

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

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Date of Judgment: 21.1.2010

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TEST CAS.No.35/1999

SHAMA SETHI

.....Petitioner

Through: Mr. Anil K. Kher, Senior
Advocate with Mr.Rishi
Manchanda &
Mr.S.S.Pandit, Advocates.

Versus

STATE & OTHERS

.....Respondents

Through: None.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the 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

INDERMEET KAUR, J. (Oral)

1. This is a petition under Section 276 of the Indian Succession Act for grant of probate of the Will of late Sh.Din Dayal Kaicker. Sh.Din Dayal Kaicker had died on 22.12.1985. Petitioner is the daughter of the deceased and she is seeking a probate of the Will dated 18.9.1978 duly registered with the Sub-Registrar.
2. The details of the property of which probate is sought are mentioned herein as follows:

A. House No.C-155, Greater Kailash Part I, New Delhi.

B. 1/3rd share in Commercial Building No.AB-4, Safdarjang Development Scheme, Near Kamal Cinema, New Delhi.

C. 1/2 share in Dakhanwali Building, Bazar Mandi, Faridabad comprising Six shops.

D. 1/2 share in property known as Nauhra, Faridabad.

E. 1/6th share in Residential House at Mohalla Khatriwala, Faridabad.

3. The properties detailed as item C, D and E were not available at the time of death of the testator.

4. The beneficiaries as per the Will are the petitioner and respondent no.11 Smt.Madhu Narang both of whom are the daughters of the deceased.

5. The Will states that the petitioner is the executor of the Will of the said property both movable and immovable.

6. The respondents herein are the other legal representatives of the deceased. Respondent no.2 is the daughter-in-law; respondents no.3 to 7 are the sons and respondents no.8 to 11 are the daughters of the deceased.

7. The wife of the deceased had died on 25.5.1991.

8. After notice to the respondents, respondent no.4, 7 and 9 had filed their respective objections contesting this petition. All the aforesaid objectors had admitted to the execution of the Will dated 18.9.1978 by their deceased father but had countered this Will by submitting that pursuant to the Will a family settlement had

been arrived at between the parties dated 22.8.1990 which superseded the Will of the deceased and the properties of the deceased have to be divided in terms of the aforestated family settlement.

9. On 17.5.2006, the following issues were framed:

1. Is the petitioner entitled to grant of probate of the Will dated 18.9.1978?
2. Were there family settlements on 22.8.90 and 31.3.98?
3. Does the family settlements on 22.8.90 and 31.3.98 stand in the way of the grant of probate?

10. On 13.10.2006 issues no.2 and 3 relating to the family settlement had been deleted. Court had held that the issue relating to the title of the property stated to be belonging to the deceased could not be gone into in a petition under Section 276 of the Indian Succession Act.

11. The only issue which remained for adjudication was issue no.1. The parties had led evidence by way of affidavits. Objector no.4 did not support his objections with any evidence; he did not file any evidence by way of affidavit; Objector no.7 and 9 had filed evidence by way of affidavit. On 15.12.2009, objector no.7 had made a statement on oath in court that he has no objection if the probate of the Will is granted.

12. Evidence of Objector no.9 only remains to be considered by this court. None has appeared for Objector no.9 today.

13. Arguments have been heard. Record has been perused.

14. Findings of this court on only issue to be adjudicated is as follows:

ISSUE NO.1

15. Petitioner Shama Sethi had reiterated averments made in the petition. It is reiterated that she has filed the petition for grant of probate of the Will dated 18.9.1978 of her deceased father Din Dayal Kaicker. The Will has been exhibited as Ex.P-1. It has been reiterated on oath that this Will was duly registered. The death certificate of the testator has been proved as Ex.P-2 showing his date of death as 22.12.1985. Death certificate of the wife of the deceased namely Nand Rani showing her date of death as 25.5.1991 is Ex.P-3. It has been reiterated that testator had bequeathed all his assets in favour of his wife Nand Rani and after her death to the petitioner and respondent no.11. It has been deposed on oath that the petitioner is a resident of United States of America and in spite of best efforts she has not been able to trace out the whereabouts of the attesting witnesses to the Will i.e. R.Lakshminarasimhan and G.L.Kashyap. In her cross-examination she has stated that the said attesting witnesses were working somewhere in the Ministry of Government of India. She had visited the Ministry of Agriculture and CPW department for the said purpose but the whereabouts of the said witnesses could not be traced.

16. The evidence led by Objector no.9 is the affidavit of Objector no.9 who has been arrayed as RW-2. She has stated that pursuant to the family settlement dated 22.8.1990 entered into between the family members the probate of the Will of her father dated 18.9.1978 cannot be granted. She has however nowhere disputed the execution of the said Will by her father. In her cross-examination she has admitted that her father Din Dayal Kaicker had executed this Will. On 18.9.1978 she has reiterated that the probate of the Will cannot be granted in view of aforestated family settlement.

17. It is well settled proposition of law that in a petition for grant of probate the court only has to see as to whether the testator had in fact made the Will voluntarily and of his own volition; it was a genuine document, properly executed and attested as per law and the testator at the time of executing the said Will had the capacity to execute it. The petition under Section 276 of the Indian Succession Act cannot go beyond this. It is not within the scope of such a petition to go into the subsequent family settlement or arrangement.

18. In this case Objector No.9 is the only contesting objector. She has however admitted the execution of the Will dated 18.9.1978 by her deceased father. All the legal heirs have in fact admitted this document.

19. There is no dispute that this Will had in fact been executed by the deceased Din Dayal Kaicker bequeathing his property both movable and immovable in favour of his wife Nand Rani and after her demise to the petitioner and respondent no.11. Both the attesting witnesses in spite of best efforts could not be traced.

20. Under Section 281 of the Indian Succession Act, the affidavit of an attesting witness is required in cases of petition for probate. If such evidence is not available, the court will require due execution to be proved. A division bench of the Kerala High Court in Thaiullothil Kunhikaman v. Kalyani AIR 1990 Ker 226 has taken a view that under the amended Section 68 of the Evidence Act in case of registered wills it is not necessary to call an attesting witness, unless its execution is specifically denied. It was held that Section 68 of the Evidence Act relates to those documents which are required to be proved at a trial of a suit. If in any rule of law or of pleadings such proof is not required, Section 68 cannot operate to insist on a formal proof by calling an attesting witness. Section 58 of the Evidence Act read with Order 8 Rule 5 of the CPC shows that such proof can be dispensed with; examination of an attesting witness is therefore unnecessary when the parties have not joined issue on the validity or the genuineness of the Will.

21. In Balwant vs. Mainabai AIR 1991 MP 11, it has been held that where the attesting witnesses to a Will could not be produced

as they were not alive, the Will can certainly be proved in the manner provided for a proof of a document.

22. The present petition has been filed in the year 1995. The petitioner has sought probate of a Will dated 18.9.1978. Testator had died on 22.12.1985. Petitioner has explained that she is ordinarily a resident of USA; on one of her visits to India in 1980 she learnt about the dispute inter se between her brothers with regard to the property left by her deceased father; she engaged the services of an advocate and obtained certified copy of the Will from the office of the Sub-Registrar wherein it was revealed that the entire property of the deceased both movable and immovable had been bequeathed to Smt.Nand Rani his wife and on her demise to the petitioner and respondent no.11. The petitioner requested the other LRs to abide by the wishes of her deceased father. It was only thereafter that the present petition was preferred by her.

23. In Kunwarjeet Singh Khandpur v. Kirandeep Kaur & Ors. AIR 2008 SC 2058 it has been held by the Supreme Court that an application for grant of probate is only a permission which is sought for the purpose of a legal duty which has been created by a Will or for recognition as a testamentary trustee and is continuous right which can be exercised any time after the death of the deceased as long as the right to do so survives and the object of

the trust exists or any part of the trust, if created, remains to be executed. Bar of limitation is not attracted.

24. The Will of the deceased has been duly proved. The petition has been preferred by the executor of the Will; there appears to be no impediment legal or otherwise in granting the present petition. The valuation report of the Valuator dated 8.10.2001 is on record. Accordingly, the probate of the Will dated 18.9.1978 is granted as per Schedule VI of the Indian Succession Act. Administration bond and surety bond be executed.

(INDERMEET KAUR)
JUDGE

JANUARY 21, 2010.
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