

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

% **Date of Decision: May 11th, 2009**

+ **FAO 242/2006**

RUCHI TALREJA Appellant
Through : Mr. Sameer Mendiratta, Advocate.

versus

THE STATE & ANR Respondent
Through : Mr. Som Dutt Sharma, Advocate.

CORAM:

* **HON'BLE MS. JUSTICE VEENA BIRBAL**

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

Veena Birbal, J.

1. By way of present appeal under Section 299 of Indian Succession Act, 1925 (hereinafter referred to as the 'Act') appellant has challenged impugned judgment dated 14.8.2006 by which the probate petition filed by her has been dismissed.

2. Briefly the facts of the case are as under:

Appellant had filed a probate petition under Section 276 of the Act for grant of probate in respect of 'will' dated 26.2.1987 alleged to have been executed by her father late Sh. Kasturi Lal Kalra who died on 8.3.1987 at Delhi. Respondent no. 2 is the widow of deceased. As per case set up by appellant after her marriage in the year 1990, her sister Niti Kalra was feeling isolated as such respondent no. 2

requested her to live with them at P-44, Pitampura house, Delhi. She also requested appellant and her husband to raise construction upto 2nd floor of said house. It is alleged that appellant also helped financially in raising construction of said house and in May, 1994, appellant along with husband and children started living in the aforesaid house. On 28.3.1996, her sister Niti Kalra died. It is further alleged that in November, 1998, respondent no. 2 left the house after locking first floor. It is further alleged that in the year February, 2004, petitioner found the alleged 'WILL' as per which her late father had bequeathed property no. PP-44, Pitampura, Delhi and plot bearing no. B-1164, Shastri Nagar, Delhi in her favour as well as her sister Niti Kalra. She has alleged that nothing has been given in the 'WILL' to respondent no. 2. It is further alleged that respondent no. 2 along with her brothers had been ill-treating her father when he was alive. Immediately thereafter, she filed the petition for grant of probate.

3. The probate petition was contested by respondent no. 2 by filing objections in the form of reply to the said petition wherein she has denied that deceased left behind any 'Will'. She has alleged that deceased died intestate when appellant was minor at that time.

4. In support of her case, appellant i.e petitioner before the court below had filed her own affidavit as PW 3 and affidavit of one Ashok Kumar as PW 1. When aforesaid witnesses did not appear for cross-examination on the date fixed, i.e. 14.8.2006, Ld. ADJ closed the

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evidence of the petitioner, and dismissed the probate petition on the very day on the ground that as the witnesses have not appeared for cross-examination, their statement remained incomplete as such it was a case of no evidence and dismissed the petition for grant of probate. Aggrieved with the same, present appeal is filed.

5. Ld. counsel for appellant has contended that the Ld. ADJ has acted in haste in closing evidence of appellant/petitioner and thereby dismissing the probate petition by ignoring that talks for compromise were going on between the parties in CM(M) No. 319/2005 wherein compromise meeting was fixed on 4.8.2006 in the chamber of Hon'ble Judge which was further adjourned to 31.10.2006. It is contended that on date fixed, i.e. on 14.8.2006, counsel for appellant appeared before the Ld. ADJ and apprised the said position and requested for an adjournment but same was declined and the evidence was closed vide order dated 14.8.2006. It is contended that no reasonable opportunity is given to appellant to prove her case.

6. Ld. counsel for respondent has argued that the probate case filed by the appellant is based on false and forged Will. Appellant is unnecessarily dragging her mother to litigation. Ld. counsel has relied upon decision of this court dated 29.8.2008 in CM(M) No. 319/2005 between the parties wherein the court has disbelieved the version put forward by the appellant about the discovery of alleged 'Will'.

7. Ld. counsel for appellant has submitted that the aforesaid order was challenged by the appellant by filing SLP wherein following order dated 27.3.2009 has been passed:

“We are not inclined to interfere in this matter. The SLP is dismissed. However, if any observation has been made about the genuineness of the will the same shall not be determinative while deciding the question of grant of probate.”

8. I have considered the submissions made and perused the record.

9. Perusal of record shows that the probate petition was filed before Ld. District Judge on 20.2.2004 and notice of the same was issued to respondents for 9.7.2004. On the said date, respondent no. 2 appeared and filed objections in the form of reply. Issues were framed on 2.9.2005 by the Ld. District Judge and the matter was listed for evidence of appellant/petitioner on 10.1.2006. On said date, the matter was transferred before Ld. ADJ and was adjourned to 24.1.2006 for appellant's evidence by way of affidavits. On 24.1.2006, petitioner did not file affidavit and the matter was adjourned to 2.3.2006. On the said date, affidavit of Ashok Kumar-PW1 and that of appellant as PW3 was filed and the matter was adjourned to 18.4.2006 for cross-examination of appellant's witnesses. On 18.4.2006, Presiding Officer was on leave and matter was adjourned to 10.5.2006. Again on 10.5.2006, Presiding Officer was on leave and the matter was adjourned to 26.5.2006. On that date, appellant as

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well as PW Ashok Kumar did not appear and moved an application for adjournment on the ground that the husband of appellant was attacked and was hospitalized and due to that reason, the matter was adjourned to 14.8.2006. On the said date prayer for adjournment was made on the ground that talks for compromise were going on between the parties. However, request was declined and evidence of appellant/petitioner was closed and impugned judgment was passed dismissing the petition for grant of probate. In support of the stand, Ld. counsel for appellant has referred to Para 10 of the appeal wherein details are given about meeting fixed before this court in CM(M) No. 319/2005 between the parties about the talks of compromise. Nothing contrary is pointed out about these dates by counsel for respondent. Further it is not the stand of respondent that no talks for compromise were going on as is alleged.

10. There is nothing to show that the appellant had tried to prolong the proceedings. Ld. ADJ could have given one more opportunity to appellant for production of witnesses for cross-examination subject to payment of costs. The closing of evidence in these circumstances has resulted in miscarriage of justice as the appellant did not get reasonable opportunity to prove her case. Affidavits of PW1 and PW3 are already on record. The Hon'ble Supreme Court while dismissing Special Leave Petition challenging order dated 29.8.2008 in CM(M) has clarified that if any observation has been made by this court about genuineness of 'Will' in the said order, the same shall not be

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determinative while deciding the question of grant of probate. Considering the totality and in the interest of justice and for effective adjudication of case on merits, the impugned judgment is set aside. Appellant, i.e. petitioner before Ld. trial court is given one more opportunity to produce the witnesses for cross-examination, subject to costs of Rs.10,000/- to respondent.

11. Let parties appear before Ld. trial court on 29.5.2009. On that date, Ld. trial court will fix a date for the cross-examination of appellant PW3 as well as PW Ashok Kumar. Appellant to ensure that she as well as PW1 Ashok Kumar appear for cross-examination on that day.

12. Appeal stands disposed of accordingly.

13. Trial court record be sent back forthwith.

VEENA BIRBAL, J.

MAY 11th, 2009
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