

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

% Judgment delivered on 09.09.2015

+ FAO 236/2009 and CM No.10060-10061/2012 and CM No.18832/2013

VIJENDER SINGH

..... APPELLANT

VERSUS

STATE AND ORS.

..... RESPONDENTS

Advocates who appeared in this case:

For the Appellant : Mr. Sunder Khatri, Advocate

For the Respondents: Mr. G.S. Madani, Advocate for R-3, 5 and 6

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J

FAO 236/2009 and CM No.10200/2009 (condonation of delay of 166 days in filing the appeal)

1. The appeal is directed against the judgment dated 27.09.2008 passed by the learned Additional District Judge, Delhi. The captioned application, on the other hand, is an application filed to seek condonation of delay in preferring the accompanying appeal. As per the averment made in the application, there is a delay of 166 days in filing the appeal.
2. I intend to take up both the appeal as well as the captioned application for adjudication.
3. The appellant had moved the trial court for grant of probate in respect of a Will dated 04.09.1986 executed by Late Smt. Shanti Devi (mother of the appellant). Smt. Shanti Devi by virtue of the said Will,

bequeathed among other assets, the immovable property bearing no.106, admeasuring 200 sq. yds out of Mustatil No. 136, Killa No. 16, situate at Village Bawana, in the abadi known as Ishwar Colony Extension, Delhi (hereinafter referred to as the subject property). The Will, apparently, was attested by two witnesses, namely, Sh. Jai Bhagwan Verma and Sh. Dileep Singh.

3.1 The probate petition was filed on 21.12.1990. Upon notice in the petition being issued, citation was taken out to invite objections, if any, from members of the general public, the State, as well as other legal heirs of the deceased Late Smt. Shanti Devi.

3.2 The record shows that while the State filed no objections, the private respondents filed objections, which were, however, rejected on 05.03.1997 by the trial court, with liberty to file fresh objections. It appears that despite opportunity being given, fresh objections were not filed and the private respondents were accordingly, proceeded ex-parte vide order dated 07.02.2000.

3.3 The appellant, however, in order to prove the Will stepped into the witness box. Despite opportunities being given, the appellant did not produce the relevant evidence for proving the Will. The order sheets placed on record would show that the trial court had spent nearly five (5) years in persuading the appellant to bring the material evidence on record. This aspect clearly comes to fore on perusal of orders passed by the trial court on 26.05.2000, 06.08.2002, 28.04.2005 and 02.09.2005.

3.4 It appears that after the trial court had closed the opportunity given to the appellant earlier for leading further evidence in the matter vide order dated 02.09.2005, a request was made at the hearing held on 19.09.2005 that the petition be adjourned *sine die* on the ground that the subject

property, which was in the possession of the objectors, had been sold and that, steps would be taken for regaining possession of the same.

3.5 This request of the appellant was evidently accepted by the trial court and the probate petition was adjourned *sine die*. Pertinently, at this stage, the petition was otherwise ripe for final arguments.

3.6 It appears that thereafter, an application was moved by the appellant in and around January, 2008 for summoning witnesses. The trial court vide order dated 29.01.2008 dismissed this application with costs of Rs.1,000/- to be deposited with the legal aid. The petition was listed for final hearing on 13.03.2008.

3.7 Aggrieved by the said order, the appellant had filed a petition in this court, which was registered as CM (M) No.367/2008.

3.8 Evidently, in the interregnum, the trial court continued with its proceedings and passed the impugned judgment dated 27.09.2008.

3.9 Resultantly, a single Judge of this court vide order dated 31.03.2009 dismissed the appellant's petition, being: CM (M) 367/2008 on the ground that it had been rendered infructuous.

4. The appellant in this background seeks to assail the impugned judgment on the ground that no opportunity was given to lead evidence in the matter. In the alternative, it is sought to be argued, on behalf of the appellant that since evidence is available even now, this court should exercise its power under Order 41 Rule 27 of the CPC to enable the placement of relevant evidence before court.

4.1 In so far as the application for condonation of delay is concerned, it is argued on behalf of the appellant that a large part of the delay occurred on account of the pendency of the appellant's petition in this court, which finally, was disposed of, on 31.03.2009. It was submitted that within a

month of the said petition being disposed of, the present appeal was filed in this court on 17.04.2009.

5. I have heard the learned counsel for the appellant and perused the record. Having considered the same, I am of the view that the submissions made before me both on merits as well as in support of condonation of delay are devoid of merit and hence, deserve to be rejected. The reason for the same is as follows :-

5.1 As indicated above, the record shows that several opportunities were given to the appellant between 26.05.2000 and 02.09.2005 for placing the relevant evidence on record to prove the Will. The trial court left with no alternative closed the appellant's evidence on 02.09.2005.

5.2 The appellant, thereafter, at the hearing held on 19.09.2005, himself sought sine die adjournment of the probate petition on the ground that the objectors had sold the subject property and that, he would like to take steps to regain possession of the same.

5.3 After a delay of nearly two and a half years, the appellant sought to revive the proceedings by moving an application to summon witnesses. This application was dismissed, on 29.01.2008.

6. Having regard to the aforesaid, it cannot be said that the appellant was not given due opportunity to place the relevant evidence on record to prove the Will.

7. The other argument that this court should exercise powers under Order 41 Rule 27 of the CPC in favour of the appellant is also wholly untenable. The power available to the appellate court under Order 41 Rule 27 of the CPC can be exercised in three circumstances : first, when the court from whose decree, the appeal is preferred, has refused to admit evidence which ought to have been otherwise admitted. Second, when

notwithstanding exercise of due diligence, the evidence sought to be produced, was not within the concerned person's knowledge or despite, exercise of due diligence could not be produced at the time when the decree was passed. Lastly, when the appellate court requires the document to be produced or witness to be examined to enable it to pronounce judgment in the matter or for any other substantial cause.

7.1 The facts set out above show that the appellant's case does not conform to any of the three circumstances set out above. The trial court did not refuse to admit any evidence, which was otherwise admissible. As a matter of fact, after having failed to have the appellant place the relevant evidence on record, the trial court after a period of nearly five years, closed the opportunity accorded to the appellant, in that behalf. The delay, in the conclusion of the matter, which occurred on this account, clearly brought the case of the appellant outside the second circumstance, as well. There was clearly, lack of exercise of due diligence by the appellant in placing the relevant evidence before the trial court. This is also not a case where I would like to exercise my powers under the residuary clause as the appellant by his conduct, allowed the continuation of the trial for nearly 18 years. The probate petition was filed on 21.12.1990. The judgment of the trial court got delivered only on 27.09.2008.

8. Quite clearly, as noticed in the impugned judgment, the appellant failed to prove the Will on account of his failure to produce the attesting witnesses. I find there is no error in the impugned judgment.

9. In so far as the application for condonation of delay is concerned, the same is also bereft of merits. The appellant despite being aware of the fact that the impugned judgment had been delivered, chose not to file an appeal within the prescribed period of limitation. The specious plea taken to

explain the delay, which is, that a petition against an interlocutory order passed by the trial court was pending adjudication in this court, cannot be accepted, in the given fact situation.

10. Thus, having regard to the above, both the appeal as well as the application for condonation of delay, are dismissed.

11. Resultantly, all pending applications having been rendered infructuous, are also dismissed.

SEPTEMBER 09, 2015

RAJIV SHAKDHER, J.

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