

\$~A-44

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

+ **CM(M) 1179/2016**

SANJAY KUMAR & ANR. Petitioners
Through Ms.Prabha Mishra and Mr.Imran
Khan, Advocates

Versus

SULLAD SINGH Respondent
Through None.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

ORDER

% **17.11.2016**

CM No. 42713-14/2016 (exemption)

Allowed subject to all just exceptions.

CM(M) 1179/2016 and CM No. 42712/2016 (stay)

1. By the present petition filed under Article 227 of the Constitution of India, the petitioner seeks to impugn the order dated 28.07.2011.
2. The limited facts that can be gathered from the record filed by the petitioner is that Smt. Krishan Wati, the mother of petitioner No.1 was the stated owner of the property No.V-15, Gali No. 1, Arvind Nagar, Brahampuri, Delhi-110053. The mother- Smt. Krishan Wati filed a suit against the petitioners for possession. On 28.04.2010, the trial court passed a decree in favour of the mother and against the petitioners to handover vacant peaceful possession of the suit property within one month and also damages @ Rs.1,500 per month in favour of Smt. Krishan Wati from the date of the filing of the suit till actual possession. The petitioners filed an appeal against the said judgment and decree. However, on 28.07.2011, the appellate court noted that the appeal is pending since 2010 and the appellant has not paid

the court fees and cost of Rs.1,000/-. The appeal was hence rejected under Order 7 Rule 11 CPC.

3. Smt. Krishan Wati thereafter moved an execution petition seeking execution of the decree. While the execution petition was pending, warrants of possession as well as attachment were issued. The decree holder expired on 08.07.2011. Hence, the respondent moved the present application under Section 146 CPC stating that Smt. Krishan Wati expired on 08.07.2011 leaving behind her LRs, namely, her husband-respondent, petitioner No.1, Chandra Prakash, Pradeep and Sandeep Kumar. Other than petitioner No.1 nobody else had any objection to the Will. As per the Will dated 07.01.2011 executed by Smt. Krishan Wati, the property was bequeathed to the respondent.

4. The executing court on 18.05.213 framed the following issue:-

“Whether the applicant is entitled to proceed with the present execution petition and Will dated 07.01.2011 bequeathed the right in the suit property upon him?”

5. The respondent led the evidence of DHW2-Tej Pal Singh, namely, the witness of the Will, DHW3 Pandit Shiv Swaroop, the typist who got the Will in question typed at the instance of the deceased Smt. Krishan Wati and DHW4-Pradeep Singh who is the other witness to the Will. The petitioner led his own evidence. Based on the evidence, the executing court concluded that the Will stands proved by the testimony of DHW2, the witness to the Will who is also the brother of the deceased. The executing court concluded that there was nothing material in the cross-examination to doubt or put a question mark on the authenticity of the Will.

6. Learned counsel appearing for the petitioner has vehemently argued

that on the death of the mother Smt. Krishan Wati, the petitioner has also a right in the property. In view thereof, she further submits that the evidence of the witnesses relied upon by the executing court cannot be relied upon and has discrepancies. She further submits that it is not for the executing court to go into the authenticity of the Will. She relies upon the judgment of this court in the case of *Chetan Dayal vs. Mrs. Aruna Malhotra & Ors.* in CS(OS) 2318/2006 dated 14.08.2012.

7. As far as the issue of going into the authenticity of the Will is concerned, it was a necessary corollary for disposing of the execution petition. The adjudication was appropriate in terms of Section 47 of the CPC as it relates to the execution, discharge or satisfaction of the decree.

8. Regarding the judgment of this court in *Dayal vs. Mrs. Aruna Malhotra & Ors. (supra)*, in that case this court held that a probate court has the exclusive jurisdiction to grant probate of the Will. The proceedings undertaken by the executing court do not relate to the probate of the Will. In fact, grant of a probate is not necessary in courts in Delhi. The said contention of the petitioner has no merits.

9. Regarding the conclusion of the executing court on the authenticity of the Will of Smt. Krishan Wati dated 07.01.2011, learned counsel for the petitioners has not been able to show any discrepancy which would warrant interference of this court.

10. There is no merit in the present petition and the same is dismissed.

11. All pending applications also stand dismissed.

JAYANT NATH, J

NOVEMBER 17, 2016/rb