one of the attesting witness to the Will and who has identified not only his own signatures on the Will but also the thumb impression put by the deceased/testator. It has been stated by the learned trial court that this witness has also proved the signatures of the other attesting witness, namely, Peda Ram, who unfortunately is stated to be no more in existence. The respondent/petitioner has also examined PW-2, Subhash Grover, who is scribe of the Will and this clearly establishes to link of proof of the Will.

16. So far as the age of the deceased/testator being 100 years is concerned, it has been stated by PW-1 that he did not find anything amiss with regard to the fitness of the deceased/testator in making the Will. Similar is the statement made by the other two witnesses, namely, the petitioner/respondent herself as well as PW-3 that there was nothing to presume that the deceased/testator was not mentally in a

sound disposing of mind.

17. I have carefully considered the analysis of the evidence arrived at by the trial court as well as the submissions and the testimony of these witnesses. However, I am not convinced that the Will has been proved by preponderance of probability by the respondent/petitioner. The reason for drawing this irresistible conclusion is on account of the fact that it is established on record by the appellants that the deceased/testator was in the habit of putting his signatures. In this regard, the appellants have proved not only the previous will purported to have been executed by the deceased/testator on 3.4.1978 which is exhibit PW3R-1 which bears his signatures apart from thumb impression. They have also proved with the help of the record keeper RW-3, R.S. Rawat from the passport office that it bears the signatures of the deceased/testator Mangu Ram Pahuja who was issued a passport exhibit RW33. Similarly, RW-4, Ghasi Ram, who is a cashier from PNJ Branch of West Patel Nagar, where the deceased/testator was living before shifting to Faridabad and he has proved an account opening form exhibit RW41 which also bears the signatures of the deceased/testator. Therefore, it is clearly established that the deceased/testator used to put his signatures also. It is well possible that in addition to the signatures, he was putting his thumb impression also but in the case of Will in question, he has only put the thumb impression.

18. A person who is normally in the habit of putting his signatures then he would continue to do so irrespective of his age unless and until he is physically or medically disabled from putting his signatures. In the instant case, admittedly the deceased/testator has only put his thumb impressions. The fact that the age of the deceased/testator was around 100 years is not disputed by the respondent/petitioner. PW-1 also admits that the deceased was 80 or 100 years old and was very frail in health but he was not stated to have been accompanied by any family member. He admits that he did not draft the Will and that he did not know personally the testator. He also admits that he was brought to him by Peda Ram, who was the other attesting witness. When inquired about Peda Ram, he is stated to have died. He also admits that Peda Ram used to get professional work to him. These facts clearly show that the possibility of Peda Ram in simply getting the document duly thumb marked by the deceased/testator having been brought to

him for signatures, cannot be ruled out. This is so even if it is assumed to have been genuinely thumb marked by testator, it does not meet the requirement of law under Section 63 (c) of the Indian Succession Act, 1925. As a matter of fact, Peda Ram seems to be only a tout operating in the courts and, therefore, this evidence of PW-1 does not inspire confidence in court so as to take it as a proof of Will in question. In such circumstances, the respondent/petitioner was under an obligation to have established the reasons as to why the deceased/testator has not put his signatures and has only put his thumb impression. If the deceased/testator had put only his thumb impression and not the signatures, it is well possible that he was suffering from some physical disability which prevented him from putting his signatures on the questioned document. This fact in itself adds an added burden to the respondent/petitioner to have established that at the time when the deceased/testator had executed the Will, he was in a sound disposing of mind.

19. PW-2 is the scribe of the Will, who has stated that he is the person who has drafted the Will on the instructions of the executant. It is really very strange his educational qualifications are FSC and holding a diploma in Civil Engineering and yet he is acting as a scribe. It is very unlikely that a person who has done diploma in Civil Engineering would act as a 1, Sukh Ram Jhakkar, who was an advocate, had he stated that he had drafted the Will perhaps it would have inspired some confidence but the very fact that he has not stated so and in his place PW-2, who is admitting in his cross-examination that he has no specialized knowledge of drafting or pleading the case, in my view, raises a serious doubt about the genuineness of his being a person who has drafted the Will. Though, he has stated that he was maintaining a register where at entry No.494, the Will in question is duly entered at point E and the photocopy of the said register has been proved as exhibit PW21. If all these points are seen in the light of the fact that the Will which has been allegedly drawn by the deceased/testator which is mark A and has not been executed as a document, does not find any mention about the previous Will and that is the reason why he was revoking this Will.

20. In addition to this, the deceased/testator was normally living in West Patel Nagar and had shifted during the last one and a half year before his actual death

to Faridabad to live with the petitioner/respondent herein. It is at Faridabad that he has executed the Will and the possibility of his having been influenced by the respondent/petitioner to get the Will drafted in his favour cannot be ruled out. Therefore, all these factors clearly raise a fair amount of suspicion that the Will dated 13.5.1986 is not free from all suspicion which these facts and circumstances create. Therefore, because of these reasons, I feel that the Will dated 13.5.1986 is not proved by preponderance of probability purported to have been made by the deceased/testator Mangu Ram Pahuja. The deceased/testator was admittedly in a fairly advanced stage of his age; therefore, it was incumbent, in my considered opinion, on the respondent/petitioner to have proved that he was in a sound disposing of mind and competent to make the Will, which has not been done.

21. I feel that the trial court has grossly erred in holding that the respondent/petitioner has been able to prove the Will and thereafter granted the probate in her favour. Accordingly, for the reasons mentioned above, I set aside the judgment passed by the learned trial court dated 4.4.2008 granting probate in favour of the respondent/petitioner. No order as to costs.

22. The appeal stands allowed. V.K. SHALI, J.

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