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

+ **FAO(OS) 275/2013**

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Date of decision: 10.09.2015

MRS SURINDER PAL KAUR

..... Appellant

Through: Mr.S.C.Maheshwari, Sr.Adv. with
Mr.H.C.Kharbanda and
Mr.M.P.S.Tomar, Advocates

versus

STATE OF DELHI

..... Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

1. The present appeal is directed against the judgment and order of the learned Single Judge of 14.12.2009 in Testamentary Case 48/2005 rejecting the probate application preferred by the present appellant.

2. The facts in brief are that Baba Chakravarti Darvesh (hereinafter referred to as 'the testator') died on 05.09.2003. The appellant propounded a Will said to have been executed by the testator on 07.06.2003. It was inter alia contended that in terms of the Will the appellant, who is the testator's sister-in-law (brother's wife) was the sole legatee entitled to his possessions. Besides bequeathing the "Gaddi" i.e. the control of the religious denomination of the sect of which the testator was a spiritual leader/Guru, the Will also

conferred rights in respect of a property being property No.E-255, Greater Kailash-II, New Delhi constructed on a 250 sq. yards' plot (hereinafter referred to as 'the property'). The appellant applied for probate, claiming to be the sole legatee, in Test. Case.48/2005.

3. The probate application was supported by the affidavits of the legal heirs of the testator i.e. arrayed as respondents 2 to 5. They were the probate applicant's children i.e. brothers and sisters of the testator. The said respondents expressed "no objection" to the grant of probate. On 03.03.2006, the learned Single Judge, before whom the probate petition was listed after citation was published (pursuant to the order dated 29.11.2005) recorded as follows:

"Citations have been published and copies of the citations have been filed . There is no opposition from anybody. In so far as other legal heirs are concerned, namely, the respondents 2 to 5, they have already filed their affidavits accepting the Will and given no objection to the grant of probate.

Evidence shall, accordingly be led by means of affidavits which shall be filed within two weeks.

List before the Joint Registrar for exhibiting the documents on 3rd April, 2006 and before the court for arguments on 8th May, 2006."

4. The probate petitioner relied upon the testimonies of two attesting witnesses Ms.Dalbir Kaur, PW1 and Mr.Kamaljeet Singh besides the testimony of Mr.Gurdev Singh PW4 who claimed to have taken down the Will at the instance of the testator was also relied upon. The testimonies of both the witnesses who have been said to have attested the Will were that the testator, who was sight impaired,

dictated his wishes to PW4 Mr.Gurdev Singh who then read over the written document to him and that both of them signed on it in the presence of each other. The attesting witnesses further testified that the Will was prepared at 147, Shivalik Enclave, Landram Road, Kharar, District Ropar where the deceased/testator lived.

5. The learned Single Judge considered the evidence of the attesting witnesses and examined the Will. In the impugned judgment, learned Single Judge noticed a discrepancy in the ink and difference in pen, to doubt the presence of the two attesting witnesses. The second ground on which the learned Single Judge doubted the veracity of the depositions of the two witnesses was with regard to the manner in which certain words were written. Thereafter, the learned Single Judge went on to conclude as follows:

“7. By the Will, the deceased had handed over “Gaddi” of his Sect/ Organization to his sister-in-law Ms. Surrender Pal Kaur on the ground that she was of Dharmik mind. So far as this handing over of “Gaddi” is concerned, nobody would have an objection since this matter relates to his followers. However, he has bequeathed the property bearing number E-254, Greater Kailash, Part-II, New Delhi measuring 250 sq yards in favour of Ms. Surrender Pal Kaur on the ground that this property was donated to him by Smt. Gurudayal Kaur. The photocopy of a true copy of alleged donation deed placed on record is a scrap. It is settled law that transfer of immovable property worth more than Rs.100/- can be done only through a registered document duly registered with Registrar of Properties executed on a stamp paper of appropriate value. A donation deed or a gift deed or any other deed by which an immovable property worth more than

Rs.100 is transferred, donated or gifted is compulsorily registrable and no Court can take cognizance of any unregistered document in respect of transfer of immovable properties. I, therefore, consider that the Will, even if it had been considered as genuine, Will would have given no right to petitioner over the property bearing number E-254, Greater Kailash, Part-II, New Delhi as the property had not been transferred to deceased by virtue of document Ex.PW1/8.”

6. It is urged by Mr.Maheshwari, learned Senior Counsel that the learned Single Judge fell into an error in minutely examining the Will in the absence of any suspicious circumstance, contending that it is only if the court is of the opinion that there are suspicious circumstances surrounding the execution of a Will that the attesting witnesses’ testimonies can be doubted or even discarded. The counsel submitted that all the formalities spelt out in Section 68 of the Indian Evidence Act, 1872 read with Section 63 of the Indian Succession Act, 1925 had been satisfied. It was secondly urged by placing reliance upon the judgment of the Supreme Court in ***Chiranjilal Shrilal Goenka vs. Jasjit Singh and Others* (1993) 2 SCC 507** and ***Ishwardeo Narain Singh vs. Kamta Devi & Others* AIR 1954 SC 280** that a probate court cannot examine and render findings on question of title. It was argued that whether the donation of the property made in 1996 was valid or not was not an issue that could be gone into by the probate court, which at best could only conclude whether Will was genuine or not.

7. It is evident from the materials on record that the heirs of the deceased, other than the probate claimant, had expressed no objection; there is nothing in the impugned judgment which shows the awareness of the learned Single Judge to this aspect borne out by the order dated 03.03.2006 in the testamentary case. The second feature which this court notices is that both the attesting witnesses support each other as to the manner in which the execution of the Will took place as well as the place where the testator affixed his thumb impression on the Will. As noticed earlier, the testator was sight impaired and therefore, dependant on the assistance of someone else. That someone else happened to be PW4 Mr.Gurdev Singh who clearly deposed that the testator had dictated to him and he wrote the Will in the presence of the attesting witnesses and also read out the contents of the Will to the testator. In the absence of any other circumstance, the mere fact that different pen/writing instrument was used by the attesting witnesses, could not have been compelled the learned Single Judge to conclude that the Will was not genuine. We are of the opinion that the learned Single Judge was rather overly influenced by the manner in which the donation was allegedly made of the property to the testator – way back in 1966. Whilst the correctness of such a transfer or alienation may be an issue vis-à-vis a third party (whose claims would also be open to adjudication given that the grant of probate only signifies the court's conclusion that the genuineness and due execution of the Will was proved), the fact that such title perhaps did not inhere in the testator or there was a question mark over it in our opinion could not have led the learned Single

Judge to conclude that the Will itself was invalid. In **Chiranjilal Shrilal Goenka's** case (supra) the Supreme Court has held as follows:

“15. Therefore the only issue in a probate proceeding relates to the genuineness and due execution of the Will and the court itself is under duty to determine it and preserve the original Will in its custody. The Succession Act is a self-contained code in so far as the question of making an application for probate, grant or refusal of probate or an appeal carried against the decision of the probate court. This is clearly manifested in the fascicule of the provision of Act. The probate proceedings shall be conducted by the probate court in the manner prescribed in the Act and in no other ways. The grant of probate with a copy of the Will annexed establishes conclusively as to the appointment of the executor and the valid execution of the will. Thus it does no more than establish the factum of the will and the legal character of the executor. Probate court does not decide any question, of title or of the existence of the property itself.”

8. The court had reiterated this position in law after noticing the previous rulings in **Ishwardeo Narain Singh's** case (supra) and the judgment of the Privy Council in **Sheoparsan Singh vs. Ramnandan Prasad Singh AIR 1916 PC 78**.

9. In view of the above conclusion we are of the opinion that the impugned judgment cannot be sustained and is accordingly set aside. The petitioner is entitled to the probate claimed by her. The appellant shall be present before the Registrar to complete the formalities for grant of probate such as furnishing undertaking, security etc. for proper administration of the probate.

10. List the matter before the Registrar on 23.09.2015.
11. The appeal is allowed in the above terms.

S. RAVINDRA BHAT, J

DEEPA SHARMA, J

SEPTEMBER 10, 2015

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