

Kanwar Saln and ors. Vs. State and ors.

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Court : Delhi

Decided On : Jul-30-1975

Reported in : AIR1976Delhi11; 1976RLR96

Judge : Avadh Behari Rohatgi, J.

Acts : [Succession Act, 1925](#) - Sections 272

Appeal No. : F.A.O. 135 of 1968

Appellant : Kanwar Saln and ors.

Respondent : State and ors.

Advocate for Def. : Kapil Sibal, Adv.

Advocate for Pet/Ap. : R.K. Makhija, Adv

Judgement :

1. One Jawahar Devi was an old lady. She was 83 years of age. She was the owner of two houses Nos. 3755 and 3756 situated in Kucha Parma Nand, Delhi. These Properties had been let to the tenants. She was getting rental income. This was her main source of sustenance.

Jawahar Devi was a widow. She was issueless. Her husband Sardari Lal died in 1939.

Sardari Lal had a sister Thakurani Devi by name. She died in 1963. She had three sons and a daughter. Their names are Kanwar Sain Kapoor, Suraj Singh Kapoor and Bahadur Singh Kapoor and Bachhi Rani.

2. Jawahar Devi had a sister. Her name was Rela Devi, She is dead. She had a son Naval Kishore. Jagdish Narain Tandon is the son of Naval Kishore. Jagdish Narain's son is Deepak Tandon. He is a minor.

3. Deepak Tandon son of Jagdish Narain through his father made an application to the District Court under Section 272 of the Indian Succession Act for grant of probate or letters of administration. He said that Jawahar Devi made a will on 6th of June, 1963 and that he was a beneficiary under the will.

4. Under the will Deepak gets one house - House No. 3756. Deepak was two years old at the time of the making of the will. As regards the other house No. 3755 the testatrix gave a direction that that house should be used for the purpose of a Dharamshala for the benefit of the general public. She constituted a board of trustees to manage the Dharamshala. The following trustees were appointed by her:-

1. Kailash Nath Mehra S/o Ambika Prasad.

2. Raj Kishore Tandon.

3. Bahadur Singh.

5. This will dated 6th June, 1963 was presented for registration to the Sub-registrar on the same day. It was duly registered. Just after one year of the Execution of the will Jawahar Devi died. She died on 6th of June, 1964.

6. Deepak made the application to the District Court on 5th of September, 1964. Citation was issued. Kanwar Sain, Suraj Singh, Bahadur Singh and Bachhi Rani and daughter of the sister of Sardari Lal opposed the grant. They said that Jawahar Devi did not make any will in favor of Deepak Tandon. The will was forged it was said. It was then said that Jawahar Devi did not have sound disposing mind at the time of the Execution of the will.

7. Witnesses were examined on both sides. The District Judge came to the conclusion that the will propounded before him was duly executed by Jawahar Devi. She had a sound disposing mind when she made the will. He pronounced for the will. He granted Letters of Administration with the will annexed to Deerak Tandon. He dismissed the objections. This order was made on 3rd June, 1968. Kanwar Sain, Surai Singh, Bahadur Singh sons of Thakurni Devi and Kailash Nath S/o Ambika Prasad now appeal to this Court against the order of grant.

8. The evidence of Deepak Tandon the propounder of the will establishes these facts. The will was drafted by a lawyer Mr. Narinder Dutt, Advocate. He appeared in the witness box. He prepared a draft of the will. He got it typed at the instance of Jawahar Devi. She attended his office. She gave instructions to the lawyer. She was with him for about an hour on the first occasion. This was in May, 1963. Again she went to him to collect the will. The lawyer explained the contents of the will to her. She approved of the will.

9. The Sub-registrar is the second witness, He said that the will was produced before him on 6th June, 1963. Jawahar Devi appeared before him. Execution was admitted by her. The Sub-registrar admitted the will to registration. He explained the contents of the will to the testatrix. She admitted it to be her last will and testament. In addition to signatures she also affixed thumb mark in his presence. Hori Ram, Pleader, identified Jawahar Devi before the Sub-registrar.

10. Two attesting witnesses of the will are R. K. Tandon and Jagdish Narain Tandon. They are brothers. Jagdish Narain is the father of Deepak Tandon. R. K. Tandon is his uncle. Both the attesting witnesses appeared in witness-box. They deposed that they signed the will in presence of the testatrix. She was in a sound disposing mind at that time. The contents of the will were explained by R. K. Tandon to Jawahar Devi. She admitted the will to be correct and signed the will in their presence.

11. The appellants examined 8 witnesses. They tried to show that Jawahar Devi was more than 80 years of age at the time of the Execution of the will. She was hard of hearing. She could not see. She was operated in the eye twice - once in 1959 and a second time in 1965. She was unable to walk. Her mental faculties

were impaired due to old age. She was unable to take decisions. She was unable to understand things. This is the purport of their evidence.

12. Mr. Makhija counsel for the appellant in the first Place has contended that there is no proof on the record to satisfy the conscience of this court that the instrument propounded by Deepak Tandon is the will of a free testatrix. He argued that the will set up is a fabricated document. The burden of his argument was that there is no independent attesting witness of the will. He said there are circumstances attending the Execution of the will which excite and arouse suspicion of the court. The attesting witnesses are the father and the uncle of Deepak Tandon. Their word cannot be relied upon, he argued Jagdish Narain, it was said took a leading part in the Execution of the will. He introduced the lawyer to the old lady. Narinder Dutt was a class fellow of Jagdish Narain and therefore it was said that Narinder Dutt was not a reliable witness. In any case Narinder Dutt did not sign the will nor did he get it executed and registered. Then it was said that the relations were not consulted. H. K. Kapoor brother of the testatrix was living in Delhi. He was not consulted at the time of making the will. The Sub Registrar did not know the lady himself. She was identified by Hori Lal. Hori Lal is a Professional identifier. Without knowing the lady personally Hori Lal identified her for which he was Paid Rs. 3/-. These are the various factors, the counsel said, which go to prove that the will is not a genuine document.

13. To all these manifold arguments there is a short answer. The appellants Kanwar Sain, Surai Singh, Bahadur Singh and Bachhi Rani brought a suit for administration on 5th of July, 1964 in the court of the Sub-Judge. To this suit Deepak Tandon, Jagdish Narain, R. K. Tandon were party defendants among others. In paragraph 5 of this plaint an important averment was made which to a very large extent demolishes the case of the appellants. I will read the paragraph in full. It runs as follows:-

'It seems defendants 12 and 13 (Jagdish Narain and R. K. Tandon) who were the relatives of Smt. Jawahar Devi on her parents' side imposed upon her and made her sign a document purporting to be a will dated the 6-6-1963. Being in 1963 about 82 years of age, she was deaf and had almost lost her vision. She could not

even understand what was talked to her. The said defendants are her sister's grandsons and she had attachment for them. Later his father (L. Nawal Kishore Tandon) turned defendant No. 12 Jagdish Narain out of his house and shelter, he being a wastrel. He induced the old lady to allow him to live in one room of her house No. 3756 in Kucha Parmanand, Darya Gani, Delhi. Probably the whole show of turning defendant No. 12 out of doors was enacted to let him have a foot hold in the house of the deceased. Suffice it to say that the old lady being too feeble both in mind and body, defendants Nos. 12 and 13 (who are real brothers) took undue advantage of their relationship in the garb of protecting and serving her and made her sign the said will without her understanding what she was subscribing to. So the will cannot be considered to be the conscious act of a person knowing her interests or having a disposing mind, besides she never had any independent advice. Even before the Sub Registrar her age was not divulged to avoid all suspicion of lack of understanding, advanced senility and helplessness.'

14. From this paragraph it is quite clear that it is admitted that Jawahar Devi did sign and execute the will. The only plea raised in this paragraph is that Jagdish Narain his brother exercised undue influence on the old lady. In other words what is said is that the old lady did not know what she was doing it was not the act of a free and independent mind. She had no sound disposing mind.

15. This paragraph in my opinion is a damning piece of evidence. Nowhere it is said that Jawahar Devi did not sign the will. That she did sign the will appears to be the underlying admission. The appellants admit that Jagdish Narain and R. K. Tandon are the grandsons of the deceased's sister and that 'she had an attachment for them'. If that is admitted it is not difficult to understand why she made a will in favor of Deepak Tandon. She wanted to give a part of her property to the descendants of her deceased sister. She did not want to give anything to husband's family. It is true that she got these properties from her husband on his death and became the owner of these properties by reason of the Married Women's Property Act. Hindu Succession Act made her absolute owner. But it appears that she had no affection for the sons and daughter of the sister of her husband. She was deeply attached to her own sister. For her heirs she had

affection.

16. The only question that remains for decision is whether the testatrix had a sound disposing mind at the time of the Execution of the will. It appears to me that she was in full senses and was mentally alert at the time of the Execution of the will. No undue influence was exercised on her. This conclusion can be drawn from the fact that Jawahar Devi was managing her two properties till the very last. She used to recover rent from the tenants. She used to sign the receipts. This is the appellant's own evidence (See R. W. 5, R. W. 7 and R. W. 8). The lady who could collect rent and issue receipts and manage the property herself till the age of 82 or so must be in possession of her senses. She was able to go to the lawyer twice in 1963. She was able to instruct him for more than 4n hour. I have no reason to disbelieve that evidence of the lawyer Narinder Dutt.

17. It seems to me that the will propounded is a natural will. The apellants themselves admit that Jawahar Devi. was attached to Jagdish Narain. This is why Jawahar Devi made a bequest in favor of his son. Jagdish Narain was living with the old lady for 6 or 8 years. He was looking after her. In 1964 just before her death he took her to the hospital.

18. It was said that Jagdish Narain had influence with the old lady. But in order to avoid a will it is not enough that there was influence. It must be shown that the influence destroyed the free agency of the testator. Then it can be said to be undue influence. Persuasion, appeals to the affections or ties of kindered, to a sentiment of gratitude to past services, or pity for future destitution or the like - these are all legitimate and may fairly be pressed on the testator. (See Charu Chandra Mukheriee v. Khitish Chandra Mukheriee. Air 1948 Cal 351 following Hall v. Hall (1868) 1 P & D 481.

19. Lord Carnworth has said: 'Undue influence cannot be presumed'. (Boyse v. Ross Borough, 1857) 6 Hlc 2. While the overall burden of proving a will lies on those who propound it, such burden is, in general, discharged by showing that the will was duly executed and that the testator had testamentary capacity. On these matters being shown, those alleging undue influence must prove it; for, as already stated, undue influence cannot be presumed. It is not sufficient to show that the

circumstances attending the Execution are consistent with its having been procured by undue influence, it must be shown that they are inconsistent with any other hypothesis. There is no undue influence unless the testator if he could speak his wishes would say 'this is not my wish but I must do it.' (See Williams and Mortimer - Executors, Administrators and Probate p. 162 (1970) ed.)

20. The other thing of note is that Jawahar Devi has not given both houses to Jagdish Narain's son. She has given one. One she has set apart for the use of Dharmashala. If the will had been forged there would have been no provision for Dharamshala this shows the righteousness of the transaction this is the weightiest factor for pronouncement in favor of the will. Then out of the trustees of the board of management two are from the appellants before me. Kailash Nath and Bahadur Singh are two of the three trustees. That the testatrix did not completely ignore them is clear from the provision of the will by which they were appointed trustees. But she did not make a bequest in their favor. All that she wanted them to do for her is that they should manage her Dharamshala after her death. If the will had been a spurious document Kailash Nath and Bahadur Singh would not have been appointed as trustees.

21. There are no particulars of undue influence in the objection petition. Nor is there any satisfactory evidence on the record to prove that the old lady was coerced by Jagdish Narain into doing that which she did not desire to do or in other words he exercised undue influence. That Jawahar Devi died after a year of the Execution of the will is a factor in favor of the genuineness of the will. She has signed the will at several places. She also thumb marked it before the sub-registrar. She has made meticulous provisions in the will to ensure that on attaining majority Deepak gets the property.

21-A. The District Judge was also of opinion that it was a natural will. He said:

'There was nothing unnatural in the old lady preferring the grand children of her own sister to the grand children of the sister of her husband, who had died some years earlier and if the respondents were entitled to succeed under the ordinary law of inheritance, that may have been the very reason for the old lady making the will and thereby diverting the course of devolution to her own relations in

preference to those of her deceased husband'.

22. It was said that Jawahar Devi was getting on in years and did not have the mental capacity to make a will. I do not agree. The degree of capacity which must be retained by the old is dealt with in *Den v. Vancleve*, (2 Southard at p 600 cited in *Banks v. Goodfellow*, (1870) Er 5 Qb 549. There it was said:-

'By the terms a sound and disposing mind and memory it has not been understood that the testator must possess these qualities of mind in the highest degree; otherwise, very few would make testaments at all: neither has it been understood that he must possess them in as great a degree as he may have formerly done, for even this would disable most men in the decline of life; the mind may be in some degree debilitated, the memory may have become in some degree enfeebled and yet there may be enough left clearly to discern and discreetly to judge of all those things and all those circumstances which enter into the nature of a rational, fair, and just testament. But if they have so far failed as that these cannot be discerned and judged of then he cannot be said to be of sound and disposing mind and memory.'

23. Criticism was made of certain writings which appear in the will in hand. The boundaries of the property and the names of the trustees are written in hand. The counsel said that on this aspect the evidence is discrepant. As regards the person who filled these blanks here is the dependable testimony of the lawyer who says that he filled the blanks and wrote the boundaries and the names of the trustees himself. This criticism is therefore not well founded.

24. Criticism was made that the lawyer should not be believed as he did not sign the will himself. There is no requirement of law that lawyer must sign the will.

25. Criticism was made that the old lady did not consult her own brother. In my opinion, this shows strength of her will and a determined mind.

26. It was said that neither in the will nor before the sub-registrar the age of the lady was given. This is also not required by law.

27. Capital was sought to be made of the tenants' evidence who deposed that she was unable to take decisions. When the tenants asked for repairs she did not reply. It seems to me that she was a shrewd landlady and knew where her pecuniary interests lay.

28. The counsel criticised the evidence of Hori Lal who identified the lady. This is true that Hori Lal is a professional identifier. But that factor alone will not invalidate the will.

29. From the surrounding circumstances it appears that the will is the offspring of the old lady's own volition, and not the record of some one else.

30. For these reasons I would dismiss the appeal leaving the parties to bear their own costs.

31. Appeal dismissed.

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