RAJASTHAN HIGH COURT

Smt. Khushal Kanwar

Vs.

Smt. Kamla Devi

D.B. Special Appeal (Civil) No. 22 of 1992
(V.K. Bali and Ajay Rastogi, JJ.)

19.09.2005

JUDGMENT

V.K. Bali, J.

1. Will dated 28.01.1977 executed by the testator Smt. Anandi Devi wife of Ganeshi Lal, who was registered in the office of Sub Registrar, Ajmer on 01.02.1977 was proved. Respondents did raise objection in opposing the cause of the appellant for grant of probate of the Will by pleading that Anandi Bai had no right or title to execute any Will and had not executed any Will on 28.01.1977 nor was she physically and mentally fit to execute the same. There was no plea, however, pertaining to map annexed with the registered Will. The Will has since been held to be a genuine document having been duly executed but for the plan attached with the Will and on that count alone, application made by the appellant herein under Section 276 of the Indian Succession Act, for grant of probate of the Will dated 28.01.1977 has been dismissed by the learned Distt. Judge, Ajmer, vide order dated 29.08.1987 which order has since been confirmed on the same very ground by the learned Single Judge of this Court vide order dated 13.02.1992 recorded in Civil First Appeal No. 48/83. It is against these two orders passed by the learned Distt. Judge and the learned Single Judge that the present appeal has been filed under section 18 of the Rajasthan High Court Ordinance, 1949.

2. Learned counsel appearing for the appellant vehemently contends that once the Will (Ex. 1) has been proved which contained specific portions that were to fall to the shares of three daughters of Anandi Bai and which portions were not at variance with portions that were to fall to the share of three daughters in the plan (Ex. 2) and further that the plan (Ex. 2) attached to the Will was not even questioned, the courts ought

have held that entire Will to have been duly executed and granted the probate in favor of the appellant. In any case, the appellant was entitled to probate of Will (Ex. 1) which the appellant is prepared to have even now and that even though there is no discrepancy in the respective portions allotted to daughters of Anandi Bai in Will (Ex. 1) and one depicted in plan (Ex. 2) the appellant is prepared to have probate as per shares mentioned in the Will (Ex. 1), further contends the learned counsel.
With a view to appreciate the contentions of the learned counsel, as noted above, it would be necessary to take into consideration facts giving rise to the present appeal.

3. Smt. Anandi Devi, before her demise on 22.02.1977 bequeathed her property by way of a Will executed on 28.01.1977 and registered on 01.02.1977 in favor of her three daughters. Smt. Koshal Kanwar, one of her daughters filed application under section 276 of the Indian Succession Act for grant of probate of the Will dated 28.01.1977. Smt. Kamla, Sister of Smt. Koshal Kanwar raised objections by pleading that Smt. Anandi Devi had no right or title to execute any Will. She also pleaded that Anandi Devi had neither executed any Will on 28.01.1977 nor was she physically and mentally fit to execute any Will. It is the case of appellant so canvassed through her counsel that no plea pertaining to any objection with regard to map annexed to the registered Will was ever raised. Other sister of Smt Kanwar raised similar objections in the written statement tiled by her dated 19.07.1978 raising similar pleas in opposing the cause of Smt. Koshal Kanwar but not raising any plea with regard to the map annexed to the registered Will. On the pleadings of the parties, all important issue with regard to execution of the Will dated 28.01.1977 was framed by the trial Court. Other issue was only with regard to the relief. Learned Distt. Judge, Ajmer after taking into consideration evidence, while discussing the only relevant issue as mentioned above, held that from the discussion made above, he had come to the conclusion that even though the plaintiff had been able to prove that Smt. Anandi Devi had duly executed the Will but material part of the plan had been changed after execution and in the manner aforesaid, the Will propounded by the plaintiff had been tempered with. Findings recorded by the learned Distt. Judge would thus reveal that even though the Will was held to have been duly executed, the same was still rejected on the ground that the plan attached to the Will had been changed subsequent to the execution of the Will. Learned Single Judge before whom the matter came in appeal in the context of contentions raised before him noted that the only dispute was with regard to the reliability of the map and therefore, it would not be necessary to discuss further evidence available on the records. While dealing with the only question debated

before him, learned Single Judge returned a finding that execution of the Will was doubtful inasmuch as the map stated to have been attached with the Will at the time of execution of the Will dated 28.01.1977 could not be said to be the same which was found attached at the time of registration of the Will. For coming to the conclusion aforesaid learned Single Judge referred to the statement made by PW3 one of the attesting witnesses who stated that on January 28, 1977 when the Will was executed, the map was attached to the Will. However, he further stated that the map was not signed by the testator in her presence. He further stated in cross-examination that he did not see the map with the Will when it was executed on 28.01.1977 but he had seen map on February 01, 1977 which was attached to the Will. The learned Single Judge further observed that Ganesh (PW7) another attesting witness stated that he would not remember whether the testator signed the map on 28.01.1977 or not but lie did remember that the testator signed the map on 01.02.1977 when the will was registered. He further stated in his cross-examination that he saw the map only at the time of registration. From the statements of the witnesses, as mentioned above, learned Single Judge concluded by observing as follows:

> "Therefore, a question arises when the map was already prepared on January 17, 1977 where was the necessity to prepare another map on January 17, 1977 as stated by PW4 and PW9. This also arises suspicion whether two maps were prepared and that which was the map which was attached with the Will at the time when the Will was executed on January 28, 1977 and which was the map, which was found attached with the Will at the time of its registration on February 1, 1977? Another question arises is that, according to Vasudev PW4 attesting witness, if the map was signed at the time of execution of the Will by the testator on January 28, 1977 then if the map was same, on which, the testator affixed her signature on February 1, 1977 at the time of registration as stated by PW7 one of the attesting witness, then this map should have two signatures of the testator. However, it bears only one signature. This grave doubt is raised from the statement of the witnesses discussed above regarding the correctness of the map, which was attached with the Will at the time of registration. It may also be stated that the area of the portions mentioned in the Will, given to each of the daughters does not reconcile with the separate portion shown in the map attached with the Will."

4. Learned counsel for the appellant vehemently contends that the findings recorded

by the learned Distt. Judge and by the learned Single Judge cannot possibly be sustained as the map annexed to the Will had only depicted various portions of the property owned by Smt. Anandi Devi that would fall to the share of her three daughters mention whereof had been specifically made in the body of the Will itself. If part of the Will which has been held to have been validly executed and which contains recitals with regard to the portion of the property owned by Smt. Anandi Devi to be given to her respective daughters and which tallies with the map attached to the Will, the Will could not possibly be rejected. Learned counsel further contends that the learned Single Judge clearly erred in returning the finding that the plan attached to the Will executed on 28.01.1977 was not the same as attached with the Will which was registered on 01.02.1977. Next and the last contention of the learned counsel for the appellant is that the appellant would be prepared to have probate of the Will sans site plan that would fall to the share of three daughters of Smt. Anandi Devi.

5. We have heard learned counsel for the parties and with their assistance examined records of the case.

6. In the Will (Ex. 1) dated 28.01.1977, it has *inter alia* been recited that the description of the property which would go to her three daughters by way of Will is as follows:

> 1. To Smt. Kamla Devi d/o self and late Pt. Ganeshi Lal :
> Property mentioned in attached plan described by mark DEFG, measuring 155.5 meter shown in Ferro colour. She would get land and the constructions mentioned thereon which had been shown in the site plan. She would be the exclusive owner of the same.
> 2. To Smt. Nihal Kanwar w/o Vishnu Kumar d/o Self and Late Pt. Ganeshi Lal :
> According to the site plan attached, area shown in red color measuring 167.5 metres, land and constructions made thereon. She would be the absolute owner of the said area.
>
> 3. To Smt. Kushal Kanwar w/o Vasudev d/o self and late Pt. Ganeshi Lal.

According to the plan attached shown in yellow colour the area measuring 381.5 metres and according to that, construction shown in the said area. She would be the absolute owner of the same.

7. The area falling to the share of all three daughters, it is thus apparent, has been mentioned in the Will itself. Learned counsel for the appellant vehemently contends that the map attached to the Will shows respective areas falling to share of three daughters in different colors and the same is as per the recital of the area falling to the share of all the daughters mentioned in the Will itself. If that be so, there was no warrant at all for a finding that different map came to be attached at the time of registration of the Will.

8. There appears to be considerable merit in the contention of the learned counsel, as noticed above. It is significant to mention that the Will was executed on 28.01.1977 and was registered on 01.02.1977. There is thus a gap of only 3-4 days in execution and registration of the Will. The Will concededly has a plan attached to it which had been signed by the testator There is only one plan available and the same, as mentioned above, is part of the Will that came to be registered on 01.02.1977.

9. Learned District Judge first observed that plan was the material part of the Will and the Will pertained to partition of immovable property which is a house. Which part of the house and how much part of the house shall be given to which daughter depends upon the plan. He further observed that in Ex. 1 the area which was to be given to the three daughters had certainly been mentioned but this area pertains to which part can be known from the plan only. In the plan, area of all the three parts has also been given which area tallies with the area mentioned in the Will. In the manner aforesaid, there is no difference between the area mentioned in Ex. 1 and Ex. 2. In the circumstances aforesaid, learned District Judge further observed that the first blush, it appeared that the plan Ex. 2 was the same which was attached with the Will (Ex. 1) and on which Anandi Devi, the executor, had appended he signatures and which Will had been duly executed. After observing so, learned Distt. Judge examined some other circumstances like statements of PW4 and PW9 etc. as also the shares which would be given to Nihal Kanwar and Kamla as per Red and Yellow colors, and then described that if the area is calculated the same would be found to be less than the one mentioned in the Will. He then mentioned the area to be given to Nihal Kanwar would have held an area measuring 918 sq. ft = 102 sq. yards whereas in the Will (Ex. 1) this area comes to 167 sq. metres. He also held that share of Kamla as per different four sides would come to 170 sq. yards whereas as per the Will (Ex. 1) it would come to 155.5 sq. yards.

10. We are of the considered view that once a firm finding of fact had been returned that in the plan, total area of all the three shares had been given, which was tallying with the total area shown in the Will, and in the manner aforesaid, there was no difference between Ex. 1 and Ex. 2 and further the plan Ex. 2 appeared to be the same which was prepared at the time when the Will (Ex. 1) was prepared, there was no need at all to go to any other circumstance, whatsoever. As mentioned above and so is the finding returned by the learned Distt. Judge that the Will recites the area specified and demarcated for three daughters, the same is not at variance with the plan and if that be so, the circumstances relied upon by the learned Distt that the plan (Ex. 2) was different than the one prepared at the time of execution of the Will, were wholly unwarranted and in our considered view, there was no need at all to go to the circumstances like statements of witnesses PW4 and 9 etc. when a patent fact was proved to its hilt on the basis of documentary evidence, there was no requirement of evaluating oral evidence. It is rather interesting to note that how and in what manner the learned Distt. Judge found, by giving dimensions of all the four sides like East, West, North and South of the area given to respective daughters of Anandi Devi and calculated it and on the basis thereof returned a finding, that the same did not tally with the one mentioned in the Will. It was nobody's case that if the area shown in the plan (Ex. 2) is counted from all sides i.e. North, East, West and South, the same would be lesser than the area mentioned in the Will (Ex. 1) nor the parties led any evidence on this point. What was the basis of calculation is also not known and why the area was held to be lesser or more in terms of yards and meters is rather baffling. The contention raised by the learned counsel for the appellant that there was no dispute, in so far as the plan attached to the Will is concerned, raised in the written statement, has not been disputed. The respective shares of the respective daughters shown in different coolers are not in dispute even today. Learned counsel appearing for the appellant further states that the daughters have raised construction as per the area earmarked to them and shown in different colors in the plan Ex. 2. When confronted that the appellant is prepared to have probate of Will (Ex. 1) sans plan (Ex. 2) learned counsel appearing for the respondents virtually had nothing to say in opposition to the case, as projected by the learned counsel for the appellant.

11. Will (Ex. 1) which has been held proved, recites respective three portions of the properties that would fall to the share of three daughters. Will (Ex. 1) recites the precise area that was to fall to the share of respective three daughters. The same even as per the finding returned by the learned Distt. Judge tallies with the plan (Ex. 2).

Once these stark facts were proved, there was no need at all to examine the statements of witnesses and to return a finding with regard to the different plan having been prepared after execution of Will (Ex. 1) on the basis of some variation in the statements of witnesses which is bound to take place when examined after long time. Once the area mentioned in the Will tallies with the area mentioned in the plan, there could be no occasion for anyone to have substituted the plan that came to be made when the Will was executed with one stated to have made when the Will was registered. Substitution of plan could be necessitated if someone was to gain by doing so. But as mentioned above, once no one stood to gain and the area mentioned in the Will (Ex. 1) continued to be the same, as was mentioned in the plan (Ex. 2), no finding of substitution of plan could possibly be returned. As mentioned above, once the facts were clear from documentary evidence, there was no need at all to draw inference from attending circumstances, such as, discrepancies in the statements made by the witnesses. There was no occasion at all for the courts to have considered the area which was not even raised and on which no evidence was either led.

12. No findings of fact on the point could be recorded with regard to which there was complete absence of pleadings and evidence. Reference in this connection may be made to judgments of the Hon'ble Supreme Court in *Gulabrao Balwantrao Shinde and others v. Chhabubai Balwantrao Shinde and others,* [1] *Inder Sain Bedi v. Chopra Electricals,* [2] and *Gangajal Kanwar v. Sarju Pandey* [3] We also find no justification for the learned Distt. Judge to have measured the area of his own and that too by calculating it on the basis of the area mentioned on all the four sides without putting the appellant to notice and informing her on her counsel the way and the manner he had calculated the area shown in Ex. 2. Be that as it may, the appellant had to be granted probate of Will as per Ex.1 which as mentioned above, clearly and in sufficient details, mentions respective areas falling to the share of all the parties. It is no doubt true that the plan Ex. 2 is an essential part of the Will (Ex. 1) but as mentioned above, the same does not differ with the Will (Ex. 1). Be that as it may, the appellant is entitled to have probate of the Will (Ex. 1) and plan Ex. P2 in so far as the same may be in consonance with plan Ex. P2.

13. In view of the discussion made above, this appeal is allowed. The orders passed by the learned Single Judge and the learned Distt. Judge, dated 13.02.1992 and 29.08.1997 respectively are set aside. The appellant is granted probate of the Will (Ex. 1) along with plan (Ex.2) in so far as the same may tally with Ex. 1. At any stage, if

the respondents may be able to show, that the area of the appellant shown in plan (Ex. 2) is more than the one mentioned in Will (Ex. 1) the appellant would get probate only of the portion mentioned in the Will (Ex. 1). The appeal is accordingly allowed leaving however, the parties to bear their own costs.
Appeal allowed.

Cases Referred.

1. 2003(1) SCC 212
2. 2004(7) SCC 277
3. AIR 2001 SC 2693