

UNREPORTABLE

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

FAO No.407/2007

Date of Decision: March 04, 2010

PEAREY LAL Appellant
Through Mr. B.B.Sawhney, Senior Advocate
with Ms. Yasmin Zafar, Advocate

versus

STATE AND ORS Respondents
Through Mr. V.K.Mehra, Advocate

CORAM:
HON'BLE MISS JUSTICE REKHA SHARMA

1. Whether the reporters of local papers may be allowed to see the judgment? No
2. To be referred to the reporter or not? No
3. Whether the judgment should be reported in the 'Digest'? No

REKHA SHARMA, J. (ORAL)

The appellant had applied for 'Letters of Administration' in respect of 'Will' dated October 17, 1973 executed in his favour by Hans Ram @ Hans Raj. The learned Additional District Judge who dealt with the petition has dismissed the same vide her order dated September 06, 2007 holding that the 'Will' in question was not duly executed, in as much as it was not attested by two witnesses as required by Section 63 of the Indian Succession Act, 1925. It has been held that one of the alleged attesting witnesses, Shri Krishan Pal Singh, Advocate was a scribe of the 'Will' and he had signed the same only as a scribe and not as an attesting witness. As regards the other

witness Dr. Prem Narain, it has been held that he merely certified that the testator was in sound health and mental fitness and that he also had not signed the 'Will' as an attesting witness. It has been further held that the 'Will' has not been proved in terms of Section 68 of the Indian Evidence Act, 1872.

Feeling aggrieved by the finding of the trial Court, the present appeal has been preferred.

Before I examine the 'Will' in question so as to ascertain whether it was attested by two witnesses and whether it was duly proved, it may be noticed that the testator was a bachelor at the time of his death and there was no opposition to the grant of 'Letters of Administration' in favour of the appellant by the other relatives left behind by him.

Coming to the 'Will', a perusal of the same shows that under the caption 'witnesses', it is recorded against serial No.1 – *"Drafted by Krishan Pal Singh, Advocate, 1426, Chandni Chowk, Delhi-6"*, and against serial No.2 it is recorded, *"I have examined Sh. Hans Ram Executant who is in sound health & mentally fit at the time of execution of Will"* and underneath this writing is the signature of Dr. Prem Narain, bearing the date October 17, 1973. In view of these notings, it cannot be disputed that the 'Will' bears the signatures of Shri Krishan Pal Singh, Advocate and Dr. Prem Narain underneath the heading "Witnesses". However, having regard to the findings of the learned Additional District Judge, what needs to be examined is, whether Shri Krishan Pal Singh, Advocate signed the 'Will' as a scribe only or in a dual capacity both as a scribe and as an attesting witness.

What further needs to be examined, is whether Dr. Prem Narain had merely certified to the sound health and mental fitness of the testator or had signed the 'Will' as a witness too. And for this, one needs to examine the evidence on record. However, before I do that, it will be appropriate to refer to a judgment of the Apex Court reported as ***Mathew Oommen Versus Suseela Mathew*** reported in (2006) 1 Supreme Court Cases 519. One of the grounds, on which the 'Will' before the Apex Court was assailed, was that one of the alleged witnesses to the 'Will' was only a scribe of the 'Will' and not an attesting witness. The Apex Court dismissed the objection holding as under:-

"There is no requirement in law that a scribe cannot be an attesting witness. The person concerned has appeared in the witness box as PW.1 and has clearly stated that he is a scribe of the Will as well as he is an attesting witness of the Will. For attestation what is required is an intention to attest which is clear from the statement of PW.1."

In the present case, to prove the 'Will' Shri Krishan Pal Singh, Advocate had appeared before the trial Judge as PW.2. He had deposed that he had signed the 'Will' as an attesting witness at serial No.1 and then before the Sub Registrar. He also deposed that he had signed as an attesting witness to the 'Will' at points 'A' & 'B' and he identified his signatures at both these places. It may be noted that point 'A' is that point on the 'Will' where, as noticed above, it is written that, "*Drafted by Krishan Pal Singh, Advocate, 1426, Chandni Chowk, Delhi-6*", under the heading "Witnesses" and point 'B' is the point where he signed the 'Will' as an attesting witness before the Sub Registrar.

The appellant along with the present appeal has filed an application under Order 41 Rule 27 read with Section 151 of the Code of Civil Procedure and thereby he has sought to place on record an additional affidavit of Shri Krishan Pal Singh, Advocate dated October 16, 2007 wherein the said Shri Krishan Pal Singh has again stated that he had signed the 'Will' dated October 17, 1973 of deceased Hans Ram @ Hans Raj as a scribe and also as an attesting witness in his presence after he had signed the same. The said Krishan Pal Singh, Advocate is also present in the Court and he has affirmed to the contents of his affidavit dated October 16, 2007. As there is no opposition to the 'Will' from other legal representatives of the testator, I take the affidavit of Shri Krishan Pal Singh, Advocate on record.

In view of the judgment of the Apex Court referred to above wherein it has been held that a scribe of a 'Will' can also be a witness and in view of the evidence of Shri Krishan Pal Singh, Advocate before the trial Judge and the additional affidavit filed before me, it will not be correct to say that Shri Krishan Pal Singh, Advocate did not sign the 'Will' as an attesting witness and had merely drafted the same. Hence, I hold that he had not only drafted the 'Will' but had also signed the same when it was executed by the testator and presented before the Sub Registrar for registration.

It is laid down in Section 68 of the Indian Evidence Act, 1872 that to prove a 'Will', one of the attesting witnesses must appear in the Court. In so far as Dr. Prem Narain is concerned, he had died and, therefore, could not be examined as a witness. However, as

noticed above, Shri Krishan Pal Singh, Advocate had deposed before the trial Court and has also filed an additional affidavit dated October 16, 2007. In his additional affidavit, he has specifically stated that after he had signed the 'Will', Dr. Prem Narain had also appended his signatures on the same as an attesting witness at serial No.2 in his presence and in the presence of the testator while also certifying to the sound health and mental fitness of the testator. I see no reason to disbelieve the said testimony of Shri Krishan Pal Singh, Advocate.

For what has been noticed above, I set-aside the judgment of the trial Court dated September 06, 2007 and hold that the appellant has successfully proved the 'Will'. Accordingly, I grant 'Letters of Administration' to the appellant in respect of the 'Will' in question subject to his furnishing valuation certificate from the Sub-Divisional Magistrate and on paying stamp duty on the same and also completing the other usual legal formalities.

List before the concerned Registrar for further necessary action on March 22, 2010.

MARCH 04, 2010
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REKHA SHARMA, J.