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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ TEST.CAS. 15/2005

SARDAR INDERMOHAN SINGH SIALI Petitioner
Through Mr. Jasmeet Singh and Mr. Saurabh Tiwari, Advocates

versus

STATE AND ORS. Respondents

Through : None

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT

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

Mr. Justice S. Ravindra Bhat (Open Court)

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1. The present proceedings is for grant of probate in respect of the Will of late Shri Harnam Singh Syali ("the testator") dated 18.8.1978. The first petitioner is the grandson and the second petitioner, the daughter-in-law of the testator.

2. One of the heirs of the late testator had filed a suit being CS (OS) No.1932/1996. One of the parties (the second respondent in this case) filed a suit being CS (OS) No.1253/2006 claiming partition of the properties, which were subject matter of the Will. The proceedings continued for a considerable time. The petitioners contended that as a result, the present claim for probate was not made. The original of the Will was produced, in the course of the said proceedings; a certified copy has been placed on the record in this case.

3. The testator apparently had 5 sons and one daughter i.e. Gurcharan, Surinder Singh Siali, Jang Bahadur Singh, Sardar Manmohan Singh Siali and Kuldeep. The 3 of them i.e., Jang Bahadur Singh, Surinder Singh Siali and S.Gurcharan Singh have died during the pendency of the proceedings. It is submitted that the Will had made the following bequests :

a) life interest in the H-478, New Rajinder Nagar, New Delhi property in favour of his wife Smt. Kishan Kaur with the limited right to enjoy it till her lifetime.

b) After the death of his wife Smt. Kishan Kaur, he bequeathed first floor of the property No.H-478, New Rajinder Nagar, New Delhi and Barsati floor absolutely and exclusively to his son late Sardar Gurcharan Singh who was given right to hold without interference from others and ground floor of the said property was bequeathed to the petitioner. This Will was duly executed in presence of witnesses whose signatures are affixed at the bottom of the Will.

c) On his grandson Shri Inder Mohan Singh s/o Shri S.Man Mohan Singh who will have the right to hold the same so far as the ground floor properly, absolutely.

4. The suit No.1923/1986, ended with the order of the court on 21.2.2003; the order in that case has been filed. Apparently all the sons of the testator were present in court. A certified copy of the application filed under Order 23 Rule 1 along with the affidavits and a compromise affidavit was produced in support. That was duly taken note of even while recording the withdrawal of the suit.

5. In terms of the compromise some of the respondents relinquished their share of the suit property and settled their disputes with the petitioners. This is evidenced by Exhibit Ex.PW1/1, PW1/2, PW1/3, PW1/4, PW1/5, PW1/6, PW1/7, PW1/8 and PW1/9; they were executed on various dates in February, 2003 i.e. 17.2.2003 19.2.2003 and 21.2.2003.

6. The order of the court disposing of the suit is in the following terms :-

“IA 2212/2003 & Suit No.1923/1986

Counsel for defendant No.1 has handed over pay orders details of which have been mentioned in the application. As agreed between the parties the respective pay orders have been handed over to the counsel for the plaintiff and to the counsel for the defendant No.2 for encashment. As agreed between parties their disputes stand satisfied. Defendant Nos.5 and 6 have already been proceeded against ex parte.

The application is allowed and as prayed for in this application the suit is dismissed as withdrawn. In view of the withdrawal of the suit the future dates stand cancelled.”

7. The Will Ex. PW1/1 was apparently attested by Smt.Raj Kaushalya and one Shri Amar Nath. The petitioners have produced the death certificate of Shri Harnam Singh Siali, who expired on 21.10.1980, as Annexure PW1/2. The second petitioner, the daughter-in-law of the testator, has deposed in support of the petition as PW1 by filing an affidavit; the affidavit was entered as Ex. 1/A on 12.8.2009. Apart from supporting the petitioners’ claims and narrating consequence leading upto the settlement with the respondents, the description of the relinquishment deed signed by various parties, it is also mentioned by the said PW-1 that the two attesting witnesses i.e. Shri Amar Nath and Smt. Raj Kaushalya had died. In the circumstances, the petitioner sought liberty to lead secondary evidence. The affidavit of deposition of Shri Balkrishan Sibbal, claiming that he was aware of Raj Kaushalya’s signature was filed and exhibited as Ex. PW-2A on 12.8.2009. The affidavit of Surinder Singh Siali, was filed in support of the petition; he too deposed on 12.8.2009 and has supported the claims in the petition.
8. The deposition of Shri Balkrishan Sibbal, identifies the signature of Smt. Raj Kaushalya who is said to have attested the Will on 18.8.1978.
9. It is contended by the petitioners that in the conspectus of the above circumstances and that the only objector Mona Siali, the daughter of late Shri Gurcharan jit Kaur, withdrew the objections and accepted the sum of Rs.5 lakhs, the court should proceed to grant probate.

10. Since the Will could not be proved by the deposition of an attesting witness, learned counsel relied upon Section 68 and 69 of the Evidence Act. It would be relevant to extract Section 68 and 69, which are as follows :

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

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

11. Reliance is placed upon the judgment of this court reported as *Girdhari Lal Bhat v. The State and others*, 22(1982) DLT 487.

12. The court has considered the pleadings. It is evident that the present Will was a subject of previous protracted litigation i.e. CS (OS) No.1923/1986. The agreement dated 17.2.2003, which is a part of the record and which was signed by all the parties to the present proceedings (or their predecessors) supported the Will dated 18.8.1978 executed by the testator as valid and the parties have accepted it. The agreement appears to have been acted upon as is evident from the relinquishment deeds, placed on record as Ex.PW1/9 to PW1/17. Furthermore, the court had recorded the statements of all the concerned parties including heirs of the respondents, heirs of the testator and who were, at that time, available. In fact, the certified copy produced as Ex.P1/10 contains the signatures of such parties.

13. So far as the question of proof is concerned, Section 68 no doubt enjoins that the party seeking to rely upon a Will has to produce attesting witness. However, the rigor of Section 69 is relieved where the attesting witness is not available. In such cases it would be considered

adequate if some one is able to prove the signatures of the attesting witness appearing on the concerned document with the added obligation of having to prove the signatures of the executants of the document. In this case this requirement – as interpreted in *Girdhari Lal's case* (supra) has been fulfilled by the deposition of PW2 and PW3 who have submitted about the signatures of the testator and the circumstances whereby, was aware of the execution of such a document. In para 4 of the affidavit (Ex. PW3/4) the said witness Manmohan Singh Siali, deposes that the testator was in a sound and healthy mind.

14. In view of the above facts, the court is of the opinion that the petitioners have proved that the late Shri Harnam Singh Siali executed, the Will dated 18.8.1978.

15. In these circumstances, the court is of the opinion that the petition deserves to be allowed. The testator has not as is apparent from the Will, appointed any executor. In the circumstances, the petitioners are hereby appointed as administrators to duly execute the Will and administer the estate of the late testator. The Administrative and Surety bond as required by law shall be filed within four weeks. The probate is granted subject to furnishing of a valuation report and payment of court fee and other fees.

16. The petition is allowed, subject to the above terms.

S. RAVINDRA BHAT,J

SEPTEMBER 10, 2009

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