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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CM(M) 81/2016**
ASHOK KUMAR

..... Petitioner

Through Mr.Ashok Gurnani, Advocate.

versus

THE STATE & ORS

..... Respondents

Through

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

ORDER
% **27.01.2016**

C.M. No.2692/2016 (exemption)

Exemption is allowed subject to just exceptions. Application disposed of.

CM(M) 81/2016 & C.M. No.2691/2016

There are two orders which have been impugned before this Court. The first order is dated 06.11.2015 and the subsequent order is dated 15.12.2015.

Before the Trial Court a probate petition is pending. The petition had been dismissed on merits by order of the Additional District Judge on 02.12.2011. This was challenged in the High Court. The High Court vide order dated 15.4.2014 had set aside the impugned order passed by the Trial Judge granting permission to the petitioner (person seeking probate) to lead fresh evidence in support of the registered Will dated 31.7.1991 executed by the deceased

Shandi Devi. The Court had while passing the order had made a passing reference to Section 165 of the Evidence Act and Order XLI Rule 27 of the Code of Civil Procedure. The Court had noted that technical defects should not come in the way of advancement of justice and parties should not lose their rights merely because of technicalities. The impugned order passed by the Trial Judge had also been reproduced in para 2 by the Bench of this Court in its order dated 15.4.2014.

The petitioner before the Trial Judge pursuant to this order had filed affidavits of three persons namely Jagdish Prashad, R.D.Kashyap and Balbir Singh. They were marked as PW-1, PW-2 and PW-3 respectively. They were taken on record and the matter is now listed for the cross-examination of the said PWs.

Learned counsel for the petitioner is aggrieved by the affidavit filed by PW-2 R.D.Kashyap. He has no grievance qua the affidavit of PW-1 and PW-3. His submission is that R.D.Kashyap has improved upon his affidavit as in the earlier order an observation had been made by the Trial Judge (while dismissing the probate petition) that R.D.Kashyap in his affidavit had not uttered a single word on the presence of the second attesting witness. This has been improved in the second affidavit. Learned counsel for the petitioner submits that this affidavit which has been filed by R.D.Kashyap (PW-2) is not in consonance with the import of the order passed by the High Court on 15.4.2014.

This Court is not in agreement with this submission of the learned counsel for the petitioner. The order dated 15.4.2014 had set

aside the order passed by the Trial Judge on 02.12.2011 giving complete right to the petitioner to file fresh evidence in support of the proof of the registered will of the deceased; affidavit filed by R.D.Kashyap is in consonance with that order. Needless to state that it is open to the petitioner to cross-examine R.D.Kashyap (PW-2) on this aspect which has now been urged that this affidavit is not in consonance with the earlier affidavit which he had filed before the Trial Judge. Needless to reiterate that the other witnesses also have to be cross-examined by the learned counsel for the petitioner.

Petition is accordingly dismissed with cost of Rs.10,000/-.

INDERMEET KAUR, J

JANUARY 27, 2016

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