

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **C.R.P. 50/2009**

Date of decision : 19.02.2010

IN THE MATTER OF :

RAKESH BHAN Petitioner
Through: Mr. Amit Trikha, Advocate

versus

BAWA KRIPAL SINGH & ANR Respondents
Through: Mr. S.Ghosh, Advocate for R-2.

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* **HON'BLE MS.JUSTICE HIMA KOHLI**

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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 |

HIMA KOHLI, J. (ORAL)

1. The present revision petition is directed against an order dated 28.02.2009 passed by the learned ADJ, allowing an application filed by the respondent No.2 (respondent No.6 in the court below) wherein, she sought her transposition as a petitioner in place of Late Shri Bawa Kirpal Singh, the petitioner in the probate petition, who was appointed as the executor of a will dated 02.01.1994, executed by Late Dr.R.K. Bhan. By the impugned order, the aforesaid application filed by the respondent No.2 was allowed and she was permitted to be

transposed as a petitioner in the pending probate proceedings with directions to file the amended petition.

2. After the aforesaid order was passed, respondent No.2 filed the amended petition wherein she sought grant of letters of administration in her favour, with respect to the estate of Late Dr.R.K. Bhan. Replies to the aforesaid amended petition have also been filed by the petitioner herein (respondent No.7 in the court below) and the other respondents. Copy of the amended petition and the reply is handed over by the counsel for respondent No.2 in the Court and is taken on record.

3. Counsel for the petitioner states that in view of the provision of Section 222 of the Indian Succession Act, 1925 (hereinafter referred to as 'the Act'), probate can only be granted in favour of the executor, appointed by the Will and in the present case, the sole executor having expired on 09.08.2008, the proceedings stand abated. He seeks to draw support from a judgment of a Division Bench of Bombay High Court in the case of Thrity Sam Shroff vs. Shiraz Byramji Anklesaria & Anr. reported as **AIR 2007 Bombay 103** and of a Single Judge of this Court in the case of Inder Chand Nayyar vs. Sarvadeshik Arya Pratinidhi Sabha & Anr. reported as **AIR 1977 Delhi 34.** *Per contra*, counsel for respondent No.2 relies on the provisions of Section 232 of the Act and submits that in the present case, his client is entitled to grant of letters of administration in respect of the will in question.

4. A perusal of the application filed by respondent No.2 shows that a prayer was made by her for being transposed as a petitioner in place of the deceased petitioner, Late Shri Bawa Kirpal Singh. However, no specific prayer was made by the respondent No.2, for converting the proceedings from a probate petition to a petition for grant of letters of administration, nor was an amendment of the prayer clause sought by her. Therefore, strictly speaking, the amended petition filed by respondent No.2 pursuant to the impugned order, is beyond the scope of the amendment sought in the application or granted by the court below. Pertinently, the said objection was not taken either by the petitioner herein (respondent No.7 in the court below) or by Smt. Lila Bhan and Smt. Sunita Kaul (contesting respondents No.2-A and 2-C in the court below).

5. It is an undisputed position that had the respondent No.2 filed a substantive application before the trial court, not only seeking her transposition as the petitioner, but seeking grant of letters of administration instead of a probate in respect of the Will dated 02.01.1994 executed by Late Dr.R.K.Bhan, the amended petition as filed by her on 02.04.2009 could be entertained. But in the absence of such a prayer, no leave was granted vide order dated 28.2.2009 to convert the probate petition to a petition for grant of letters of administration. Hence, respondent No.2 acted beyond the scope of the amendment granted in her favour by the impugned order.

6. The aforesaid technical flaw can however be overcome even at this stage. In the case of Harbans Singh vs. State & Ors. reported as **2010 II AD (Del) 191**, decided by this Court on 19.1.2010, when confronted with similar facts where the petitioner therein challenged the order of the learned ADJ by which he allowed the application of the respondents therein for permission to be substituted in place of the original petitioner/executor of the Will and the beneficiary thereunder, notice was taken of a judgment in the case of "Hari Pada Shaha vs. Gobinda Chandra Shaha" reported as **(1948) ILR 1 Calcutta 300**. In the said judgment, a Division Bench of the Calcutta High Court held that the proper thing for the respondents therein to have done was not to apply to continue the proceedings as substituted heirs of the deceased executor, but to have filed a fresh application praying for letters of administration with a copy of the will annexed as her heirs and personal representatives. It was further observed that as the said objection about the application being defective was raised at the end of the probate proceedings, when arguments were being addressed, to obviate all disputes and ambiguity, it would have been proper for the respondents to have filed an application seeking amendment of the prayer clause in the petition by making a request that the same be treated as one for letters of administration, either as heirs of the deceased executor, or independently in their own rights.

7. In the present case, counsels for the parties state that the matter is at an advance stage. The probate petition was filed in the

year 1997. After pleadings were completed, issues were duly framed and thereafter, the original petitioner/executor had adduced evidence of all the witnesses except for one witness. The said witnesses were duly cross-examined by the petitioner herein (respondent No.7 in the court below) and by the remaining legal heirs of respondent No.2, Late Col. O.N. Bhan. It was at this stage that the petitioner in the probate petition/executor, Shri Bawa Kirpal Singh expired, resulting in filing of an application for transposition by the respondent No.2. The prayer made in the amended petition filed by respondent No.2 is for grant of letters of administration. Replies to the said petition have already been filed. In other words, the petition is at an advance stage of recording of remaining evidence, whereafter, arguments are left to be addressed by the parties. At this stage, counsel for the petitioner states that subject to a clarification that the amended petition filed by respondent No.2 is for grant of letters of administration, the matter can be taken further.

8. Considering the vintage of the case and the fact that it is at an advance stage, where only the cross-examination of one witness produced by the original petitioner and the evidence of respondent No.2 herein is pending, with the consent of the parties, the present petition is disposed of on the following terms:

- (i) The amended petition filed by respondent No.2 for grant of letters of administration in respect of the estate of Late Dr.R.K.Bhan, is accepted and permitted to be taken on

record.

- (ii) To obviate any confusion, the respondent No.2 shall file a fresh amended memo of parties, by impleading respondent No.7 (petitioner herein) as respondent No.6, within one week.
 - (iii) As the pleadings *qua* the amended petition are complete, the trial court shall be at liberty to amend the issues in the light of the amended petition and thereafter, the remaining cross-examination of one witness shall be completed and respondent No.2 shall lead her evidence.
9. As counsels for the parties state that the matter is listed before the trial court on 25th March, 2010, list before the said Court on 10th March, 2010, for directions.
10. Copy of this order be sent by the Registry forthwith to the trial court for perusal and compliance.
11. The revision petition is disposed of.

(HIMA KOHLI)
JUDGE

FEBRUARY 19, 2010
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