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

Date of Decision: September 22, 2016

+ **FAO 185/2016 & C.M.No.15420/2016**

ABAN A DITTIA Appellant

Through: Mr. Bhaskar Subramanian,
Advocate

versus

THE STATE (NCT OF DELHI) & ORS.Respondents

Through: Mr. Aspi M. Dittia, respondent
No.2 in person

CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR

JUDGMENT
(ORAL)

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Impugned order of 12th February, 2016 refuses to grant probate in respect of Will of 5th December, 1991 alongwith Codicil of 8th July, 2006 by holding that appellant has failed to prove the Will as no attesting witness to the last Will and testament of 5th December, 1991 has been got examined. It is also noted in the impugned order that the two witnesses to the aforesaid last Will are not traceable and in such a situation, resort to Section 69 of *the Evidence Act* ought to have been made to get the Will proved by scribe in reference to the attestation made by the attesting witnesses on the typed Will.

Learned counsel for appellant submits that respondent No.1 is a

pro forma party.

Respondent No.2 appears in person and submits that he endorses the '*No Objection Certificate*' already tendered by him. Respondent No.3 is unserved.

Respondent No.2 submits that he is elder brother of respondent No.3 and on his instructions, it is submitted that even respondent No.3 has already tendered '*No Objection Certificate*' in respect of the Will in question. It is also submitted by respondent No.2 that a joint statement has been made by him as well as respondent No.3 to prove the '*No Objection Certificate*' before the trial court.

At the outset, learned counsel for appellant submits that after passing of the impugned order, with much efforts, the two attesting witnesses have been traced out and now the additional evidence of attesting witness-Mrs. *Mini Sawhney* is to be got recorded. The factual background of this case is already noted in the impugned order and needs no reiteration as the Will in question is uncontested.

Learned counsel for appellant submits that due to the change of address of attesting witness, she could not be traced out and now after much efforts, her whereabouts are known and indeed her evidence is essential for the just decision of this case and so, the application for additional evidence i.e. C.M. 15420/2016, deserves to be allowed.

Upon hearing and on perusal of impugned order and the material on record, I find that there was no lack of due diligence on the part of appellant and the evidence of the attesting witnesses to the Will is essential for the just decision of this case. Accordingly, the application for additional evidence i.e. C.M. 15420/2016 is allowed. Impugned order

is set aside and the case is remanded back to trial court. Appellant is permitted to lead additional evidence of attesting witness-*Mrs. Mini Sawhney* and for this purpose, trial court shall afford two effective opportunities to appellant to get aforesaid attesting witness examined and thereafter, it shall pronounce the order after affording an opportunity of hearing.

With aforesaid direction, this appeal and the application are disposed of.

SEPTEMBER 22, 2016

s

**(SUNIL GAUR)
JUDGE**

