IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN,
JAIPUR BENCH, JAIPUR.

JUDGMENT

Anil Kapoor Vs. Smt. Nirmal Grovar
(S. B. Civil First Appeal No.163/2010)

S. B. Civil First Appeal under Section 96 read with Order 41 Rule 1 C.P.C. Against the judgment and decree dated 9-3-2010 passed by Additional District Judge No.2, Sikar, whereby the suit has been decreed in favour of the plaintiff.

Date of Judgment: **August 31, 2010**

PRESENT

Hon'ble Mr. Justice R. S. Chauhan

Mr. N.C.Goyal, for the appellant.

Mr. R.K. Agrawal, for the respondent.

BY THE COURT:

Aggrieved by the judgment and decree dated 9-3-2010, passed by Additional District Judge No.2, Sikar, the defendant-appellant has filed the present first appeal.

2. The plaintiff-respondent, Ms. Nirmal Grovar, had filed a civil suit against the defendant-appellant for possession and permanent injunction. According to the plaintiff on 21-12-1976 her friend Ms. Janki Naiyar, and she had bought a plot, namely, Plot No.23 old

(New 2), Anaj Godam Street, Anand Nagar, Sikar, from the owner Ramesh Kumar, through a registered sale-deed. Both the ladies constructed a house over the said plot. Vide agreement dated 13-11-1977, Ms. Janki Naiyar agreed that the house should be divided between the ladies. Since both the ladies were living together, the plaintiff claimed that she had lookedafter Ms. Janki Naiyar during her life. Because of love and affection Ms. Janki Naiyar had executed a will dated 25-6-1997, whereby she bequeathed her share of the property to the plaintiff. The plaintiff further claimed that on 12-10-2000 the defendant and his parents, who were related to Ms. Janki Naiyar, came to their house and stayed there. However, just two days after their arrival, Ms. Janki Naiyar expired. Since they claimed to be the relatives of Ms. Janki Naiyar, they decided to stay in the house till the last rites and ceremonies were over. However, even after the rites were completed, they decided to illegally stay in the house. The plaintiff further claimed that the defendant and his family members have misappropriated the goods belonged to plaintiff. Lastly she claimed that she is entitled to mesne profit Rs.36,000/- as rent due against the defendants. Hence, a suit for possession and permanent injunction.

3. The defendant-appellant filed written statement and denied the averments made by the plaintiff. According to the appellant since Ms. Janki Naiyar was unmarried lady, she had adopted him as a son. He further claimed that vide will dated 28-3-2000 Ms. Janki Naiyar had bequeathed her share of the property to him. Therefore, the plaintiff can neither claim possession of the property, nor claim mesne profit. Lastly, he denied that he had misappropriated the goods which belonged to plaintiff.

4. On the basis of pleadings of parties, the learned trial court had framed nine issues. In order to prove her case, the plaintiff examined nine witnesses and exhibited ninety seven documents; the appellant examined four witnesses and exhibited twenty-six documents.

5. Vide judgment dated 9-3-2010, the learned trial court decreed the suit and directed the defendant to handover the possession of property within two months. Learned trial Judge has also prohibited the appellant from transferring the suit property, or from raising any construction. However, the learned trial judge dismiss the case of plaintiff with regard to mesne profit and misappropriation of goods.

Hence, the present first appeal before this court.

6. Learned counsel for the appellant Mr. N.C.Goyal, has raised following contentions:-

Firstly, the learned trial Judge does not have jurisdiction to analyse the will. The court who granted probate, can analyse the claim. In the present case, since no probate had been granted in favour of the plaintiff, therefore, she cannot claim the right over the property. Secondly, the learned trial judge has not given any cogent reason for holding the will, in favour of the plaintiff, as valid. Thirdly, the learned trial Judge has not given any cogent reasons for holding the will dated 28-3-2000 as a fabricated document.

7. On the other hand, Mr. R.K. Agrawal, the learned counsel for plaintiff-respondent, has strenuously contended that the contention with regard to applicability of Section 213 of Indian Succession Act, 1925 are baseless. According to Section 213 of the Act, the Hindus who are living in the territories enumerated under Section 57 of the Act, only they are required to obtain probate. A person can establish his right as a legatee without grant of probate. In order to support his

contention he has relied upon the case of Clarence Pais Vs. Union of India (AIR 2001 SCC 1151). Mr. Agrawal has further contended that since the property in dispute is situated in Sikar, since Sikar is outside the territory, referred to in Section 57 of the Act, Section 213 (1) of the Act is inapplicable. He has further contended that similar views have been expressed by this Court in Mst. Jatav Vs. Ram Swarup (1960 R.L.W. 685), and Sultan Singh Vs. Brijraj Singh (1997 (1) W.L.C. (Raj.) 368.

8. Secondly, the learned trial Judge has elaborately discussed the reason for holding the will in favour of the plaintiff to be a valid will. Similarly, the learned trial Judge has given reasons for holding the will, in favour of the appellant, as an invalid will.

9. Heard learned counsel for the parties and perused the impugned judgment.

10. Section 57 of the Act, reads as under:-

> 57. The provisions of this part which are set out in Schedule III shall subject to the restrictions and modifications specified therein apply (a) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jain on or after the first day of Sept.1870 within the territories which at the said date were subject to Lieutenant Governor of

> Bengal within the local limits of the ordinary civil jurisdiction of the High Court of Madras and Bombay.
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> (b) to all such wills and codicils made outside those territories and limits so far as relates to immovable property situate within those territories or limits, and
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> (c) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jains on or after the first day January, 1927, to which those provisions are not applied by clauses (a) and (b):
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> Provided that marriage shall not revoke any such will or codicil.

11. Section 213 of the Act, reads as under:-

> 213. (1) No right as executor or legatee can be established in any court of justice, unless a court of competent jurisdiction in India has granted probate of the will under which the right is claimed or has granted letters of administrator with the will or with a copy of an authenticated copy of the will annexed.
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> (2) This section shall not apply in the case of wills made by Muhammadans and shall only apply in the case of wills made by any Hindu, Buddhist, Sikh or Jains where such wills are of the “Classes' specified in “clauses (a) and (b) of section 57”.

12. Discussing the scope and ambit of Section 213 of the Act in combination of Section 57 of the Act, the Hon'ble Supreme Court in the case of Clarence Pais (supra) has observed as under:-

> The scope of Section 213(1) of the Act is that it prohibits recognition of rights as an executor or legatee under a will without production of a probate and sets down a rule of evidence and forms really a part of procedural

requirement of the law of forum. Section 213(2) of the Act indicates that its applicability is limited to cases of persons mentioned therein. Certain aspects will have to be borne in mind to understand the exact scope of this section. The bar that is imposed by this section is only in respect of the establishment of the right as an executor or legatee and not in respect of the establishment of the right in any other capacity. The section does not prohibit the will being looked into for purposes other than those mentioned in the section. The bar to the establishment of the right is only for its establishment in a court of justice and not its being referred to in other proceedings before administrative or other Tribunal. The section is a bar to everyone claiming under a will, whether as plaintiff or defendant, if no probate or Letters of Administration is granted. The effect of Section 213(2) of the Act is that the requirement of probate or other representation mentioned in sub-section (1) for the purpose of establishing the right as an executor or legatee in a court is made inapplicable in case of a will made by Muhammadans and in the case of wills coming under Section 57(c) of the Act. Section 57 (c) of the Act applies to all wills and codicils made by any Hindu, Buddhist, Sikh or Jain, on or after the first day of January, 1927 which does not relate to immovable property situate within the territory formerly subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary civil jurisdiction of the High Courts of Judicature at Madras and Bombay, or in respect of property within those territories. No probate is necessary in the case of wills by Muhammadans. Now by the Indian Succession [Amendment] Act, 1962, the section has been made applicable to wills made by Parsi dying after the commencement of the 1962 Act. A combined reading of Sections 213 and 57 of the Act would show that where the parties to the will are Hindus or the properties in dispute are not in territories falling under Section 57(a) and (b), sub-section (2) of Section 213 of the Act applies and sub-section (1) has no application. As a consequence, a probate will not be required to be obtained by a Hindu in respect of a will made outside those territories or regarding the immovable properties

> situate outside those territories. The result is that the contention put forth on behalf of the Petitioners that Section 213(1) of the Act is applicable only to Christians and not to any other religion is not correct.

13. Similar views were expressed by this Court in the case of Mst. Jatav Vs. Ram Swarup (supra).

14. Since, Sikar does not fall within the territory as enumerated in Section 57 of the Act, therefore, Section 213 of the Act is inapplicable. Therefore, the first contention raised by the learned counsel for the appellant is unacceptable.

15. A bare perusal of the impugned judgment clearly reveals that the learned trial judge has framed eight important issues with regard to the controversies involved in the case. Issue No.7 is whether appellant had been legally adopted by Ms. Janki Naiyar or not?, and whether the will dated 28-3-2000, in favour of appellant, has been drawn legally or not, and whether on the basis of such will appellant became owner of the property? Another issue, issue No.2, was framed whether vide will dated 25-6-1997 Ms. Janki Naiyar had bequeathed her share of the property in favour of the plaintiff or not?, and whether on the basis of said will, the plaintiff had become owner

of the said property or not?

16. Learned trial Judge has elaborately discussed and assessed the evidence on record. He has noticed that according to D.W.4 Smt. Dinesh Kapoor, mother of appellant, in her cross-examination, she has admitted the fact that the appellant is her only son. She has further admitted the fact that for the purpose of giving the appellant in adoption, no religious ceremony had taken place. Most importantly, she had admitted the fact that there was no “give and take of the child in any ceremony”. Learned trial Judge has also noticed that the appellant in his cross-examination has admitted the fact that despite his adoption in the year 1992, he did not change his last name from “Kapoor” to “Naiyar”. He has further admitted that even in his wedding invitation card, the last name “Naiyar” is conspicuously missing. He has further admitted that the name of his biological parents has been shown in the said card. Considering these testimonies, the learned trial Judge has correctly concluded that adoption has not been proved legally. For, in the case of Madhusudan Das Vs. Smt. Narayanibai [(1983) 1 SCC 35], Hon'ble Supreme Court, in para 20 of the report, has observed that “for a

valid adoption, the ceremony of giving and taking is an essential requisite in all adoptions, whatever the caste. This requisite is satisfied in its essence only by the actual delivery and acceptance of the boy, even though there exists an expression of consent or an executed deed of adoption". Since in the present case, both the defendant and his mother have admitted that there was no physical "give and take of the child', clearly the essential ingredient for adoption is conspicuously missing. Learned trial Judge has also held that the defendant was not present even at the time when the last rites of Ms. Janki Naiyar were performed. Hence, the learned trial Judge is justified in holding that a valid adoption did not take place as required by law.

17. As far as the will, in favour of the appellant, is concerned, the learned trial Judge has elaborately dealt with the evidence available on record. Firstly, it was noticed that the witnesses of the will dated 28-3-2000 were unknown to Ms. Janki Naiyar. Therefore, it was highly unlikely that she would have asked strangers to be attesting witnesses. Secondly, it has noticed that on the date when allegedly the will was drafted and signed, according to D.W.7 Rajkumar at the

relevant time Ms. Janki Naiyar was in the School. Therefore, the claim of the defendant that the will was drafted and signed at home is not borne out. In fact, it is belied by the testimony of D.W.7, Raj Kumar.

18. Considering the fact that according to School register (Article-1) since presence of Ms. Janki Naiyar has been shown at the School, therefore, the learned trial Judge has disbelieved the testimony of D.W.2, Vijay Kumar, who claims himself to be a witness of the will dated 28-3-2000. Learned trial Judge has further disbelieved the witness on the ground that although he claims that he had stayed with Ms. Janki Naiyar, but the fact remains that he is a total stranger to her. It is highly unlikely that Ms. Janki Naiyar would have asked total strangers to stay with her. Learned trial Judge has also noticed that there are certain contradictions between D.W.2 Vijay Kumar and D.W.3 Prem Pal Singh, both of them claim to be witnesses of the alleged will dated 28-3-2000.

19. In the case of Ugre Gowda Vs. Nagegowda (2004) 12 SCC 48, the Hon'ble Supreme Court has opined that adoption of son does not

deprive the adoptive parents to dispose of their properties by transfer or will. Moreover, in the case of Kishori Lal Vs. Mrs. Chalti Vai, A.I.R. 1959 S.C. 504, the Apex Court has opined as under:-

> As an adoption results in changing the course of succession, depriving wives and daughters of their rights and transferring properties to comparative strangers or more remote relations it is necessary that the evidence to support it should be such that it is free from all suspicions of fraud and so consistent and probable as to leave no occasion for doubting its truth.

20. Since sufficient doubt does exist about the truthfulness of the will dated 28-3-2000, the learned trial Judge was certainly justified in concluding that the will was not authentic. Hence, after giving cogent reasons, the learned trial Judge has concluded that the will dated 28-3-2000 is unacceptable.

21. With regard to will dated 25-6-1997, the learned trial Judge has noticed that P.W.2, Ashwini Kumar, and P.W.3, Bhagwat Sharan Sharma, both witnesses have claimed that in June,1997 they were called by Ms. Janki Naiyar to come to her house as she wanted them to attest the will drawn by her in favour of the plaintiff. Both of them claimed that the will was read over to them and was signed by Ms. Janki Naiyar. Thereafter, both of them had put their signatures on the will. Considering the fact that these two witnesses have testified to

the genuineness of the will dated 25-6-1997, learned trial Judge was justified in treating the said will to be a valid will. Thus, the learned trial Judge is justified in holding that Ms. Janki Naiyar had bequeathed her share of the property to the plaintiff.

22. Since the learned trial Judge has elaborately discussed the evidence produced before the trial court, there is no perversity, nor any illegality in the impugned judgment.

23. Hence, this first appeal is devoid of any merit. It is, hereby, dismissed. Decree be prepared accordingly.

(R.S. CHAUHAN) J.

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