

Rajesh Sharma Vs. Krishan Kumar Sharma

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Court : Delhi

Decided On : Jul-05-2007

Reported in : (2008)149PLR60

Judge : J.M. Malik, J.

Acts : [Indian Succession Act, 1925](#) - Sections 222 and 276; [Limitation Act, 1963](#) - Schedule - Article 137; Evidence Act - Sections 63 and 68; [Court Fees Act, 1870](#) - Sections 19(1); Delhi High Court Rules

Appeal No. : FAO 641/2002 and CM No. 1282/2002

Appellant : Rajesh Sharma

Respondent : Krishan Kumar Sharma

Advocate for Def. : P.C. Sharma, Adv.

Advocate for Pet/Ap. : Shailender Dahiya, Adv

Disposition : Appeal allowed

Judgement :

J.M. Malik, J.

1. Appellant, Rajesh Sharma, the propounder of the registered will dated 13th July, 1989, executed by his mother, has locked horns with his step-brother, Krishan

Kumar Sharma, the respondent herein. Smt. Sneha Prabha Sharma, the testatrix, and her husband Ram Mohan Sharma were married twice. The appellant, Rajesh Sharma, is the son of the testatrix and Ram Mohan Sharma. The respondent Krishan Kumar Sharma, is the son from the first wife of Ram Mohan Sharma. The appellant's case is this that the will dated 13th July, 1989, was made by the above-said testatrix in sound disposing mind on 13th July, 1989 and it was got registered on 11th September, 1989. Smt. Sneha Prabha Sharma died on 9th July, 1990. Except Krishan Kumar Sharma, none of the other siblings of the appellant contested the petition moved by the appellant under Section 276 of the Indian Succession Act.

2. On the basis of the pleadings, the following issues were framed by the learned trial court vide order dated 19th May, 1999:

1. Whether the will dated 13.7.89 propounded by the petitioner is the last will and testament of deceased Sneha Prabha Sharma and it had been executed by her in sound disposing mind and that it is a valid will' OPP.

2. Whether the petitioner is entitled to the grant of probate' OPP

3. Whether the petition is not maintainable for the reasons, stated in preliminary objection No. 1' OPR

4. Whether the petition is barred by time' OPR

5. Relief.

The trial court has decided issues Nos. 1 and 3 in favor of the appellant and issues Nos. 2, 4, 5 against the appellant. It was held that in view of the judgment of this Court reported in Pamela Manmohan Singh v. State (2000) RLR 137, the instant petition was barred by time. It was also held that according to Article 137 of the [Limitation Act, 1963](#), the limitation for filing petition under Section 276 of the Indian Succession Act is three years. Aggrieved by the above-said order, the appellant has preferred the present appeal. The main plea of the appellant is that the law of limitation does not apply to the petition under Section 276 of the Indian Succession Act.

3. Counsel for the respondent has filed cross-objections. In the cross-objections, he pointed out that the Will in question is littered with the evidence of various suspicious circumstances.

4. I have heard the learned Counsel for the parties. The view taken by the trial court that the petition under Section 276 of the Indian Succession Act is barred by time does not appear to be correct. The case relied upon by the trial court reported in Pamela Manmohan Singh v. State (supra) was decided by a learned Single Judge. The said judgment was overruled by a division bench of this Court in a case reported in S.S. Lal v. Vishnu Mitter Govil : 112(2004)DLT877 (DB). In another case reported in Kanwal Malhotra v. State : AIR2006 Delhi71, the learned Single Judge of this Court has held that Article 137 of the Limitation Act would have no application to such like proceedings. It was further held that right to apply for probate or letters of administration is recurring one. Counsel for the respondent has raised no arguments in this context and therefore, I set aside the order passed by the trial court in this respect and hold that the petition of the appellant under Section 276 of the Indian Succession Act cannot be dismissed on this sole ground.

5. Counsel for the respondent has raised copious objections, in order to show that the suspicious circumstances qua the will exist, for which no probate should be granted in favor of the appellant. He listed the following suspicious circumstances. Firstly, the appellant is in possession of a portion of the premises in dispute but this fact finds no mention in the Will. Secondly, the testatrix was an illiterate lady. Counsel for the respondent could not clarify whether the testatrix ever studied in school. Thirdly, Ved Prakash, the only attesting witness examined by the appellant is not reliable. In this context, the attention of the Court was drawn towards the fact that in his deposition, this witness stated, that, the testatrix had four sons and two daughters, whereas the testatrix had four sons and three daughters as per the probate petition. Again, this witness stated that he had visited the suit property on many occasions but could not say whether the objector was residing in the rear portion of the plot. He again contradicted the appellant's story by stating that testatrix was not bed ridden for 12 years prior to her death. This stance is contrary to the death certificate Ex.PW2/A. It was further argued that this is an admitted fact

that the will was drafted by Shri Sushil Chadha, C.A., but he did not sign the will. Moreover, Ms. Vijaya Laxmi, who is the sister of the appellant and another attesting witness, was not produced in the dock. The attention of the court was drawn towards an authority reported in *Dinesh Kumar v. Khazan Singh* : AIR1988 Delhi273 , wherein only one attesting witness was examined though other witness was also available. It was held that second witness should have been examined. It was also submitted that the mere fact that the will is registered is not enough to prove its genuineness. Learned Counsel for the respondent has cited an authority reported in *Rajinder Nath Sharma and Ors. v. Rani Chander Kanta* : AIR1982 Delhi584 , in this regard. The last submission made by learned Counsel for the respondent was that the father of the appellant had purchased this property in the name of his wife, the sale deed was a benami transaction and consequently, the testatrix had no right to execute the will. He also pointed out that the proceedings in this context are also pending before the Senior Civil Judge and the decision is yet to come in this case.

6. It is clear that attempts were made to obfuscate the real issue. It must be borne in mind that in the present proceedings we are dealing with the question of grant of probate under Section 276 simpliciter. These proceedings cannot be turned into the title/ownership proceedings. If the respondent has got any grouse, he can file the suitable proceedings before the Civil Court. Consequently, in these proceedings such like questions require no adjudication. The decision given by the civil court may settle the rights of the parties. See *H.P.S. Chawla v. N.P.S. Chawla* 2006 AIR (Del) 53

7. Even if it is assumed that the appellant is in possession of the portion of the suit property, by no stretch of imagination, it can be said that the testatrix or the appellant has tried to suppress this fact or has not come to the court with clean hands. The question as to who are in possession of the case property is irrelevant. The entire family was living as a single unit in the property in dispute but the testatrix had bequeathed the property in question in favor of the appellant, Rajesh Sharma, to the exclusion of all the other legal heirs including the objector irrespective of the fact whether he is in possession or not in respect of the property in dispute. It appears that this objection is raised merely for the sake of cavil and

has no force at all.

8. It cannot be said that the testatrix was an illiterate lady. Rajesh Sharma, PW-2, deposed that she had studied up to seventh or eighth class. Moreover, there is no evidence on record which may go to show that she was under undue influence, coercion or any kind of misrepresentation while executing the will. Even an illiterate person knows why her signatures are being obtained twice before the attesting witnesses and before the Registrar. It cannot be said that she was dumb driver cattle or ignorant testator. This objection must be eschewed out of consideration.

9. Ved Prakash, the attesting witness, appears to be a reliable and trustworthy witness. The flaws pointed out about his testimony are not serious. I am unable to pin much value to these arguments. He has an aroma of dependability.

10. It is now settled law that only one attesting witness is sufficient to prove the will. This view was taken in an authority reported in *Janki Narayan Bhoir v. Narayan Namdeo Kadam* : [2002]SUPP5SCR175 , wherein it was observed, 'It is true that Section 68 of Evidence Act does not say that both or all the attesting witness has to be called for proving due execution of the Will as envisaged in Section 63. But what is significant and to be noted is that that one attesting witness examined should be in a position to prove the execution of a Will. To put in other words, if one attesting witness can prove execution of Will in terms of Clause (c) of Section 63, viz., attestation by two attesting witness can be dispensed with.' Emphasis supplied

11. Further, this Court in *Mathew Jacob v. Salestine Jacob* : AIR1998 Delhi390 , was pleased to hold that examination of only one witness is sufficient. It was further held that to prove the Will it would be sufficient if only one attesting witness is examined. Section 68 of the Evidence Act stipulates that to prove a 'Will' at least one attesting witness be examined.

12. This is also not the requirement of law that the C.A. who drafted the Will must sign it. In the result, I am of the considered view that the doubts raised by the respondent's counsel have been proved to be puerile and baseless.

13. It was also argued by learned Counsel for the respondent that since the deceased has not named the executor of the will, therefore, the petition for probate would not lie. He has cited an authority reported in *Vinod Bahl v. State* : 68(1997)DLT772 , in support of his case. The next submission made by learned Counsel for the respondent was that the present petition is not in accordance with the law laid down under Section 276 of the Indian Succession Act as also not in accordance with the Delhi High Court Rules, Schedule III and Section 19(1) of the [Court Fees Act, 1870](#).

14. These arguments carry no conviction. It must be borne in mind that Section 222 of the [Indian Succession Act, 1925](#), lays down:

222. Probate only to appointed executor ' (1) Probate shall be granted only to an executor appointed by the Will.'

(2) The appointment may be expressed or by necessary implication.

It is, therefore, crystal clear that the appointment of executor can be expressed or by necessary implication.

15. A bare look on the will in question provides sufficient inkling towards the fact that the appellant was given the powers of executor impliedly. The relevant paras of the Will are reproduced to understand the position clearly and unequivocally:

Now, I hereby declare that my son, Shri Rajesh Sharma shall be my only legal heir to inherit all my assets and properties after my death. He shall be my only legal heir entitled to take possession and inherit all the rights, connections, interest, title etc. in my all movable and immovable properties as mentioned above or in my all movable or immovable properties that I may acquire after the execution of this Will. My son, Shri Rajesh Sharma shall be fully authorised to get the immovable properties transferred/mutated in his name in the records of the Delhi Development Authority, NDMC, Municipal Authority or any other Government authorities or Departments. More precisely, I once again state that no-one else including my husband, my sons except Shri Rajesh Sharma or my daughters or any other person claiming to be my legal heir shall have any right, title, interest,

connection or to share in my any movable or immovable properties or assets. My most lovable son, Shri Rajesh Sharma is my only legal heir and I have rested all my rights in him in all my movable or immovable properties after my death.

xxxxxFurther, my husband Shri Ram Mohan Sharma also have one son from his first wife whose name is Krishan Kumar Sharma. My this step-son, Shri Krishan Kumar Sharma, his wife and children or any person claiming for and on their behalf also shall have no right, title, interest or connection of whatsoever nature with my any properties or assets. Further, if my husband dies before me and whatever assets I may acquire, inherit or devolve upon me on his death such as fixed deposits with Banks, shares, properties or any other deposits, assets etc. shall also be inherited by my only son Shri Rajesh Sharma.

The above-cited paragraphs of the will in question clearly depict the same that the appellant and nobody else was given the powers to execute the will. He was given the authority to get the immovable properties transferred/mutated in his name in the records of the Delhi Development Authority, NDMC, Municipal Authority or any other Government authorities or departments. The appellant is, therefore, entitled to grant of the probate. I, therefore, set aside the order passed by the learned trial court and grant

probate in respect of the will in favor of the appellant. The court below is hereby directed to issue the probate to the appellant after completion of all necessary formalities.

16. It is now well settled that Court is not totally devoid of jurisdiction in the matter of granting probate even if the entire property schedule in the will is not included in the application. This view was taken in K.M. Varghese v. K.M. Oommen : AIR1994 Ker85 .

17. FAO 641/2002 is accordingly allowed. CM 1282/2002 also stands disposed of. The trial court record along with a copy of this judgment be sent back forthwith. Parties to appear before the trial court on 1st August, 2007.