

* **HIGH COURT OF DELHI : NEW DELHI**

FAO. No.248/2008 & CM No.10537/2008

% Judgment reserved on: 28th August, 2009

Judgment delivered on: 3rd September, 2009

Dr. Vijay Shankar Mishra

S/o. Late Dr. Ram Prasad Mishra

R/o. Flat No.14, Sahyog Apartments

Mayur Vihar, Phase-I, Pocket-IV

Delhi-110091

....Appellant

Through: Mr. Anil Amrit, Adv.

Versus

1. The State

Govt. of NCT of Delhi
Delhi.

2. Smt. Surya Kumar Tripathi

W/o. Shri Raghvendra Tripathi
R/o. 1A, Navsheel DHam
Bithoor Road, Kalyanpur
Kanpur- 208017, U.P.

3. Dr. Pawan Kumar Mishra

S/o. Late Dr. Ram Prasad Mishra
R/o. H.No.7, Gayatri Society
Hadgur Road, Anand
Gujrat.

4. Shri Uday Shankar Mishra

S/o. Late Shri Ram Prasad Mishra
R/o. H-41, Vikar Puri

New Delhi.

....Respondents.

Through: None.

Coram:

HON'BLE MR. JUSTICE V.B. GUPTA

- | | |
|--|-----|
| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | No |
| 3. Whether the judgment should be reported in the Digest? | No |

V.B.Gupta, J.

Appellant has filed this appeal against judgment dated 16th April, 2008 of Additional District Judge, Delhi, vide which appellant's petition, under Section 275 and 276 of the Indian Succession Act, 1925 for grant of Probate of Will dated 30th December, 2004, executed by his father, Late Ram Prasad Mishra, was dismissed.

2. Along with this appeal, appellant has filed an application for additional evidence, in which it is stated that, despite due diligence by appellant, additional evidence which is sought to be adduced in the form of

annexed affidavits of attesting witnesses, could not be produced and he may be allowed to lead additional evidence by placing on record, affidavits of attesting witnesses.

3. Trial court in the impugned judgment observed;

“No doubt the will can be proved by examining one attesting witness of the will also if he is in a position to prove the signature of the second attesting witness of the will also. In this case the original will was not shown to the witness and he has not identified even his own signature and the signature of the testator on the original will. He simply deposed that the will was signed by the testator in his presence but he has not identified that signature on that will which was executed in his presence. The affidavit of this witness is totally silent about the thumb impression and the signature of the second attesting witness of the will. So it is not proved by the statement of PW2 Ajit Jha that the will was executed by the testator in the presence of two attesting witnesses or that anybody else except the testator and PW2 Ajit Jha was present at the time of execution of the will. Even the petitioner has not proved and identified the signature of the second attesting witness of the will. Even the name of the second attesting witness of the will is not given by any of the witness examined by the petitioner. The signature of the second attesting witness of the will remained unproved. It is a mandatory

requirement of law that a valid will can be executed if it is witnessed by two attesting witnesses who had seen the testator affixing his thumb mark or signature on the will. The petitioner has totally failed to prove that the will dated 30.12.2004, Ex.PW1/2 was executed by the testator in the presence of two attesting witnesses. Merely putting an exhibit mark on a document does not prove its valid execution as per the provisions of law. The petitioner has failed to prove the execution of the will dated 30.12.2004, Ex.PW1/2 as per law.”

4. Other legal heirs, have already filed their ‘No Objection’ to the grant of probate of Will in favour of appellant. So, in the interest of justice, present appeal is allowed and impugned judgment is set aside. The case is remanded to the trial court and permission is granted to appellant to place on record, affidavits of attesting witnesses of registered Will and to lead additional evidence to this effect, subject to payment of costs of Rs.5,000/-.

5. Costs be deposited with Delhi High Court Legal Services Committee within four weeks from today and receipt of the same be filed in the trial court.

6. Parties are directed to appear before trial court on 6th October, 2009.

7. Trial court record and copy of this order, be sent to trial court.

3rd September, 2009
rb

V.B.GUPTA, J.