

Kishore Gidwaney Vs. the State

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Court : Delhi

Decided On : May-31-1985

Reported in : ILR1986Delhi404

Judge : Jagdish Chandra, J.

Acts : [Succession Act, 1925](#) - Sections 2

Appeal No. : Probate Case No. 22 of 1981

Appellant : Kishore Gidwaney

Respondent : The State

Advocate for Pet/Ap. : A.C. Gulati,; K.K. Mehra,; G.S. Nayar,;

Judgement :

Jagdish Chandra, J.

(1) The petitioner Kishore Gidwaney has put up this petition under Section 278 read with Section 272 Indian [Succession Act, 1925](#) for the grant of letters of administration with a copy of the Will annexed in regard to the Will dated 30th May, 1980 alleged to have been executed by Smt. Puran Devi widow of Dr. Gurbakash Singh Nayar whereby she is alleged to have bequeathed her perpetual sub-leasehold rights in plot No. 205 measuring 487.7 sq. yards in Block 'A' and situated in the lay out plan of New Friends Cooperative Horse Building Society

Limited. New Delhi, which she had obtained from the aforesaid House Building Society vide a registered document dated 14th August, 1974. The testatrix Smt. Puran Devi died on 6th August, 1980 and at the time of her demise she left behind five near relations listed in para No. 5 of the petition and they are her husband Dr. Gurbakash' Singh Nayar and her children. Annexure 'A' of the petition gives the valuation of the property left behind by the deceased whereas Annexure 'B' gives the schedule of her debts.

(2) Notices were issued to the Chief Revenue Controlling Authority as also to the near relations of the deceased. Citation to the general public was got published in the English daily 'Statesman'.

(3) Replies were filed only by relations 1 and 2 Dr. Gurbakash Singh Nayar and his son Dr. R. S. Nayar and by none others even though served. From the general public no one came forth to resist this petition.

(4) Relations 1 and 2 Dr. Gurbakash Singh Nayar and Dr. Rajindar Singh Nayar filed separate replies which are almost identical and in which they asserted that the document purporting to be a Will of the deceased was in fact not a Will inasmuch as the deceased who was the owner of the plot in question was desirous of having construction thereon and the petitioner offered to do the construction as a building contractor .on this plot on her behalf and in that context various documents were got executed from the deceased and at that time on the representation emanating from the petitioner the document purporting to be the Will of the deceased was also got executed from her and that it was not intended to be a Will nor was it meant to be treated as such and was executed solely for the purpose of permitting the petitioner to carry out the building contract on the plot in question, and as the deceased died before the start of construction, all the documents permitting the petitioner to do construction automatically lapsed and became inoperative as a result of which the petitioner no longer remained authorised in law to continue the construction work. The question of making the Will in question by the deceased did not arise in favor of the petitioner who is a total stranger to the family of the deceased who had left behind her husband and children who were her rightful heirs.

(5) It is also asserted that the petitioner himself also did not consider the alleged Will as a Will inasmuch as the estate duty on the plot in question was not paid by him which he would have paid had this plot been bequeathed to him and on the other hand the estate duty had been paid by Dr. Gurbakash Singh Nayar relation No. 1.

(6) Dr. Rajindar Singh Nayar relation No. 2 has further set up another Will dated 20th May, 1979 in his own favor alleged to have been executed by the deceased who is his mother allegedly bequeathing the plot in question in his favor.

(7) It was also pleaded by Dr. Rajindar Singh Nayar that after the death of the deceased he and the other family members had offered to return to the petitioner the amount of security (sum not specified) which had been paid by the petitioner to the deceased to carry out this part of the contract for doing the construction work on the plot in question, but the petitioner did not accept the same and now in the reply he has again offered the return of that security amount to the petitioner.

(8) In the replications, the petitioner denied and controverted the pleadings of relations 1 and 2 in their replies by asserting that both these relations had signed the will in question as attesting witnesses and had also affirmed on oath by way of affidavits that the deceased had acknowledged the Will in question to be her last Will and Testament in their presence. The assertions regarding the building contract for raising construction on the plot in question having been given by the deceased to the petitioner and the petitioner having given any amount to her by way of security were denied specifically by asserting to the contrary that the deceased was in fact desirous of and had agreed to transfer all her right./rights, title and interest in this plot in favor of the petitioner for a total consideration of Rs. 2,35,000.00 , and as she was unable to effect immediate transfer of her ownership in this plot in favor of the petitioner against the aforesaid amount of Rs. 2,35,000!- due to restrictions in the perpetual sub-lease of the plot in question in her favor, she instead of executing a sale deed executed the following documents in favor of the petitioner in respect of the plot in question :-

1.Six special Powers of Attorney all dated 29-4-1980 for the purpose of applying for building plan and to get the same sanctioned, for the grant of cement permits to

the appropriate authorities, for the construction of building over the said plot. for grant of brick permits for construction over this plot, to appear in all offices of Dda and to make there necessary applications etc., for water and electric connections to concerned authorities and other connected matters ',

2.General Power of Attorney dated 29th April. 1980;

3.letter of license enabling the petitioner to enter upon the plot in question and to construct thereupon a residential building or other permanent structure at his own cost and expenses;

4.Agreement to sell dated 29th April, 1980 in respect of the plot in question in favor of the petitioner;

5.Receipt for Rs. 2,35,0001-.

(9) All these aforesaid documents had been executed by the deceased in favor of the petitioner to secure the petitioner till such time as she was able to obtain permission from the Lesser to execute the sale deed or transfer deed in favor of the petitioner.

(10) It was asserted that to cover further the eventuality of her dying before she was able to obtain the requisite permission and execute the will and transfer deed, the deceased executed the Will in question dated 30th May, 1980 bequeathing the plot in question in favor of the petitioner. It was denied that the Will was got executed to facilitate the work of construction or it was executed solely for the purpose of permitting the petitioner to carry out the building contract as alleged by relations 1 and 2. He has controverted the plea of relations 1 and 2 that on the death of the deceased all these documents lapsed or became inoperative and has. on the other hand. asserted that he has full right to deal with the plot in question and to carry out the construction thereon. The non-filing of the estate duty return by the petitioner is alleged to be meaningless by asserting that Dr. Gurbakash Singh had to file the same in respect of the entire estate of the deceased who was his wife, including the plot bequeathed to the petitioner. He has also asserted that the Will in question became operative on the death of the testatrix Puran Devi.

(11) The due execution of the Will in question Ex. Public Witness 211 dated 30th May, 1981 by the deceased Smt. Puran Devi as also the valid attestation thereof were not questioned by the learned counsel for relations 1 and 2 during the course of arguments and the same stood established from the testimony of Dr. H. S. Nayar Public Witness 2 one of the attesting: witnesses of the Will according to whose testimony the deceased Smt. Puran Devi executed this will by netting her left thumb impression on both its pace'? at points 'A' after accepting the contents thereof after she had been explained in Punjabi language either by the Sub Registrar who was present at the time of the execution thereof or by some Advocate who drafted this Will and immediately where after he arid his father Gurbakash Singh Nayar attested this will by putting their signatures respectively at points 'B' and 'C' on this Will at that very time in the presence of the deceased testatrix and further that the deceased testatrix was fully conscious at that time as to what she was doing and that she was in her perfect senses. He also made it clear in his cross-examination that there was no pressure on the deceased when she executed this Will by putting her thumb impression thereon voluntarily. The testimony of Dr. Gurbakash Singh Nayar husband of the deceased was recorded on commission at his residence by a local commissioner. The thumb impression of the deceased as also the signatures of Dr. H. S. Nayar Public Witness 2 and his own signatures on this Will dated 30th May, 1980 were admitted by Dr. Gurbakash Singh Nayar in his testimony. Who also accepted the factum of the registration thereof on 10th June, 1980.

(12) The contention raised by the learned counsel for relations 1 and 2 were that there was no intention on the part of Puran Devi deceased to make a Will in favor of the petitioner who was a total stranger to her family and that this intention could be clearly seen from a number of documents executed previously by her in favor of the petitioner which included the agreement to sell in respect of the plot in question, and that the alleged Will in question was only a device to override the statutory provisions of the Stamp Act and Registration Act which would have been applicable to the regular sale deed in respect of the plot in question. It was also contended that this Will was only a collateral security to the other documents previously executed by her as already adverted to above and the factum of the Will being a collateral security had also been admitted by the petitioner in his

cross-examination. It was contended that the agreement to sell and the sale deed in respect of the plot in question could not be executed as the petitioner was not a member of 'New Friends Cooperative House Building Society Limited' which was the lessee of the plot in question and of which Puran Devi deceased was a perpetual sub-lessee and clause 6(a) of the perpetual sub-lease Ex. Public Witness 2/2 in favor of the deceased placed a blanket ban' on the deceased in the matter of sale transfer, assigning parting with the possession of the plot in question in any form or manner benami or otherwise. to a person who was not a member of the aforesaid lessee house building society, and for that reason the Will in question Ex. Public Witness 2/1 could not be executed. It was also contended that the Will in question was only one of the series of documents and was not to be read in isolation, and the other documents, already referred to above, could not be executed so as to transfer the rights, interest and title of the deceased in the plot in dispute in favor of the petitioner who was not a member of the aforesaid lessee house building society and thus the Will being an integral part of the series of those other documents trying to operate against the aforesaid ban. was void under Section 27 of the Contract Act being opposed to public policy.

(13) No doubt clause 6(a) of the perpetual sub-lease deed Ex. Public Witness 212 executed by the aforesaid lessee house building society in favor of the deceased in respect of the plot in dispute places a total ban on the sub-lessee to transfer in any form or manner, benami or otherwise, the plot in question to the petitioner who was not a member of the said house building society, clause 10 thereof provided that in the event of the death of the sub-lessee deceased the person on whom the title of the deceased devolves shall, within three months of the devolution. give notice of such devolution to the Lesser and the lessee and further the person on whom the title devolves shall supply the Lesser and the lessee the certified copies of the document(s) evidencing the transfer of devolution, and in this manner the factum of devolution of the title of the deceased on his death on a person was recognised and was to be notified to the Lesser and the lessee. In other words, it means that whereas during the life time the sub-lessee deceased who could not transfer her title in the plot in dispute to the petitioner who was not a member of the said house building society, was entitled to bequeath the same in favor of the petitioner by executing the Will in question and thereby the title could devolve

upon the petitioner in the event of the death of the deceased testatrix. It would, thus, be seen that the execution of the will in question could not be called an illegality as it did not come into conflict with the ban on sales contemplated in clause 6(a) of the perpetual sub-lease Ex. Public Witness 2/2 which ban was meant only during the life time of the sub-lessee and not on the death of the sub-lessee is the matter of devolution-testamentary or interstate-was saved by means of clause 10 of the perpetual sub-lease. In this view of the matter, the Will in question becomes an independent document all by itself and could not be said to be an integral part of a series of documents executed earlier by the deceased in favor of the petitioner, and for that very reason the execution of the will could not be said to be an embargo on the provisions of the Stamp Act or the Registration Act which are meant for a regular sale deed as the sale deed which could transfer the title in present was not permitted under the sub-lease whereas the execution of the Will is visibly permissible there under which fact further sets at naught the contention that the execution of his Will was hit under Section 23 of the Contract Act being opposed to public policy.

(14) The Will in question can be said to be a collateral security, as also conceded by the petitioner in his cross-examination as Public Witness 3, in the sense that if the title of the deceased in the plot in dispute could not be transferred during her life time in favor of the petitioner for whatever reason including the ban imposed under clause 6(a) of the perpetual sub-lease deed Ex. Public Witness 2/2, as already referred to above, the same could be passed on her death to the petitioner in view of clause 10 of the same. It cannot be said that this Will was executed not for the purpose of bequeathing the plot in question to the petitioner on the death of the deceased and had been executed for some other collateral purpose. The only purpose was that the deceased had an unambiguous intention to pass on her title in this plot in favor of the petitioner on her death as she could not do so during her life time in view of the ban already referred to above. Mr. Mehra learned counsel for relation No. 1 Dr. Gurbakash Singh Nayar husband of the deceased testatrix relied upon an English Authority reported as *Lister and Others v. Smith and others*, 1863. 9 L.T. R 578 for the purpose of convincing the court that the Will in question was not intended by the deceased to be her Will and had been executed by her for some other collateral purpose. The perusal of this authority shows that it does not

bear out the contention of Mr Mehra. The facts in that authority were that one Mrs. Julia Mason was a married daughter of the deceased and she was one of the beneficiaries under the will of the deceased along with other children' of the deceased, and there was some dispute between the deceased on the one hand and one Mrs. Marshall, the mother-in-law of Mrs. Julia Mason, on the other as to the title to some house property Mrs. Marshall occupied and for which the deceased thought Mrs. Marshall ought to pay him rent. An agreement was drawn up which the deceased wished Mrs. Marshall to sign. but Mrs. Marshall refused or in fact did not sign the same and the deceased desired his brother to get a conditional codicil made with the view to compelling Mrs. Marshall to give up the house or to come to his terms. One Mr. Green, Managing clerk to an attorney, to whom the brother of the deceased came with instructions from the deceased testified as follows :-

'THE condition, as far as I understand it, was that if Mrs. Marshall gave up the house the codicil was not to take effect; and if she refused then it was to take effect.....'

(15) The question which fell for determination in that case was whether, upon the evidence, the deceased signed the codicil intending it to be an effective instrument, or whether he signed it as a mere sham. It was held that the codicil was regularly executed by the testator but the evidence given at the trial showed that the testator never intended it seriously to operate as a testamentary document or to operate at all. It was further held that the codicil which appeared to be the record of a testamentary act was in reality the offspring of a jest, or the result of a contrivance to effect some collateral object, and never seriously intended as a disposition of property, and that it was not reasonable that a court should turn it into an effective instrument, It was further held that there must be the animus testandi. Obviously that codicil had been brought into existence as a mere sham and was intended for a collateral purpose of settling the dispute with Mrs. Marshall who was in occupation of the house and the deceased wanted that she should give up the house and in case Mrs. Marshall was to give up the house the codicil was not to take effect.

(16) One other authority reported as *Rajeshwar Misser and others v. Sukhdeo Missir*, : AIR1947 Pat449 (DB) and relied upon by Mr. Mehra in support of his above mentioned contention, again does not help him. It was held therein that where in executing a document there was no real animus testandi on the part of the executant and it was brought into existence for some collateral purpose, the document could not be regarded as a Will. The perusal of that authority shows that it was asserted that there was no real animus testandi on the part of the executant of the Will and that it had been brought into existence for some collateral purpose, as for instance, to prevent the other brother or his sons from laying claim to any part of the property of the executants and another brother of their own. However, letters of administration were granted in that case and the matter rested on the real animus testandi of the testator. The authority *Ramautar Singh v. Sm. Ramsundari Kur and others*, : AIR1959 Pat585 cited by Mr. Sistani learned counsel for relation No. 2 points out two characteristics of a will viz. (i) that it must be intended to come into effect after the death of the testator and (ii) that it must be revocable. It was further pointed out by Mr. Sistani from this authority that the document under consideration in that authority was a composite one inasmuch as one part of the document which was a deed of gift was made irrevocable, but the other portion of the document, which was a will, was not made irrevocable at all. The authority *Kondappalli Vijayaratnam and another v. Mandapaka Sudarsana Rao and others* cited by Mr. Sistani does not appear to have any bearing on the controversy in the instant case.

(17) The perusal of the Will in question Ex. Public Witness 2[1 clearly shows that it is testamentary in character as it is to take effect on the death of the deceased testatrix and it does not smack of irrevocability. The real test is what was the real intention of the deceased for making the Will in dispute. Whether it was to transfer her title in the plot in question in favor of the petitioner on her death or was it for some other purpose The answer to this question must be given in favor of the petitioner and against relations 1 and 2. The animus testandi of the deceased to bequeath the plot in question in favor of the petitioner is unmistakably and clearly made out from the earlier documents she executed in favor of the petitioner and already referred to above. The agreement to sell Ex. P-4 dated 29th April, 1980 shows the intention of the deceased to sell away the plot in question in favor of the

petitioner and his brother Dhanraj Gidwaney for a total consideration of Rs. 2,35,000 which was received by the deceased from them vide receipt Ex. Public Witness 213 by means of two bank drafts dated 28th April, 1980 and 6th May, 1980 both drawn on the Union Bank of India, 52 Sunder Nagar, New Delhi, in respect of the plot in dispute and even though the aforesaid amount is mentioned as 'earnest money' it is not the earnest money but the whole price which inference is at once made out from the agreement to sell Ex. P-4 which shows the intention of the deceased to immediately divest herself of her right, title and interest in the said plot completely and wholly in favor of the petitioner and his brother in respect of this plot and the idea of immediate divesting as aforesaid would be inconsistent with the amount of Rs. 2,35,000 being only the earnest money in contradistinction to the full price which the deceased received. The agreement to sell Ex. P-4 also provided that the petitioner and his brother would have the right to borrow money for construction of building on this plot from any source by further sub-leasing or mortgaging their right, title and interest in this plot. As there was a ban on the transfer of this plot by the deceased in favor of the petitioner and his brother under clause 6(a) of the perpetual sub-lease deed Ex. Public Witness 2/2 and on taking this plot the petitioner and his brother could not be expected to keep it vacant and were rather expected to raise a construction thereon of their own, a letter of license Ex. Public Witness 3/X-5 was executed by the deceased in favor of the petitioner and his brother granting them license to enter upon the plot in dispute as also to construct thereupon a residential building or other permanent structure with their own cost and expense and to permit use of the same for the duration of the structure and this letter nowhere shows even by way of a hint that the petitioner was to raise this construction on the plot in question as a building contractor for the deceased as averred in the written statements of relations 1 and 2 or sought to be suggested to the petitioner and his witnesses who are none else but relation No. 1 Dr. Gurbakash Singh Nayar and his son Dr. H. S. Nayar relation No. 3. As a matter of fact there is no document whatever which could evidence the contention of relations 1 and 2 that the petitioner had to raise construction on the plot in question only as a building contractor for the deceased. On the other hand, the matter of fact appears to be just to the contrary that the building had to be raised on the plot in question by the petitioner and his brother for themselves at their own

cost and expense as the user thereof as also the permission of user of the construction for the duration of the structure rested with the petitioner and his brother. The necessity of executing Special Powers of Attorney Ex. Public Witness 3/X-3, Ex. Public Witness 3/X-4, Ex. Public Witness 3/M-6, Ex. Public Witness 3/X-7 and Ex. Public Witness 31X-8 by the deceased in favor of Mrs. Mohini Gidwaney, mother of the petitioner, authorising her to make applications for building plan, grant of cement and brick permissions' as also for water and electric supply etc. to appropriate authorities for the construction of the building over this plot, was obviously there because of the ban on the sale/transfer of the plot in question by the deceased in favor of the petitioner and his brother who were not members of the lessee house building society and as the ownership till remained with the deceased on the date of execution of these Special Powers of Attorney and the agreement to sell i.e. 29th April, 1980, the petitioner and his brother could not act in the matter of construction on the plot in question. Thus, all the aforesaid documents viz. the agreement to sell, the letter of license and the Special Powers of Attorney are vocal enough to evince an unmistakable and convincing intention on the part of the deceased to part with her title in respect of the plot in question in favor of the petitioner. But as she could not do the same on account of the aforesaid ban during her life time, she executed the will in question in favor of the petitioner and, thus, her animus testandi appears to be established beyond all manner of doubt and as the animus testandi on the part of the deceased, as per the settled law even on the authorities cited by the learned counsel for relation No. 1, being unmistakably present, it cannot be said that the Will in question Ex. (Public Witness 2/1 dated 30th May, 1980 is not a will in fact or was not intended by the deceased as her testamentary disposition in respect of the plot in question. It is also a matter worthy of note that Dr. Gurbakash Singh Nayar relation No. I, husband of the deceased, wrote a letter Ex. P-I in July 1981 to the Honorary Secretary of the aforesaid house building society with a copy to the petitioner in which it was mentioned that the Will in question had been thumb marked by his deceased wife and had been attested by himself and his youngest son H. S. Nayar as also by the Registrar who was also present at the time of the execution of this Will. He further wondered in the said letter why a doubt had been expressed on the genuineness of this Will by the house building society at that stage. There is a

further endorsement in the copy of this letter to the petitioner wherein the petitioner was requested to get the Will probated in a competent court of law. Thus there are two affidavits of Dr. Gurbakash Singh Nayar one deposed to before a Magistrate of Panipat and the other before an Oath Commissioner-both dated 3rd June, 1981 and both being identical in contents. These affidavits go to show that he was one of the attesting witnesses to the last Will and Testament in question dated 30th May, 1980 of his wife late Smt. Puran Devi whereby she had bequeathed the plot in question in favor of the petitioner and further that Smt. Puran Devi was of a sound disposing mind at the time of its execution and continued to be so until the time of her death. The aforesaid letter and these two affidavits of Dr. Gurbakash Singh Nayar relation No. 1 should be sufficient to stultify his objection against the Will in question.

(18) It was lastly contended that the petitioner and his brother being in possession of the plot in question, the grant of letters of administration, as prayed for, would be useless and meaningless as there would be nothing to administer. It would be seen from Clause 10 of the perpetual sub-lease deed Ex. Public Witness '2/2, already referred to above, that the person on whom the title devolves on the death of the sub-lessee has to give notice of such devolution to the Lesser and the lessee within three months of the devolution and further that he is to supply them also the certified copies of the document(s) evidencing the transfer of devolution and, thus, that affords some reasonable ground on which the petitioner is entitled to ask for letters of administration.

(19) The payment of estate duty in regard to the estate of the deceased by her husband Dr. Gurbakash Singh Nayar is of no consequence on the respective contentions of both the parties and he can seek reimbursement of the same in respect of the plot in question from the successful party.

(20) In view of what has been stated above, the petition succeeds and consequently I order the grant of letters of administration in favor of the petitioner in respect of the Will Ex. Public Witness 211 dated 30th May, 1980 which is the last Will and Testament of the deceased Smt. Puran Devi in respect of the plot in question subject to the petitioner furnishing a bond with one surety engaging for

the due collection, getting in, and administering the estate of the deceased as required under Section 291 of the Indian [Succession Act, 1925](#), which formality be completed by the petitioner by 15th July, 1985. The costs of this petition shall be borne by relations 1 and 2.

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