

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 01.07.2010

Test Cas. No. 13/1994

NARENDER NATH NANDA

..... PETITIONER

Vs

THE STATE

..... RESPONDENT

Advocates who appeared in this case:

For the Plaintiff : Mr Sanjeev Sahay and Mr Abhishek Agarwal, Advocates
For the Defendant: Mrs Anju Bhattacharya with Mr Algin Matt John and Ms Kavery, Advocates

**CORAM :-
HON'BLE MR JUSTICE RAJIV SHAKDHER**

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment ? | Yes |
| 2. | To be referred to Reporters or not ? | Yes |
| 3. | Whether the judgment should be reported in the Digest ? | Yes |

RAJIV SHAKDHER, J

1. This is a petition under Section 278 of the Indian Succession Act, 1925 (hereinafter referred to as the 'Succession Act') for grant of Letters of Administration. The petitioner herein is one of the four sons of one late Smt Krishna Pyari Nanda. The petitioner has based his claim on the fact that late Smt Krishna Pyari Nanda died inte-state leaving behind movable and immovable assets as well as debts delineated in Annexures A and B appended to the petition.

1.1 In the petition, it is stated that Smt Krishna Pyari Nanda, the widow of late Shri Kidar Nath Nanda, died between 10.00-10.30 pm on March 8, 1994 at 41, Golf Links, New Delhi-110003. The deceased Smt Krishna Pyari Nanda is survived by the following legal representatives (in short 'LRs'), apart from the petitioner, i.e., Shri Mohinder Nath Nanda, Shri Virender Nath Nanda and Shri Rajinder Nath Nanda. The grant of Letters of

Administration was opposed by the afore-mentioned siblings of the petitioner (hereinafter collectively referred to as the 'respondents').

1.2 In the reply, the respondents have stated that prior to her death Smt Krishna Pyari Nanda had executed a Will (Ex R-1) on 05.11.1987. The original Will was lodged for safe custody with the ANZ Grindlays Bank, P.L.C Connaught Circus Branch, New Delhi (hereinafter referred to in short as the 'Bank'). A receipt was obtained on the handing over of the original Will, from the Chief Manager of the afore-mentioned Bank; which was filed with the reply.

1.3 It may be pertinent to note at this stage that when the petition was placed before the Court on return of notice i.e., on 03.08.1994, the reply of the respondents was on record, which was filed on or around 28.04.1994. At the hearing held on 03.08.1994, the Court noticed the fact stated in paragraph 2 of the reply, that the Will, on which reliance was placed by the respondents, was in the custody of the Bank. On the request of the counsel for the petitioner, the production of the Will was however deferred till filing of an appropriate application in that behalf by the petitioner.

2. Consequently, the petitioner filed IA No. 7853/1994 which came up before Court on 11.08.1994. The Court issued notice on the application both to the respondents as well as to the Bank with a direction to the Bank to file the Will in Court.

2.1 At the hearing held on 12.05.1995, it appears that an officer from the Bank presented himself in Court, and made a statement that Will of late Smt Krishna Pyari Nanda could not be traced, and that if particulars are provided, he shall search the Bank's records. A photocopy of the receipt issued by the Chief Manager's Office of the Bank dated 05.11.1987, was handed over by the counsel for the respondents to facilitate the Bank's attempt at retrieving the Will.

2.2 The matter was thereafter taken up by the Court on 21.07.1995. At this hearing, the Court recorded the statement of the Bank officer that their search revealed that no Will was deposited with the Bank. At this juncture, the Court permitted the respondents to place a carbon impression of the Will on the Court record.

2.3 In the meanwhile, on 28.08.1995 the petitioner filed a Criminal Miscellaneous Application No. 3413/1995 in which notice was issued. The matter was posted for hearing on 09.10.1995.

2.4 On 09.10.1995, the Court framed the following issues:-

- “1. Whether the deceased, Smt. Krishna Pyari, had executed the Will dated 5.11.1987? OPR
2. In case issue No.1 is proved in the affirmative, whether the petitioner is still entitled to grant of Letter of Administration? OPP
3. Relief.”

2.5 It is pertinent to note that in respect of criminal miscellaneous application No. 3413/1995, at the aforementioned hearing, the Court observed that the said application could be disposed of only with the final decision in the “probate proceedings”.

2.6 By an order dated 18.10.1995 passed in IA No. 9676/1995 the carbon impression of the Will was placed in a sealed cover.

2.7 The petitioner, it appears thereafter moved an application being IA No. 4828/1996 for seeking permission of the Court to engage a handwriting expert to inspect the document placed in sealed cover i.e., the carbon impression of the Will. This permission was granted by an order dated 22.05.1996.

2.8 The respondents, it appears, also moved an application being IA No. 6517/1996 seeking permission of the Court for allowing an officer of the Bank of Tokyo Mitsubishi Limited, Parliament Street, New Delhi to compare signatures of the testator late Smt Krishna Pyari Nanda, with the record maintained by the said Bank, and after comparison, be directed to give his opinion in the matter. The Court allowed the application partially, in as much as, permitted the Bank of Tokyo, Mitsubishi Limited to inspect, and compare the signatures of the testator i.e., late Smt Krishna Pyari Nanda with those available in their record. The Court, however, did not issue any directions to the officer of the Bank of Tokyo Mitsubishi Limited to give his opinion in regard to the genuineness of the signatures. The Court observed that it was for the respondents to arrange their expert witness in that regard.

3. The other aspect of the matter which also requires to be noticed is that: during the course of proceedings respondents had placed on record the affidavits of evidence of its three witnesses i.e., Shri H K Sondhi, the brother of late Smt Krishna Pyari Nanda; Shri Madan Lal Khanna and Shri Arvind Khanna; the latter two were persons who had attested the Will.

3.1 The petitioner, however, had preferred an application being IA No. 10182/1998 whereby, objections were raised with regard to the Court, entertaining the evidence of the said witnesses in-chief, by way of affidavits. Since an objection was raised at the hearing held on 09.11.2000, the counsel for the respondents took a stand before the court that they will not rely upon the evidence filed by way of affidavits, and that oral evidence in that regard will be led at the trial.

3.2 It may also be noticed that IA No. 10023/2001 was filed by the petitioner, inter alia for the purpose of deferring the cross-examination of RW-2 (H K Sondhi) till such time the propounder of the Will stepped into witness box, and was cross-examined. Notice on this application was issued on 30.10.2001.

3.3 It appears that since the respondents closed their evidence on 30.08.2006, the matter was put up for examination of petitioner's witness on 28.11.2006. Thus IA No. 10023/2001 was rendered infructuous. To be noted, even though the record does not reflect any specific direction to that effect, the order dated 11.01.2007 seems to indicate that this was the intention of the Court; when the Court recorded that the said application had already been disposed of and, therefore, need not be shown in the cause list. The effect of which was that RW2's (H K Sondhi) examination remained incomplete.

3.4 To complete the narration, on 14.09.2007 at the behest of the petitioner the Court permitted the petitioner to engage another handwriting expert in view of the death of the earlier expert Mr P K Sukhija. The necessary consequential directions for facilitating the examination were also passed. The evidence in the matter was completed on 23.09.2009.

3.5 It may also be noticed that since then one of the LRs i.e., Shri Mohinder Nath Nanda, expired on 09.02.2009. The Court allowed the application to bring on record the LRs of Shri Mohinder Nath Nanda. This order was passed in IA No. 8125/2008.

Submissions of Counsels

4. In the aforesaid background, it was argued by the learned counsel for the petitioner that the only defence raised in respect of the prayer made in the petition was that the mother Smt Krishna Pyari Nanda had left behind a Will. It was urged by the learned counsel that the said Will was a forged and fabricated document and hence, could not be relied upon to disentitle the petitioner of his legitimate share, for the following reasons; which according to him, raised suspicion with regard to the execution of the Will:-

- (i) the propounder of the Will Mohinder Nath Nanda was not examined;
- (ii) the second attesting witness, i.e., Arvind Khanna who was the son of PW-1 M L Khanna, Advocate, even though available for examination, was not examined;
- (iii) the choice of the attesting witnesses (i.e., M.L. Khanna and his son Arvind Khanna). Despite the fact that: the evidence on record reveals that H K Sondhi, the brother of the testator, was present at the time when the Will was drawn up;
- (iv) Shri Mohinder Nath Nanda was unable to prove as to how he came to possess the carbon impression of the Will. RW-1 (M L Khanna) in his deposition did not advert to the fact that at the time when the Will was drawn up, the testator was in a sound disposing mind, and that the Will had been executed by her of her own volition. As a matter of fact, the affidavit of evidence which was filed alluded to this fact;
- (v) the case set up by the respondents was that the original Will was deposited with the Bank. The Bank, however, reported to the Court that the record did not reveal that the Will had been deposited with them. For this purpose, reliance was placed on the order of the Court dated 21.07.1995;
- (vi) the petitioner, on the other hand, has produced a handwriting expert Ashok Kashyap (PW-1/1) whose opinion ought to be given due credence;

- (vii) the respondents, on the other hand, had been given liberty by Court to produce a handwriting expert, which for reasons best known to them they did not avail of. Hence, in his view, the respondents had failed to discharge the burden placed on them as regards existence of a Will; and
- (viii) lastly, the respondents in their cross-examination have not challenged the expertise of the petitioner's expert witness Ashok Kashyap (PW-1/1).

4.1 Based on the above submissions, the learned counsel contended that the respondents had failed to discharge their burden as regards existence of a Will. It was thus the contention of Mr Sahay that the prayers in the petition ought to be allowed as there is no dispute with regard to share of the petitioner in the assets of the deceased Smt Krishna Pyari Nanda. In support of his submissions, the learned counsel relied upon the following judgments:-

Lellapalli Sakuntala (died) per Lrs Vs Vedantam Seethamahalakshmi and Ors.: 2008(6) ALT 113; and Lalit Popli vs Canara Bank: AIR 2003 SC 1796

5. The submissions made by Mr Sahay were refuted by the learned counsel for the respondents Ms Anju Bhattacharya. The learned counsel submitted that soon after the respondents had filed their reply, the petitioner had moved a criminal miscellaneous application being IA No. 3413/1995 alleging perjury by the respondents. The respondents, it was submitted, filed their reply refuting the same. By an order dated 21.07.1995 the Court had permitted the respondents to place on record a carbon impression of the Will. It was contended by Ms Bhattacharya that the carbon impression of documents is admissible in evidence, and is treated as an original document. Being a primary document, it was contended, reliance could be placed on it to prove existence of the Will (Ex R-1). Reliance in this regard is placed on the following judgments:-

Bhagwan Das Arora vs 1st Additional District Judge, Rampur & Ors. AIR 1983 All 95; and Prithi Chand vs State of Himachal Pradesh: AIR 1989 SC 702

5.1 The learned counsel further contended that except for averments made in the aforementioned criminal miscellaneous application being IA No. 3413/1995, there are no

pleadings whatsoever with respect to there being any suspicious circumstances surrounding the execution of the Will (Ex R-1.). This fact, according to the learned counsel, was quite evident from the order dated 09.10.1995 whereby, issues were cast. In support of her submission, the learned counsel laid stress on the fact that the petitioner had chosen not to file a replication to the reply filed by the respondents to the petition under Section 278 of the Succession Act.

5.2 Ms Bhattacharya further contended that the necessary prerequisites as mandated in Section 63 of the Succession Act for execution of a valid Will obtain in the instant case. Amongst other requirements, the said section stipulates the attestation of Will by two witnesses. The Will, it was contended, had been attested by two witnesses being: M L Khanna (RW-1) and his son Arvind Khanna. Similarly, it was contended that for the purposes of proof of execution of the Will, the testimony of one of the two attesting witnesses is sufficient in the eyes of law. Reliance in this regard has placed on Section 68 of the Indian Evidence Act, 1872 (hereinafter referred to in short as 'the Evidence Act') and also on the following judgments:-

Mathew Jacob and Ors. vs Ms Salestine Jacob and Anr.: AIR 1998 Del 390; and Vrindavanibai Sambhaji Mane vs Ramchandra Vithal Ganeshkar & Ors.: (1995) 5 SCC 215

5.3 As regards the issue raised by the learned counsel for the petitioner that H K Sondhi's evidence was not completed, Ms Bhattacharya submitted that the petitioner created circumstances which, in a sense resulted in a situation, which propelled H.K. Sondhi not to appear for cross-examination. In this regard she referred to the fact that in the first instance when affidavits of evidence were filed, the petitioner moved an application being IA No. 10182/1998 objecting to the examination-in-chief being conducted by filing of affidavits. In order to expedite the process, the respondents at the hearing held on 09.11.2000 conceded to the evidence being recorded orally. Thereupon, at a stage when H.K. Sondhi had been partly cross-examined, on 18.10.2001, the petitioner moved an application being IA No. 10023/2001 under Order XVIII Rule 3A of the Code of

Civil Procedure, 1908 (hereinafter referred to in short as 'CPC') for deferment of his cross-examination. In this regard Ms Bhattacharya drew my attention to an order dated 18.10.2001 to which I have already made a reference hereinabove. It was contended by Ms Bhattacharya that the circumstances resulted in H K Sondhi not presenting himself for cross-examination.

5.4 Ms Bhattacharya, however, submitted that notwithstanding the aforementioned circumstances, the evidence on record proved the existence of the Will (Ex R-1). The exclusion of the petitioner from the estate of the deceased Smt Krishna Pyari Nanda was explained by Ms Bhattacharya by laying stress on the fact that the petitioner's relationship with his mother, and other members of the family was strained. To buttress her submission, the learned counsel relied upon an affidavit filed by the mother in another proceedings being CS(OS) No. 1310/1998 pending adjudication in this Court; amongst persons, who are also party to the present petition. In support of this submission Ms Bhattacharya also placed reliance on observations made by this Court in the case entitled *M/s Kidarsons Industries Pvt. Ltd vs M/s Hansa Industries Pvt. Ltd. & Ors.: 1993(1) Delhi Lawyer 275 in paragraphs 1, 49 and 57.*

5.5 As regards the opinion of the handwriting expert produced by the petitioner, Ms Bhattacharya submitted that the petitioner was 74 years of age at the time of execution of the Will, the "line defects" referred to in the opinion were on account of age. On the issue of how a court ought to proceed in examination of the signatures, appended on a document, in this case a Will, reliance was placed on the following judgments:-

Ganpatrao Khandero Vijaykar vs Vasant Rao Ganpatrao Vijaykar: AIR 1932 Bombay 588; and Shashi Kumar Banerjee and Ors. v. Subodh Kumar Banerjee since deceased and after him his legal representatives and Ors. AIR 1964 SC 529 at paras 7 and 15

5.6 As to why the propounder of the Will i.e., Mohinder Nath Nanda was not examined by the respondents; Ms Bhattacharya relied upon the reply filed to IA No. 10023/2001.

5.7 I may only notice that in the reply, the respondents briefly contended as follows: in the facts and circumstances of the case the testimony of the Mohinder Nath Nanda i.e., the

propounder of the Will, was not necessary; the application which was moved under the provisions of Order XVIII Rule 3A of the CPC only required that if a party to the proceedings wished to adduce evidence, the concerned party should be examined in the first instance, and since in the given circumstances, this need was not felt, the application was not sustainable; and lastly, the application had been filed by the petitioner at this late stage only to delay the proceedings.

5.8 The last objection I had put to Mr Sahay; who had fairly conceded that the application had been moved at the stage which was rather late.

6. In rejoinder, Mr Sahay while reiterating the submissions made in the opening, submitted that while carbon impression of a document is admissible it was his case that it required a higher degree of proof. Mr Sahay further submitted that: had both attesting witnesses been produced, he would have had the opportunity to confront them with the testimony of the other; an exercise which would have facilitated emergence of truth. It was thus Mr Sahay's submission that requisite proof had not been tendered. On this aspect reliance was placed on the judgment of this court, in the case of *Dinesh Kumar vs Khazan Singh & Ors.: AIR 1988 Delhi 273 para 6*.

6.1 In so far as the affidavit of late Smt Krishna Pyari Nanda filed in CS(OS) No. 1310/1988 was concerned, Mr Sahay contended, it would have to be examined in the light of the fact that the mother was, to begin with, not a party to the said suit proceedings, and that it was only at the instance of the respondents, that the mother was made a party to the suit proceedings.

Reasons

7. I have heard the learned counsel for the petitioner as well as the contesting respondents and also examined the evidence on record. As is evident from the issues which have been cast in the matter, the petition will succeed or fail depending on whether the respondents are able to prove the execution of the Will dated 05.11.1987 (Ex R-1), in fact, as well as, in law.

7.1 Therefore, before I proceed further, it may be appropriate to advert to the provisions of law as encapsulated in the Succession Act and the Evidence Act. I shall be advert to only those provisions of statute which are relevant for the purposes of adjudication of the issues raised in the present petition.

7.2 In this connection, therefore, provisions of Sections 59 and 63 of the Succession Act are relevant. Section 59 of the Succession Act, makes a reference to the capacity of the testator and hence, provides that every person of sound mind, not being a minor, may dispose of his property by a Will. Section 63 of the Succession Act requires that the testator should execute his Will: Firstly, in writing, and affix thereon his signature or mark, or have it signed by some other person in his presence and as per his direction. Secondly, the signature or the mark of the testator or of the person so directed by the testator, should be so appended on the Will that it should appear that it is intended to give effect to the writing, as a Will. Lastly, the Will should be attested by two or more persons who ought to have witnessed the testator having signed or affixed his mark on the Will or ought to have received from the testator a personal acknowledgement of his signature or mark, or that of the other person so directed by the testator; on the Will. It is important that each of the witnesses should sign the Will in the presence of the testator. There is, however, no requirement that more than one witness should be present at the same time. The attestation by witnesses is not confined to any particular form.

7.3. Section 68 of the Evidence Act, on the other hand, provides for the manner in which documents which are required to be attested in law, ought to be proved. The said section, in no uncertain terms, specifies that a document, in this case a Will, will not be used as evidence unless one of the attesting witnesses proves its execution; if such an attesting witness is alive, is subject to the process of Court, and is capable of giving evidence. In short a combined reading of the afore-mentioned provisions of the Succession Act and the Evidence Act bring to fore the following in respect of an unprivileged Will:-

- (i) a person of sound mind, not being a minor, can dispose of his property by executing a Will;

- (ii) the Will should be reduced to writing;
- (iii) it should bear the signature or the mark of the testator or of any person who is so directed to sign on the document;
- (iv) the signature or the mark of the testator or of any person so directed to sign on the document should be affixed in a manner that it reveals an intention, to execute a document, of the nature of a Will;
- (v) the Will should be attested by two or more witnesses who should have seen the testator signing or affixing his mark on the Will or seen such other person, so directed by the testator, appending his signatures on the Will or in the alternative, received from the testator a personal acknowledgment of his having appended his signatures or mark on the Will or the signatures of such other person so directed by the testator to sign the Will;
- (vi) the attesting witnesses should have signed the Will in the presence of the testator; and
- (vii) lastly, the execution of the Will would stand proved, if at least, one of the attesting witnesses proves its execution by the testator;

8. Therefore, the execution of a valid Will stands proved if the propounder of the Will is able to prove that: at the time of execution of the Will the testator was in a sound disposing state of mind; the execution was made by the testator of her own volition and the execution of the Will was witnessed by two or more persons. In India to prove attestation of a Will, the examination of one witness would suffice. [*See Rammol (Das) Koch vs Hakol Koli Kochini: 22 CWN 315*]

9. It is only when the propounder of the Will has proved the execution of a Will in accordance with law, which includes proof of attestation, would the Court be required to examine, if at all, the alleged suspicious circumstances put forth by the objectors. As is obvious if, the propounder fails to prove the execution of the Will in accordance with law, then the Court would not have to necessarily proceed to the next step in the enquiry, which is, examination of the suspicious circumstances. As regards suspicious circumstances there

may arise myriad situations impugning the genuineness of the Will, such as: where, the signatures of the testator are in doubt; the condition of the testator's mind is unsound either for the reasons of insanity, intoxication or even illness; the dispositions of property made, are unnatural, improbable, or unfair when, seen in the light of relevant facts and circumstances, or that there are indications that the testator's mind was not free. However, merely because a Will bequeaths the property of the testator to persons outside the immediate family, or excludes one or the other members of the family would not by itself put it in the category of a suspicious circumstance; as a Will by its very nature is a document which breaks the normal line of succession. Once suspicious circumstances are present, the onus is on the propounder of the Will to remove the doubts so created, on account of suspicious circumstances, and if that is done, the Court will have to give effect to the Will even if the dispositions of property provided therein exclude one or all family members or near relations of the testator. [*See Pushpawati & Ors. vs Chandraraja Kadamba: 1973(3) SCC 291*]

9.1. If, there is any doubt as to the execution of the Will, the Court should examine the explanations offered by the propounder of the Will, by applying the test of a "prudent mind". By that the Courts have meant that the requirement is not that the propounder of the Will is called upon to adduce "mathematical proof". The propounder must, "remove the suspicion, if any, attaching to the execution of the Will and if there be any doubt regarding the due execution, he must satisfy the conscience of the Court that the testator had a sound and disposing state of mind and memory when he made the Will". "Reasonable scepticism, not an obdurate persistence in disbelief nor a resolute and impenetrable incredulity is demanded of the testamentary judge. He is never required to close his mind to the truth." [*See Seth Beni Chand vs Smt Kamla Kunwar & Ors.: (1976) 4 SCC 554*]

9.2. Before arriving at a conclusion that the dispositions made under a Will are unnatural, the improbability of such dispositions should be weighed against the evidence led by the propounder of the Will as regards the due execution of the Will by the testator by

putting his signatures, and its attestation, as required by law. The evidence placed before Court as regards improbability of disposition should not only be “clear” and “cogent” but must altogether constitute an “impossibility”. [*See Vrindavanibai Sambhaji Mane vs Ramchandra Vithal Ganeshkar & Ors.: (1995) 5 SCC 215 at Para 14*]

9.3. The propounder of the Will, while satisfying the court’s “conscience” should attempt to dispel any suspicious or unnatural circumstances surrounding the execution of the Will provided such unnatural suspicious circumstances attach to the Will. The law does not permit conjecture or suspicion to take place of “legal proof”. Well grounded suspicion can be a ground for closer scrutiny of evidence but suspicion alone, cannot be the basis for arriving at a conclusion one way or the other. [*See Madhukar D Shende vs Tarabai Aba Shedage: (2002) 2 SCC 85*]

10. Based on the aforesaid principles it may perhaps be prudent to examine the evidence of the witnesses produced by both parties. As was indicated earlier, the respondents had filed evidence by way of affidavits of H K Sondhi, Madan Lal Khanna and Arvind Khanna. Since objections were taken by the petitioner that there should be oral examination-in-chief of the said witnesses, the affidavits of evidence were not relied upon by the respondents. I have already indicated in the foregoing part of the judgment, the circumstances in which H K Sondhi was partially examined in the matter.

10.1 Therefore, in the instant case in so far as the respondent is concerned, we have only the testimony of Madan Lal Khanna (RW-1). In his testimony, Madan Lal Khanna (RW-1) has clearly adverted to the fact that he became acquainted with the testator late Smt Krishna Pyari Nanda through H K Sondhi who was a retired Commissioner of Income Tax. He deposed that he had met the testator late Smt Krishna Pyari Nanda on two occasions. Once at the house of H K Sondhi, and the second time when she alongwith H K Sondhi had visited his office for the purposes of executing the Will (Ex R-1). Madan Lal Khanna (RW-1) in his testimony alluded to the fact that: in November, 1987 Smt Krishna Pyari Nanda had visited his office. She had expressed her desire to execute a Will. Since she was conversant in Hindi, he had asked his assistant one, Mr Y K Pandey to record the Will in

Hindi. His assistant had used a carbon paper while writing out the Will of Smt Krishna Pyari Nanda. He further deposed that his assistant Y K Pandey who had written out the Will, had died about five years back. After the Will had been recorded, the same had been read over to Smt Krishna Pyari Nanda. The testator Smt Krishna Pyari Nanda had signed the Will in his presence, and that he alongwith his son Arvind Khanna, who was the second attesting witness had also signed the Will, in the presence of the testator Smt Krishna Pyari Nanda. He stated that the testator had signed the Will in his presence and that others in turn had signed the Will in her presence. He identified the signatures of the testator Smt Krishna Pyari Nanda on the Will (Ex R-1) at Point 'A' on each page of the Will, and similarly, identified his own signatures at Point 'B' at Page 4 of the Will and his initials at Point 'B' on Pages 1, 2 and 3 of the Will (Ex R-1).

10.2 Madan Lal Khanna (RW-1) also categorically stated in so many words that ***“at the time when the Will was being dictated Smt Krishna Pyari Nanda was in sound disposing mind”***. In his cross-examination Madan Lal Khanna (RW-1) clearly stated that both the original Will and the carbon impression of the Will had been taken away by H K Sondhi and Smt Krishna Pyari Nanda. He expressed his inability to state as to where the original Will had been placed. Madan Lal Khanna (RW-1) specifically refuted the suggestion that he had any previous dealings with Smt Krishna Pyari Nanda in his capacity as a lawyer. He also stated that the sons of late Smt Krishna Pyari Nanda had not contacted him for the purposes of Will or for a copy thereof. On being confronted, he refuted the suggestion that the signatures on the Will (Ex.R-1) at Point 'A' were not those of Smt Krishna Pyari Nanda. He volunteered that he was certain that the signatures were of late Smt Krishna Pyari Nanda as she has signed in his presence. The witness, Madan Lal Khanna (RW-1), also refuted the suggestion that the carbon impression of the Will was brought to him in July, 1995, which is when, he signed and initialed the Will.

11. In so far as the petitioner is concerned, he examined two witnesses one was handwriting expert Mr Ashok Kashyap (PW-1) and the other was the petitioner himself i.e., Narinder Nath Nanda (PW-2).

11.1 I would first touch upon the testimony of PW-2. PW-2 in his testimony has accepted the fact that when his mother expired he was not residing with her. While asserting that the relations between him and his brothers were cordial he accepted the fact that he alongwith his brothers (i.e., the contesting respondents) was a director in the company M/s Kidar Sons & Industry against which he had filed a winding up petition. He also accepted the fact that his mother Smt Krishna Pyari Nanda had a shareholding in the said company i.e., M/s Kidar Sons & Industry. He asserted that in the winding up petition the mother was not a party. The witness PW-2, however, accepted the fact that M/s Kidar Sons & Industry had filed a suit (being suit no. 1310/1988) against him, and that the said suit was filed after he had filed a winding up petition. He also alluded to the fact that the suit had been compromised between him and his brothers, and that, in addition to the said suit there were other litigations which were pending between him and his brothers which were initiated by his brothers. He, however, failed to recollect the cases which were pending in Court between him and his brothers. He asserted the fact that the compromise arrived at in the said suit bearing no. 1310/1988 was filed by M/s Kidar Sons & Industry. He also asserted that the settlement arrived at in the said suit was not binding on his mother Smt Krishna Pyari Nanda. He volunteered that the mother was not a party to the said suit, and that she had great regard and affection for him which is why she brought him to Delhi to establish his brothers as he was doing "good business". On being shown an affidavit filed by the mother marked 'A' dated 14.06.1990 filed in this Court in IA No. 4602/1990 in suit no. 1310/1988 in the case entitled M/s Kidarsons Industries Pvt Ltd vs M/s Hansa Industries Pvt Ltd & Ors: He stated that he was unable to say whether the affidavit bore his mother's signatures, and that he would require the services of a handwriting expert before adverting either way. To be noted that this answer was given in the light of his statement that he recognized his mother's signatures. He refuted the suggestion that his relationship with his mother had soured, and that he did not care for his mother which is why he had inveigled her in various litigations. He volunteered that he met his mother everyday four months before his mother's death, and would take her blessings before going to his office.

The witness, PW-2, accepted the fact that he was not present at his mother's funeral. He volunteered that he could not attend the funeral as he was not informed of his mother's death by his brothers, and that on knowing of her death, he had closed his office for four days. He refuted that his mother had executed a valid Will in favour of the respondents.

11.1 In so far as PW-1 was concerned, in his capacity as the expert witness, he proved his opinion dated 22.10.07 (Ex PW1/1). In his testimony he stood by his opinion that the disputed signatures D-1 to D-4 on the Will dated 05.11.1987 (Ex R-1) were forged, and that it had not been signed by the author of the admitted documents S-1 and S-2.

12. In view of the evidence on record, one would have to bear in mind the well settled principles prescribed in law to prove the handwriting of an author of a document or his signatures on a document, which is authored by another. The proof in this regard can be adduced either by a direct method or by what is termed as "opinion evidence". The direct method is in the form of a testimony of the person who signed or authored the document which, in the case of a Will, is not possible or, by adducing evidence of a person who, has seen the document in issue, being authored or signed. Indirect method normally requires evidence to be led in the form of a testimony of a handwriting expert, as provided for under Section 45 of the Evidence Act; or in the form of evidence of a person, who is acquainted with the handwriting of the person who is said to have authored or signed the document, as provided for in Section 47 of the Evidence Act. In this regard, under the provisions of Section 73 of the Evidence Act, the Court is also empowered to compare the disputed signature and/or handwriting with admitted signature and/or handwriting. The rule of prudence in most cases would require the Courts to call for an opinion of an expert and not rely solely on the ocular examination of the documents in issue.

12. Before I proceed further, it must be noted that there seems to be a good authority for the proposition that carbon impressions are primary documents. (*See Smt Kamala Rajamanikkam vs Smt Sushila Thakur Dass & Ors.: AIR 1983 Allahabad 90 and Prithi Chand vs State of Himachal Pradesh: AIR 1989 SC 702*)

12.1 The Will in issue (Ex R-1) is a carbon impression. Based on the aforesaid authority I have no difficulty in accepting it as a primary document. This aspect was also conceded by Mr Sahay. He, however, submitted that being a carbon impression it required a higher degree of proof. This was especially so since suspicious circumstances surrounded the execution of the Will. In this connection, it was Mr Sahay's contention that the respondents had not discharged their burden of proof. These are submissions which I shall deal with in the latter part of my judgment. However, even though I have accepted the carbon impression of the Will (Ex R-1) as a primary document; one would still have to examine whether its due execution stood proved in accordance with law.

13. In the instant case we have by way of proof the testimony of only one of the attesting witnesses, that is, Madan Lal Khanna (RW-1).

13.1 Madan Lal Khanna (RW-1) in his deposition has categorically adverted to the fact that the testator Smt Krishna Pyari Nanda signed the Will (Ex R-1) in his presence. If I were to accept the testimony of Madan Lal Khanna (RW-1) which is a direct mode of proof then I need not resort to the indirect mode of proof at all. The only ground of challenge laid to the credibility of Madan Lal Khanna (RW-1) was that there was no good reason for the testator to have Madan Lal Khanna (RW-1) and his son Arvind Khanna attest the Will (Ex R-1) when, H K Sondhi was present at the stage of execution of the Will. In my opinion, there could be several imponderables as to why the testator called upon Madan Lal Khanna (RW-1) and his son, Arvind Khanna to attest the Will (Ex R-1). It is quite possible that the testator chose an outsider to lend authenticity to the Will, as attestation by a close relation such as H K Sondhi who was her brother, could have led to the charge of undue influence. It is also possible that H.K. Sondhi himself may have been diffident. It could be any one of these reasons or both or even some other reason. Impugning the veracity of a Will is a serious business. A Court, therefore, is not to go by imponderables, surmises and conjectures. The fact that the testator Smt Krishna Pyari Nanda chose Madan Lal Khanna and his son, Arvind Khanna as witness cannot by itself effect the veracity of the Will (Ex R-1).

13.2 Therefore, what is of importance is the credibility of Madan Lal Khanna's (RW-1) deposition. In the light of this, let me examine what Madan Lal Khanna (RW-1) had to say in his cross-examination. In the cross-examination when confronted, the witness Madan Lal Khanna (RW-1) stood his ground, with regard to the fact that, the Will was executed by the testator Smt Krishna Pyari Nanda, in his presence. Madan Lal Khanna (RW-1) also went on to state that, he alongwith his son Arvind Khanna had appended their signatures on the Will as attesting witnesses, in the presence of Smt Krishna Pyari Nanda. He also stated quite categorically that the Will was written out, on the dictation of Smt Krishna Pyari Nanda, by his assistant Y K Pandey; and on the Will being prepared, the same was read out in Hindi to Smt Krishna Pyari Nanda before, she appended her signatures on the Will. He also adverted to the fact that a carbon paper was used while preparing the Will and both counterparts were taken away by H K Sondhi and Smt Krishna Pyari Nanda. A cumulative effect of the above, in my opinion, is that the execution of the Will cannot be in doubt.

14. This brings me to the alleged suspicious circumstances surrounding the execution of the Will. Since I am otherwise convinced about the due execution of the Will (Ex R-1), let me test the validity of the suspicious circumstances put forth by Mr Sahay. The first objection of Mr Sahay was that the propounder of the Will Mr Mohinder Nath Nanda had not been examined. In my view, this objection first of all misses the point that there is no requirement in law, that the beneficiary should also be examined. What is come through in the evidence, is that, when the Will (Ex R-1) was executed neither were the brothers of the petitioner, including Mohinder Nath Nanda, present nor, were they involved in its execution. It is not uncommon for a testator, in this case a parent, to execute a testamentary document without the knowledge of the beneficiary for fear of a family dispute erupting.

14.1 The testimony of Madan Lal Khanna (RW-1) on execution of Will of Smt Krishna Pyari Nanda is quite unambiguous. Therefore, to cite Mohinder Nath Nanda as a witness would not have carried the case of the respondents any further. Therefore, in my view, this objection is without merit.

14.2 The second suspicious circumstances, according to Mr Sahay, is that Arvind Khanna, son of RW-1 even though available was not examined. As noticed above, the position in law is that, in order to prove the execution of a Will, it would suffice if one of the attesting witnesses is examined. This is the mandate of Section 68 of the Evidence Act. There is, therefore, in law no infirmity in Arvind Khanna having been not examined. Mr Sahay in support of his submissions relied upon the judgment of the Karnataka High Court in the case of *Sri P N Balakrishna S/o late Sri Nagappa Gowda & Ors vs Sri H B Bhavani Shankar S/o late Shri H Bojappa* passed in *Miscellaneous First Appeal No. 7502/2003 decided on 08.12.2009*. In my view, this judgment does not support the proposition put forth by Mr Sahay. As a matter of fact, the observations contained in Paragraph 22 of the said judgment go against the proposition put forth by him. The relevant observations are as follows:-

*“22. Insofar as the decisions relied by the learned Counsel for the appellants as regard to the examination of one of the attesting witnesses no doubt, this Court in the case of Virupakshappa Malleshappa (supra) has observed that, evidence of the only attesting witness is unworthy of acceptance and also on the ground that when at more than one place there are misstatement of facts. This Court in a case where the attesting witness has denied himself being present at the time of execution of the Will, doubted his evidence and observed that, relying on the evidence of only attesting witness was not justified by the trial court, but this is not a case where attesting witness denied his presence at the time of execution of the Will, he has categorically stated that, not only he was present at the time of execution of the Will, but he has seen the testator putting signature and has also stated that he put his signature thereafter and another attesting witness also put his signature after the testator put his signature on the Will. The signatures appearing on the Will also reveal that the document was properly executed. **As far as non-examination of another attesting witness or the scribe is concerned, law does not require that another witness should be examined unless it is pointed out that the evidence of attesting witness, who has been examined, is doubtful and not reliable.** From the evidence of PW-2, no doubt, there are some minor discrepancies, but that will not take away the effect of the evidence as regard to the proof of the execution of the Will. Further, the attesting witness not known to Janardhan and non-examination of Janardhan do not prove any doubt as regard to the execution of the Will, when other circumstances are strong and trustworthy...”*

(emphasis is mine)

14.3 The third objection taken by Mr Sahay was that since the propounder of the Will Mohinder Nath Nanda was not examined, no evidence could be led or indeed was led to establish as to how the carbon impression of the Will (Ex R-1) came in his possession. In

my view, in the facts and circumstances of this case, this objection has lost much of its significance, as it has come through in the evidence of Madan Lal Khanna (RW-1) that the Will was prepared in two counterparts by using a carbon paper. He (RW-1) has also stated in his deposition in court, that both counterparts were taken away by H K Sondhi and late Smt Krishna Pyari Nanda. It has also come through in the evidence of PW2, (i.e., the petitioner) that at the time of death of Smt Krishna Pyari Nanda, he was not staying in the same house where the testator Krishna Pyari Nanda, died i.e., 41, Golf Links, New Delhi. In the reply filed in Court by the respondents, at the very first opportunity the respondents had stated that the first counterpart was in the custody of the Bank. When the Bank reported that they did not have the first counterpart of the Will in their custody, the respondents sought permission of the Court to place the carbon impression of the Will i.e., the second counterpart on record of the Court. It is not inconceivable in the instant circumstances, that the carbon impression of the Will (Ex R-1) which is the second counterpart was available in the house of the testator at the time of her death, or was with H K Sondhi who may have handed over the document to the respondents. The fact that such a document that is, the Will (Ex. R-1) was in existence has come through in the testimony of Madan Lal Khanna (RW-1). The due execution of the Will (Ex. R-1) having been proved in accordance with the law, the placement of Will (Ex.R-1) on record of the court would not have me believe that the Will was not a genuine document.

14.4 As regards the objection that there was a contradiction between the affidavit of evidence filed by Madan Lal Khanna (RW-1) in the first instance, and in his deposition in Court, as regards, the state of mind of the testator at the time of execution of the Will, in my opinion, is again without merit. Since the petitioner himself took an objection to the examination-in-chief of witnesses being carried out by way of affidavits, the same cannot be looked at as evidence. The Court would have to rely upon, in the instant case on the oral deposition of RW-1 made in Court. In the oral deposition undoubtedly Madan Lal Khanna (RW-1) has said that at the time of execution of the Will (Ex R-1) the testator Smt Krishna Pyari Nanda was in “sound disposing mind”.

14.5 The other suspicious circumstance to which Mr Sahay referred to, is the statement made by the representative of the Bank in Court on 21.07.1995, that the first counterpart of the Will (Ex R-1), was not available in their record. This objection is also without merit for the reason that: in the facts and circumstances of the case, not only have I found Madan Lal Khanna (RW-1) to be a reliable witness but the conduct of the respondents has also instilled belief that Will is genuine. The respondents in the very first instance brought to the notice of the Court the factum of existence of the second counterpart of the Will (Ex R-1). The mere fact that the first counterpart of the Will (Ex R-1) was not available in the record of the Bank for whatever reason, is not sufficient to create a suspicion that the Will (Ex R-1) is a forged or a fabricated document.

14.6 The last submission of Mr Sahay that due credence ought to be given to the testimony of the expert witness PW-1, produced by the petitioner, especially in the circumstances, that even though the respondents had obtained an order from the Court that they would be producing their own expert witness, they chose not to avail of the opportunity granted by the Court. As observed by me hereinabove, the testimony of the handwriting expert would have relevance if I were to otherwise disbelieve the testimony of Madan Lal Khanna (RW-1); who witnessed the execution of the Will (Ex R-1). The handwriting expert's evidence is only an "opinion evidence". The Courts take resort to such form of evidence if no direct evidence is available or if direct evidence, such as one placed before me lacked credibility. In the absence of direct evidence, the Court is also empowered to compare the disputed signatures with the admitted signatures though in doing so, it does not don the robes of an expert. The Courts in such circumstances would ordinarily resort to the assistance of a handwriting expert. In the instant case, however, as noticed by me such a situation has not arisen; having placed reliance on the testimony of Madan Lal Khanna (RW-1).

14.7 What is to be noticed in this case is that none of the circumstances alluded to by Mr Sahay are such that it would persuade me to hold that the Will (Ex R-1) was not executed by the testator Smt Krishna Pyari Nanda or that the dispositions were unnatural. A close

scrutiny of the testimony of PW-2 clearly seems to suggest that his (i.e., the petitioner's) relationship both with his mother and the contesting respondents was strained, even though he made a vain attempt to mask it by terming it as 'cordial'. PW-2 in his testimony accepted the fact that he had filed a winding up petition against M/s Kidar Sons & Industry, which was, a closely held company, in which, the petitioner along with his mother and other brothers was a director. He has also accepted the fact that in the said company, the mother had a share. Even though, as indicated above, in his testimony PW-2 has adverted that his relationship with his brothers i.e., the contesting respondents was "cordial" and that the mother Smt Krishna Pyari Nanda had love and affection for him; the contrary appears to be true. This is quite evident from the fact that there were several litigations pending between the petitioner on one side and the contesting respondents and their late mother Smt Krishna Pyari Nanda on the other. PW-2, as noticed above, had filed a winding up petition against M/s Kidar Sons & Industry Pvt Ltd, which was closely held private limited company, in which, the family had shares. In turn Kidar Sons & Industry Pvt Ltd had filed a suit bearing no. 1310/1988 in which the mother Smt Krishna Pyari Nanda had filed an affidavit marked 'A'; which alluded to the fact that the petitioner and his family members had given her grief. Even though the petitioner in his testimony refused to identify the signatures of the mother on the said affidavit, the attempt, in my opinion, in that direction seems to be contrived. What fortifies my view is the observations of a learned Single Judge of this Court, in a judgment dated 05.02.1993, passed while disposing of several interlocutory applications, filed in suit no. 1310/1988 entitled *M/s Kidarsons Industries Pvt Ltd vs M/s Hansa Industries Pvt Ltd & Ors.: reported in 1993(1) Delhi Lawyer 275*. The learned Single Judge of this Court in paragraphs 1, 49 and 57 has clearly brought out the fact that the petitioner had an acrimonious relationship with his brothers i.e., the contesting respondents and his late mother Smt Krishna Pyari Nanda. I am inclined to take judicial notice of these observations. In these circumstances, for the mother/testator Smt Krishna Pyari Nanda to exclude the petitioner from her estate does not seem unnatural. Therefore,

the disposition in favour of the contesting respondents seems quite in tune with the relationships subsisting between the testator and her children.

15. This brings me to the judgments cited by the petitioner. In so far as judgment in the case of *Lellapalli Sakuntala (died) per Lrs vs Vedantam Seethamahalakshmi & Ors.: 2008(6) ALT 113* is concerned, this was a case where the testator had executed a registered Will in the first instance. Under the registered Will the testator had bequeathed the property in favour of his two daughters, elder son and the wife of the second son. The plaintiffs had instituted a suit for partition based on a subsequent unregistered Will, based on which the plaintiffs, claimed a larger share in the estate of the testator. What is of importance is that the plaintiffs had filed an application for referring the unregistered Will which was the basis of their claim to a handwriting expert for comparison of signatures, with the admitted, registered Will. The Court allowed the application, and referred the matter to the Assistant Director of Forensic Laboratory, Hyderabad for adducing his opinion. The forensic expert submitted his opinion that the unregistered Will was forged. The trial court was unable to take the opinion on record since the expert was not examined. In these circumstances, the Court drew an adverse inference against the petitioner for his failure to examine the handwriting expert. The Court thus gave weight to the opinion of the handwriting expert, and came to the conclusion that the unregistered Will was a forged document. The facts of the case are completely distinguishable from the facts obtaining in the present case. The principle of law of direct proof has been noticed by Court in paragraph 16 of the said judgment. In the instant case, as observed by me above, Madan Lal Khanna (RW-1) has proved the due execution of the Will (Ex R-1), by the testator, in his presence. In my view, the ratio of the judgment on facts is not applicable.

15.1 Similarly, the judgment in the case of *Nallabothu Purnaiah vs Garre Mallikarjuna Rao & Ors.: AIR 2003 Andhra Pradesh 201* also has no applicability. The trial court in the said case had excluded the evidence of the expert witness on the ground that he was not a qualified expert. The High Court on the contrary noted the fact that the expert was qualified since he had the requisite experience in the field; having been

appointed as an expert by the Government in relation to several matters. It may also be noted that in this case apart from the testimony of the expert, there was direct evidence of the execution of the document in issue Ex A-1 (See Paragraph 31). As a matter of fact, the observations made in paragraph 30 support the view taken by me above. These being relevant the same are extracted hereinbelow:-

“30. If the mode of proof is by means of an expert evidence, it all depends upon the quality of opinion given by the expert by assigning cogent and convincing reasons in support of his opinion. If the quality of the opinion given by the expert is impeccable, having been supported by cogent and good reasons, there is no need to seek for any corroboration. If for any reason, the quality of the opinion is weak, it shall not be the sole basis for arriving at the conclusion unless it is corroborated by other means. The evidence of the expert being opinion evidence, cannot falsify the convincing direct evidence. In either case the relative quality of the evidence that tilts the scales. Although, there has been no legal bar to the Judge using his own eyes to compare the disputed writings with the admitted writings; as a matter of prudence, extreme caution, and judicial sobriety, the Court should not normally take upon itself the responsibility of comparing the disputed signatures with that of the admitted signatures or handwritings and hesitate to base its findings with regard to the identity of the handwritings solely on such comparison made by itself. The power under Section 73 of the Evidence Act can be exercised by the Court ordinarily in normal course to test the veracity of the opinion given by the Expert or the other evidence adduced on the point by any one of the six modes enumerated above.” (Emphasis is mine)

15.2. The last judgment cited by Mr Sahay i.e., *Anant Construction (P) Ltd. Vs Ram Niwas: 1994 (31) DRJ 205* was pressed into service for the proposition that the failure on the part of the petitioner to file a replication would not by itself non suit the petitioner. In view of the observations made hereinabove that the respondents have been able to prove the existence of a Will (Ex R-1) based on evidence on record, and not on the basis of mere failure on the part of the petitioner to rebut what was stated in defence in the reply/written statement by the respondents the judgment has no relevance to the present case. I may only note that the principle set forth in the judgment, is now fairly well settled: which is that replication ordinarily is not part of the pleadings, and that it is permissible to file replication only in three situations :(i) when required by law; (ii) when a counter claim is raised by the defendant; (iii) when the Court directs or permits a replication being filed: (See paragraph 15 of the judgment). The other principle referred to in the said judgment,

which is that, once a Court allows a party to file a replication it becomes part of its pleadings, is also, unassailable (See paragraph 21). However, as observed above, these principles have no impact on the decision in the instant case, since findings have been returned on merits, and not on deemed admission.

21. In the background of the discussion above, my decision on the issues cast in the matter are as follows:-

(i) In so far as Issue No.1 is concerned, I am of the opinion that the respondents have been able to prove that Will dated 05.11.1987 (Ex R-1) was executed by late Smt Krishna Pyari Nanda.

(ii) In so far as Issue Nos 2 and 3 are concerned, in view of my findings as regards Issue No.(i) and the contents of Will (Ex R-1), I am of the opinion that the petitioner cannot be granted the letters of administration. Therefore, these issues are found against the petitioner.

22. Consequently, the petition will have to be dismissed. It is ordered accordingly. The parties, in the facts and circumstances of the case, shall bear their own costs.

RAJIV SHAKDHER, J

JULY 01, 2010
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