

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

% **Date of decision: 10th January, 2017.**

+ **TEST.CAS.9/2001**

JAI PRAKASH AGGARWAL

..... Petitioner

Through: Mr. Ashwin Vaish and Mr. Vinod
Kumar Pandey, Advs.

Versus

STATE & ORS

..... Respondents

Through: Mr. T.K. Ganju, Sr. Adv. with Mr.
Bharat Gupta, Mr. Varun Tyagi, Mr.
Manik Ahluwalia, Mr. Abhishek
Bhardwaj and Ms. Swati Singh, Advs.
for R-4.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This petition under Section 276 of Indian Succession Act, 1925 seeks probate of the documents dated 23rd October, 1983 and 16th April, 1986 stated to be validly executed last Will and Codicil respectively of Sh. Raja Ram son of late Sh. Ram Singh resident of Gurgaon, Haryana.

2. Territorial jurisdiction of this Court is invoked as the immovable property of the deceased is situated within the jurisdiction of this Court.

3. The petition is filed by Sh. Jai Parkash Aggarwal @ Jay Prakash Aggarwal son of the deceased and besides impleading the State, Sh. Amar Prakash, another son of the deceased was impleaded as respondent No.2 and

Mrs. Darshana Singla and Mrs. Anand Bansal, daughters of the deceased were impleaded as respondents No.3&4 respectively and Sh. Satish Singla being son of the respondent No.3 Mrs. Darshana Singla was impleaded as the respondent No.5.

4. Objections are found to have been filed on behalf of the respondents No.3&5 Mrs. Darshana Singla and Sh. Satish Singla and to which a rejoinder was filed by the petitioner.

5. A written statement is also found to have been filed by the respondent No.4 Mrs. Anand Bansal. The counsel for the petitioner states that the respondent No.4 Mrs. Anand Bansal in the written statement supported the petitioner and thus need to file rejoinder thereto was not felt.

6. No objections are found to have been filed on behalf of the respondent No.2 Sh. Amar Prakash and who is informed to have been proceeded against *ex-parte* vide order dated 23rd September, 2005.

7. Today, besides the counsel for the petitioner, only the senior counsel for the respondent No.4 Mrs. Anand Bansal appears and both state that respondents No.3&5 Mrs. Darshana Singla and Sh. Satish Singla have since withdrawn the objections by submitting a letter to this effect to the Commissioner appointed for recording evidence.

8. Prior thereto, vide order dated 1st November, 2012, the following issues were framed in the petition:

“(i) Whether the deceased late Sh. Raja Ram Singh died leaving behind the Will dated 23.10.1983 and the Codicil dated 16.4.1986?

(ii) Relief.”

9. The counsel for the petitioner commenced his final arguments.

10. The senior counsel for the respondent No.4 has rightly contended that the only question to be considered in this proceeding is, whether the documents dated 23rd October, 1983 and 16th April, 1986 claimed to be the validly executed last Will and Codicil respectively of the deceased have been proved or not and according to him, have not been proved, inasmuch as the originals thereof even have not come on record.

11. I have enquired, whether the foundation for leading secondary evidence has been laid in evidence.

12. While the senior counsel for the respondent No.4 denies, the counsel for the petitioner draws attention to the order dated 22nd September, 2006 where the application being IA No.13150/2006 of the petitioner to prove the document dated 23rd October, 1983 by secondary evidence was allowed. Though the petitioner vide the said application had also sought permission to

prove the document dated 16th April, 1986 also by secondary evidence but the order dated 22nd September, 2006 records that the prayer in that regard had been withdrawn. The counsel for the petitioner states that vide order dated 4th August, 2015, a subsequent application being IA No.10942/2015 under Section 65 of the Evidence Act, 1872 was allowed. The order dated 4th August, 2015, while allowing IA No.10942/2015 for leading secondary evidence to prove the document dated 16th April, 1986 permits the petitioner to summon the original document from the office of the Sub-Registrar, Asaf Ali Road, Delhi with which it purports to be registered.

13. The senior counsel for the respondent No.4 states that the petitioner subsequently, on 19th March, 2016, gave up the said witness.

14. Though the counsel for the petitioner does not controvert but states that in order 28th February, 2008, it is already recorded that the original of the document dated 16th April, 1986 is not traceable before the Sub-Registrar and thus it was not deemed necessary to, in pursuance to the order dated 4th August, 2015, summon the record of the Sub-Registrar.

15. I have enquired from the counsel for the petitioner, whether the petitioner has otherwise laid foundation for leading secondary evidence with respect to the document dated 16th April, 1986.

16. The counsel for the petitioner states that the petitioner, besides examining himself has examined Sh. Rajesh Mahajan, an attesting witness to the document dated 16th April, 1986. It is stated that otherwise the petitioner has also examined Sh. Radhey Shyam Gupta, an attesting witness to the document dated 23rd October, 1983.

17. Neither of the two witnesses examined as attesting witnesses have in their testimony laid any foundation for leading secondary evidence.

18. The evidence of the petitioner is perused to gauge, whether the petitioner in his own testimony has laid foundation for proving the documents dated 23rd October, 1983 and 16th April, 1986 by leading secondary evidence.

19. Section 61 of the Evidence Act, 1872 provides for the contents of the documents to be proved either by primary evidence or by secondary evidence. Section 64 provides that document must be proved by primary evidence except in cases thereafter mentioned. The following Section 65 provides that secondary evidence may be given of the existence, condition or contents of the document in situations mentioned thereunder.

20. Primary evidence, as per Section 62 means the document itself produced for the inspection of the Court. Secondary evidence, as per Section

63 means and includes certified copies, or copies made from original by mechanical process which insures accuracy of the copies and copies compared with such copies, or copies made from or compared with the original, or counterparts of documents as against the parties who did not execute them, or oral account of the contents of a document given by some person who has himself seen it.

21. In a petition seeking probate, judgment wherein is judgment *in rem*, the petitioner is required to prove the existence and execution as required by law of the document claimed to be Will of the deceased. Such proof, as per aforesaid provisions has to be by producing the document itself. Admittedly neither of the two documents claimed to be the Will and Codicil of the deceased has come before this Court. Though the petitioner under the law aforesaid is also entitled to prove the document by leading secondary evidence of the kind mentioned in Section 63 i.e. either by proving a certified copy of document, or a copy made from original by mechanical process which insures accuracy of the copy and copies compared with such copies, or copies made from or compared with the original, or by oral account of the contents of document by some person who has himself seen it, but it is not as if there is absolute freedom to prove a document either by

primary or secondary evidence or to adopt any of the modes provided in Section 63 of secondary evidence. Section 65 provides the situations on proving existence of which only secondary evidence can be led and the nature of the secondary evidence which can be led. For instance, if the petitioner proves that the original is shown or appears to be in the possession or power of the person against whom it is sought to be proved or of any person not subject to the process of the Court or of any person who is bound to produce but does not produce even after notice, the petitioner is permitted to give any form of secondary evidence. However, if the petitioner proves that the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved, secondary evidence in form of written admission only is admissible. Similarly, when the petitioner proves that the original has been destroyed or lost or for any other reason not arising from his own default or neglect is unable to produce it, again any form of secondary evidence provided in Section 63 is admissible. On the contrary, when original is a public document, secondary evidence only in the form of a certified copy and in no other form is admissible.

22. Thus, the person wanting to prove the existence and execution of a

document by secondary evidence, before doing so, is first required to prove the existence of one of the several situations in which Section 65 permits proof of a document by secondary evidence and thereafter prove the document by secondary evidence of the form and the kind permitted in that situation. Without fulfilling this twin task, no document can be said to have been proved by secondary evidence. Such task can be performed only while leading evidence and the Court, only at the time of appreciating such evidence and which generally is at the time of final arguments, can hold whether a situation in which Section 65 permits secondary evidence has been proved to exist and if so, whether the document has been proved by secondary evidence. No such finding can be returned on an application and without leading evidence. The petitioner thus cannot take any advantage of the orders dated 22nd September, 2006 and 4th August, 2015 supra allowing the applications of the petitioner to prove the documents by secondary evidence. In fact, the applications were misconceived as no permission for proof of a document by secondary evidence which is permitted by Evidence Act itself, is required. It is for this reason that it needs to be examined on appreciation of the evidence led by the petitioner, whether the petitioner has proved before this Court existence of any of the situations mentioned in

Section 65 in which secondary evidence is permitted to be led. Without the petitioner proving the existence of such situation, the question of proving the document by secondary evidence does not arise. This is what is meant by “laying the foundation for leading secondary evidence”.

23. The petitioner in his affidavit by way of examination-in-chief has deposed that the original of the document dated 23rd October, 1983 executed at Kansas, United States of America (USA) was deposited with the Judge, Probate Department, Johnson County, Kansas, USA. However, the petitioner in his cross-examination recorded on 23rd March, 2007, deposed that he never applied to Johnson County for supply of the original Will to him, though claims to have written a letter to Johnson County to supply to him a copy of the original Will but further deposed that the same was not supplied.

24. I have enquired from the counsel for the petitioner, whether the petitioner has proved any document to establish the deposit of the original of the document dated 23rd October, 1983 as claimed and whether he can show any law of that jurisdiction providing for such deposit. I may add that the petitioner does not claim to be involved in execution of the document dated 23rd October, 1983 or deposit thereof and claimed to have learnt of it

subsequently. The evidence of having learnt of execution and deposit of document dated 23rd October, 1983 from others and which others were not examined as witnesses is hearsay evidence and no credence can be given thereto.

25. No evidence has come on record, of deposit of original of the document dated 23rd October, 1983, as claimed.

26. The counsel for the petitioner however invites attention to an endorsement on the photocopy claimed of the document dated 23rd October, 1983, of “FILED NOV. 4 1983 LOVA DUNCAN CHIEF CLERK OF THE DISTRICT COURT BY _____TIME_____”.

27. The said endorsement itself appears to be a photocopy and is incomplete. Though there is another endorsement dated 1st December, 2005 below that and which appears to be original, being the Certificate of Clerk of District Court that “above is a true and correct copy of the original instrument filed on the 4th day of November, 1983” and recorded in the Court of 10th Judicial District, Johnson County, Kansas but neither has the said endorsement been proved nor is it known as to what is ‘above’ the said endorsement as the same is on the covering sheet of the copy of the document dated 23rd October, 1983. Without the counsel for the petitioner

showing the foreign law under which the document dated 23rd October, 1983 was deposited, no credence thereto can be given under Section 38 of the Evidence Act.

28. The petitioner similarly does not claim any involvement in the execution of the document dated 16th April, 1986. The said document purports to be registered; even if the original thereof was not available, the best evidence to prove the same was the record of the Sub-Registrar with which it was registered and which record according to the counsel for the petitioner was not traceable.

29. Ordinarily, record of the Sub-Registrar, of registration of document, cannot go missing and it is not understandable as to why the petitioner did not take the said enquiry to its logical conclusion. Record of registration is contained not only by retaining copy of the document in the office of the Registrar but also in several other registers where the factum of registration of the document is recorded. The petitioner has not bothered, even if the copy of the document dated 16th April, 1986 was not available in the office of the Sub-Registrar, to lead evidence of registration of the said document, which, if the document had been registered, would have been contained in the registers maintained in the office of the Sub-Registrar. There is also no

evidence of what happened to the original of document dated 16th April, 1986.

30. The petitioner has not laid foundation for leading secondary evidence i.e. has neither proved the deposit of the original of the document dated 23rd October 1983 with the district court, Johnson County, Kansas, nor has proved that there is any provision in the law of that country for deposit of the original nor proved that the said law does not allow the original to be produced in courts of this country, if so required. None has even proved that the copy produced before this court and on which commissioner appointed has put Ex. PW1/PA is a copy of the original. With respect to document dated 16th April, 1986, there is absolutely no evidence as to where is the original therefor, the said document purports to be registered, however there is no evidence of loss of the record of registration either. It has thus but to be held that the petitioner has failed to prove the documents dated 23rd October, 1983 and 16th April, 1986 claiming which to be the Will and Codicil respectively of the deceased, probate is sought. The examination of the attesting witness of the two documents to prove the execution thereof within the meaning of Section 68 of the Evidence Act is of no avail once the document itself has not been proved by primary evidence and no evidence of

circumstances permitting leading of secondary evidence has been given.

31. The senior counsel for the respondent No.4 in this regard has referred to *Ashok Dulichand Vs. Madahavlal Dube* (1975) 4 SCC 664, *H. Siddiqui Vs. A. Ramalingam* (2011) 4 SCC 240, *U. Sree Vs. U. Srinivas* (2013) 2 SCC 114, *Prem Chandra Jain Vs. Sri Ram* (2009) ILR 7 Delhi 605 and *Manmohan Vs. Baldev Raj* MANU/DE/4137/2013.

32. Once the documents claimed to be the Will and Codicil have not been proved, the petition but has to be dismissed.

33. The counsel for the petitioner has also argued that the respondent No.4 who is now opposing the petition in fact had in reply supported the petitioner and is bound by the admissions.

34. A probate proceeding is not an inter-partes proceeding and a judgment therein is a judgment in *rem*. It is for this reason, that probate is not granted on admissions or even when none contests the proceeding and is granted only on proof of the Will. In the present case, the petitioner having failed to prove the documents to be the Will and Codicil, notwithstanding the fact that the respondent No.4 who alone is now contesting, may have at one stage supported the petitioner, probate cannot be granted.

35. The senior counsel for the respondent No.4 has in this regard drawn

attention to *A.E.G. Carapiet Vs. A.Y. Derderian* AIR 1961 Cal. 359, *Sushila Bala Saha Vs. Saraswati Mondal* AIR 1991 Cal. 166, *Sanjay Suri Vs. State* AIR 2004 Delhi 9 and *Krishan Lal Dilawari Vs. State* 210 (2014) DLT 440.

36. Though the senior counsel for the respondent No.4 has also relied on *H. Venkatachala Iyengar Vs. B.N. Thimmajamma* AIR 1959 SC 443, *Rani Purnima Devi Vs. Kumar Khagendra Narayan Dev* AIR 1962 SC 567, *Smt. Jaswant Kaur Vs. Smt. Amrit Kaur* (1977) 1 SCC 369, *B. Venkatamuni Vs. C.J. Ayodhya Ram Singh* (2006) 13 SCC 449 and *Shri Vidya Sagar Soni Vs. State* AIR 2006 Delhi 354 to contend that there are various suspicious circumstances but need to go into the said aspect is not felt, as once the documents claimed to be the Will and Codicil have not been proved, the question of going into the suspicious circumstances, if any surrounding the execution thereof, does not arise.

37. Similarly, though it is also the contention of the senior counsel for the respondent No.4 that the petition is barred by time, inasmuch as the same has been filed after three years of knowledge of the petitioner (from execution of a Power of Attorney on 10th October, 1996 in favour of the respondent No.5 Sh. Satish Singla for seeking probate of document dated 28th December, 1995 then set up by the respondent No.5 Sh. Satish Singla to be the validly

executed last Will of the deceased) but neither has any issue been framed on the said aspect nor as aforesaid in the facts, need to go into the said question arises.

38. The petition thus has to fail and is dismissed. I refrain from imposing any costs.

RAJIV SAHAI ENDLAW, J.

JANUARY 10, 2017
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