

Smt Chamno Devi Vs. Smt Usha and ors

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Court : Delhi

Decided On : Mar-28-2011

Judge : Mool Chand Garg, J.

Acts : Code Of Criminal Procedure (CPC) - Sections 107, 151; Indian Succession Act - Section 63

Appeal No. : FAO 40/1990

Appellant : Smt Chamno Devi

Respondent : Smt Usha and ors

Advocate for Def. : Mr.D.S.Patial; Mr.U.K.Malik, Adv.

Advocate for Pet/Ap. : Mr.Ajay Kumar Chopra, Adv.

Judgement :

1. Whether the Reporters of local papers may be allowed to see the judgment?
Yes

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

1. This appeal has been filed by the appellant against the impugned judgment dated 4.11.2008 passed by the Additional District Judge, Tis Hazari in Probate Case No.236/06/04 granting probate of the Will Ex.PW1/2 in favour of Smt.Usha,

respondent No.1 subject to her complying with other formalities. The grant of probate was further made subject to the following:-

" .the exact measurement and valuation of the land and house in question shall be got ascertained from the collector concerned before completion of necessary formalities. An inventory of the properties of the deceased shall be exhibited in Court within six months from the date of grant of certificate of Letter of Administration and the petitioner shall thereafter file a statement of account within one year. It is clarified that question of right, title and share in the properties in question as well as legality and validity of alleged sale transaction though Ex.PW1/4 to 6 is not decided by this Court."

2. Briefly stating the facts giving rise to filing of this case are that deceased Sh. Mahabir, father of respondent No.1/Usha, had executed a registered Will on 22.05.2003 in respect of his allegedly self acquired property i.e. agricultural land situated in village Tehri, Daulatpur, Delhi and one residential house measuring 272 sq. yards situated in old Lal Dora of 1908-09 of village Hiranki, Delhi in favour of respondent No.1 who was looking after and taking care of him. Soon after the death of her father, respondent No.1 filed a probate petition before the Additional District Judge, Tis Hazari on 12.07.2004.

3. The deceased was survived by this wife and son, who contested the proceedings and filed joint objections. According to them, Will in question had been obtained and procured fraudulently by respondent No.1 in collusion with the witnesses as the deceased had no desire to give away his properties to respondent No.1. It is also stated that respondent No.1 neither resided in the village with the deceased nor looked after him at any time. The right of the deceased to bequeath the property through Will was also challenged on the ground that those were ancestral properties and not his self acquired properties.

4. Replication was filed by respondent No.1, who relied upon the contents of Civil Suit No. 662/2002 allegedly filed by the deceased against the objectors, wherein he admitted the execution of Will in favour of respondent No.1. She also alleged that the objectors used to harass and torture the deceased and were not serving him during his last days as he was suffering from cancer. She also alleged that the

deceased also executed GPA, agreement to sell, affidavit, etc. in her favour and in the favour of her husband out of love and affection as they were maintaining him and providing him necessary help for survival.

5. On the pleadings of parties, following issues were framed by the Additional District Judge:-

"1. Whether late Mahabir had executed a valid and enforceable Will dated 22.05.2003 as claimed by the petitioner? OPP

2. Whether the petitioner is entitled for grant of Letter of Administration/Probate in respect of aforesaid Will? OPP

3. Whether the petition is liable to be dismissed for objections raised by the respondents? OPR

4. Relief."

6. In order to prove her case, Smt.Usha/respondent No.1 examined six witnesses including herself as PW-1, Sh.Shishan and Sh.Jai Kumar, attesting witnesses of the Will as PW-2 and PW-3 respectively. She also examined PW-4 Sh.Jagbir Singh, an official from the office of Sub Registrar to prove the registration of the Will. Sh.S.K.Rana and Sh.R.C.Joshi appeared as PW-5 and PW-6 to prove drafting of the Will and attestation of other documents.

7. On the other hand, both the objectors have stepped in the witness box and examined themselves as RW-1 and RW-2.

8. The Additional District Judge decided all the issues against the objectors and in favour of respondent No.1. With regard to the execution and attestation of the Will left by the deceased, while observing that nobody has objected that the deceased was not having sound and disposing mind at the time of executing the Will or he was incapable to understand the consequences of disposition, the Additional District Judge relying upon the testimony of two attesting witnesses and propounder of the Will and other documents executed by the deceased just after the execution of the Will in favour of the propounder of the Will held that, Will in

question was executed by the deceased in favour of respondent No.1/Smt.Usha and that the attestation thereof was also proved by the testimonies of PW-2 and 3, who are trustworthy and unimpeachable witnesses.

9. On the other hand, the Additional District Judge brushed aside the statements made by RW-1 and RW-2 inasmuch as there was admission on the part of the objectors that litigations were going between the deceased and objectors. RW-1 admitted in her cross- examination that she had filed a petition for maintenance against the deceased in the court which was pending since 1982. She also admitted that she and her son were living separately from the deceased. Even criminal proceedings under Section 107/151 Cr.P.C. were also initiated two three times against the deceased by RW-1. Respondent No.1 had placed on record the copy of the plaint of the suit for injunction filed by the deceased against the respondents which is Ex.RW1/P-1 and it was not disputed by the objectors. The contents of the plaint show that the deceased was not happy with the behaviour and conduct of the respondent who used to torture and harass him. The Additional District Judge further observed that, "Deceased in this plaint of civil suit also mentioned about execution of one Will in favour of his daughter i.e. petitioner. Though the Will referred in the plaint is not the present Will but an earlier Will however one thing is clear from the above facts that the deceased had no cordial relations with the respondents and he wanted to give his properties to petitioner after excluding respondents i.e. his wife and son. The strained relationship, pendency of civil and criminal proceedings and living separately might be the valid grounds in the mind of the deceased to exclude his own wife and son from the benefit of his estate. Exclusion of respondents from the benefits of his estate through the Will in such circumstances cannot be said as unnatural conduct on the part of the deceased and accordingly Will in question cannot be seen with any doubt. RW-1 did not even know that her husband died due to throat cancer whereas RW-2 admitted this fact. RW-2 admitted that his deceased father used to pay his as well his mother's maintenance. RW-1 and 2 also admitted that deceased was unemployed and was only doing cultivation. I have no ground to disbelieve the version of the petitioner that despite being married lady she was living in the village, looking after the deceased, medically treating him, serving him in his old age as well as also making payments of maintenance of respondents on

behalf of deceased. Husband of the petitioner admittedly was serving in the Army and used to visit his house after taking leave from his office once or twice in a year. In that situation, conduct of the petitioner in not living in her matrimonial house and living in the village to look after his old father can be said as justified and believable especially when deceased's wife and son were living separately. Mere fact that the petitioner failed to show how much expenses she incurred on the deceased for his maintenance or medical treatment and failed to produce any medical bill or from where she paid sale consideration of the property to the deceased is not a ground to reject the Will in question."

10. On the other hand, dealing with the testimony of PW-2 and PW-3, the Additional District Judge has observed that, "PW-2 and 3 are the attesting witnesses of the Will. Though their affidavit of examination in chief may not have been attested strictly as per law but these witnesses had tendered their respective affidavit at the time of starting of evidence so some lacunas in attestation of the affidavits is not a sufficient ground to reject the same to discard the whole statement of these two witnesses. PW-2 and 3 proved how and in which manner, the Will was executed. They while identifying their own signatures also identified signature and thumb impression of the deceased on the Will. They also stated that the Will was executed by the deceased after understanding its contents in Hindi language. In my opinion, the testimony of PW-2 and 3 have proved the due execution of the Will and fulfilment of all formalities as required under Section 63 of Indian Succession Act. Nothing in the cross examination of these two witnesses anything has come on record which create doubts about the genuineness and the due execution of the Will in question. The objection raised that Will in question was procured with collusion of attesting witnesses is liable to be rejected. PW-2 and 3 are trustworthy and unimpeachable witnesses. They cannot be termed as interested witnesses because they have equal and similar relationship with the respondents as well as that of petitioner. From the statement of PW-2 and 3, it also appears that Will was executed by the deceased without any pressure, influence or coercion and it was his voluntarily Will. Otherwise also, Will was registered and in case of registered document, a presumption of due execution also arises. Endorsement of Sub-Registrar on the Will also point out that deceased had executed the Will voluntarily without any pressure after understanding the

contents and nature of disposition.

There is no dispute of the fact that deceased had some agricultural lands in the village Tehri. Mere no giving of details of that land in the Will is not sufficient to reject it. Whatever land deceased owned can be ascertained from revenue record and its valuation can be found later on at the time of completion of necessary formalities. If respondents have any dispute about the correctness of the quantum of measurement of the land, then that dispute can be sorted out in civil proceedings but not in the present case. After considering the merits of the case, I am of the view that Will Ex.PW1/2 is duly proved the last and duly executed Will of the deceased and there exist no ground to decline the relief claimed by the petitioner on basis of this Will. Accordingly both these issues are decided in favour of the petitioner and against the respondents."

11. I have heard the counsel for the parties and have examined the record. The Will in this case dated 2.9.2002 is a registered Will. The registration thereof has been proved by the clerk from the Registrar's office. It is attested by two witnesses who both have appeared in the witness box. They both have filed their affidavits in support of the attestation of the Will by them and execution of the Will by the deceased testator. They both have appeared for the cross-examination but the respondents have not been able to take out anything which may prove that the affidavits were not filed by them or that the Will in question was not executed by the deceased. In fact, the suggestions given by the appellants are only to the effect that the Will is a forged document which is also a suggestion given to the propounder of the Will. However, no evidence has been led by the respondent to prove that Will in question was not signed by the deceased testator.

12. It has also been admitted by the appellant that there were criminal proceedings pending between the deceased, his wife and his son, which explains the reasons as to why the deceased wife and the son have not been granted benefit of the estate left by the deceased.

13. As far as the plea of the appellant that the property in question was not the self-acquired property of the deceased, the Additional District Judge has taken note thereof and has put a rider to the grant by observing that the question of right,

title and share in the properties in question as well as legality and validity of the alleged sales transaction through Ex.PW2/4 to 6 is not decided by the probate court and it has been kept open.

14. The appellant has relied upon a judgment delivered in the case of Lalitaben Jayantilal Popat v. Pragnaben Jamnadas Kataria, I (2009) SLT 172. Having gone through the contents of the aforesaid judgment, I do not find anything which may help the appellant in succeeding in appeal. Consequently, the appeal is dismissed with no orders as to costs.

15. LCR be sent back along with a copy of this order. CM No.2221/2009(Stay)

Dismissed as having become infructuous.

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