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

Date of Decision: 8th September, 2016

+ **FAO 408/2015**

SANJEEV DESAI

..... Appellant

Through: **Mr. Mukesh Gupta, Advocate**

versus

STATE NCT OF DELHI & ORS

.....Respondents

Through: **Mr. Arun Kumar Panwar, Ms.
Aayushi Gupta, Advocates for Mr.
Raman Duggal, Standing Counsel
for Respondent No.1.
Ms.Vrishti Gupta, Advocate for
Respondent Nos.2 and 3.**

CORAM:

HON'BLE MR. JUSTICE SUNIL GAUR

JUDGMENT

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1. Impugned order of 06th July 2015 dismisses appellant's probate petition in respect of the Will dated 14th March, 2011 by holding that the Will produced by the appellant/petitioner does not inspire confidence.

2. The factual backdrop, as noticed in the impugned order, is that appellant is Executor of the Will of 14th March, 2011 executed by late Sh. Lalit Mohan Gupta who had passed away on 05th January, 2013. The parents of the Testator had pre-deceased him and the Testator was

survived by his wife Mrs. Constance Gupta and daughter, namely Ms.Charu. The appellant/petitioner was appointed as Executor of the Will in question as he was a neighbour and the close friend of the Testator. The Will in question pertains to various amounts lying in the banks in fixed deposits, shares etc. and immovable property i.e. *First floor of the property No.174-Golf Links, New Delhi* which is under lease to M/s. Desaico Consulting Pvt. Ltd. for a period of 20 years.

3. The contents of operative portion of the Will in question (paragraph Nos.7 to 9 thereof) have been reproduced by Trial Court in the impugned order. A bare perusal of the Will in question reveals that the aforesaid immovable property shall devolve upon wife and children of the appellant. So far as the two only heirs of the Testator are concerned, as per the Will in question, they get assets of the Testator which are in United States of America.

4. The death certificate of the Testator and the original Will in question running into 4 pages was tendered in evidence. The valuation report as well as publication in the newspaper was also tendered in evidence. The daughter of the Testator had filed her evidence by way of an affidavit before the Trial Court in which she had given no objection to the grant of probate of the Will. The Testator's daughter had also made a verification and she filed Affidavit of 11th November, 2013 to this effect. The original Will produced before the Court was laminated. The LRs of the deceased resides in USA and they had sent self-attested signatures of theirs which were tabulated by the Trial Court in paragraph 12.2 of the impugned order. It is noted in the impugned order that last page of the

Will filed in the Court contained 2 sets of signatures of the LR's of the Testator.

5. The Trial Court found that signatures of Testator's daughter on the left side of the Will did not match with her signatures on the right side of the Will and the copy of the said Will is on appeal record as Annexure A-5. It is noted in the impugned order that the explanation of petitioner to the variation of signatures on the Will in question was that the signatures on the right side on the Will were affixed on 27th January 2013 before the Notary to get the Will attested, which has been done after the death of the Testator. Trial Court concluded that this explanation raised further doubts which were expressed in the impugned order in the following manner:-

“(a) How for the purposes of self attestation done in USA when the original was with the petitioner/Executor.

(b) What circumstances necessitated self attestation of Will (unregistered) by a Notary after the death of Testator.

(c) The entire evidence of the petitioner has claimed that the Will of the Testator has been duly notarized.”

6. Trial Court has relied upon the Supreme Court's decision in *Niranjan Umesh Chandra Joshi Vs. Mridula Jyoti Rao: 2007 (1) AD SC 477* and *Surinder Pal Vs. Saraswati Arora (1974) 2 SCC 600* to observe that where the propounder takes prominent part in the execution of the Will which confers on him a substantial benefit, that is itself one of the suspicious circumstances, which must be removed by clear evidence. The Trial Court concluded that by disowning fourth page of the notarized

Will, petitioner has defeated his entire case which was built on the alleged notarized Will and that by the Will in question, substantial benefit stood conferred upon the wife of the Executor and this by itself created suspicious circumstance. While relying upon various decisions of the Supreme Court, Trial Court has dismissed the probate petition by holding that the Will in question is shrouded in suspicion.

7. The challenge to the impugned order by the learned counsel for appellant is on the ground that Ms. Charu, daughter of Testator had travelled from all the way to USA and appeared before the Trial Court to give no objection to the probate of the Will in question and there was no question of doubt qua the so-called variation of signatures on the attested notarized Will which was self-attested/notarized on 27th January, 2013 and thus, the Trial Court has erred in not relying upon the original Will, which is there on the record. It is submitted that the primary evidence has to be seen and that is the original Will itself and so, on the basis of secondary evidence i.e. attested/notarized Will, the entire case cannot be discarded without eliciting any clarification from the attesting witnesses particularly when the daughter of the Testator had deposed to support the Will in question.

8. It was vehemently asserted by learned counsel for appellant that there was no question of disowning of the fourth page of the self-attested/notarized Will and trial court has erred in holding so. It was submitted that by way of abundant caution, fourth page of the Will was got signed by the attesting witness in the presence of the Notary to put the Will in question beyond any challenge. It is pointed out that as per Section 68 of

The Indian Evidence Act, 1872 the examination of one attesting witness is required to prove the Will and the evidence of real daughter of Testator as attesting witness is already on record. It is asserted that there was ample justification for the Testator to bequeath his assets in India to the wife of the Executor due to close relations and assets of the Testator in USA had already been bequeathed to the wife and daughter of the Testator. Thus, it is submitted that no suspicious circumstance exists to discard a validly executed Will and the reliance placed by the Trial Court upon various decisions is wholly misplaced and that the impugned order of 6th July, 2015 deserves to be set aside and the Will in question ought to be probated.

9. After having heard learned counsel for appellant and on perusal of impugned order, evidence on record and decisions cited, I find that the queries raised by the trial court in the impugned order ought to have been put to the attesting witness- *Charu*. A bare perusal of the evidence of the attesting witness- *Charu* reveals that no court question was put to this witness. Judicial notice can be taken of the fact that due to time gap, little variation in signatures can take place. Otherwise also, there is no marked variation of signatures of the attesting witness on the original Will and notarized Will. So, on this ground, refusal to probate the Will in question is wholly unjustified and trial court has erred in doing so.

10. The answer to the query, as given by appellant's counsel and noted in the impugned order, is that self attestation was done by attesting witness on the photocopy of the last page of the Will in USA and the same was got notarized by the witness and the original Will as well as its

last page, which was self attested and notarized, was sent to appellant. The aforesaid answer cannot be termed to be implausible one and trial court was unjustified in rejecting the probate on this ground as well. Judicial notice can be taken of the fact that at times, a party may get the Will notarized while being ignorant of the fact that a Will need not be attested or notarized to seek probate. Infact, the probate petition was based on original Will, which was laminated and merely because extra copy of the last page of the Will was got separately notarized, would not be of any consequence in the instant case because the original Will of 14th March, 2011 was produced before the Court.

11. In the light of the aforesaid, the suspicion cast by the trial court on the Will in question stands abundantly dispelled and so, reliance placed by the trial court upon various decisions, as referred to in the impugned order, would not be of any avail, as this Court finds from the evidence of the Executor as well as attesting witness that there was no question of disowning the fourth page of the Will in question. Thus, there was no valid basis to discard the Will in question.

12. Consequently, impugned order is set aside and the Will of 14th March, 2011, which was got notarized on 27th January, 2013, stands probated subject to payment of requisite Court fees and upon furnishing of requisite indemnity bond to the satisfaction of the trial court.

13. The appeal is disposed of in aforesaid terms.

(SUNIL GAUR)
JUDGE

SEPTEMBER 08, 2016

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