

Kamla Devi vs.state

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Court : Delhi

Decided On : Feb-02-2018

Appellant : Kamla Devi

Respondent : State

Judgement :

* + % KAMLA DEVI STATE IN THE HIGH COURT OF DELHI AT NEW DELHI
TEST. CAS. 48/2000 versus 2nd February, 2018 Through: None.

... Petitioner

Through: None. Respondent CORAM: HONBLE MR. JUSTICE VALMIKI
J.MEHTA To be referred to the Reporter or not?. YES VALMIKI J.

MEHTA, J (ORAL) TEST. CAS. 48/2000 and I.A. No.15216/2010 (under Section 151 CPC) 1. This matter is on the Final Board of this Court since 12.11.2017, no one appears for the petitioner or the objector although it is 12 noon. I have therefore gone through the entire record and am proceeding to decide the case.

2. This testamentary case is filed by the petitioner Smt. Kamla Devi seeking probate of the Will dated 26.5.1995 said to be executed by one Sardar Gurcharan Singh Dhingra who expired at TEST CAS. 48/2000 Page 1 of 10 Delhi on 18.6.1995. At the time of his death the deceased Sardar Gurcharan Singh Dhingra was residing at SFS Flat No.143, Hauz Khas, New Delhi. It is this Hauz Khas property which the petitioner claims has been bequeathed to her in terms of the

Will dated 26.5.1995 of late Sardar Gurcharan Singh Dhingra. In terms of the facts which have emerged on record during the trial of this testamentary case admittedly the petitioner was a maid of the deceased Sardar Gurcharan Singh Dhingra and who also claimed to be a wife of Sardar Gurcharan Singh Dhingra but not only no evidence has been led of any marriage of the petitioner with Sardar Gurcharan Singh Dhingra but the fact of the matter is that the petitioner admits that she is the wife of Sh. Ram Chander and there was no divorce of the petitioner with Sh. Ram Chander.

3. The petition has been contested by the objector Smt. Inni Dhingra who is the wife of the son of deceased testator Sardar Gurcharan Singh Dhingra. As per the objections filed by Smt. Inni Dhingra the present petition is prayed to be dismissed on two counts. Firstly, it is argued that Sardar Gurcharan Singh Dhingra had executed his Will dated 5.4.1994 in favour of the objector with respect to the TEST CAS. 48/2000 Page 2 of 10 Hauz Khas flat and the objector has obtained letters of administration of the Will dated 5.4.1994 from the court of the District Judge of Delhi on 15.9.2000. The second ground for dismissal of the testamentary case is that it is pleaded that the Will dated 26.5.1995 propounded by the petitioner has been forged and fabricated by the petitioner.

4. At the outset, I would like to note that in the Will which is relied upon by the petitioner dated 26.5.1995 no executor has been appointed and therefore in view of Section 222 of the Indian Succession Act, 1925 probate cannot be granted of the Will. What will however be granted, in case this testamentary case has to be allowed, is a letter of administration with the Will annexed.

5. The following issues were framed in this testamentary case on 8.8.2005:-

"1. Whether the present petition is barred by time?. (OPD) 2. the Will executed by Whether importunity?. (OPD) Relief?. the testator suffers from 3.

6.

... Petitioner

in support of her case has filed her own affidavit by way of evidence which has been exhibited as Ex. PX. TEST CAS. 48/2000 Page 3 of 10

... Petitioner

has been cross-examined on 6.12.2006.

... Petitioner

in her affidavit of evidence has proved the certified copy of the Will dated 26.5.1995 as Ex.PW

and this Will is also proved through one attesting witness PW-4, namely, Sh. D.P. Singh, Advocate. Sh. D.P. Singh, Advocate is one of the attesting witness of the Will dated 26.5.1995. Both, the petitioner and the attesting witness PW-4 Sh. D.P. Singh have been cross-examined. Objector has filed affidavit by way of evidence through her attorney Sh. Bawa Harwinder Singh and has inter alia proved the certified copy of the letter of administration granted by the court of the District Judge, Delhi, as Ex.RW1/17. This letter of administration has been granted with respect to the last Will Ex.P-1 dated 5.4.1994 of late Sardar Gurcharan Singh Dhingra.

7. In my opinion, this testamentary case is liable to be dismissed though petitioner and the attesting witness PW-4 Sh. D.P. Singh have given their testimonies and proved the certified copy of the Will dated 26.5.1995 as Ex.PW3/1. The testamentary case has to be dismissed for the reason that the original of the Will which is relied upon by the petitioner has not seen the light of the day and there is no explanation which is given by the petitioner or PW-4 Sh. D.P. Singh TEST CAS. 48/2000 Page 4 of 10 as to why the original of the Will is not forthcoming. Certified copy of the Will existing in the Sub-Registrars record is only secondary evidence of the Will and not primary evidence because primary evidence of the Will is the original Will itself. The fact that it is only the original Will which can be proved for granting a probate of letter of administration becomes clear from Section 70 of the Indian Succession Act and which provides that a Will can be revoked by destroying the same such as by tearing the same or by burning the same. This Section 70 of the Indian Succession Act reads as under:-

"70. Revocation of unprivileged will or codicil.-No unprivileged will or codicil, nor any part thereof, shall be revoked otherwise than by marriage, or by another will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same. (underlining added) 8. The only way in which the Court will accept secondary evidence being a certified copy of the Will as a substitute of the original Will where evidence is led that the original Will has been destroyed accidentally and it has not been destroyed by the testator with the intention of revoking the same. This is clear from the language not only of Section 70 of the Indian Succession Act as reproduced above TEST CAS. 48/2000 Page 5 of 10 but also from Section 237 of the Indian Succession Act which reads as under:-

"237. Probate of copy or draft of lost will.-When a Will has been lost or mislaid since the testator's death, or has been destroyed by wrong or accident and not by any act of the testator, and a copy or the draft of the will has been preserved, probate may be granted of such copy or draft, limited until the original or a properly authenticated copy of it is (underlining added) produced. 9. There is no evidence led by the petitioner that the original Will dated 26.5.1995 has been lost or misplaced or has been destroyed only by a wrong or accident and not with the intention to revoke the same as stated in Section 70 of the Indian Succession Act. Therefore in view of the fact that it is not proved that original of the alleged Will dated 26.5.1995 has been lost or mislaid or has not been destroyed by wrong or accident, in view of the provisions of Sections 70 and 237 of the Indian Succession Act, it has to be held that the original Will would have been destroyed by the act of the testator for revoking the said instrument.

10. For arriving at a conclusion for dismissal of this testamentary case because of provisions of Sections 70 and 237 of the Indian Succession Act in view of the undisputed position emerging on record that only the certified copy of the Will has been proved as TEST CAS. 48/2000 Page 6 of 10 Ex.PW

and original of the Will has not seen the light of the day with the fact that it has not been deposed as to the original Will being destroyed by a wrong act or accident,

this Court is proceeding on the basis that the original Will dated 26.5.1995 was duly executed in view of the deposition of PW-4 Sh. D.P. Singh and who had deposed in his examination-in-chief with respect to the due execution and attestation of the Will and he has stood his ground during his cross-examination or nothing adverse has been elicited. Accordingly in my opinion this probate petition is liable to be dismissed firstly because there is no original of the Will dated 26.5.1995 which has been proved on record and only certified copy has been proved as Ex.PW

and no testimonies being given on behalf of the petitioner and her witness Sh. D.P. Singh that the original of the Will has been destroyed only by an unintentional act or a wrong act and not deliberately by the testator.

11. The second reason for dismissing of the probate petition is that undisputedly a letter of administration was granted in favour of the objector by the District Judges order dated 15.9.2000 which has been proved as Ex.RW1/17. This order Ex.RW1/17 makes it clear that the Will dated 5.4.1994 of late Sardar Gurcharan Singh Dhingra is TEST CAS. 48/2000 Page 7 of 10 the last Will of late Sardar Gurcharan Singh Dhingra and which was proved as Ex.P-1 in the aforesaid letter of administration case filed by the objector Smt. Inni Dhingra.

12. In law, the decision of a letter of administration case operates as a judgment in rem in view of the provision of Section 41 of the Indian Evidence Act, 1872 and which provision reads as under:-

"41. Relevancy of certain judgments in probate, etc. jurisdiction- A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial admiralty or insolvency jurisdiction which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to an specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant. Such judgment, order pr decree is conclusive proof- that any legal character which it confers accrued at the time when such judgment, order or decree came into operation; that any legal character, to which it declares any such person to be entitled, accrued, to that

person to be entitled, accrued, to that person at the time when such judgment, order or decree declares it to have accrued to that person; that any legal character which it takes away from any person ceased at the time from which judgment, order or decree declared that it had ceased or should cease; and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property. 13. Finality with respect to a letter of administration being granted of a Will is also clear from the provision of Section 211 of the Indian Succession Act and which provides that a letter of TEST CAS. 48/2000 Page 8 of 10 administration once granted has the effect that the person to whom the letter of administration is granted will be treated as a legal representative for all purposes of the deceased testator and that the property of the deceased testator/person vests in the person to whom the letter of administration is granted. Section 211 of the Indian Succession Act reads as under:-

"211. Character and property of executor or administrator as such.- (1) The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such. (2) When the deceased was a Hindu, Muhammadan, Buddhist, Sikh, Jaina or Parsi or an exempted person, nothing herein contained shall vest in an executor or administrator any property of the deceased person which would otherwise have passed by survivorship to some other person. 14. The only way in which letter of administration granted would not have been binding was if the same was recalled in proceedings instituted under Section 263 of the Indian Succession Act providing for filing of an application/petition for revoking the letter of grant of administration. Admittedly no application has been filed by the petitioner for revocation of the letter of administration granted to the objector Smt. Inni Dhingra in terms of Ex.RW1/17. Even the limitation period for filing of the application under Section 263 of the Indian Succession stands expired and for which period of limitation is TEST CAS. 48/2000 Page 9 of 10 three years under Article 137 of the Limitation Act because petitioner was put to notice of the grant of letter of administration Ex.RW1/17 in terms of the objections filed by the objector way back on 29.10.2004. Therefore once there is finality to the letter of administration Ex.RW1/17 then no fresh letter of administration can be granted in favour of the

petitioner in view of Section 211 of the Indian Succession Act read with Section 41 of the Indian Evidence Act.

15. For the aforesaid reasons there is no merit in the petition and the same is hereby dismissed, leaving the parties to bear their own costs. FEBRUARY02 2018
AK VALMIKI J.

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