* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **FAO.No.327/2007**

% *Decided On: 25.01.2011*

RAJIV BAHL & ORS. .... Appellants

Through: Mr. Akshay Makhija, Adv.

Versus

STATE & ORS. .... Respondents

Through: Mr.Prashant Bhushan with Ms.Harsh Lata, Mr.P.K.Jain and Mr.Vipul Jain, Advs. for Respondent No.2
Mr.Kishore M.Gajaria, Mr.Rajiv Shukla and Piyush Sachdeva, Adv. for Respondent No.3

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

1. Whether reporters of Local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether the judgment should be reported in the Digest?

: MOOL CHAND GARG,J. (ORAL)
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1. The present appeal arises out of a judgment dated 13.05.2007 delivered by the Additional District Judge, Delhi in Probate Case No.65/2006, whereby the probate has been granted in favour of the respondent of the Will dated 12.08.1986 (Ex.P-1) and the Codicil dated 03.07.1991 (Ex.P-2). By the impugned order the Additional District Judge has disbelieved the Codicil dated 03.07.1991 (Ex.OW1/4) of the Will relied upon by the appellants holding that the said Codicil was not a genuine Codicil as propounded by the appellants.

2. Appellants are claiming succession of the property left by Smt.Ram Piari on the basis of the Will (Ex.P-1) and the Codicil to the said Will dated 03.07.1991 (Ex.OW1/4), whereas the respondents are relying upon the Will dated 12.08.1996 and Codicil dated 03.07.1991 (Ex.P-2).

3. Smt. Ram Piari, the Executrix, died on 6th October, 1994. She had three sons, namely, S/Shri Rajneesh Bahl, Ashok Bahl and Dinesh

Bahl. Shri Dinesh Bahl pre-deceased Smt. Ram Piari and the appellants herein are the legal heirs of Shri Dinesh Bahl. They are residing abroad. Shri Rajneesh Bahl died during the pendency of the proceedings before the trial court.

4. The estate of Smt. Ram Piari comprises of property bearing No. 14, Kautalya Marg, Chanakyapuri, New Delhi and certain other movables.

5. Smt. Ram Piari executed a Will dated 12.08.1996, whereby she bequeathed the rear portion of the house at Kautalya Marg to Shri Rajneesh Bahl and the front portion jointly to S/Shri Ashok Bahl and Dinesh Bahl. All movables were divided in equal shares amongst the three sons. Shri Ashok Bahl was appointed the Executor of the said Will. The said Will further provided that in the event of any of her sons pre-deceasing her, his share shall go to the son or sons of the pre-deceased son and in case there is no male heir, then the share would be divided amongst the other living sons in equal shares. 6. There is no dispute amongst the parties insofar as the execution of Will dated 12.08.1996 Ex.P-1 is concerned. The dispute arises on account of Sh.Rajneesh Bahl, respondent, propounding the Codicil Ex.P-2. The Codicil Ex.P-2 is attested by two witnesses and is in original. The appellants have propounded the Codicil Ex.OW1/4, which is not the original copy. According to them, this Codicil bears the endorsement in original of late Smt.Ram Piari, who addressed the said endorsement along with the Codicil to their father Sh.Dinesh Bahl.

6. As per Codicil (Ex.P-2) Shri Dinesh Bahl has been excluded completely from the estate of Smt. Ram Piari and the entire front portion of Kautalya Marg property has been bequeathed to Sh.Ashok Bahl. Consequently, the appellants are now not entitled to any share of the property in question. Further all other assets have been divided equally between S/Shri Rajneesh Bahl and Ashok Bahl.

7. Shri Dinesh Bahl is purportedly excluded as he was suffering from cancer and expressed a desire not to inherit the Kautalya Marg house as also that his family is well-settled and is not likely to return to the country.

8. In the Codicil Ex.OW1/4, on the other hand, the bequest made to Sh.Dinesh Bahl in the Will dated 12.08.1986 has been transferred to his son, Sh.Rajiv Bahl on account of poor health of Sh.Dinesh Bahl i.e. the front portion stands bequeathed to S/Shri Ashok Bahl and Rajiv Bahl. All other assets were divided equally amongst S/Shri Rajneesh Bahl, Ashok Bahl and Rajiv Bahl in three equal shares.

9. On the document Ex.OW1/4, there is a handwritten note of Smt.Ram Piari stating "Dinesh Darling, this is the Codicil which I have signed and witnessed and which Ashok tells he sent to you. I hope it is alright with you. With lots of love, yours affectionately, Mummy".

10. The appellants have relied upon another letter stated to have been written by late Sh.Dinesh Bahl to her mother Ex.PW2/RX acknowledging the receipt of her letter appended on Ex.OW1/4.

11. It is the case of the appellants that the Codicil Ex.OW1/4 is the real codicil while Ex.P-2 relied upon by the respondent is not a real Codicil.

12. It may be observed here that both the Codicils are of the same date i.e. 03.07.1991.

13. It is also of importance to note that another Will Ex.PW1/6 was propounded by the legal heirs of late Sh. Dinesh Bahl i.e. the appellants whereby the rear portion of the said property was bequeathed to Sh.Rajneesh Bahl while the ground portion was bequeathed to Sh.Dinesh Bahl and the first floor of the front portion was bequeathed to Sh.Ashok Bahl. As far as the said Will is concerned, the probate petition filed by the appellants was dismissed by the Additional District Judge vide order dated 22.11.1991 against which an appeal was filed by the appellants which is registered as FAO 328/2007. The said appeal was dismissed as withdrawn vide separate order passed today.

14. According to the appellants, the Codicil Ex.P-2 which ought to have been proved by the respondent is shrouded by suspicious circumstances and, therefore, could not have been accepted by the ld. Additional District Judge as a genuine document, for the reason that the said document completely excludes Sh.Dinesh Bahl and his family even though in earlier Will Ex.P-1 accepted by all the parties deceased Ram Piari has given share in the front portion to Sh.Dinesh Bahl. He

has relied upon the judgment of the Apex Court in the case of ***H. Venkatachala Iyengar v. B.N. Thimmajamma,1959 Supp (1) SCR 426.*** The relevant paragraphs are reproduced hereunder:-

> **"18.** What is the true legal position in the matter of proof of wills? It is well-known that the proof of wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject. 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, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under Section 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 proving 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 proving 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. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. 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 wills 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.
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> **19.** However, there is one important feature which distinguishes wills 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 wills 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, 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.

20. 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."

15. By the impugned order the Additional District Judge has taken note of the execution of the Will Ex.P-1 as also the Codicil Ex.P-2 on which the respondents are relying upon as well as the Codicil Ex.OW1/4 relied upon by the appellants. It is of importance to note that while Codicil ExP-2 is the original one, Codicil Ex.OW1/4 is only a photocopy though it also has an endorsement allegedly of late Smt.Ram Piari on right hand portion thereof on the second page. Even though according to the appellants the Codicil Ex.OW1/4 also bears the

signatures of the two witnesses, one of whom has appeared in witness box but has not supported the case of the appellants and has supported Codicil Ex.P-2.

16. The Additional District Judge has also taken note of the evidence which has come on record and also have compared the signatures of the two witnesses who signed Ex.P-2 and who also stated to have signed Ex.OW1/4.

17. As regard execution of Ex.P-2, it is the case of the respondents that there are good reasons for execution of the said Codicil by the mother of the deceased inasmuch as, after the execution of the Will dated 12.08.1986 (Ex.P-1), late Sh.Dinesh Bahl developed cancer. He married a German lady and settled in America since 1972. He had no intention to return back to India in the house in question. Accordingly, a copy of the Will is sent by Smt.Ram Piari to late Sh.Dinesh Bahl. When he developed cancer he expressed a desire that his portion be also bequeathed to Ashok Bahl as neither he nor his Americal wife and children were expected to settle down in India. It is noted by the Additional District Judge in the impugned order that it was in the changed circumstances the deceased Ram Piari executed a Codicil on 03.07.1991 bequeathing the front portion of the property in favour of Ashok Bahl and rear portion to Dinesh Bahl. The Codicil was witnesses by Sh.Naveen Bahl, an attesting witness to the Will and Arvind Nair, resident of Vasant Kunj. The reasons for executing the Codicil Ex.P-2 is given in the Codicil itself and are reproduced hereunder:-

> "After the execution of the aforesaid will dated 12th August, 1986, I informed my three sons of the same and I am happy to record that they have understood and accepted what I recorded in the said will, although their agreement is not required. I have been occupying for my residential purposes the Rear Unit of the property 14, Kautilya Marg and the front portion of the Kautilya Marg House has been given out on rent……."
>
> "In my will dated 12th August, 1986, I have provided that the Front Portion Will be inherited by my two sons Dinesh Bahl and Ashok Bahl. In view of the fact that Dinesh is suffering from cancer and has expressed a desire not to inherit the Kautilya Marg house for this and also for various other reasons including the fact that his family is well settled and living abroad and is not likely to return to the country and they have expressed a wish that they would be very happy to

see my son Ashok inherit the entire Front Portion in order to retain it as a whole……."

"Thereafter she bequeathed the front portion exclusively in favour of Ashok Bahl and rear portion in favour of Rajnish Bahl……."

"I am making this provision in view of Dinesh's illness, his desire and also various other facts and considerations……."

18. It may be observed here that Sh.Naveen Bahl filed an affidavit in support of the Codicil (Ex.P-1), wherein, he deposed that:-

"That he was a practicing CA for the last thirty years and was looking after the income tax work of Ram Pyari till her death. He also used to look after the taxation matters of Pratap Chand Bahl's estate after his death. Ram Pyari reposed great confidence in him and treated him like a close family associate. In 1986 she executed a will in favour of her three sons namely Rajnish Bahl, Dinesh Bahl and Ashok Bahl. One day before the execution of the will she telephoned him. When he reached the house of Ram Pyari, Trilok Nath Aggarwal was also present there. Then she informed him as well as Trilok Nath Aggarwal that she had prepared a will. She took out the papers. After reading and correcting it in her own handwriting signed the same at marks A1 to A12. She also signed over the cuttings and over writings. She signed at marks A1 to A12 in the presence of this witness as well as in the presence of Trilok Nath Aggarwal. Thereafter Trilok Nath Aggarwal signed it at mark C,D,E and F in the presence of Ram Pyari. Lastly it was signed by this witness at Mark K in the presence of Ram Pyari and Trilok Nath Aggarwal. He proved that Ram Pyari executed the Will dated 12.8.1986 in the presence of two witnesses namely Naveen Bahl and Trilok Nath Aggarwal

She again called him on 3.7.1991. On that day Arvind Nair was present there. She expressed a desire to execute a codicil to the Will dated 12.8.1986 and told them that she wanted to make some alterations in her will. Thereafter she took out some documents and signed the codicil at marks A1, A2 and A3 in his presence as well as in the presence of Arvind Nair. Thereafter he signed the codicil at marks B1 and B2 in her presence and in the presence of Arvind Nair. Lastly Arvind Nair signed the codicil at marks C1 and C2 in his presence as well as in presence of Ram Pyari. He proved the codicil Ex.P2. After executing the codicil she also attached a copy of her will dated 12.8.1986 as Annexures A1 and A2 to the codicil Ex.P2. By this codicil she had given the front portion of property number 14, Kautilya Marg to Ashok Bahl and rear portion to Rajnish Bahl. He verified the probate petition filed by Ashok Bahl. He further deposed that except these two documents i.e. the will Ex.P1 and the

codicil Ex.P2 no other document was executed by Ram Pyari in his presence."

19. The Additional District Judge has also taken note of the cross-examination of this witness, wherein he deposed that:-

> "In cross examination he deposed that he was handling the taxation matters of Ram Pyari since 1980. Mainly he was having professional relations with her. All the corrections made in the Will Ex.P1 and codicil Ex.P2 were already there before its execution. He denied the suggestion that the codicil Ex.P2 was fabricated by him later on in place of original of codicil Mark A in connivance with petitioner Ashok Bahl. He showed his ignorance about the execution of codicil on 15.11.1991. He also showed his ignorance about the execution of the Will on 22.11.1991 and the signature of this witness on the codicil Ex.P2 are not denied. Will of 12.08.1986 is not denied by any of the respondents and the witness specifically deposed that under the codicil signed by him entire front portion in favour of Rajnish Bahl. Nothing could be illicited from this witness which could prove that the Will and codicil propounded by Ashok Bahl were not genuine documents."

20. Thus, it can be said that the evidence as is required to have been led with respect to a Will was led by the respondent in this case. The said evidence as led by the respondent is in accordance with the law laid down by the Apex Court in the case of ***Bhagat Ram & Anr. Vs. Suresh and Ors., 2003 (12) SCC 35***. Similar formalities which are attached to the execution of the Will also need to be carried out in relation to the Codicil. In Paragraph 8 of the aforesaid judgment, the following questions were framed:-

> "8. Three questions arise for consideration in this appeal:
>
> (1) Whether the formalities attaching with the execution of Will need to be carried out in relation to a codicil also, and if so, whether a codicil is also required to be proved in the same manner as a Will?
>
> (2) Whether a Registrar of Deeds can also be an attesting witness?
>
> (3) Whether registration of a Will or codicil dispenses with the need of proving the execution and attestation of Will in the manner required by Section 68 of the Evidence Act?"

21. While replying the first question, the Apex Court has observed:-

"Question-1:

9. 'Will' and 'codicil' are defined respectively in Clauses (h) and (b) of Section 2 of the Indian Succession Act, 1925 as under:-

> "2(h) 'will' means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death;
>
> (b) 'codicil' means an instrument made in relation to a will, and explaining, altering or adding to its depositions, and shall be deemed to form part of the will;"

10. Section 63 provides, by enacting the rules, for the manner in which an unprivileged will (the class to which the Will in question belongs) shall be executed. The rules are as under:-

> *Succession Act, 1925*
>
> *"63. Execution of unprivileged Wills.-* Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules:-
>
> (a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.
>
> (b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.
>
> (c) the will shall be attested by two or more witnesses, each of whom has seen to the will or has seem 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 of 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. It is also relevant to refer to Section 70 which provides that no unprivileged will on codicil, nor any part thereof, shall be revoked otherwise than by marriage, or by another will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged will is hereinbefore required to be executed,or by the burning, tearing, or otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same. (emphasis supplied) In Section 64 of the Succession Act also we find a reference to due attestation of a Will or codicil both. It is provided that if a testator, in *a will or codicil duly attested,* refers to any other document then actually written as expressing any part of his intentions, such document shall be deemed to form a part of the will or codicil in which it is referred to. (emphasis supplied)

12. According to Section 68 of the Evidence Act, 1972 a document required by law to be attested, which a will is, shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if available to depose and amenable to the process of the Court. The proviso inserted in Section 68 by Act No. 31 of 1926 dispenses with the mandatory requirement of calling an attesting witness in proof of the execution of any document to which Section 68 applies if it has been registered in accordance with the provisions of the Indian Registration Act 1908 unless its execution by the person by whom it purports to have been executed is specifically denied. However, a Will is excepted from the operation of the proviso. A Will has to be proved as required by the main part of Section 68. It is true that Section 63 of Succession Act does not specifically speak of codicils and that omission has prompted the learned counsel for the appellants to urge that the applicability of Section 63 abovesaid should be treated as confined to the execution of Wills only. A codicil need not necessarily be attested and, therefore, a codicil need not be proved in the manner contemplated by the main part of Section 68 of the Evidence Act; a codicil will attract applicability of the provide, submitted the learned counsel for the appellants. In our opinion, such a submission cannot be countenanced. Williams states in The Law of Wills, Vol. 1 (1987 Edn.)-

"Codicils which in form and execution are similar to a will are useful for the purpose of making slight alternations to a will, such as a change of executors or deleting some specific gift. Codicils may be used for making any alteration in a will, but it is so easy to fail to see that a substantial alteration so made will affect parts of the will other than that intended to be affected, that it is a wise practical rule to execute a new will whenever any substantial alteration is intended, it may,

in cases of urgency, be more practical to execute a codicil than to prepare a new Will, ... the codicil is executed and attested in the same way as a will. (at p.161)"

22. Now, coming to the second Codicil on which the appellants placed reliance i.e. Ex.OW1/4 whereupon there is a letter stated to have been written by Smt.Ram Piari. The Additional District Judge has taken note of the depositions of two witnesses examined by the appellants i.e. Sh.S.K.Khanna and Rita Alfred. While taking note of the deposition of S.K.Khanna, who proved the Codicil dated 03.07.1991 Ex.OW1/4 and identified the handwriting of deceased Ram Piari on the same as he had seen her writing and signing, the Additional District Jude has observed that the deposition of the aforesaid witness cannot be relied upon for proving the Codicil Ex.OW1/4 and made the following observations:-

"The statement of this witness cannot be relied upon for proving the codicil marked as Ex.OW1/4 for the simple reason that original of this has not been placed on record. No permission was taken to lead secondary evidence to prove this document. S.K. Khanna is not an attesting witness of this document and the document can be proved by one of the attesting witness of the codicil only as per provisions of Section 68 and Section 69 of the Indian Evidence Act.

> "If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be and attesting witness alive, and subject to the process of the Court and capable of giving evidence."

Section 69 of the Indian Evidence provides:

> "If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person."

The only attesting witness of this council Naveen Bahl was examined by Ashok Bahl and he specifically deposed that the codicil propounded by Rajiv Bahl was never executed by Ram Pyari in his presence. He proved the codicil Ex.P2 propounded by Ashok Bahl. It was submitted on behalf of the petitioner Ashok Bahl that Ex.OW1/4 propounded by

> the legal heir's of Dinesh Bahl is a forged and fabricated document and forgery was done by photocopying and the real codicil dated 3.7.1991, Ex.P2 is the one which was executed by Ram Pyari. I agree with the argument advanced on behalf of petitioner Ashok Bahl and hold that codicil dated 3.7.1991, Ex.P2 was executed by Ram Pyari and not the codicil Ex.OW1/4 because execution of that document is not duly proved. The only attesting witness of that codicil has denied its execution and S.K. Khanna and Rita Alfred were not the attesting witnesses of that codicil."

23. In these circumstances, the case of the appellants was not accepted by the Additional District Judge with respect to the execution of the Codicil Ex.OW1/4 by the deceased Ram Piari.

24. Another circumstance which also goes against the appellants is that the appellants have also relied upon another Codicil dated 15.11.1991 (Ex.OW1/5) and the Will dated 22.11.1991 (Ex.OW1/6). Both these documents have been found to be fabricated by the learned Additional District Judge and on that basis, the probate petition filed by the appellant being Petition No. 70/2006 has been dismissed by the Additional District Judge and the appeal filed against the aforesaid order, also stand dismissed as withdrawn in Court today.

25. In these circumstances and in view of the law as discussed above, it is apparent that the respondents have proved the Codicil Ex.P-2 in accordance with the requirement to proving the Will under Section 63(c) of the Indian Succession Act. The appellants are only relying upon a document which is fabricated and even one of the attesting witnesses has not supported the case of the appellants. As such, the case of the appellants does not stand squarely. The appeal filed by the appellant is dismissed.

CM No.11543/2007

Interim order stands vacated.

Application stands disposed of.

MOOL CHAND GARG, J

JANUARY 25, 2011
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