(2009) 05 MP CK 0018

Madhya Pradesh High Court (Gwalior Bench)

Case No: None

Vimal Mishra		APPELLANT
	Vs	
Krishna Gopal Sharma		RESPONDENT

Date of Decision: May 7, 2009

Acts Referred:

- Evidence Act, 1872 - Section 45, 47, 67, 68
- Succession Act, 1925 - Section 218, 254, 59, 63

Citation: (2009) ILR (MP) 1737 : (2009) 3 JLJ 285 : (2009) 4 MPHT 415 : (2009) 3 MPLJ 246

Hon'ble Judges: S.K. Gangele, J

Bench: Single Bench

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

S.K. Gangele, J.

Appellant/non-applicant has filed this appeal against the order dated 8-3-2002, passed by IIIrd Additional District Judge, Shivpuri in Probate Case No. 7/2000. Applicant filed an application for probate under Sections 218 and 254 of the Indian Succession Act. He pleaded that his uncle Chhotelal Sharma executed a "Will" on 16-3-1995 and by the aforesaid "Will" he had bequeathed admeasuring 1.89 hectare of land situated at Village Kota, Pargana and District Shivpuri in favour of the applicant because the applicant had been living with his uncle. It is an admitted fact that the non-applicant is the daughter of the deceased. Non-applicant resisted the claim of the applicant. She further stated that her father has not executed any "Will" in favour of the applicant. The said "Will" (Exh. P-1) is a forged one. After considering the evidence on record of the case, the Trial Court granted probate in favour of the applicant by holding that ''Will'' executed in favour of the applicant is proper.

Learned Senior Counsel on behalf of the appellant/non-applicant has submitted that the Trial Court has committed an error of law in granting probate in favour of the respondent. The "Will" is not genuine and the respondent has failed to prove genuineness of the ''Will''. In support of his contentions, learned Counsel relied on the following judgments:

(i) Bharpur Singh and Others Vs. Shamsher Singh, ,

(ii) Adivekka and Others Vs. Hanamavva Kom Venkatesh ''D'' by LRs. and Another, ,

(iii) H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, ,

(iv) Joseph Antony Lazarus (Dead) by Lrs. Vs. A.J. Francis, ,

(v) Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao and Ors. (2006) 13 SCC 433.

Contrary to this, learned Counsel for the respondent has submitted that the Trial Court has considered all the evidence on record and passed proper order. ''Will'' executed by the deceased is in accordance with law. Hence, probate has rightly been granted in favour of the respondent/applicant. In support of his contentions, learned Counsel relied on the following judgments:

(i) Sridevi and Others Vs. Jayaraja Shetty and Others, ,

(ii) Pentakota Satyanarayana and Others Vs. Pentakota Seetharatnam and Others, ,

(iii) Meenakshiammal (Dead) through LRs. and Others Vs. Chandrasekaran and Another, ,

(iv) Keshav Prasad and Another Vs. Smt. Bhuwani Bai and Another, .

Applicant/respondent clearly stated in his application that the deceased was his uncle. He had been living with him, hence he executed the ''Will'' in his favour with regard to land situated at Village Kota, Pargana District Shivpuri. Copy of the ''Will'' has been filed as Exh. P-l. In his evidence the applicant deposed that deceased Chhotelal was his real uncle and he died on 11-5-1995. The appellant is only daughter of the deceased. She got married in the year 1981. The respondent/applicant used to look after the deceased and thereafter deceased executed the ''Will'' (Exh. P-1) in favour of the respondent/applicant. He got the ''Will'' typed at the residence of Mr. Ashok Agrawal, Advocate at the instance of Chhotelal. Thereafter he took the ''Will'' to Kota where deceased Chhotelal signed over the ''Will'' along with witnesses namely Mr. Uday Singh and Karan Singh. Before execution of the ''Will'' some property had been given to the appellant/non-applicant. At the time of execution of ''Will'' the deceased was quite well and healthy. He dictated the ''Will'' (Exh. P-1) and it was typed at the residence of Mr. Ashok Agrawal, Advocate. He further admitted the fact that Chhotelal had came to the Court to attend the case and he died on 11-5-1995 due to heart attack. He also came to Shivpuri Court on 13-3-1995, 10-5-1995, 5-5-1995 and 1-5-1995.

Uday Singh witness No. 2, in his evidence, stated that Chhotelal executed the ''Will'' and signed the ''Will''. At that time, Karan Singh was also present and he also signed the ''Will''. He further admitted in his cross-examination that he could not read the newspaper and he could not read what has been written in Exh. P-l. However, Mr. Chhotelal read over the contents of Exh. P-l and told him that he had been giving 1/2 of his land to Krishna Gopal and except this he did not tell anything to him. He further stated that he signed over the ''Will'' on the request of Chhotelal.

Non-applicant, i.e., the present appellant in her evidence stated that she is only daughter of his father Chhotelal. She has no other sisters and brothers and his father had two brothers. One is Thakurlal who had three sons and two daughters. Krishna Gopal is one of the sons of Thakurlal. At the time of death of her father he was healthy and he attended the Shivpuri Court on 10-5-1995 a day before his death. She received information of death of his father on telephone. Thereafter she went to Kota where last rites of her father had been performed by Mr. Krishna Gopal Sharma. She further stated that she had no knowledge about the ''Will''. She filed application before the Appropriate Authority for mutation of her name over the land, then she came to know about execution of ''Will''. She won the case in Tehsil. She further stated that she has been cultivating the land and house of Shivpuri was also in her possession. Except these witnesses nobody has been examined on behalf of the applicant and non-applicant. Copy of the ''Will'' has been filed as Exh. P-l. It has been mentioned in the ''Will'' by Chhotelal that he was old-aged person and he could not move freely and look after his affairs. Hence, he is executing the ''Will'' with regard to agricultural land, house, plot and other properties. It has been stated in the ''Will'' that Chhotelal had only one daughter, namely, Smt. Vimal Mishra who got married in the year 1981 and 1.78 hectare land had already been given to her by way of registered sale deed. It has also been mentioned that health condition of Chhotelal was not good. He instructed the respondent to prepare a ''Will'' and Krishna Gopal Sharma got prepared the ''Will'' on his instructions.
From perusal of the ''Will'' (Exh. P-1), it is clear that testator of the ''Will'' has mentioned that he was ill and he was not able to walk and bequeathed all his properties including agricultural land, plot and house in favour of the respondent. However, the present probate application has been filed by the respondent with regard to agricultural land situated at Village Kota, Pargana District Shivpuri-admeasuring 1.89 hectare. He admitted in his evidence that apart from agricultural land Chhotelal had a house at District Shivpuri and at Village Kota also one out-house situated at Shivpuri was in dilapidated condition.

Hon''ble Supreme Court in the matter of H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, , with regard to the facts, which have to be taken into consideration by the Court for the purpose of proof of a ''Will'' has held as under:

The party propounding a ''Will'' or otherwise making a claim under a ''Will'' is no doubt seeking to prove a document and, in deciding how it is to be proved,

reference must inevitably be made to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. u/s 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for providing such a handwriting under Sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of providing its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of law. Similarly, Sections 59 and 63 of the Indian Succession Act are also relevant. Thus, the question as to whether the ''Will'' of the testator has to be decided in the light of these provisions. It would prima facie be true to say that the ''Will'' has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of ''Will''s it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

However, there is one important feature which distinguishes ''Will'' from other documents. Unlike other documents the ''Will'' speaks from the death of the testator, and so, when it is propounded or produced before a Court, the testator who has already departed the world cannot say whether it is his ''Will'' or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last ''Will'' and testament of the departed testator. Even so, in dealing with the proof of ''Will''s the Court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the ''Will'' was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free ''Will''. Ordinarily when the evidence adduced in support of the ''Will'' is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator''s mind and his signature as required by law, @ Page SC 444. Courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

There may, however, be cases in which the execution of the ''Will'' may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder''s case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator''s mind, may appear to be very feeble and debilitated; and evidence adduced may not

succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the ''Will'' may appear to be unnatural, improbable or unfair in the light of relevant circumstances, or, the ''Will'' may otherwise indicate that the said dispositions may not be the result of the testator''s free ''Will'' and mind. In such cases, the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last ''Will'' of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and unless it is satisfactorily discharged, Courts would be reluctant to treat the document as the last ''Will'' of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the ''Will'' propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free ''Will'' in executing the ''Will'' and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.

Apart from the suspicious circumstances above referred to in some cases the ''Will''s propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the ''Will''s which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the ''Will'' and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the ''Will'' and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with ''Will''s that present such suspicious circumstances that decision of English Courts often mention the test of the satisfaction of judicial conscience. The test merely emphasizes that, in determining the question as to whether an instrument produced before the Court is the last ''Will'' of the testator, the Court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive.

It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on ''Will''s, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the ''Will'' has to prove the due and valid execution of the Will and that if there are any suspicious circumstances surrounding the execution of the ''Will'' the propounder must remove the said suspicions from the mind of the Court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. AIR 1946 PC 156 relied on.

It is no doubt true that on the proof of the signature of the deceased or his acknowledgment that he has signed the ''Will'' he will be presumed to have known the provisions of the instrument he has signed; but the said presumption is liable to

be rebutted by proof of suspicious circumstances. What circumstances would be regarded as suspicious cannot be precisely defined or exhaustively enumerated. That inevitably would be a question of fact in each case.

Hon''ble Supreme Court in the matter of Bharpur Singh and Others Vs. Shamsher Singh, , has considered most of the previous judgments of the Hon''ble Supreme Court with regard to proof of ''Will'' and held as under:

14. The legal principles in regard to proof of a ''Will'' are no longer res Integra. A ''Will'' must be proved having regard to the provisions contained in Clause (c) of Section 63 of the Succession Act, 1925 and Section 68 of the Evidence Act, 1872, in terms whereof the propounder of a ''Will'' must prove its execution by examining one or more attesting witnesses, where, however, the validity of the ''Will'' is challenged on the ground of fraud, coercion or under influence, the burden of proof would be on the caveator. In a case where the ''Will'' is surrounded by suspicious circumstances, it would not be treated as the last testamentary disposition of the testator.

This Court in H. Venkatachala Iyengar v. B.N. Thimmajamma, opined that the fact that the propounder took interest in execution of the ''Will'' is one of the factors which should be taken into consideration for determination of due execution of the ''Will''. It was also held that (AIR P. 451, Para 19):

one of the important features which distinguishes a ''Will'' from other documents is that the ''Will'' speaks from the date of death of the testator, and so, when it is propounded or produced before a Court, the testator who has already departed the world cannot say whether it is his ''Will'' or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last ''Will'' and testament of the departed testator.

In H. Venkatachala case, it was also held that the propounder of a ''Will'' must prove:

(i) that the ''Will'' was signed by the testator in a sound and disposing state of mind duly understanding the nature and effect of disposition and he put his signature on the document of his own free ''Will'', and

(ii) when the evidence adduced in support of the ''Will'' is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator''s mind and his signature as required by law, Courts would be justified in making a finding in favour of propounder, and

(iii) if a ''Will'' is challenged as surrounded by suspicious circumstances, all such legitimate doubts have to be removed by cogent, satisfactory and sufficient evidence to dispel suspicion. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts indicated therein.

It was moreover held: (H. Venkatachala case AIR p. 452, Para 20)

20. There may, however, be cases in which the execution of the ''Will'' be surrounded by suspicious circumstance. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounded case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator''s mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the ''Will'' may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the ''Will'' may otherwise indicate that the said dispositions may not be the result of the testator''s free ''Will'' and mind. In such cases, the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last ''Will'' of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and unless it is satisfactorily discharged, Court would be reluctant to treat the document as the last ''Will'' of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the ''Will'' propounded, such pleas may have to be proved by the caveators, but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free ''Will'' in executing the ''Will'', and in such circumstances, it would be part of the initial onus to remove any such legitimate doubts in the matter.
This Court in Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao held (SCC pp. 447-48, Paras 33-34):

33. The burden of proof that the ''Will'' has been validly executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has singed the ''Will'' and that he had put his signature out of his own free ''Will'' having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. In the case of proof of ''Will'', a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion of undue influence is raised, the burden would be on the caveator. (See Madhukar D. Shende v. Tarabai Aba Shedage and Sridevi v. Jayaraja Shetty). Subject to above, proof of a ''Will'' does not ordinarily differ from that of proving any other document.

There are several circumstances which would have been held to be described by this Court as suspicious circumstances:

(i) when a doubt is created in regard to the condition of mind of the testator despite his signature on the ''Will'';

(ii) when the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances; where propounder himself takes prominent part in the execution of ''Will'' which confers on him substantial benefit.

In the present case, it is an admitted fact that the respondent/ applicant propounder has taken prominent part in the execution of ''Will'' as per his evidence and got the ''Will'' typed at the residence of Mr. Ashok Agrawal, Advocate and thereafter Mr. Chhotelal signed the ''Will''. It has been mentioned in the ''Will'' that due to ill-health condition Mr. Chhotelal was not able to move and his health was not good. However, it is clear from the admission of the respondent/applicant himself that before the death of Mr. Chhotelal on 10-5-1995 he attend the proceedings of the Court at Shivpuri and died on the next date, i.e., 11-5-1995. He also attended the Court proceedings on 13-3-1995, 10-5-1995, 5-5-1995 and 1-5-1995. The ''Will'' (Exh. P- 1) is said to have been executed on 16-3-1995. After near about one and 1/2 month of the execution of ''Will'' Mr. Chhotelal attended the Court proceedings on various dates then why he had not prepared the Will at his own instance, why it has been mentioned that he was not able to walk. It is a suspicious circumstance. Attesting witness No. 2 of the ''Will'' Uday Singh in his evidence stated that Chhotelal had told him that he had giving only 1/2 of his land to the respondent/applicant, however in the ''Will'' it has been mentioned that along with agricultural land his other movable and immovable properties have been given to the respondent/applicant. This fact is contrary to the statement of Uday Singh who is one of the attesting witnesses of the ''Will'' examined before the Court other attesting witness has not been examined. In such circumstances, it could not be held that attesting witness has deposed in accordance with law in favour of the execution of ''Will''. Apart from this, after perusal of the ''Will'' the name of the propounder Krishna Gopal Sharma appears after applying whitener.
Looking to the aforesaid facts of the case and the law laid down by the Hon''ble Supreme Court in various judgments as stated hereinabove it could not be held that the respondent/applicant has proved the execution of ''Will'' (Exh. P-1) in accordance with law. Hence, the Trial Court has committed an error of law in granting probate in favour of the respondent/applicant.

Consequently, appeal of the appellant/non-applicant is hereby allowed and impugned order is hereby set aside. No order as to cost.