Ms. Sumitra Devi and ors. Vs. State and ors.

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Court : Delhi

Decided On : May-15-2007

Reported in : 2007(98)DRJ617

Judge : Vipin Sanghi, J.

Acts : Indian Succession Act, 1925 - Sections 2 and 63; Indian Succession Act, 1865 - Sections 50; Evidence Act, 1872 - Sections 68

Appeal No. : Test Case No. 21/2000

Appellant : Ms. Sumitra Devi and ors.

Respondent : State and ors.

Advocate for Def. : Nemo

Advocate for Pet/Ap. : Harish Malhotra, Sr. Adv. and; Anupama Kant, Adv

Disposition : Petition dismissed

Judgement :

Vipin Sanghi, J.

1. The issue that arises for consideration is:

Whether a document purporting to be an unprivileged 'Will' attested by only one witness can be probated by the Court.

2. At the very outset, it would be pertinent to note the relevant statutory provisions in this regard.

3. Section 2(h) of the Indian Succession Act, 1925 (the Act) gives the definition of a 'Will'. It reads as under:

2(h) 'Will' means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.

4. Section 63 of the Act, so far as it is relevant, reads as follows:

63. Execution of unprivileged wills. - Every testator, not being a soldier employed in an expedition or engaged in actual warfare or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules:

(a) ...

(b) ...

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of the witnesses shall sign the will in the presence of the testator but it shall not be necessary that more than one witness be present at the same time and no particular form of attestation shall be necessary.

5. Also relevant is Section 68 of the Indian Evidence Act, 1872. The relevant extract of Section 68 is reproduced herein below for the sake of convenience:

68. Proof of execution of document required by law to be attested. - If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution,

if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.

6. Thus, Section 63(c) of the Act provides the mode of execution of the 'Will', while Section 68 of the Indian Evidence Act, 1872 provides the mode of proof of execution of a document, required by law to be attested.

7. In the present case the Petitioner, Smt. Sunitra Devi has filed this Petition for the grant of probate in respect of, what is claimed to be, the 'Will' of her late husband Shri Amolak Raj Chopra son of Shri Ram Lal Chopra dated 17th July 1986. The said document is stated to have been executed by the testator Shri Amolak Raj Chopra in his own hand. This is evident from not only para 5 of the petition but also from the last lines of the document. None of the Class I heirs of the deceased, who are enlisted in Annexure C to the petition, have filed any objections to this petition. Even in response to the public notice issued by the court, there has been no objection from any quarter to grant of probate. thereforee, the question that needs to be answered is whether probate can be granted of a document, which is claimed to be a 'Will' attested by only one witness.

8. Counsel for the petitioner submits that in circumstances like the present, where there is no contest to the petition seeking probate of a 'Will', by any of the heirs of the deceased, or by any person of the public, the requirement under Section 63(c) of the Act, wherein two attesting witnesses are required to attest the 'Will', should be read as a directory and not a mandatory provision.

9. It is submitted that the object of the law with regard to the attestation of an unprivileged 'Will' by two witnesses, and that too in a particular way, is to ensure the genuineness of the 'Will' of the testator. As the 'Will' takes effect after the death of the testator, and it is for the court, at that stage, in the absence of the testator, to determine as to what was his last 'Will', and how he intended to distribute his properties, this particular manner of execution of a 'Will' is provided by law.

10. It is argued that the said provision should be read as directory in a case where there is no contest or objection to the grant of probate, since the law does not provide the legal consequence of the failure to fulfill the requirement set out in

Section 63(c) of the Act. Counsel for the petitioner has relied on three decisions of the Hon'ble Supreme Court in support of his arguments.

11. In State of Punjab v. Satya Pal : [1969]1SCR478 , the Hon'ble Supreme Court observed that the distinction between a mandatory provision of law, and that which is merely directory is that in a mandatory provision there is an implied prohibition to do the act in any other manner while in a directory provision substantial compliance is considered sufficient. In those cases where strict compliance is indicated to be a condition precedent to the validity of the Act itself, the neglect to perform it is fatal.

12. On the strength of the aforesaid decision, it is argued that since the Act does not, in terms, say that a 'Will' not duly executed in accordance with Section 63(c) thereof, would be invalid and would not under any circumstances, be probated, the requirement of attestation prescribed under Section 63(c) is directory.

13. The next decision relied upon by the Petitioner is Rajendra Singh v. State of M.P. : AIR 1996 SC2736 . The Hon'ble Supreme Court in this judgment observed as follows:

The provision may be a directory one or a mandatory one. In the case of a directory provisions, substantial compliance would be enough. Unless it is established that violation of a directory provision has resulting in loss and/or prejudice to the party, no interference is warranted. Even in the case of a violation of a mandatory provision, interference does not follow as a matter of course. A mandatory provision conceived in the interest of the party can be waived by that party, whereas a mandatory provision conceived in the interest of the public cannot be waived by him. In other words, wherever a complaint of violation of a mandatory provision is made, the Court should enquire - in whose interest the provision is conceived. If it is not conceived in the interest of public, question of waiver and/or acquiescence may arise - subject, of course, to the pleadings of the parties.

14. It is argued by the petitioner that even in the case of a mandatory provision, it is open to the parties for whose benefit the provision is made to waive compliance

thereof. It is further argued that the requirement of the attestation by two witnesses of a unprivileged 'Will' is really for the benefit of all the heirs, who would, in the absence of the 'Will' derive interest in the property of the deceased as per the law of intestate succession. Furthermore, since all the Class I hears in the present case are agreeable to the grant of probate, inasmuch as, none of them have filed any objections despite notice, the requirement of attestation by two witnesses in accordance with Section 63(c) of the Act stands waived and the court can proceed to grant probate of the 'Will'.

15. Learned Counsel for the Petitioner also relied upon para 149 of the decision reported as In the matter of Special Reference No. 1 of 2002 (Gujarat Assembly Election matter), : AIR 2003 SC87 wherein it was observed:

In determining the question whether a provision is mandatory or directory, the subject-matter, the importance of the provision, the relation of the provision to the general object intended to be secured by the Act will decide whether the provision is directory or mandatory. It is the duty of the courts to get the real intention of the legislature by carefully attending the whole scope of the provision to be construed. The key to the opening of every law is the reason and spirit of the law, it is animus impotentia, 'the intention of the law-maker expressed in the law itself, taken as a whole'.

16. It is argued that the object of ensuring the authenticity of the 'Will' is achieved even when the 'Will' is attested by one witness and none of the heirs of the deceased question the existence and correctness of the 'Will'.

17. The Petitioner has brought to the notice of this Court the decisions reported as T.V.S. Rao and Anr. v. T. Kamakshiamma AIR 1978 Orr 145 and has sought to distinguish the same. In T.V.S. Rao (Supra), the court observed:

Proof of attestation of the document by only one witness would not satisfy the statutory requirement of attestation of a will, and so long it is not proved that the document was attested by two witnesses it cannot have the legal sanctity of a will. So, though under Section 68 of the Evidence Act only one attesting witness, if alive and subject to the process of the court and capable of giving evidence, has to

be called to prove the execution of the document, it would be incumbent on the propounder or the person claiming under the will to prove that the said document was executed as required under Section 63(c) of the Indian Succession Act, 1925, and then only that document can be given effect to as a will.

18. The counsel has argued that this judgment was rendered in respect of a contested unprivileged 'Will' and thereforee, is not applicable in the instant case, it being an uncontested unprivileged 'Will'. On the same ground the counsel for the Petitioner has sought to distinguish S.S. Srivastava v. State and Ors. 2007 IV AD (Del) 314, wherein this Court has observed as under:

16. A 'Will', in order to be validly executed, is required to be attested by two witnesses who are required to witness the execution of the 'Will' by the testator and are required to affix their signatures as witnesses at the same time in the presence of each other and the testator.

19. Having considered the matter, I am unable to accept the interpretation sought to be given to Section 63(c) of the Act by the petitioner.

20. The definition of the expression 'Will' contained in Section 2(h) of the Act itself suggests that for a document to be even claimed to be a 'Will', it has to be attested in terms of Section 63(c) of the Act. A 'Will' is defined as 'the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.' For it to be a 'legal' declaration, the declaration should, of necessity, comply with the requirements of law. The requirement of law for the declaration of an unprivileged 'Will' to be legal are those contained in Section 63(c) of the Act. Thus, in my view, a document not attested in accordance with Section 63(c) of the Act, cannot even be called a 'Will'. thereforee, there is no question of it being probated.

21. The Hon'ble Supreme Court in the case of Janki Narayan Bhoir v. Narayan Namdeo Kadam (2003) SCC 91 has dealt with and considered exhaustively the provision contained in Section 63(c) of the Act.

22. The court observed that the requirement of attestation of a 'Will' by two or more witnesses, is mandatory. On a combined reading of Section 63 of the Act with Section 68 of the Indian Evidence Act, it appears that a person propounding the 'Will' has necessarily to prove that the 'Will' was duly and validly executed. That cannot be done by simply proving that the signature on the 'Will' was that of the testator, but it must also be proved that the attestations were also made properly as required by Clause (c) of Section 63 of the Act. Though Section 68 of the Evidence Act does not expressly state that both, or all the attesting witnesses must be examined, and the propounder may prove and establish the 'Will' in a court of law by examining only one attesting witness, the 'Will' has to be attested by at least two witnesses mandatorily under Section 63 of the Succession Act.

23. It is the scheme of the Act that the attesting witness examined should be in a position to prove the execution of a 'Will' in terms of Clause (c) of Section 63. thereforee, the attesting witness produced before the court as a witness should be in a position to, and must depose with regard to, the execution of the 'Will' by the testator and also with regard to attestation of the 'Will' by two attesting witness.

24. The decisions cited by the petitioner at the bar do not further the case of the petitioner, in view of my finding that the document in question does not fall within the definition of a 'Will'. Satya Pal (Supra) in fact supports the view that I am inclined to take that the non-compliance of Section 63(c) is fatal to the claim that the document is a 'Will'.

25. No doubt, a 'Will' may not be executed in public interest. However, the legal requirements for the due execution of the 'Will' are prescribed in public interest. It is wrong to contend that the requirement of attestation under Section 63(c) of the Act is for the benefit of the heirs of the testator. This requirement, to my mind, is for the benefit of the Public at large, because a grant of probate operates as a declaration in rem. thereforee the test laid down in Satya Pal (supra) cannot be applied to conclude that the requirement of attestation in terms of Section 63(c) is directory. Rajendera Singh (supra) and the Gujarat Assembly Election Matter (supra) also do not support the petitioners contentions for the same reason.

26. I am fortified in my view by the following other judicial pronouncements and treaties.

27. 'Will' is a translation of the latin word Voluntas, a term used in the texts of the Roman Law to express the intention of a testator. The testament must be made in compliance with the forms of law. [see N.D. BASU, Law of Succession, 6th Edition (2000)]

28. In Syed Mohamed v. Syed Ali it was observed with reference to provision contained in Section 50 of the Indian Succession Act, 1865, which is pari materia with Section 63 of the Act, that the term 'execution' in reference to a 'Will' means not only the signing by the Testator but also comprehends the attestation thereof of by witnesses, and till the document in question was not attested the 'Will' could not be said to be executed.

29. Broom's LEGAL MAXIMS, Tenth Edition, 481 states:

it is clear that the maxim, quailed potest enunciate juri pro se introducto, which means 'any one may at his pleasure renounce the benefit of a stipulation or other right introduced entirely in his own favor', is inapplicable where an express statutory direction enjoins compliance with the forms which it prescribes; for instance, a testator cannot dispense with the observance of formalities essential to the validity of a 'Will'; for provisions of the 'Will's Act were introduced for the benefit of the public, not of the individual, and must be regarded as positive ordinances of the legislature, binding upon all. Nor can an individual waive a matter in which public have an interest.

30. It thereforee, appears that an unprivileged 'Will' under the Act cannot be executed except in the manner provided for in Section 63(c) of the said Act. In this view of the matter, in the present case, the document claimed to be the last 'Will' of the testator, Late Shri Amolah Raj Chopra cannot be said to be a 'Will' within the meaning of Section 2(h) of the Act, and cannot, thereforee, be probated. The Petition is, thereforee, dismissed.