

Pradeep Kumar vs.state & Anr

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Court : Delhi

Decided On : Feb-25-2019

Appellant : Pradeep Kumar

Respondent : State & Anr

Judgement :

\$~F-72 * + TEST.CAS. 12/2009 PRADEEP KUMAR IN THE HIGH COURT OF DELHI AT NEW DELHI

... Petitioner

Through Mr.Pravir Kumar Jain, Advocate. versus STATE & ANR Through Mr.Amit Punj and Mr.Archit Arora, Advocates for R-2.

... RESPONDENTS

% Date of Decision:

25. h February, 2019 CORAM: HON'BLE MR. JUSTICE MANMOHAN

JUDGMENT

MANMOHAN, J: (Oral) 1. Present petition has been filed under Section 276 of Indian Succession Act, 1925, for grant of probate in respect of Will dated 30th December, 1996, of late Shri Dwij Kumar Shastri, father of the petitioner and respondents Nos.2 to 5.

2. In the petition, it has been averred that Shri Dwij Kumar Shastri son of Sh. Thakur Mangal Sainji expired on 08th April, 1997. It is averred that Shri Dwij Kumar Shastri during his lifetime had executed his last and final Will dated 30th December, 1996, which was duly registered. It was mentioned in the Will, that it shall come into effect TEST.CAS.12/2009 Page 1 of 11 only after the death of the testator and his wife Smt. Kusum. It is averred that Smt. Kusum passed away on 20th November, 2007. The aforesaid Will dated 30th December, 1996 is reproduced hereinbelow:-

"WILL I, Dwij Kumar Shastri S/o Late Thakur Shri Mangal Sain, resident of C-4/113, S.D.A, Mangal Bhawan, New Delhi 110016 on this day of 30-12-96 in my full senses and without any pressure or anxiety, make this Will which will be effective/implemented after my death and my wife Kusums death. The above mentioned C-4/113, S.D.A., Mangal Bhawan is completely my Kothi. Nobody has invested to build this house, neither my family member nor relatives. I have got it made by my income and loan from Delhi Administration & my friends, details of which are in the receipt of payment of Govt. dues and names of my friends mentioned in a big diary. Keeping in mind the maintenance, Ground Rent & House Tax etc., I distribute this Kothi among my three sons as written below. My both the daughters have no right/claim in this Kothi because their right/claim has already been given in the form of dowry and cash. It is my keen desire and order that none of my sons will sell, mortgage, execute power of attorney or transfer his portion from this kothi. I give right hand portion set of 1st Floor, C-4/113, S.D.A. and complete ground floor of Ghanta Ghar house to my elder son Mahendra Pratap Singh. I give left hand side portion set of 1st Floor and roof of Ghanta Ghar house to Ashok Kumar. Right hand side small room set of ground floor will be given on rent and rent income will be distributed equally between Mahendra Pratap Singh and Ashok Kumar. TEST.CAS.12/2009 Page 2 of 11 I give left hand side portion of big room set on ground floor and complete third floor to Pradeep Kumar. All three brothers will pay their House tax, ground rent and other government dues as per their share. I distribute half portion of Padhele named farms by the river side in Village Kurra Chittarpur, equally among three sons. All three brothers will arrange to distribute Rs. 51/- shirni on the memorial (chatari) of my parents in the village. Rs. 251/- shall be sent to Sidh Baba every year. After my death, all three brothers

will bear the expense of livelihood of my wife, but I myself give special responsibility to Pradeep Kumar. My first Will dated 20.9.1996, registered be treated as cancelled. Sd/- (Dwij Kumar Shastri) Signatures Sd/

Kirpal Singh B-263, Matiyala Extension Uttam Nagar, New Delhi Sd/

Swarn Singh Off. Cum Res. S-21, Pvt. Colony Srinivas Puri, New Delhi 3. It is stated that on 17th March, 2009, the petitioner filed the present probate petition for grant of probate in respect of the registered Will of his late father.

4. It is stated that on 20th July, 2009, the respondent no.2 being the eldest son of late Shri Dwij Kumar Shastri, filed his objections, wherein he claimed execution of a family agreement dated 30th TEST.CAS.12/2009 Page 3 of 11 December, 1997, and stated that the will dated 30th December, 1996 was given a go by.

5. It is stated that respondent Nos. 3 and 5 being son and younger daughter of late Shri Dwij Kumar Shastri filed their written statement and accepted the registered Will.

6. It is stated that on 21st October, 2009, respondent No.4 i.e. elder daughter of late Shri Dwij Kumar Shastri filed her objections which were later withdrawn on 26th April, 2010. The said withdrawal was recorded vide order dated 24th May, 2010.

7. Vide order dated 20th August, 2010, the following issues were framed:-

"(i) Whether the registered Will dated 30th December, 1996, is the legally and validly executed Will of late Shri Dwij Kumar Shastri?. OPP (ii) Whether the Will dated 30.12.1996 was given a go-by in view of the family settlement dated 30.12.1997?. If so, what would be its effect?. OPD (iii) Whether the family settlement dated 30.12.1997 has been signed by all the legal heirs?. OPD (iv) Relief(s). Learned counsel for petitioner submits that in the present 8. proceedings the only issue that arises for consideration is with regard to genuineness and execution of the Will. He states that Issues Nos.2 and 3 should be struck off as they have been wrongly framed.

9. Per contra, learned counsel for the respondent no.2 states that Issue Nos.2 and 3 have been rightly framed inasmuch as the TEST.CAS.12/2009 Page 4 of 11 subsequent Family Settlement operates as an estoppel against the petitioner. In support of his submission, he relies upon the judgment of this Court in Krishan Dass Gupta Vs. State & Ors., (2012) SCC OnLine Del 977. The relevant portion of said judgment is reproduced hereinbelow:-

"12. On the pleadings of the parties, the Court on 10.02.2003 framed the following issues for consideration:-

"the

"1. Whether two Wills dated 06.03.1992 and 21.09.1998 which have been set up by petitioner and respondent No.3 respectively are the valid Wills?.

2. Whether the present petition is not maintainable in view of Section 278(1)(d) of the Indian Succession Act, 1925?.

3. Whether the present petition is not maintainable in view of Section 235 of Indian Succession Act?.

4. Whether the petition has been properly verified in the manner as provided in Section 281 of Indian Succession Act, 1925?.

5. Whether the Will dated 6.3.1992 has been revoked/cancelled by the testator Shri Bhiku Ram Gupta by his subsequent Will dated 21.9.1998?.

6. Whether Administration in respect of Will dated 6.3.1992? the petitioner is entitled for Letter of 7. Whether the family settlement dated 2nd October, 1991 is valid and if so its effect?.

8. Relief?." xxx xxx xxx 46. In view of the aforesaid, I have no hesitation in upholding the validity of the family settlement which, it is stated, at the risk of repetition, was nothing but a memorandum of what had TEST.CAS.12/2009 Page 5 of 11 10. already taken place between the parties. It is not in dispute that the parties were living in their demarcated portions prior to their entering into the family settlement. It is also the undisputed position that the parties continue to do

so till date. It is, therefore, too late in the day to challenge the sanctity of the family settlement. As noticed above, rules of evidence recognize estoppel. Substantive law and the law of evidence of which the rules of estoppel are an integral part, operate in their respective fields. A conveyance of title requires registration of the written instrument but a grant may be fed by estoppel and may confer sanctity to even an oral agreement between the parties, initially acted upon by the parties, acquiesced in and taken advantage of, but later on sought to be discarded on the ground that it lacked registration under the substantive law. The petitioner-PW1 has filed his evidence by way of affidavit. He has proved the original Death Certificate of the testator as Ex.PW1/1. He has also proved the original Will dated 30th December, 1996 as Ex.PW1/2. He also proved the original Death Certificate of Smt. Kusum, wife of the testator, as Ex.PW1/3.

11. The execution of the Will has been proved by PW-4, Mr Kripal Singh, who was an attesting witness to the Will dated 30th December, 1996. He stated that late Shri Dwij Kumar Shastri had signed the will in his presence. The relevant portion of PW4 statement is reproduced hereinbelow:-

"The Will was firstly signed by Sh. Dwij Kumar Shastri then by me and subsequently by MR. Swaran Singh. Sh. Dwij Kumar Shastri along with Mr. Swaran Singh was present when I had signed the Will as witness at Point-Y. Everyone had signed in each others presence. The Ex.P-1 was presented for registration after it was executed. I was present at the time of registration TEST.CAS.12/2009 Page 6 of 11 12. The respondent no.2, who is the only contesting party has also accepted the execution of the will dated 30th December, 1996 during his cross examination. He accepted that the will dated 30th December, 1996 was the last will of his father and he also identified the signature of his father. The relevant portion of statement of RW1 during his cross-examination is reproduced hereinbelow:-

"It is correct that my father had told me in December, 1996 itself about the execution of the WILL dated 30.12.1996. I can identify the signature of my father. After seeking the original WILL dated 30.12.1996 (Ex.P-1), I identify the signature of my father at point Mark X on two pages. This also bears the photograph of my

father, which I identify..It is correct that the WILL of my father dated 30.12.1996 is the last WILL of my father. 13. Consequently in the present case the petitioner has proved that (i) the Will was signed by the testator, (ii) he at the relevant time was in a sound and disposing state of mind, (iii) he understood the nature and affect of the disposition, and that (iv) he put his signature to the document of his own free Will. (See. Jagdish Chand Sharma Vs. Narain Singh Saini (Dead) Through LRs and Ors., (2015) 8 SCC615 14. In the opinion of this court, Issue Nos. 2 and 3 do not arise for consideration in a probate petition. A Court of Probate is said to be a Court of conscience which is not to be influenced by private arrangements of a party. Either this Court shall grant probate to a Will or reject such a grant. For a Probate Court, there is no middle path for a happy compromise. In Sushila Bala Saha Vs. Saraswati Mondal, AIR1991 Cal 166, the Calcutta High Court has held as under:-

"TEST.CAS.12/2009 Page 7 of 11 17. xxxx.In any event, as we have already stated that the Probate Court cannot go into the question of title, the Probate Court is not to be influenced by any agreement of the parties and if the Will was duly executed and the maker of the Will was of sound and disposing state of mind, then the Probate should be granted to that Will. 15. It is further settled law that the jurisdiction of the Probate Court is limited being confined only to consider the genuineness of the Will. A question of title arising under the Act cannot be gone into the probate proceedings. Construction of a Will relating to the right, title and interest of any other person is beyond the domain of the Probate Court. In Pasupati Nath Das (Dead) vs. Chanchal Kumar Das (Dead) By LRs. & Ors., 2018 (13) Scale 486, the Apex Court held as under:-

"12. We must, at the outset, say that the scope of the matter arising from Probate proceedings is very limited. The scope of the matter is primarily and principally regarding the genuineness of the execution of the testament or Will. This part has been succinctly dealt with in a decision rendered by this Court in Krishna Kumar Birla v. Rajendra Singh Lodha¹. Paragraphs 57, 66 and 67 of the said decision spell out the scope of the enquiry in Probate proceedings as under: 57. The 1925 Act in this case has nothing to do with the law of inheritance or succession which is otherwise governed by statutory laws or the custom, as the case may be. It

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16. makes detailed provisions as to how and in what manner an application for grant of probate is to be filed, considered and granted or refused. Rights and obligations of the parties as also the executors and administrators appointed by the court are laid down therein. Removal of the existing executors and administrators and appointment of subsequent executors are within the exclusive domain of the court. The jurisdiction of the Probate Court is limited being confined only to consider the genuineness of the will. A question of title arising under the Act cannot be gone into the (sicprobate) proceedings. Construction of a will relating to the right, title and interest of any other person is beyond the domain of the Probate Court. (Emphasis by us) In *Kanwarjit Singh Dhillon vs. Hardyal Singh Dhillon & Ors.*, AIR 2008 SC306 the Apex Court held that, it is well settled law that the functions of the probate Court are to see that the Will executed by the testator was actually executed by him in a sound disposing state of mind without coercion or undue influence and the same is duly attested. It was, therefore, not competent for the probate court to determine whether late S. Kirpal Singh had or had not the authority to dispose of the suit properties which he purported to have bequeathed by his Will. The probate Court is also not competent to determine the question of title to the suit properties nor will it go into the question whether the suit properties bequeathed by the Will were joint ancestral properties or acquired properties of the testator.(emphasis supplied).

17. Further, reliance placed by the respondent no.2 on *Krishan Dass Gupta* (supra) is misconceived as in the said case, during the lifetime of the testator, family settlement had been executed and subsequently to give effect to the said family settlement, the first Will had been executed by the testator. The issue of family settlement was decided in the said case, as one of the parties therein had set up a second Will subsequent to the execution of the family settlement. This would be apparent from the following reasoning in the said judgment.

47. Issue No.7 is accordingly decided by upholding the family settlement. The effect of upholding its validity, needless to state, is that it lends authenticity to the will dated 6th March, 1992 as the said will is on identical lines with the family settlement and the will having been executed less than six months of the family settlement leads to the inference that the testator merely executed the will to place matters beyond the pale of controversy and with a view to clinch

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the whole matter. 18. In any event, in the present case, family arrangement is subsequent to the Will and consequently the principle of estoppel will not apply.

19. It is pertinent to mention that Order XIV Rule V (2), Code of Civil Procedure, 1908 grants power to this court to strike off any issues that have been wrongly framed or introduced. In Chikkaveeragowda V. Devegowda AIR1975 Kant 145, the Karnataka High court upheld the trial courts decision of deleting an issue on the ground that the said issue cannot arise for consideration in a suit for permanent injunction simpliciter.

20. Consequently, this Court is of the opinion that issue nos. 2 and 3 have been wrongly framed and are thus struck off.

21. Accordingly, the present petition is allowed. The letter of administration in respect of the Will dated 30th December, 1996 of the testator late Shri Dwij Kumar Shastri annexed thereto is granted in favour of the petitioner, subject to his furnishing the requisite Court TEST.CAS.12/2009 Page 10 of 11 fee in terms of the latest valuation reports and submitting an administrative bond with one surety in accordance with law. FEBRUARY25 2019 KA/sp MANMOHAN, J TEST.CAS.12/2009 Page 11 of 11

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