

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

+ **FAO No. 314/2007**

% **25th July, 2017**

SUDESH @ ALKA Appellant

Through: Mr. Manish Aggarwal, Adv.

Versus

THE STATE & ORS. Respondents

Through: Mr. Amarjit Singh,
Adv. for Respondent Nos. 4 to 8

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This first appeal under Section 299 of the Indian Succession Act, 1925 is filed against the judgment of the probate court dated 02.05.2007 by which the probate court below has dismissed the probate petition filed by the present appellant, petitioner before the probate court.

2. The facts of the case are that the appellant/petitioner sought probate of the registered Will dated 25.06.1976 of her mother Smt. Krishna Wanti. The bequest is with respect to the property No.

30/32-A, West Patel Nagar, New Delhi and which has been bequeathed to the appellant/petitioner by the registered Will dated 25.06.1976. Smt. Krishna Wanti died on 06.09.1979 leaving behind one son and three daughters. The appellant/petitioner is one daughter of Smt. Krishna Wanti.

3. In the probate case, objections were filed on behalf of two other legal heirs of late Smt. Krishna Wanti, namely, the son Sh. Kaushal Kumar and one daughter Smt. Pushp Lata. However, both these objectors Sh. Kaushal Kumar and Smt. Pushp Lata did not lead any evidence whatsoever and their right to lead evidence was closed as the opportunities given for leading evidence were not availed of. The order of closing evidence of the objectors has admittedly become final.

4. The appellant/petitioner led evidence of three witnesses. One witness is the appellant/petitioner herself. Second witness is the attesting witness of the Will Sh. Ved Prakash. The third witness was a clerk from the office of the Sub-Registrar to prove registration of the Will.

5. The attesting witness Sh. Ved Prakash PW-3 has duly proved the execution and attestation of the Will. He has proved signing of the Will by the testatrix Smt. Krishna Wanti in his presence and in the presence of the other attesting witness Sh. Rattan Lal. PW-3 has also deposed that both the attesting witnesses Sh. Rattan Lal and he himself signed in front of the testatrix. It is also deposed that the testatrix was of sound disposing mind and in fact for which a certificate appears at the last page of the Will of Dr. Amar Nath Marwah that the testatrix was of sound disposing mind. As per Section 68 of the Indian Evidence Act, 1872 a Will can be proved by summoning at least one attesting witness, and which has been done in the present case.

6. The probate court below has dismissed the probate petition on account of completely minor inconsistencies and contradictions inasmuch as there is some issue with respect to (i) whether the deceased testatrix was doing stitching at home or was doing stitching at a stitching centre where the sister of the attesting witness Sh. Ved Prakash was also working, (ii) that the appellant/petitioner as PW-1 admitted that the mother Smt. Krishna Wanti

wanted to give the share to Sh. Kaushal Kumar but simultaneously, appellant/petitioner deposed that Sh. Kaushal Kumar used to ill-treat and beat the testatrix, (iii) as to why would a certificate of a doctor be required for a healthy person and thereby the trial court has erred that extra caution in taking a doctors certificate is not a suspicious circumstance and thus the doctor's signature taken on the last page of the Will was with respect to the sound disposing mind of the testatrix, (iv) of the fact that the attesting witness Sh. Ved Prakash did not accompany the testatrix for registration of Will although there were two other attesting witnesses of the Will including the advocate Sh. A.L. Joshi who was sitting in the Sub-Registrar's office and who got the Will registered etc etc. In my opinion, the probate court below has committed a clear cut illegality in failing to hold that the Will has been proved and this is all the more so because whereas the appellant/petitioner led evidence to prove due execution and attestation of the Will as also soundness of the mind of the testatrix, the respondents/objectors led no evidence. Once the respondents/objectors led no evidence, i.e they had no courage to enter into the witness box and prove their case/objections and stand the test

of cross-examination, the probate court below ought to have granted probate of the Will dated 25.06.1976 of the deceased testatrix Smt. Krishna Wanti and which was proved on record as Ex.PW3/1.

7. At this stage, learned counsel for the legal heirs of the objector late Sh. Kaushal Kumar argues that since a civil suit was filed by these respondents and this civil suit for partition has been decreed by the Court of Sh. Rakesh Kumar-IV, Additional District Judge-06, West District, Tis Hazari Courts, Delhi and wherein the legal heirs of the objector Sh. Kaushal Kumar/respondents have succeeded in establishing that the bequeathed property at Patel Nagar did not belong to the mother Smt. Krishna Wanti, therefore it is argued that though the Will can be held to be proved, however, the issue with respect to the ownership of the Patel Nagar property by Smt. Krishna Wanti be left open for being decided in the civil suit since the judgment in the civil suit dated 15.03.2017 passed by Sh. Rakesh Kumar-IV, Additional District Judge-06, West District, Tis Hazari Courts, Delhi is a subject matter of an appeal which is pending in this Court.

8. In view of the aforesaid concession argument and stand

on behalf of the legal heirs of the objector Sh. Kaushal Kumar, the probate petition is allowed and it is held that the appellant/petitioner has succeeded in proving the due execution and attestation of the Will Ex.PW3/1 being the Will dated 25.06.1976 of late Smt. Krishna Wanti and appellant/petitioner is granted probate of this Will Ex.PW3/1 dated 25.06.1976 of Smt. Krishna Wanti, however, the issue with respect to whether at all Smt. Krishna Wanti had ownership rights or any title in the property No. 30/32-A, West Patel Nagar, New Delhi is not decided in these proceedings and is left open for being decided in the civil proceedings between the parties emanating from the Suit No. 609300/2016 titled as Chander Mohan Sharma vs. Sudesh @ Alka and two other defendants decided by the Court of Sh. Rakesh Kumar-IV, Additional District Judge-06, West District, Tis Hazari Courts, Delhi in which the judgment dated 15.03.2017 is passed and which judgment is under challenge by way of filing of a first appeal in this Court being RFA No.581/2017 and which is pending.

9. The appeal is allowed and disposed of, however, with the observation that the issue of title with respect to the Patel Nagar property is not decided in these proceedings and is left open to be

decided in the civil proceedings in the aforesaid suit for partition filed by the legal heirs of late Sh. Kaushal Kumar, S/o Late Smt. Krishna Wanti, testatrix.

JULY 25, 2017/pk

VALMIKI J. MEHTA, J