

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

Date of decision: 10th November, 2016

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FAO 306/2014

ANITA BHARGAVA

..... Appellant

**Through Mr P.K. Srivastava and Mr S.P.
Dao, Advs.**

versus

STATE & ORS

..... Respondent

**Through Mr Pradeep Kumar Kar, Adv. for
R2&3**

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CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

: SUNITA GUPTA, J. (ORAL)

CM 32945/2016 (under Order 41 Rule 27 CPC) & FAO 306/2014

1. The challenge in this appeal is to the impugned judgment dated 28.02.2013 passed by learned Additional District Judge, Saket Courts, New Delhi vide which the petition under Section 276 of the Indian Succession Act filed by the appellant herein for grant of probate of Will dated 25.03.2003 of the Testator was dismissed.
2. The factual matrix of the case leading to filing of the present appeal broadly stated is as follows.
3. The deceased Testator Smt Sushila Rani Khosla widow of late Sh. Bhagwant Rai Khosla died on 04.03.2010. Husband of Smt. Sushila Rani Khosla already pre-deceased her in the year 1950. Smt Sushila Rani Khosla died leaving behind 3 legal heirs i.e. petitioner (appellant) herein and the respondent nos.2 and 3. The respondent no.3 – Ashit Khosla S/o Smt. Sushila Rani Khosla died on 26.12.09 leaving behind his widow and daughter namely Shobha Khosla and Ms. Gitika Godara. Vide Will dated 25.03.2003 the deceased has bequeathed her entire movable and immovable properties in favour of petitioner as well as

respondents as such the petition was filed seeking probate of the Will. Notice to general public was issued through newspaper. No objections were filed on behalf of the respondent no.2 and legal heir of respondent no.3. Besides that, separate statement of Smt. Shobha Khosla W/o Sh. Ashit Khosla was also recorded. Affidavit of Vinit Khosla and Gitika Khosla giving no objection to the grant of probate of Will were also filed. The petitioner/appellant led evidence by way of affidavit and filed documents viz. original Will dated 25.03.2003 of late Smt. Sushila Rani Khosla, her death certificate, death certificate of Ashit Khosla and share certificates. Besides that she also examined Shri Krishan Kumar, LDC from the office of Sub-Registrar who proved the original Will Ex.PW2/1 executed by Smt. Sushila Rani Khosla as per Reg. No.12023, Additional Book No.3, Vol. No.5845 on page 128 – 132. However, the petition was dismissed on the ground that as per the provisions of Indian Succession Act, 1945 and the Indian Evidence Act, in order to prove the Will at least one of the attesting witnesses must be examined in order to prove due execution of the Will. However, in the instant case, the appellant did not examine any of the attesting witnesses. That being so, the petitioner was not entitled for grant of probate in respect of the Will dated 25.03.2003.

4. Thereafter, an application under Section 114 of the Civil Procedure Code seeking review of the judgment was filed on the ground that immediately after the pronouncement of the judgment, the petitioner / appellant could find the attesting witnesses and also enclosed the statement of the attesting witnesses, therefore, an opportunity was sought to examine the attesting witnesses. However, this application did not find favour with the learned Additional District Judge, who vide order dated 07.07.2014 dismissed the application on the ground that no ground for review of the order was made out.

5. Thereafter, the present appeal was filed. During pendency of appeal, an application under Order 41 Rule 27 CPC has been filed seeking an opportunity to lead additional evidence by examining the attesting witnesses to prove execution of the Will. It is stated that there was no fault or negligence on the

part of the appellant since the attesting witnesses despite efforts were not traceable and now they have been traced, their affidavits have also been filed as such in case opportunity is not granted to lead additional evidence that will cause grave and irreparable damage to the appellant.

6. Learned counsel for the respondents submits that he has no objection to the allowing of the application inasmuch as when the probate petition was filed these respondents had given their 'no objection' to the grant of probate of the Will executed by late Smt. Sushila Rani Khosla.

7. It goes without saying that execution of a Will is required to be proved in terms of Section 68 of the Evidence Act read with Section 63 of the Indian Succession Act. Section 68 of the Evidence Act reads as under:

"68. Proof of execution of document required by law to be attested - If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specially denied."

It is evident that in cases where the document sought to be proved is required by law to be attested, the same cannot let be in evidence unless at least one of the attesting witnesses has been called for the purpose of proving the attestation, if any such attesting witness is alive and capable of giving evidence and is subject to the process of the Court. Section 63 of the Indian Succession Act deals with execution of unprivileged Wills and, inter alia, provides that

every Testator except those mentioned in the said provision shall execute his Will according to the rules stipulated therein. It reads:

"63. Execution of unprivileged wills.- Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules:-

(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

From a conjoint reading of the two provisions extracted above it is evident that a Will is required to be attested by two or more witnesses each of whom has seen the Testator signing or affixing his mark on the Will or has seen some other person signing the Will in the presence and by the direction of the Testator or has received from the Testator a personal acknowledgment of the signature or mark or his signature or the signature of such other person and

that each of the witnesses has signed the Will in the presence of the Testator. Section 68 of the Evidence Act is against the use of a Will in evidence unless one attesting witness has been examined to prove the execution.

8. In the instant case, although there was no challenge to the execution of the Will propounded by late Smt. Sushila Rani Khosla who had bequeathed all her rights, title and interest in favour of the appellant and the respondent nos. 2 and 3 with respect to all her movable as well as immovable properties including property no.P-94, South Extension Part – II, New Delhi – 110049 as Vineet Khosla son of late Smt. Sushila Rani Khosla and the legal heirs of deceased Ashit Khosla, another son of deceased Smt. Sushila Rani Khosla had given their ‘no objection’ in the affidavits filed by them before the learned Trial Court. Not only that, Shobha Khosla wife of late Shri Ashit Khosla had also made a statement to this effect before the Trial Court. However, since the basic ingredients of Section 68 of the Evidence Act and Section 63 of the Indian Succession Act were not complied with by examining any attesting witness to the Will, therefore, the petition was dismissed.

9. Now by virtue of this application under Order 41 Rule 27 CPC, the appellant is seeking an opportunity to lead additional evidence by examining the attesting witnesses. Rule 27 of Order 41 CPC reads as under:

“27. Production of additional evidence in Appellate Court.- (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the

exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Whenever additional evidence is allowed to be produced, by an Appellate Court, the court shall record the reason for its admission."

10. A bare reading of this Rule goes to show that under normal circumstances at the appellate stage, the parties to the appeal are not entitled to adduce additional evidence, however sub-clause (aa) has been inserted by the Act 104 of 1976 which came into effect with effect from 01.02.1977 which permits parties to lead additional evidence if party seeking to produce additional evidence establishes that notwithstanding the exercise of due diligence, such evidence could not be produced by him at the time when the decree /judgment was passed.

11. It is the case of the appellant that despite her best efforts, the attesting witnesses were not tracable during the pendency of the probate petition. However, after the judgment was pronounced, the attesting witnesses were traced and immediately thereafter an application for review of the judgment was filed seeking an opportunity to lead additional evidence which, however, was not allowed. Since there is no contest to this plea raised by the appellant and in fact there is no objection on behalf of the respondents to lead additional evidence, in the interest of justice, the application under Order 41 Rule 27 CPC is allowed granting opportunity to the appellant to lead additional evidence.

12. Resultantly, the impugned judgment dated 28.02.2013 is set aside. Learned Additional District Judge is directed to afford opportunity to the appellant to lead additional evidence and decide the matter afresh. In order to avoid any further delay, the parties are directed to appear before the concerned Additional District Judge for leading additional evidence on 28.11.2016 where the appellant will be granted two opportunities to lead her evidence.

13. The appeal as well as the application is disposed of in the aforesaid terms.

NOVEMBER 10, 2016/rd

**(SUNITA GUPTA)
JUDGE**

