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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 22.09.2010

+ TEST.CAS. 8/2010

MOHD ASIF Petitioner
Through Mr. Sharad Anwar, Advocate

versus

THE STATE & ANR Respondents
Through None

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

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

MR. JUSTICE S.RAVINDRA BHAT, J (OPEN COURT)

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1. This probate appeal under Section 384 of the Indian Succession Act, 1925 is filed against a judgment and order of the Learned Additional District Judge, Sh. Rajender Kumar Shastri dated 03.10.2009, made in PC No. 99/2007. The appellant had approached the trial court for probate in respect of the will of his mother late Smt. Naseem Begum, who died on 02.02.2006; she had propounded a will on 04.03.2005 by which she bequeathed her entire estate to him. It was contended that the will was valid and binding as it has been attested by two independent witnesses and the testatrix was sound disposing state of mind.

2. The respondents, who are other heirs of the testatrix, objected to the proceedings firstly

denying the will and secondly submitting that she was suffering from acute thyroid problem from five years prior to her death. It was also argued that the testatrix, could not, having due regard to the personal law applicable to the parties i.e. Sunni Law, bequeath her entire estate to the Petitioner/Appellant (her son). The respondents had relied upon various authorities including *Noorunissa @ Pichamma Vs. Rahaman Bi* (2001) 3 MLJ 141; *B.R. Verma's Commentaries on Mohammdan Law*, 8th Editon 2002; *Abdul Rehman Vs. Uthumansa*, AIR 1925, Mad.997 and also other rulings.

3. In *Abdul Rehman's* case, the Court summarised the law as follows:-

“Under Sunni Law, a testamentary disposition by Mussulman is invalid in so far as it purports to dispose of more than one third of the testator's estate or to benefit any of his heirs unless the heirs whose rights are affected by such disposition consent to it after his death expressly or impliedly or by passive acquiescence. Consent during life is not enough under Sunni Law.”

Similarly, in *Noorunissa @ Pichamma Vs. Rahaman Bi*, which was a subsequent decision of 2001, the Court indicated the applicable principles as follows:-

“The principle laid down with regard to bequeathing of property of a Mohammedan would clearly go to show that a Mohammedan cannot bequeath more than one third of his property and even with regard to that one third of his property and even with regard to that one third he cannot bequeath it to his heirs. If the bequest is to an heir it can be validated by the consent of all the heirs after the death of testator. It is also clear that bequest in excess of one third of estate cannot take effect unless such bequeath is concerned by heirs after the death of the testator.”

4. The above discussion would indicate that those governed by Mohammedan Law cannot bequeath more than 1/3rd of their entire estate; even in respect of such 1/3rd share that an individual can bequeath, there has to be consent by the other heirs who are excluded from the estate. In this case concededly, the Appellant was able to establish that the consent of many of the testatrix's heirs had been given, but the record also showed that the consent of the fourth

respondent was not forthcoming.

5. In the circumstances, the Court is of the opinion that the existing position of law being so, a probate or Administration under the Indian Succession Act could not have been granted as claimed. The judgment under appeal is, therefore, based on sound legal principles. The appeal, therefore, cannot succeed.

6. Learned counsel for the appellant submitted that other heirs had received consideration and furnished 'No Objection' in respect of the suit property and that liberty may be granted to initiate such proceedings in that regard. The appellant is at liberty to initiate such proceedings as are admissible in law.

7. The appeal is, therefore, dismissed in the above terms. In the circumstances, there should be no order as to costs.

**S. RAVINDRA BHAT
(JUDGE)**

SEPTEMBER 22, 2010

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