

Joyna John Vs. State and ors.

Joyna John Vs. State and ors.

SooperKanoon Citation : sooperkanoon.com/907641

Court : Delhi

Decided On : Dec-21-2010

Judge : Mool Chand Garg, J.

Acts : [Indian Succession Act, 1925](#) - Sections 299/384, 276/279, 63; [Evidence Act, 1872](#) - Section 68

Appeal No. : FAO 302/2007

Appellant : Joyna John

Respondent : State and ors.

Advocate for Pet/Ap. : Mr.Avadh Bihari Kaushik, Adv.

Judgement :

1. The present appeal under section 299/384 of the [Indian Succession Act, 1925](#) is directed against the order dated 02.07.2007 passed by learned Additional District Judge, whereby the learned Judge has dismissed the petition of the appellant filed under Section 276/279 of the Indian Succession Act seeking probate in respect of the Will dated 05.11.1997 executed by Sh.Luke John in Probate Case No. 256/06/05 titled as "Smt.Joyna John v. The State and Ors."

2. Briefly stating, the facts giving rise to filing of the present appeal are that late Sh. Lukhe John had executed a Will dated 05.11.1997 in respect of the immovable property i.e. B-43, DTC Colony, Hari Nagar, New Delhi and other movable properties/assets mentioned in schedule A and expired on 2.3.2003 leaving

behind his three daughters i.e. the appellant herself and respondent Nos. 2 and 3 and one son, namely, Ibneazer John, respondent No.4. Notice of the petition was issued to the State through Collector and also to the legal heirs of the deceased. Citation was also got ordered to be published in the newspaper Rashtriya Sahara but publication not received and copy of the citation was got affixed on the notice board of the court house and all the legal heirs were also served of the notices, however, none appeared despite service of notice and they were proceeded against ex parte vide order dated 17.11.2005 and 28.02.2006.

3. The appellant in support of her petition filed her own affidavit in evidence as PW-1 and has also got recorded the statement of PW-2 Sh. Prakash Lal who is one of the attesting witnesses to the Will through Commissioner.

4. The Id. ADJ, after perusal of the record of the case and the documents and the evidence which came on record and also relying upon the judgment of the Supreme Court in Daulat Ram & Ors. v. Sodha & Ors, JT 2004 (10) SC 50, has dismissed the petition by observing as under:- "9. Neither the petitioner as PW-1 in her affidavit Ex.P-1 stated nor PW-2 deposed about the state of mind of the testator nor as to the testator having understood the nature and effect of the dispositions.

10. The declaration of witness at page 5 of the petition which is verification of the petition by one of the attesting witness as required u/s 281 of the Indian Succession Act reads:-

"I. Parkash Lal, one of the attesting witness to the last WILL and Testament of Late Luke John, the Testator mentioned in the petition, do hereby declare and say that I was present on the 5th days of November, 1997 and saw the Testator affix his signatures to the said WILL, which is ANNEXURE DB to this petition. Verified at Delhi on this 5th Day of September 2005."

11. Neither in the declaration dated 5.9.2005 nor in his testimony PW-2 stated as regards the presence of other attesting witness nor stated that the testator Sh.Luke John had signed the Will mark A in presence of both the attesting witnesses, nor that he signed the Will mark A in the presence of other attesting

witness nor that the other attesting witness signed the Will Mark A in his presence nor that they signed the Will Mark A in the presence of each other.

12. The petitioner has thus failed to establish the three ingredients as laid down in Daulat Ram & Others (supra), for a validly and genuinely executed Will.

13. From the signature of the testator on the Will mark A and its registration, even if presumption as to the free will and sound disposing state of mind of the testator is drawn, still the third requirement of valid will has not been established and as such the Will mark A cannot be said to be a validly executed and genuine document and the petitioner is not entitled to any relief in respect of the same. The petition is liable to be dismissed. Accordingly, the petition is dismissed."

5. It is submitted on behalf of the appellant that it is a matter of record that the Will to which the probate was sought on behalf of the appellant is a registered Will, which was duly registered vide the office of the Sub Registrar Delhi vide document bearing No. 75173 in additional book No. III, Vol. No. 4056 at pages 136-137 on 05.11.1997 i.e. on the very same day when the same was executed by the father of the appellant in the presence of two witnesses, namely, Sh.Prakash Lal and Sh.H.K.Babbar, Advocate.

6. It is also submitted that the probate petition of the appellant went uncontested before the learned Trial Court as none of the respondents chose to raise any objection despite service through publication. It is further submitted that the only point which this Court has to adjudicate is as to, "whether the validly executed and proved will which has been proved on the first two points that the testator put his signature on the testament of his own free will and that he was at the relevant time in a sound disposing health of mind and understood the nature and effect of the disposition is liable to be discarded on third limb that the appellant failed to establish that the testator signed the Will in the presence of two witnesses and these two witnesses attested the same in the presence of each other?"

7. Counsel for the appellant has placed reliance on the following judgments:-

1. Rajesh Sharma v. Krishna Kumar Sharma, 143 (2007) DLT 216;

2. Afzal-Ur-Rehman Khan v. State & Anr., 150(2008) DLT 185;
3. Ashok Kumar Dua v. Ranbir Kumar Dua, 151 (2008) DLT 469;
4. K.L.Malhotra v. Sudershan Kumari & Anr., 149(2008) DLT 783; and,
5. Vir Bhan Chaudhary & Ors. v. State of Delhi through Collector, 147(2008) DLT 321.

8. I have heard the learned counsel for the appellant and have also gone through the record of the case as also the written submissions filed on behalf of the appellant.

9. At this stage, it would be appropriate to take note of the judgment of the Apex Court delivered in the case of Daulat Ram (supra), which has also been relied upon by the Id. ADJ while passing the impugned order. The relevant paragraph is reproduced hereunder:-

5. Will being a document has to be proved by primary evidence except where the court permits a document to be proved by leading secondary evidence. Since it is required to be attested, as provided in Section 68 of the Indian [Evidence Act, 1872](#), it cannot be used as evidence until one of the attesting witnesses 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. In addition, it has to satisfy the requirement of Section 63 of the [Indian Succession Act, 1925](#). In order to assess as to whether the Will has been validly executed and is a genuine document, the propounder has to show that the Will was signed by the testator and that he had put his signatures to the testament of his own free will; that he was at the relevant time in a sound disposing state of mind and understood the nature and effect of the dispositions and that the testator had signed it in the presence of two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. But where there are suspicious circumstances, the onus is on the propounder to remove the suspicion by leading appropriate evidence. The burden to prove that the Will was forged or that it was

obtained under undue influence or coercion or by playing fraud is on the person who alleges it to be so."

10. It would also be appropriate to take note of Section 63(c) of the Indian Succession Act, which reads as under:- "(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 the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or 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."

11. I have also gone through the judgments cited by the appellant but none of the judgments dispenses with the attestation of Will by two witnesses. It is a different matter that one of the attested witnesses can appear in the court for propounding the attestation. However, in the present case, the Will itself goes to show that there is only one witness who attested the Will. The Will for the sake of reference is reproduced hereunder:-

"WILL I, LUKE JOHN SON OF LATE SH. JOHN ANTHONY R/o B-43, DTC Colony, Hari Nagar, New Delhi, aged 77 years, hereby make this Testament of Will in my sound health and disposing mind without any pressure or coercion of any kind from any corner and to avoid any litigation amongst my legal heirs on this 05.11.1997 at New Delhi.

Whereas I am sole and absolute owner of the following properties are as under:-

a) Built-up property bearing No. B-43, situated at DTC Colony, Hari Nagar, New Delhi.

b) Movable properties/ assets such as cash in hand, bank balance, jewellery, House hold articles etc. c) All other movable and immovable properties. That now I from my free will and consent hereby bequeath that after my demise the aforesaid movable and immovable properties as mentioned above shall go and devolve

upon my daughter namely Joyna John wife of Mr. C. Klark R/o Dehradun (UP)

That my other sons and daughters along with their legal heirs shall have no rights to interfere in this Will. That I further declare that till I am alive, I shall remain the sole and absolute owner of my all movable and immovable properties.

That my other legal heirs shall have no rights to interfere in this Will.

This is my last and final Will regarding said properties and if any other Will executed by me prior to execution of this Will shall be cancelled/revoked and treated as null and void. In witnesses whereof I, have signed this Will in presence of the following witnesses, and who have also signed in my presence.

WITNESSES:

1. Prakash Lal

S/o Hari Chand

R/o A-26, DTC Colony

TESTATOR

Sd/- Advocate (illegible)"

12. It may be observed here that reliance placed upon by the appellant that there is a signature of an Advocate at the bottom of the Will and that he was an attesting witness to the Will, cannot be accepted for the reason that no such statement has been given by Prakash Lal, the only attesting witness examined by the appellant. Had Prakash Lal would have stated that there was a second witness to the Will also, then despite his non- appearing in the Court, the Court would have considered the said submission in the light of the judgments cited by the appellant. But this does not appear to be a factual position. There is also no explanation as to why if an Advocate was an attesting witness, he was not summoned by making a request to lead additional evidence to clarify the possession. This only goes to show that the signatures of the Advocate which appears at the bottom have been obtained when the Will was presented for registration but this does not mean that the Advocate is the second attesting witness or his signatures at the bottom of the

Will meets the requirement of attestation of Will by two witnesses, which is a legal requirement in view of Section 63(c) of the Indian Succession Act. Thus, the judgments cited by the appellant are of no consequence.

13. In view of the above, I find no ground to interfere with the impugned order dated 02.07.2007. The appeal is accordingly dismissed with no orders as to costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com