

Kulwant Kaur and anr Vs. the State and ors

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Court : Delhi

Decided On : Apr-05-2013

Judge : V.K.Shali

Appellant : Kulwant Kaur and anr

Respondent : The State and ors

Advocate for Def. : Mr. Shashank K. Lal, Mr. Harish Malik, Mr. Rohit Bhardwaj

Advocate for Pet/Ap. : Mr. Rajinder Dhawan

Judgement :

* HIGH COURT OF DELHI AT NEW DELHI + F.A.O. No.53 of 2005 Decided on :

05. April, 2013 KULWANT KAUR & ANR. Through: Appellants Mr. Rajinder Dhawan, Advocate. Versus THE STATE & ORS. Through: Respondents Mr. Shashank K. Lal, Adv. for R-2 to 4. Mr. Harish Malik & Mr. Rohit Bhardwaj, Advocates for R-9 & 10. CORAM: HONBLE MR. JUSTICE V.K. SHALI V.K. SHALI, J.

1. This is an appeal filed by the appellants under Order 43 Rule 1 CPC read with Section 299 and 384 of the Indian Succession Act against the judgment dated 27.4.2004 passed in P.C. No.350/2001 titled Kulwant Kaur vs. The State & Others.

2. Briefly stated the facts of the case leading to the filing of the present appeal are that one S. Inderjit Singh Loyal (hereinafter referred to as the testator), son of S.

Dalip Singh died as a bachelor on 8.4.1992. He had 1/6th undivided share in a building, namely, Dalip Singh Building, Sadar Bazar, Delhi Cantt. According to the appellants, the deceased/testator had executed a registered Will on 18.2.1987 bequeathing his 1/6th undivided share in the aforesaid property in favour of Sardar Iqbal Singh, his nephew, who happened to be the son of the brother of the deceased/testator. The appellant, Kulwant Kaur, mother of the beneficiary was named as executor of the Will. The Will, which was allegedly proved as exhibit PW 2/2, was executed in the presence of two attesting witnesses, namely, S. Ajit Singh Loyal and Dayal Singh. It was also stated that the deceased/testator was in a sound disposing state of mind and accordingly, probate was prayed for.

3. The respondent No.5, Joginder Singh, and respondent No.8, Madhu, who were the other relations of the deceased/testator had filed objections to the grant of probate. The respondent No.5 took preliminary objection that the property, which was allegedly bequeathed, was a joint Hindu family property and could not be the subject-matter of the Will executed by the deceased/testator. On merits, it was pleaded that the deceased/testator was having weak mental faculties and was accordingly not a person of sound mind. It was also stated that the deceased/testator had executed a subsequent Will on 3.3.1988, which was also registered with the Sub-Registrar on 27.5.1988 and thereafter, the same was cancelled on 11.10.1988. On the basis of these averments, it was stated that this showed feeble mind of the deceased/testator. It was also alleged that the Will was a product of undue influence as one of the attesting witnesses to the Will was the younger brother of the beneficiary while as the other attesting witness, namely, Dayal Singh, was related to the executor, Kulwant Kaur/ mother of the beneficiary. It was also alleged that the facts averred in the Will were contrary to the facts which were in existence at the time of the execution of the Will. It was stated that the deceased/testator in the Will had stated that the Will was being made by the deceased/testator in favour of the beneficiary, namely, S. Iqbal Singh, as he had served him during his life while as the fact of the matter was that S. Iqbal Singh had gone to France in the year 1983-1984 and remained there till 1995 and there was hardly any occasion for him to look after the deceased/testator.

4. It was also alleged in the objections that the deceased/testator had joined Indian Army on 21.12.1944 and he was discharged within a short span of nine months on the ground that he was not fit to be retained in the Army on account of mental deficiency.

5. Similar objections were also taken by other respondents, namely, respondent Nos.8, 8A and 8B.

6. On the basis of the pleadings of the parties, the following three issues were framed : (1) Whether the Will dated 18.2.1987 propounded by the petitioner is the last Will & testament of Late S. Inderjit Singh & if so, is it valid in law? OPP (2) (3)

7. Whether the testator S. Inderjit Singh was not possessed of sound disposing mind at the time he executed his alleged Will & if so, its effect on his Will? OPR Relief. The parties adduced their evidence before the court. The learned probate court, after recording of the evidence, dismissed the probate petition on the ground that the appellant/petitioner was not able to dislodge the suspicious circumstances with regard to the execution of the Will. These suspicious circumstances were the weak mental faculties of the deceased/testator. For drawing this conclusion, the learned trial court had observed that the appellant/petitioner, who was the mother of the beneficiary and the executor of the Will had concealed the factum of the deceased/testator having been discharged from the Army in the year 1945 on account of mental deficiency as no averments in this regard were made either in the petition or in her examination-in-chief but the same was admitted by her in her cross-examination.

8. The second reason for arriving at this conclusion by the trial court was that it was admitted by the witness, namely, Kulwant Kaur, PW-2 that the deceased/testator was in the habit of drinking heavily and has called him as drunkard and because of this, the court was of the view that the Will in question purported to have been executed in the year 1987 could not be treated to be free from suspicion as signatures might have been obtained under the influence of liquor. This fact was further corroborated by the fact that after the execution of the Will in question, the deceased/testator is purported to have executed another Will on 3.3.1988, which was also registered on 27.5.1988 but cancelled on 11.10.1988.

The document of cancellation was duly registered with the Sub-Registrar in which Dayal Singh, who happened to be one of the attesting witness, was also a witness and in this cancellation document, it has been specifically mentioned that the Will dated 3.3.1988 was made to be signed by the testator under the influence of liquor. On the basis of this analysis of evidence, the probate petition was dismissed.

9. Feeling aggrieved by the said judgment of dismissal of the probate petition, the appellants have preferred the present appeal. I have heard the learned counsel for the appellants. The contention of the learned counsel for the appellants is that the learned trial court did not disbelieve the due execution of the Will exhibit PW 2/2 but still dismissed the probate petition only on the ground that suspicious circumstances were in existence. It was submitted that the probate Court has erroneously relied on the cancellation document dated 11.10.1988 to draw an inference that the deceased testator was of weak mental faculties. It was stated that such an inference could not have been drawn by the trial court. It was contended that merely because the subsequent Will dated 3.3.1988 was cancelled by the deceased/testator on the ground that his signatures were obtained under the influence of liquor/alcohol, would not make any person to draw an inference that the earlier Will was also signed by him under undue influence nor could an inference be drawn that the deceased/testator was suffering from any mental deficiency. The learned counsel for the appellants has also contended that merely because the witnesses had admitted in their cross-examination that the deceased/testator was a drunkard, would not make the Will inadmissible or lead to an inference that the Will has not been proved because the mental deficiency must be proved by adducing the testimony of a doctor or by adducing medical evidence which burden was essentially on the respondents, and they have failed to discharge this burden. On the contrary, it was stated that PW-3, Ajit Singh Loyal and PW-4, Dayal Singh both, who were the attesting witnesses, have clearly made a statement that the deceased/testator had signed the Will in their presence and they had also put their signatures on the Will in the presence of the deceased/testator and the Will was read over and explained by one Mr. M.S. Butalia, Advocate, who had got the Will drafted.

10. It has also been submitted by the learned counsel that there is no evidence on record except the bare statement of the witnesses either in examination-in-chief or in cross-examination to show that the deceased/testator was discharged from the Army way back in the year 1945. It was also submitted that this was not in the objections that the deceased/testator was discharged from the Army because of mental deficiency. As a matter of fact, it has been contended that after the discharge of the deceased/testator from the Army, he had worked in CPWD and obviously, if he was working in CPWD, it would go to show that the deceased/testator was of a sound mind. It was also contended by the learned counsel that the court has laid down in number of cases that inequitable distribution by the deceased/testator cannot be treated as a ground for setting aside the Will of the deceased/testator if it has been duly proved by the appellants that the Will was made voluntarily and the requirement of law as envisaged under Section 63 of the Indian Succession Act and Section 68 of the Evidence Act is established. Accordingly, it is submitted that the learned trial court has fallen into error by dismissing the probate petition. In this regard, the learned counsel for the appellants has relied upon the following judgments :Pentakota Satanarayana & Ors. vs. Pentakota Seetharatnam & Ors.; (2005) 8 SCC 67.Ramesh Kumar vs. Kaushalya Devi & Ors.; 94 (2001) DLT 92.(DB); Rajlakshmi Dassi Bechulal Das vs. Krishna Chaitanya Das Mohanta; AIR 197.Calcutta 210 (V 5.C 37); Uma Devi Nambiar & Ors. vs. T.C. Sidhan; (2004) 2 SCC 321.

11. 10/the As against this, the learned counsel for respondent Nos.9 and objectors, have contested the claim of the appellants on the ground that the Will in respect of which the probate is sought to be obtained, was forged and fabricated Will. It was contended that the learned trial court has rightly held that the deceased/testator was of unstable mind and, therefore, was not competent to execute the Will purported to have been made by him in favour of the son of the appellant/ Kulwant Kaur. It is also stated that the attesting witnesses to the Will are the close relations of the beneficiary as well as that of the appellant/Kulwant Kaur. It was also contended that the facts averred in the Will are totally contrary to the facts available on the ground inasmuch as the deceased/testator has alleged in the Will that he has been served well by the beneficiary, namely, S. Iqbal Singh, while as the fact of the matter is that the beneficiary of the Will was nowhere in

India at the time when the Will was purported to have been made nor did he ever serve the deceased/testator. It was also stated that the deceased/testator was admittedly a drunkard, who used to drink heavily and, therefore, anybody could maneuver the signatures of the deceased/testator on any document.

12. I have considered the submissions and gone through the record.

13. I have also gone through the judgments cited by the learned counsel for the appellants.

14. Before dealing with the facts of the case, it would be pertinent here to refer to the judgments relied upon by the learned counsel for the appellants.

15. In *Pentakota Satyanarayana & Ors. Vs. Pentakota Seetharatnam & Ors.* (2005) 8 SCC 67, the Supreme Court has held that the onus of proof of the Will is initially on the propounder of the Will and it is only when this onus is discharged that the same shifts to the party alleging undue influence or coercion in execution of the Will. It has also been held that the onus on the propounder can be discharged by adducing satisfactory evidence (emphasis added) that the Will was signed by the testator who was at that time in a sound and disposing state of mind, that he understood the nature and effect of disposition signed the Will of his own free will. It has also been held that in case the executor of the Will in this regard testifies and the Will is registered then merely because the beneficiaries have actively participated in the execution of the Will, would not make the Will suspicious.

16. There is no dispute about the correctness of the aforesaid proposition of law. The only question which would arise for consideration is whether in the instant case, the appellants have been able to prove by satisfactory evidence the execution of the Will? and whether the deceased testator was of sound disposing state of mind? 17. In case titled *Ramesh Kumar Vs. Kaushalya Devi & Ors.* 94 (2001) DLT 92.(DB), the Division Bench of this Court has observed that the authenticity of Will cannot be doubted merely because it bequeaths Estate contrary to normal line of succession or inheritance and the Will has to be read as a whole and once the burden in this regard is discharged by propounder of the Will regarding the proper execution of the Will and the attesting witnesses testifies in

this regard, the onus shifts to the person challenging the Will.

17. In case titled *Rajlakshmi Dassi Bechulal Das Vs. Krishna Chaitanya Das Mohanta* AIR 197.CALCUTTA 21 (V 5.C 37), it has been held in context of Section 63 of the Succession Act, 1925 that the evidence should be examined collectively and in doing so, oral documentary and surrounding circumstances should be taken into consideration. It has been observed that before an evidence is rejected on the ground of discrepancies, the Court must satisfy itself that those discrepancies cannot be explained on account of defective memory, failing power of observation.

18. Another case which has been relied upon by the learned counsel for the appellants is *Uma Devi Nambiar & Anr. Vs. T.C. Sidhan (dead)* (2004) 2 SCC 32.to contend that although it is the responsibility of the propounder of the Will to remove all suspicious circumstances but mere exclusion of the natural heirs or reduction of their share would not tantamount to suspicious circumstances.

19. So far as *Uma Devi and Ramesh Kumars* case (supra) are concerned, they are of no help to the appellants for the simple reason that one of the important points which have been laid down in both these judgments is that changing the normal course of devolution of property by a Will does not by itself constitutes a suspicious circumstance provided the execution of the Will and the capacity of the testator is duly proved.

20. In the instant case, there is no change of normal devolution in the sense admittedly, the deceased testator was a bachelor and no immediate legal heir in his own line of succession was left behind. The property had to be inherited by his brothers, sisters and/or by their children. To that extent, there is no suspicious circumstance arising from the execution of the Will but the other factors which the Supreme Court has laid down before the authenticity of the Will is declared by the Court have necessarily to be established by the propounder of the Will. It is in this regard that the trial court has found flaws in the case of the appellants.

21. The appellant no.1 in support of her case has examined herself as PW2 and the two attesting witnesses namely *Ajit Singh Loyal* and *Dayal Singh* as PW-3 and PW-4. The first thing is regarding the capacity and the mental soundness of the

deceased testator. The appellant no.1 in her examination in chief filed an affidavit, which does not disclose that the deceased testator was a heavy drinker. It is only during the cross examination that this fact is brought about by the objectors that the deceased was fond of drinking and would indulge in the same to the heaviest binge, so much so, that he would lose all his senses. Therefore, the case which had been set up by the objectors was that at the time when the Will was executed, he might have been under the influence of liquor.

22. The very fact that this fact was not truthfully disclosed by the appellant no.1 in her examination in chief and the fact that the beneficiary of the Will happens to be the son of the executor and further the fact that two witnesses who were made as the attesting witnesses are also related to the beneficiary and to the Executor clearly creates some kind of suspicion in the due execution of the Will by the deceased testator or his being in a proper frame of mind. Ajit Singh Loyal, PW-3 is the brother of the beneficiary and the second son of the Executor. Dayal Singh, PW4 is the brother of the appellant/executor. The attesting witnesses in their cross examination have also admitted the fact that the deceased testator was a heavy drunkard. This fact was tried to be concealed from the Court and it has been only brought about in cross examination which clearly makes the Will suspicious.

23. Further the deceased testator after having executed the Will on 18.2.1987, had executed another Will on 3.3.1988 which also got registered on 27.5.1988 but on 11.10.1988, the same was got cancelled which cancellation deed was also got registered with the Sub-registrar and in this cancellation deed, again Dayal Singh/PW-4 is the attesting witness and the contents of this cancellation deed becomes important because what is stated therein is that the Will purported to have been executed by the deceased testator on 3.3.1988 was signed by him under the influence of liquor at the instance of one Joginder Singh, parental Uncle of the beneficiary. This clearly shows that anybody could have maneuvered the deceased testator by making him drunk. This fact also creates a doubt and it is well possible that the Will in question in respect of which probate was sought to be obtained by the appellant could have been executed under similar circumstances. Obviously, such things can only be proved by drawing inference or by preponderance of probabilities and not with certainty. Therefore, it was incumbent

on the appellant to have not only come to the Court truthfully disclosing all these facts about the deceased testator but also explained the circumstances in which the Will was executed.

24. There is another aspect which lends credence to this suspicion entertained by the Court and this is that in cross examination, PW-3 had admitted that the deceased testator had joined Army in the year 1944 but he was discharged on account of certain medical reasons pertaining to his mental faculties. This is also not denied by the other attesting witness or the executor.

25. If that be so, then it lends credence to the suspicious circumstance of the Will that the deceased testator was not in proper frame of mind at the time of execution of the Will. The discharge of the deceased testator from the Army was sought to be explained by the witnesses Ajit Singh Loyal and Dayal Singh by stating in their cross examination that though he was discharged from Army but he was later on employed in CPWD and obviously he could not have been employed in CPWD without being medically fit.

26. The question whether he was medically hundred percent fit or not is not necessary but the question is that it is showing a circumstance that the deceased testator might have suffered from some mental deficiency which was further compounded by heavy drinking and therefore, he could have been manipulated to sign the Will. Moreover, the persons who have been associated with the Will belong to the same family and it seems that without associating an independent witness from outside, they planned to get the entire property in the name of one of them. Further the recital of the Will is also not factually correct because the beneficiary was settled outside India since 1983-84 however, in the Will, it has been stated by the deceased testator that the beneficiary has served him.

27. For the reasons mentioned above, I feel that the appellants have not been able to show any illegality or infirmity in the appreciation of evidence arrived at by the probate Court in returning a finding that the appellants have not been able to prove that the Will of the deceased testator is free from suspicious circumstance and is in accordance with law and therefore, the appeal deserves to be dismissed. V.K. SHALI, J.

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