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Court : Delhi

Decided On : Dec-19-1980

Reported in : 19(1981)DLT196

Judge : S.N. Kumar, J.

Acts : [Succession Act, 1925](#) - Sections 276

Appeal No. : First Appeal Order Appeal No. 143 of 1979

Appellant : Vidya Wati and anr.

Respondent : State

Advocate for Pet/Ap. : Maehswar Dayal, Adv

Judgement :

S.N. Kumar, J.

(1) This is an appeal against the order of the District Judge dismissing a petition seeking grant of Letters of Administration under section 276 of the Indian Succession Act with the Will annexed in respect of the estate of Smt. Savitri Devi who died on 29th January 1978.

(2) The appellants who were the petitioners submitted before the Distt. judge that they were not the preferential heirs of the deceased but they claimed their right

only under the Will. This submission has been taken note of by the District judge in paragraph 11 of the impugned order.

(3) The learned counsel for the appellants conceded that under section 276 on a petition seeking grant of letters of administration with the Will annexed the District Judge had to decide whether Smt. Savitri Devi duly executed the Will which was alleged to be her last Will that the alleged Will was duly attested in accordance with section 63 of the Succession Act: that the testatrix was in sound disposing mind at the time of the execution of the Will; that there was no undue influence and pressure exerted upon the testatrix and that there are no suspicious circumstances. The District Judge in his order has expressed doubts about the question whether the Will was executed by Smt. Savitri Devi. He has also expressed doubt about the questions namely whether it was attested in accordance with the provisions of section 63 of the Indian Succession Act and also whether Smt. Savitri Devi was in sound disposing mind at the time of its execution. He has referred to other suspicious circumstances also and has come to the conclusion that he was not satisfied about the authenticity and genuineness of the Will and about the fact of the testatrix being of sound disposing mind at the time of execution of the Will. He, therefore, dismissed the petition.

(4) A Court of Appeal has to be slow in upsetting a finding of fact reached by the trial court. The court of Appeal also has to take note of the fact whether the trial judge who decided the matter in the trial court had the benefit of seeing the witnesses examined in the case or not. It is correct that in the present case the evidence was recorded by the predecessor of the District Judge, but when the matter came up for final arguments before him he allowed the petitioner, Vidyawati, to make a supplementary statement. Some questions were put to the counsel for the petitioner during arguments and then at the instance of the counsel her supplementary statement was allowed to be recorded on 27th March 1979. Further opportunity was, therefore, given to the petitioner to clear the doubts which, it seems, arose when arguments were being heard. Issues framed by the District Judge read :-

1. Whether Smt. Savitri Devi deceased executed the Will and is the same valid according to law 2. Was the deceased in sound disposing mind at the time of the execution of the Will 3. Relief.

(5) The District Judge dealt with issue Nos. 1 and 2 together. The petitioner examined herself as Public Witness PW-1 the scribe of the Will who is a professional petition-writer as Public Witness Public Witness . 2 and one of the attesting witnesses Shri Uggar Sain as Public Witness Public Witness . 3. Then, of course, the supplementary statement of Public Witness Public Witness . 1 was recorded as mentioned by me above. Regarding the execution of the Will by the deceased, Smt. Savitri Devi, the District Judge noticed, and I think rightly, that the two thumb impression, i.e one each on the two sheets of the Will, Exhibit P2, are quite different. The thumb impression on the first sheet of the Will is much bigger in size than the thumb impression on the second sheet. It is not disputed that the (deceased was a nurse-midwife by profession. Public Witness Public Witness . 1 is the sister of the deceased who stated that the deceased was an illiterate woman and used to put her thumb impression and sometimes scribble out the letters constituting her name with difficulty. The scribe of the Will in the cross-examination stated that when he asked Smt. Savitri Devi whether she would sign the Will she said that her eye-sight was weak and hands were unsteady and, therefore, she would put her thumb impression. The attesting witness Public Witness Public Witness . 3, however, stated that he did not know whether the deceased was literate or not and whether she could sign or not. According to him the scribe asked the deceased whether she would sign but deceased offered to put her thumb impression saying that she had weak eye-sight. On this evidence the District Judge was not satisfied that the Will was duly executed by Smt. Savitri Devi. I do not think that the District Judge was wrong in coming to this conclusion. The two thumb impressions are obviously very different in shape and dimension. There is no Explanationn as to how this happened. P.W. I has stated that after the death of her husband in or about March 1977 the deceased was living independently in her house in Shahdara and she (petitioner) along with her son Atam Parkesh and daughter Saroj was living with her at her request and during that period she (testatrix) got a ration-card made for the petitioner and her children and submitted the application form. This documentary evidence could very easily

be available to show whether the deceased could sign or not, particularly when it was alleged that the application form was submitted a few months before the alleged execution of the Will.

(6) The District Judge then noticed that the signatutes of one of the attesting witnesses, namely, Rajinder Kumar, are in a different ink and he has not been examined at a witness. Looking at the alleged Will, I find that the ink used by Uggar Sain who is another attesting witness is also different. The Will is in Persian Script (Urdu) and the description of the witnesses with their addresses appears to be written by the scribe and below that each of the two witnesses has signed. Although the handwriting of the witnesses in which names and addresses is given by the scribe seems to be the same but the ink used in giving the description and addresses of the witnesses is different. Then the ink used by both the witnesses while putting their signatures is different from each other. Uggar Sain, Public Witness Public Witness . 3. stated that he came to know Smt. Savitri Devi 20 years before when he called her in connection with the delivery of a child by his wife and thereafter she was called on several occasions and that the witness and Smt. Savitri Devi were on visiting terms. He further stated in the cross-examination that the deceased went to his house on 23rd November 1977 and then told him that her husband had died and that she wanted to make a Will and he should be a witness to it. This witness has given his occupation as service and has not disclosed as to where he was working and in what capacity. He has given his address as Pahari Dhiraj, Delhi, whereas the deceased was living in Shahdara. The witness did not know the petitioner, Vidyawati, who was sister of the deceased. On this evidence the District Judge was not fully satisfied about the due attestation of the Will. I do not think the District Judge was in error. It appears that the name and address of Uggar Sain as well as his signature were all put with a different ink. While putting the date as '24/11/77' the figure '4' is obviously overwritten. Uggar Sain gave no Explanationn.

(7) On the question of the sound disposing mind the District Judge found that the testatrix had weak eye-sight and her hands were unsteady. She was an old lady and that she was suffering from acute debility and that on account of weak eye-sight she could walk very slowly. These findings are not challenged before me. On

this evidence the District Judge was of the opinion that it was incumbent upon the petitioner to have produced more reliable and cogent evidence regarding her capacity and understanding to make the Will and that he was not convinced that the deceased was of sound disposing mind when the alleged Will was made. Having taken note of the above facts the District Judge then mentioned other suspicious circumstances. The first suspicious circumstance mentioned is that the petitioner Vidyawati asserted that the deceased had no other sister except herself. The deceased, of course, had no children and no brother and her husband was already dead. This averment was found as patently wrong because according to Exhibit P-2 itself the name of another sister Chameli Devi who was resident of Bulandshahr was mentioned. It obviously was a deliberate attempt on the part of the petitioner to suppress the existence of Smt. Chameli Devi. The second suspicious circumstance found is that there is over writing/substitution of the name in the alleged Will and this also is in different ink. It has not been explained by any of the witnesses for the petitioner as to why this over writing/substitution was necessary. The third suspicious circumstance relied upon by the District Judge is that both the petitioners were playing active role in the execution of the Will. It is not disputed that the petitioners were actively associated with the execution of the Will although it was maintained that this participation was at the instance of the deceased. It was further not disputed before me that the aforesaid participation was a circumstance justifying the court to proceed in a vigilant and cautious manner and the petitioner was required to produce clear and satisfactory evidence to prove the Will.

(8) The learned counsel for the appellant relied upon a case reported as Naresh Charan Das Gupta v. Paresh Charan Das Gupta and Am. : [1955]1ITR1035(SC) . In that case the execution of the Will was not in dispute. It was not also in dispute that the testator had the requisite mental capacity at the time of the execution of the Will and the two questions agitated were regarding undue influence/pressure exerted upon that testator and due attestation. Their Lordships were of the view that the burden to establish that the Will was the result of undue influence would be on the objector because, 'when once it has been proved that a Will has been executed with due solemnities by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under undue

influence is on the party who alleged it.' This authority, to my mind, has no application to the present case, because execution and due attestation of the Will were proved by the petitioner and those were not in dispute. Although before the District Judge attestation was in issue but at the time of hearing attestation was not challenged . Their lordships said.

'It was also argued for the appellant that there was no proof that the Will was duly attested as required by S. 63 , Indian Succession Act, and that it should therefore be held to be void. Public Witness s. 1 and 2 are the two attestors, and they stated in examination-in chief that the testator signed the Will in their presence, and that they attested his signature. They did not add that they signed the Will in the presence of the testator. Now, the contention is that in the absence of such evidence it must be held that there was no due attestation. Both the courts below have held against the appellant on this contention.'

'The learned Judges of the High Court were of the opinion that as the execution and attestation took place at one sitting at the residence of Public Witness Public Witness . 1 where the testator and the witnesses has assembled by appointment, they must all of them have been present until the matter was finished, and as the witnesses were not cross examined on the question of attestation, it could properly be inferred that there was due attestation. It cannot be laid down as a matter of law that because the witnesses did not state in examination-in-chief that they signed the Will in the presence of the testator) there was no due attestation. It will depend on the circumstances elicited in evidence whether the attesting witnesses signed in the presence of the testator. This is a pure question of fact depending on appreciation of evidence; The finding of the court below that the Will was duly attested is based on a consideration of all the materials, and must be accepted, indeed, it is stated in the judgment of the Additional District Judge that 'the fact of due execution and attestation of the Will was not challenged on behalf of the caveator at the time of the hearing of the suit.' This contention of the appellant must also be rejected'.

(9) In the present case there was overwriting in the date by the attesting witness on the face of the document. This puts the matter indoubt whether the witness

signed on that day or on some other day. In his examination-in-chief he did not state anything about it. He was also not cross-examined about it. In my opinion, it was for the petitioner to dispel this doubt. 'It is well established that in a case in which a Will is prepared under circumstances which raise the suspicion of the court that it does not express the mind of the testator it is for those who propound the Will to remove that suspicion '(Gorantla Thathaiah v. Thotakura Venkata Subbaiah and others, : [1968]3SCR473).

(10) In the matter H. Vankatachla Tyengar v. Thimmajamma and others, : AIR 1959 SC443 , their Lordships observed :-

'THERE may, however, be cases in which the execution of the Will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the attestator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the Will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the Will may otherwise indicate that the said dispositions may not be the result of the testator's free Will and mind. In such cases the court would naturally expect that all legitimate suspicious should be completely removed before the document is accepted as the last Will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last Will of the testator. It is true, if a plea is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the Will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may arise a doubt as to whether the testator was acting of his own free Will in executing the Will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.'

(11) The learned counsel for the appellant then referred to Nobodoorga and another 7 D.L.R. 387, in support of his contention that the objectors having withdrawn their objection after the evidence of the petitioner was recorded, the court had to uphold the Will in the normal course because the matter became unopposed at that stage and the evidence of the petitioner remained uncontradicted. In this case at page 389 of the report their Lordships of the Division Bench observed as under :-

'THERE would be no tolerable degree of certainty in the trial of causes and the administration of justice, if a large body of uncontradicted testimony consistent with probability was set aside in globo, and dismissed as wholly unworthy of belief, because one or two incidental facts are disclosed in the case which give rise in the mind of the judge to a suspicion.'

(12) The facts alleged and sought to be proved in the present case were not considered consistent with probability and for that reason the District Judge dismissed the petition. One can have no quarrel with the view expressed by their Lordships but the facts of each case have to be seen. In the case before their Lordships the material facts were clearly established, whereas in the present case it is not so. Nearly on all material facts disclosed in the case doubt was raised in the mind of the trial judge. Furthermore, this is not an unopposed petition where the petitioner was not put on guard to produce strong cogent evidence having the cumulative effect of convincing the court and removing all its doubts. To begin, with there was strong opposition to the petition and serious allegations of foul play were made. The witnesses after that their objections were withdrawn by the two ladies, i.e. daughters of the lister of the late husband of the testatrix. It cannot, therefore, be said that the petitioners were not squarely faced with the realities of satisfactory and sufficient proof. It has been recorded by the District judge that when they (the two aforesaid ladies) filed the objections they were represented by a counsel and when they made their statement to withdraw their objections to the grant of letters of administration to the petitioner their counsel was not present. Whether there are any objections filed or not the court has to go into the question of the due execution and validity of the Will in a proceeding under section 276. The learned counsel for the appellant cited : AIR1964 Cal34 , but that was a case

where a petition was filed under section 278 and not under section 276.

(13) In the light of the above discussion, I do not find that the District Judge has committed any error in dismissing the petition. The appeal is, therefore, dismissed but with no order as to costs.

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