

(2009) 05 DEL CK 0428
Delhi High Court
Case No: Test Case No. 38 of 1997

Mrs. Aruna Jain and
Others

APPELLANT

Vs

State

RESPONDENT

Date of Decision: May 29, 2009

Acts Referred:

- Evidence Act, 1872 - Section 63
- Succession Act, 1925 - Section 276, 291, 63

Hon'ble Judges: Anil Kumar, J

Bench: Single Bench

Advocate: K.R. Gupta, for the Appellant; Nemo, for the Respondent

Judgement

Anil Kumar, J.

This is a petition by the petitioner seeking grant of letters of administration for the will annexed of late Shri Nem Das Jain son of late Shri S.R. Jain u/s 276 of Indian Succession Act.

2. The petitioner contended that Shri Nem Das Jain son of late Shri S.R. Jain died at New Delhi on 2nd April, 1997. Along with the petition a copy of the death certificate and the list of assets and debts of deceased was also filed. It was alleged that the petitioner may be entitled to Rs. 36,79,000/- from the estate of the deceased father deducting the amount of debts.

3. The petitioner contended that the estate of the deceased is situated in Delhi and he was ordinarily a resident of Delhi and his permanent place of residence was P-28, South Extension Part II, New Delhi. The petitioner averred that the deceased executed his last will and testament dated 6th February, 1997 devising his movable amongst his living daughters, daughter-in-law, grand children and immovable properties in favour of his children.

4. According to the petitioners, the daughters of the deceased are married and are settled abroad since their marriage except Smt. Saroj Aggarwal who was settled in India and who had also died about two years back from the date of the filing of the petition.

5. According to the petitioners, Shri Nem Dass Jain died at the age of 76 years and at the time of his death he was ill and he was admitted in the Jain Medical Centre, South Extension Part II, New Delhi. Before his admission to the hospital, he had handed over a bag containing the FDRs, mutual fund certificates, etc., title deed of the property and also the original will dated 6th February, 1997, which is duly witnessed and attested by a notary. It was also disclosed by the deceased that he had executed the will dated 6th February, 1997 in two sets, one set was attested by the notary and the other set was lying in the drawer. He also expressed his desire to get the will, lying in the drawer, registered in the office of the Sub Registrar.

6. The petitioners pleaded that after the death of late Shri Nem Dass Jain, his drawer was opened in the presence of Smt. Usha Jain and Smt. Santosh Aggarwal and other will was also taken out. It is asserted that movable assets of late Shri Nem Dass Jain were distributed according to the will, however, the immovable properties were devised absolutely in favour of his grand children, Ms. Ashima Jain and Master Amit Jani.

7. The attesting witness, Shri D.R. Gupta is stated to be father of petitioner No. 1 who requested her father to get the will registered as per the desire of the deceased. It is also asserted that the daughters though were supplied the copies of the will have started challenging the same and, therefore, the present petition was filed seeking letters of administration with the will annexed.

8. After the citations were published and the notice were issued, objections were filed on behalf of respondents No. 4 to 7, being IA No. 8026 of 1998, and on behalf of respondents No. 8 to 10, being IA No. 1791 of 1999.

9. On the basis of the pleadings of the parties, the following issues were framed:

(i) Whether late Shri Nem Das Jain validly executed a Will dated 6th February, 1997 in his sound disposing mind?

(ii) Whether the movable assets were distributed among the heirs as per directions in the Will dated 6th February, 1997, as stated in the written statement?

(iii) Whether any other alleged copy of the Will was found as stated in the probate petition? If so, what is the effect of the same?

(iv) Relief.

10. The probate petition as consolidated with CS(OS) No. 1399 of 1997 for the purpose of recording of evidence and the matter was also listed before the Local Commissioner appointed for recording evidence.

11. The suit being CS(OS) No. 1399 of 1997 had been dismissed for non-prosecution and therefore by order dated 25th January, 2008, it was directed that the probate petition being Test Case No. 38 of 1997, shall be proceeded independently.
12. On behalf of petitioner, PW1 was examined whose statement was recorded, however, he was not cross-examined.
13. PW2 and PW3 were also examined, however, they were not cross-examined despite the opportunity given to the objectors. By order dated 1st May, 2009, the defendants were proceeded ex parte and their right to cross-examine the petitioner and his witnesses was closed.
14. The petitioner No. 1 filed her deposition on affidavit dated 13th February, 2008. She deposed about the various legal heirs of late Shri Nem Dass Jain. She also deposed about the original will dated 6th February, 1997 and that it was duly witnessed and attested by a notary which was exhibited as Ex.P2. She also deposed that the movable assets of late Shri Nem Dass Jain had been distributed in terms of the will which was recovered from his drawer. She also deposed that Shri D.R. Gupta, attesting witness, is her father and she had asked her father to get the will registered in accordance with the wishes of the deceased and, therefore, will was registered. Registered Will is exhibited as Ex.P3. She identified the signatures of the deceased on the will. She also proved two notes allegedly in the handwriting of Shri Nem Dass Jain which are exhibited as Ex.P4 and P5. She identified the signatures of her father-in-law, Shri Nem Dass Jain, deceased, on the will. She also identified the signatures of her father-in-law on the passport which was exhibited as Ex.P6, cheque dated 29th September, 1994 which was exhibited as Ex.P7, on application form of National Thermal Power Corporation Limited as Ex.P8 and office copies of letters addressed to Municipal Corporation of Delhi which was exhibited as Ex.P9 to P12. She also proved the house tax assessment order as Ex.P13 and a copy of the letter dated 30.12.1996 to Thapar Agro Mills Ltd., Ex.P14. The deposition of Smt. Aruna Jain dated 13th February, 2008 was also exhibited as Ex.PW1/A.
15. The attesting witnesses of the Will, Shri D.R. Gupta, also filed his deposition on affidavit dated 13th February, 2008 which was exhibited as Ex.PW2/A. The said witness deposed that late Shri Nem Dass Jain died on 2nd April, 1997. She also deposed that the son of late Shri Nem Dass Jain was married to his daughter, petitioner No. 1 and from the marriage between Shri Arun Kumar Jain son of late Shri Nem Dass Jain and her daughter, Smt. Aruna Jain, his two children were born namely Ms. Ashima Jain and the son, Master Amit Jain. He deposed that he was called on 6th February, 1997 by the deceased Shri Nem Dass Jain who had told him on the phone that he wants the deponent to attest his will. It is deposed by him that the wills were in two sets which was allowed by the testator in his presence and thereafter he signed each page of the will in his presence and thereafter the deponent signed the will in presence of the testator. He also proved that the will was also signed by Shri Suresh Chand Jain as an attesting witnesses in his presence. He

proved both the wills of late Shri Nem Dass Jain as Ex.P2 and P3. She also deposed that the will was got registered by him which is Ex.P3.

16. The other attesting witness of the will, Shri Suresh Chand Jain, also filed his deposition on affidavit which was exhibited as PW3/A. He also deposed that at the time of signing the will, besides him Shri D.R. Gupta was also present. It was deposed that the will was in two sets which was read by the deceased testator and signed on every page and thereafter Shri D.R. Gupta signed it as an attesting witness and he had signed the will after Shri D.R. Gupta. He identified the signatures of the deceased testator.

17. The testimony of PW1, PW2 and PW3 have remained unrebutted as they have not been cross-examined despite the opportunities given to the objectors.

18. Issue No. 1 is "Whether late Shri Nem Das Jain validly executed a Will dated 6th February, 1997 in his sound disposing mind?" The petitioner and the attesting witnesses of the will have categorically deposed about the execution of the will by Shri Nem Dass Jain. It is stated by both the attesting witnesses that Shri Nem Dass Jain had read the will in their presence before signing it on the each page whereafter it was attested by Shri D.R. Gupta and Shri Suresh Chand Jain in the presence of each other. The wills are exhibited as P2 and P3 and two sets of wills were prepared and one was got registered which is Ex.P3. In the circumstances, the inevitable inference is that late Shri Nem Dass Jain validly executed will dated 6th February, 1997 which are proved as Ex.P2 and Ex.P3. The issue is decided in favour of the petitioner.

19. The issue No. 2 is "Whether the movable assets were distributed among the heirs as per directions in the Will dated 6th February, 1997, as stated in the written statement?" the petitioner No. 1 in her deposition has given the details of the distribution of movable assets of late Shri Nem Dass Jain. She has given the details of the beneficiaries and what amount was given to each of the beneficiaries. The deposition of Smt.Aruna Jain, PW1, has remained unrebutted as she was not cross-examined. In the circumstances, the inevitable inference is that the movable assets of late Shri Nem Dass Jain were distributed amongst heirs of late Shri Nem Dass Jain as per the bequest made in the Will. The issue is thus accordingly decided in favour of the petitioners.

20. The third issue is "Whether any other alleged copy of the Will was found as stated in the probate petition? If so, what is the effect of the same?". The petitioner has deposed that a copy of the will was found in the drawer of the deceased which was got registered by her father, attesting witnesses of the will, Shri D.R. Gupta, as per the desire of the deceased. The will which was found in the drawer of the testator was got registered. The deposition of PW1, petitioner No. 1, and PW2 who got the will, which was found in the drawer, registered have remained unrebutted as they have not been cross-examined. Therefore, the issue is decided accordingly

holding that there was another set of will dated 6th February, 1997 which was got registered by PW2, Shri D.R. Gupta, which is Ex.P3.

21. In [H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others](#), the Supreme Court has laid down the following propositions bearing on the nature and standard of evidence required to prove a Will:

1. Stated generally, a Will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of Wills, one cannot insist on proof with mathematical certainty.

2. Since Section 63 of the Succession Act requires a Will to be attested, it cannot be used as evidence until, as required by Section 63 of the Evidence Act, 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.

3. Unlike other documents, the Will speaks from the death of the testator, and therefore, the maker of the Will is never available for deposing as to the circumstances in which the Will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last Will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the Will.

4. Cases in which the execution of the Will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the Will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the Will. That suspicion cannot be removed by the mere assertion of the propounder that the Will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at that time when the Will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the Will excite the suspicion of the Court, the propounder must remove all legitimate suspicions before the document can be accepted as the last Will of the testator.

5. It is in connection with Wills, the execution of which is surrounded by suspicious circumstance that the test of satisfaction of the judicial conscience has been evolved. That test emphasize that in determining the question as to whether an instrument produced before the Court is the last Will of the testator, the Court is

called upon to decide a solemn question and by reason of suspicious circumstances the Court has to be satisfied fully that the Will has been validly executed by the testator.

6. If a caveater alleges fraud, undue influence, coercion etc. in regard to the execution of the Will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the Will may raise a doubt as to whether the testator was acting of his own free Will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter.

22. Considering the facts and circumstances, it is apparent that the testator was of sound disposing mind at the time of execution of his last testament. There are no suspicious circumstances regarding the last testament of the deceased testator. All the yardsticks and test laid down by the Apex Court in *R. Venkatachala Iyengar (supra)* are fulfilled. There are no suspicious circumstances and this Court is satisfied that the will dated 6th February, 1997 is the last will of Late Sh. Nem Das Jain.

23. That at the time of filing of the petition the petitioner No. 2 & 3 were minors and had sued through their next friend their mother, Petitioner No. 1. During the pendency of the petition, they have become major. The petitioner No. 2 filed an affidavit dated 25th May, 2009 deposing that her date of birth is 15th March, 1980 and that she had become major on 15th March, 1998. Petitioner No. 3 has also filed an affidavit dated 25th March, 2009 deposing that his date of birth is 15th November, 1984 and he became major on 15th November, 2002. Both of them elected to proceed with the probate case. Under the will dated 6th February, 1997, rights in the property No. P-28 South Extension Part II, New Delhi have been devised to petitioners No. 2 & 3 and the rent of the tenanted portion of the property has also been devised to petitioners No. 2 & 3 and the right to live in the property has been given to petitioner No. 1. Though it is stated in the will that the petitioner No. 1 is the life trustee of the Trust named Smt. Kamla Devi Jain, however, the petitioners have not been named as executor of the will.

24. Consequently the petitioners are entitled for grant of Letter of Administration with the annexed will of Late Shri Nem Das Jain dated 6th February, 1997. Petitioners to comply with Section 291 of the Indian Succession Act, 1925. Valuation report dated 2714 dated 23rd December, 1998 of the Immovable property of the deceased given by Tehsildar valuing the property at Rs. 35,00,000 is accepted and the valuation of other assets of the deceased given in the valuation report submitted by the petitioners as Annexure A is also accepted. On the petitioners filing the requisite administration bond as also filing the requisite stamp papers, Registry would draw the instrument of letter of administration with Will annexed. The petition is disposed of with these directions.