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Court : Delhi

Decided On : Mar-11-2005

Reported in : AIR2005Delhi379; 118(2005)DLT647; 2005(81)DRJ574

Judge : Pradeep Nandrajog, J.

Acts : Benami Transactions (Prohibition) Act, 1988

Appeal No. : Probate Case 22/1998

Appellant : Mr. Surender Patrick Lall and anr.

Respondent : State and ors.

Advocate for Def. : Ajit Singh, Adv. for Respondents Nos. 2 and 3

Advocate for Pet/Ap. : S.C. Juneja, Adv

Disposition : Petition dismissed

Judgement :

Pradeep Nandrajog, J.

1. Petitioners pray for issuance of a certificate of probate/letters of administration with will annexed. Petitioners are the sons born to late Mr. S.M. Lal from his first wife. Objectors are Ms. Beena Lall and Ms. Vandana @ Meenu, the second wife and the adopted daughter respectively of the deceased.

2. Dispute is predicated on the will propounded by the petitioners, being the will dated 29.10.1997 purported to be executed by the deceased. Date of death of the deceased is 5 days later i.e. 3.11.1997.

3. According to the petitioners, 3 children were born to the deceased from the first marriage being the petitioners and Mrs. Shobha Kishore. No child was born from the second marriage to Ms. Beena Lall. According to the petitioner, house No. WZ-A/113-114, Ram Dutt Enclave, Uttam Nagar was purchased by the deceased, Benami, in the name of his second wife Ms. Beena Lal. It is stated that property at 58, Bhargava Lane, Civil Line, Delhi also belonged to the deceased. It is stated that he had a plot at Mittru Road, Najafgarh.

4. Will relied upon by the petitioners bequeaths the house at Uttam Nagar to the petitioners and their sister Shobha, born from the first marriage of the deceased. House at 58, Bhargava Lane, Civil Lines has been bequeathed equally to the three children born from the first marriage, Ms. Beena Lall and Ms. Vandana @ Meenu. Plot at Najafgarh Road had been bequeathed to Ms. Vandana @ Meenu.

5. There is reference in the will to some ancestral property inherited by the deceased in respect of which litigation is stated to be pending. Said property has been bequeathed to the petitioners.

6. Movable assets have been bequeathed to the petitioners and their sister Shobha as also to Ms. Beena Lall and Ms. Vandana @ Meenu in equal shares.

7. Opposition to the will by the second wife and the adopted daughter is based on the ground that house No. WZ-A/113-114, R.D. Enclave, Uttam Nagar, Delhi is the property of Ms. Beena Lall, Property at 58, Bhargava Lane, Civil Lines is on rent, tenancy being in name of Ms. Beena Lall, and thereforee, there could be no bequest in respect of said two properties. On merits, execution of the will is denied. It is stated that on 30.10.1997, deceased executed a written declaration styling it as a family settlement. Said declaration acknowledges that the house at 58, Bhargava Lane, Civil Lines is under tenancy in name of Ms. Beena Lall and that the house at Uttam Nagar belongs to Ms. Beena Lall.

8. On 1.5.2001, keeping in view the pleadings of the parties, following issues were framed:-

'1. Whether the will dated 29th October, 1997 is a genuine and valid will? OPP

2. Whether the properties situated at 58, Bhargava Lane, Delhi, and SZA 113-114, Ram Dutt Enclave, Uttam Nagar, Delhi are the benami properties of the deceased? OPP

3. If so, whether the properties purchased benami by the deceased could be the subject matter of a will in view of the provisions of Benami Transactions (Prohibition) Act, 1988? OPD.

4. Relief.'

9. It is rather unfortunate that issue No. 2 and 3 were got framed by the parties and as a consequence thereof useless and unnecessary energy of the parties have been wasted on proving title to the property at Uttam Nagar covered by issue No. 2 and to the tenancy rights of the property at 58, Bhargava Lane. Parties have wasted their energies on trying to wriggle out of the Benami Transactions (Prohibition) Act, 1988 or bring the case within the prohibition of the said Act.

10. It is settled law that in a proceedings for probate or letters of administration with will annexed, issue of title cannot be gone into. A limited exception to this wide proposition of law is where the testator has lost right to a property, a will in respect to the said property would convey nothing and if nothing is conveyed under a will due to the fact that the testator has no right, a court may decline probate. But that would be limited to a circumstance where original title of the testator is not in dispute, what is in issue is the fact that at some stage during his lifetime, testator lost title to the property. But, where the issue of title is raised adverse to that of the testator, question of title cannot be adjudicated in a probate proceedings.(See Nathon v. Nathon, : AIR1970 Ori28 Joga Joti v. Bavaruchi; : AIR1994 Ker85 K.M. Varghese v. K.M. Oman; and Hukumi v. Bhanwari.

11. I accordingly hold that issue No. 2 and 3 cannot be adjudicated in the present proceedings and no finding is to be returned, on merits, qua said issues.

12. Issue No. 1 is the only issue which can be adjudicated in the present proceedings.

13. Due execution of a will is proved when the following are established:-

(i) Testamentary capacity of a testator;

(ii) Testamentary character of the instrument;

(iii) Knowledge and approval of the instrument by the testator;

(iv) Absence of undue influence;

(v) Due execution and attestation.

14. Learned counsel for the parties did not question the testamentary capacity of the testator on 29.10.1997 probably for the reason that the objectors themselves relied upon a written document signed by the deceased on 30.10.1997. Even otherwise, I find that parties were not at variance with the fact that on 29.10.1997, deceased who was a resident of Delhi had travelled to Meerut in connection with a court case. I may note that the will relied upon is stated to have been scribed in the District Court complex at Meerut on 29.10.1997.

15. If the will is established otherwise, testamentary character of the instrument flows from the document itself.

16. It was not the opposition to the will that it was a result of undue influence. What was questioned was the very fact of due execution and due attestation of the will.

17. Learned counsel for the petitioners in reference to the testimony of PW-1, PW-2 and PW-3 urged that the will stood established. PW-1, Herald A. Singh and PW-2 Dharam Singh are the two purported attesting witnesses to the will in question. PW-3 Ilyas Ahmed is the scribe who states in evidence that he typed the will as dictated by the deceased.

18. Counsel for the objectors opposed the will and urged that it was a fabricated evidence, evidenced by the testimony of R2W1 Ms. Beena Lal and R2W2 Sh. S.B.

Singh as also the testimony of R2W3 Sh. Harpal Singh Chauhan.

19. In his testimony, PW-1 has stated that he was a resident of Meerut and knew the deceased. On 29.10.1997, he received a call at about 12 noon from the deceased requesting him to come to the court complex and meet him at the table of Ilyas Ahmed (PW-3) who had a table in the court complex, being a typist. He reached the given point at about 12.15 noon. Dharam Singh, PW-2 was present when he reached the table of PW-3. Deceased had got a will typed in Hindi from PW-3. Deceased put his signatures on ll pages of the will. Thereafter Mr. Dharam Singh, PW-2 put his signatures as attesting witness No. 1 and he signed the will thereafter as attesting witness No. 2.

20. PW-2 Dharam Singh deposed that on 29.10.1997 deceased came to his house at Meerut at 9 A.M. and had breakfast with him. Both went to the court complex at about 10 A.M. After he attended the case against Mr. Chauhan (R2W3), both went to the typist Ilyas Ahmed (PW-3). In the meanwhile Herald A. Singh (PW-1) also reached. Thereafter, PW-3 typed the will as per 'direct dictation' of the testator. After the will was typed, deceased put his signatures on each page in his presence. Thereafter, he signed as a witness and after him PW-1 also signed as an attestation to the will.

21. Ilyas Ahmed (PW-3) deposed that he typed the will as per the dictation of the testator. He deposed that the testator used to get typing work done from him.

22. In his cross-examination, PW-1 failed to give satisfactory response to various questions put to him about the deceased and various facets of the life of the deceased. In his examination-in-chief, PW-1 claimed to know the deceased since the time of his father. PW-1 stated that property of the father of the deceased and property of his family at Meerut were in the same area. In his cross-examination, he stated that he met the deceased at 11 A.M. at the court complex at the table of PW-3, a time materially different from what was stated by this witness in the examination-in-chief, being 1 P.M. Whereas, in his examination-in-chief witness deposed that when he reached the table of the typist after he had received a telephone call from the deceased, will was already typed out, in cross-examination, he deposed that the will was typed in his presence. In cross-

examination, PW-1 stated that he gave his name and address to the typist.

23. It may be noted that neither name nor address of PW-1 has been typed by the typist on the will.

24. In cross-examination, PW-2, stated that he was told by the deceased to meet him at the court complex around 11/11.30 A.M., a fact at material variance with his examination-in-chief wherein he stated that the deceased came to his house at 9.00 A.M, the two had breakfast together and both left in a manual rickshaw for the court complex at 10 A.M. In cross-examination, PW-2 stated that when he reached the court complex, the will was being typed by PW-3 and he gave his name and address to the typist. On a specific question whether the typist typed his name and address on the will, PW-2 responded that the deceased had brought a handwriting note and the typist typed from the same and thereafter he put his signatures on the asking of the deceased.

25. Will in question does not contain the typed name and address of PW-2.

26. A perusal of the will which has been exhibited as PW-1/1 would show that it is in 4 pages with signatures of the deceased at the bottom of each page. The signatures on the last page of the will are also at the bottom.

27. The earlier 3 pages show that each page has about 25-26 lines but the last page has only 12 lines and yet the said page has been laid out to so fill the page space that name of the executant of the document comes at the bottom of the page. A perusal of the last page of the document would show that to utilize 40% of the page space, the scribe has on the left hand side of the page typed 'witness-1' and after substantial space has, typed 'witness-2'. On the corresponding right side of the page there is a complete blank. Leaving further space on the opposite side and much below the horizontal line where the word 'witness-2' has been typed on the left side of the page, the scribe has typed 'signatures of the executant'. Leaving a space of nearly one and a half inch, scribe has typed the name of the executant.

28. A perusal of the manner in which the will has been scribed does not rule out the possibility of 4 pre-signed pages being utilized to create a document.

29. A perusal of the will would reveal not a single correction or over-writing. PW-1, PW-2 and PW-3 stated in their examination-in-chief that the will was typed on a direct dictation by the deceased. It is highly improbable that on a direct dictation taken by the typist on a manual typewriter, not a single mistake requiring correction, cutting or over-writing would be found. Further, the will uses typical Persian words; words which a scribe would know as having learnt during course of his avocation. The words are not simple Urdu words scribed in Hindi script but are Persian words.

30. Neither party disputed that the deceased was well-versed in English. The deceased had retired from government service and was engaged in missionary work. Signatures of the deceased are firm and are in English. It is highly strange that when facility is available for typing in English why would the deceased get a will scribed from a scribe in a Hindi script and that too by use of Persian words.

31. Witnesses of the petitioners have contradicted themselves on the point of time when the document was scribed. Witnesses of the petitioner have contradicted each other in the manner in which the document was scribed. At one stage, witnesses state that the document was a result of direct typing after it was dictated by the deceased to PW-3 but at another stage, in cross-examination, PW-2 stated that the deceased had brought a hand-written note and the typist typed from the same.

32. PW-1 and PW-2 have categorically stated that they were present when the will was typed and they had given their names and address to PW-3. Names and addresses of PW-1 and PW-2 are not typed on the will in question.

33. Though issue of title cannot be gone into in a probate proceedings but since it is of some relevance, I must note the fact that the objector has led evidence to establish that tenancy of the property at Bhargava Lane was in her name, she was paying the rent and that she had acquired the property at Uttam Nagar from her own funds as she had worked as a teacher of Victoria Senior Secondary School,

Rajpur Road and had her own earning.

34. It appears that the will in question has been brought into existence to create evidence emanating from the deceased which would impinge upon the title of the objector to the two properties.

35. I need not discuss the evidence of the objector for the reason, that the objector has led evidence to show title to the property at Uttam Nagar and tenancy rights in her favor qua the property at Bhargava Lane. Objector has also led evidence to establish an alleged typed acknowledgment dated 30.10.1997 executed by the deceased proved as Ex.R2W1/1. Said document purports to be a family settlement but has been signed only by the testator. A reading of the said document would show that it has been bought into existence to show that the deceased acknowledged that the objector is the owner of the house at Uttam Nagar and tenancy rights in the property at Bhargava Lane are those of the objector.

36. Since in the present proceedings, this court is concerned only with limited issue whether the will propounded by the petitioner was the last valid and legal testament of the deceased, I refrain from expressing any opinion on the validity or proof of exhibit R2W1/1 for the reason that it is not necessary for this court to decide the said issue.

37. Suspicion may be inherent in a transaction. Suspicion may arise from a conflict of testimony of the witnesses. It is true that mere suspicion cannot destroy a will, but where a will is prepared and executed under circumstances which create a suspicion in the mind of the court, it lies on the propounder to not merely prove the execution of the will, in the sense that it was signed by the testator but also to adduce evidence which would remove suspicion and satisfy the court about due execution of the will.

38. I have noted above in paras 19 to 25, the variation in the testimony of the witnesses to the will and the scribe. I have noted the conflicting versions pertaining to the typing of the will by PW-3. I have noted the variation on the issue of the time when the will came into existence and was executed. I have noted the place of

signatures on last page of the will as being indicative at pre-signed pages being utilized. Cumulatively, the facts and circumstances noted in said paragraphs 19 to 30 lean against the will in question being established as the last and valid legal testament of the deceased.

39. Issue No. 1 and issue No. 4 are accordingly decided against the petitioners and in favor of the objectors. It is held that the petitioners have failed to prove that Exhibit PW-1/1 was the last valid and legal testament of the deceased, Shri S.M. Lall. The petition is accordingly dismissed.

40. Objectors shall be entitled to costs against the petitioners.

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