

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

+ **FAO Nos. 289/2010 & 387/2010**

% **16th November, 2017**

FAO No. 289/2010

JAGDISH PRASAD (SINCE DECEASED) THROUGH LRS.

..... Appellants

Through: Mr. D.K.Rustagi, Mr. Mayank
Rustagi and Mr. Apoorv Rastogi,
Advocates.

versus

GOVERNMENT OF NCT OF DELHI & ORS. Respondents

Through: Mr. Pawan K. Bahl, Adv. for R-2
with R-2 in person.

FAO No. 387/2010

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CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

FAO No.289/2010

1. This First Appeal is filed under Order XLIII Rule 1(d) of
the Code of Civil Procedure, 1908 (CPC) read with Section 299 of the

Indian Succession Act, 1925 impugning the judgment of the trial court dated 9.11.2009 by which the trial court has dismissed the petition filed by the appellants herein for revocation of the probate granted vide judgment dated 25.10.1990 to the respondent no.2 herein and who was the petitioner in the probate petition. Respondent no.2 herein had sought probate of the unregistered Will of his uncle Sh. Umrao Singh dated 23.12.1983. The present appellants were respondent nos. 2 and 3 in the probate petition, and they are real brothers of the respondent no.2/petitioner/Sh. Pyare Lal. The disputes therefore are between three brothers and who are sons of Sh. Jawala Prasad. Sh. Jawala Prasad was the real brother of the deceased testator Sh. Umrao Singh.

2. The facts of the case are that the petitioner Sh. Pyare Lal filed probate petition no. 314/1988 for grant of probate of the Will dated 23.12.1983 of the deceased testator Sh. Umrao Singh. In this probate petition, there were a total of 8 respondents. Respondent nos. 2 and 3 of the probate petition were the brothers of the petitioner, and they are the appellants in this appeal as already stated above.

3. None of the respondents appeared. The probate petition was allowed in favour of the petitioner Sh. Pyare Lal in terms of the judgment dated 25.10.1990 after the respondents in the probate petition were

proceeded *ex-parte* because as per the service report the respondents had refused service or were served by affixation.

4. The subject petition under Section 263 of the Indian Succession Act was filed by the appellants/respondent nos. 2 and 3 pleading that they were never served in the probate petition, and therefore, the judgment dated 25.10.1990 granting probate to the petitioner Sh. Pyare Lal be set aside.

5. The only issue which was examined by the trial court in terms of the impugned judgment dated 9.11.2009, and which is also the issue to be decided by this Court, is whether the appellants/respondent nos. 2 and 3 were served in the probate petition no.314/1988 filed by the petitioner Sh. Pyare Lal. By the impugned judgment trial court has held that the appellants/respondent nos. 2 and 3 were served because they had refused service. Paras 9 and 10 of the impugned judgment which talks of service reports of the process server read as under:-

“9. A perusal of record of case PC 314/88 would reveal that after receipt of the case, apart from citation to general public, notices were ordered to be issued to the relations of deceased for 2.12.1988. Process returned unserved for some dates. Some of reports about service of notices upon the applicants/respondents are reproduced here as under:-

i. **Report about applicant Jagdish Prasad for date 2.12.1988**

Sir,

today i.e. On 1.12.1988, addressee Jagdish Pd. Was searched for service but not found at given address”

Process for 27.4.1989

“today i.e. 26.3.89, after going at given address and on the pointing of petitioner Jagdish Pd was searched, one person met there who admitted that addressee Jagdish Pd was there and same is being sent for receipt of process but after sometime, said person returned and replied that the addressee was not present there”. All this shows that addressee was avoiding his service. The petitioner stated that the person had come outside was same Jagdish Pd.

Report is sent.

Again for same date

Sir,

Today i.e. on 12.4.1989 on the pointing of petitioner Jagdish Pd was searched for service of process. Person found at spot disclosed that he was Jagdish Pd. Petitioner also identified him as Jagdish Pd but after inquiring about notice, said person replied that he was not Jagdish Pd. One neighbor identified him as Jagdish Pd. It shows that the addressee deliberately refused to receive the notice and hence same was affixed. Said person was also identified by petitioner.

For 19.7.1987

Sir,

today i.e. 1.6.89 on the pointing of petitioner, Jagdish Pd was searched for service of process. A person came out and disclosed himself as Jagdish Pd. After reading the notice he refused to receive the same, therefore, a copy of summons was affixed at spot. All this was witnessed by the petitioner.

For 25.10.89

Sir,

today i.e. 25.9.89, I went at spot for munadi. The house was found locked. In view of order of this Court publication (munadi) was done in loud voice by beat of drum and copy of a notice was affixed at the given address. Fee of munadi was received against a receipt.

Report is thus submitted.

ii Report about service of applicant/respondent Radha Kishan.

For date 2.12.1988

Sir,

today i.e. 1.11.1988 after going at spot addressee Radha Kishan was searched but not found. There was no service. Report is submitted.

For 27.4.1989

Sir,

today i.e. 26.3.89 after going at spot and on pointing of petitioner, Radha Kishan was searched for service of notice. One lady was found there who disclosed that he (Radha Kishan), was there but after sometime she returned and replied that he was not at house.

10. It shows that he was avoiding service. This was witnessed by the petitioner.

Sir,

today i.e. 12.4.89 after going at spot and on the pointing of petitioner, Radha Kishan was searched for service of notice. One person came outside and disclosed that addressee was there but after coming to know about process server having come from the court it was stated by that person that addressee was not present there. The petitioner pointed out that said person was addressee Radha Kishan. All it shows that the addressee was not receiving the notice deliberately. One copy of process was affixed at that address which was witnessed by the petitioner.

For 19.7.1989

Sir,

today i.e. 1.6.89 after going at spot and on pointing of petitioner, Radha Kishan was searched. One person was found and introduced himself as Radha Kishan but after knowing about the summons, he refused to receive the same. One copy of process was affixed there, which was witnessed by the petitioner.

For 25.10.89

Sir,

today i.e. 25.9.89 after going to the address given in the process, Radha Kishan was searched for service of notice. The house was found locked. In view of order of the court, publication (munadi) was done in loud voice by beat of drum and one copy of summons was affixed on the doors of the house. Fee of munadi Rs.5/- was given against a receipt. No witness was present there.

Report is thus submitted.”

6.(i) It is clear that when the process server's reports are seen for three dates of 2.12.1988, 27.4.1989 and 19.7.1989, the person who accompanied the process server was no one else but the petitioner in the probate petition i.e the interested party. It is the petitioner who is said to have identified appellants/respondent nos. 2 and 3 for service. The reports of service of the process server state about persons coming out of the house and going in without even mentioning the names of such persons. The report with respect to the date 27.4.1989 prepared on 12.4.1989 showed that a neighbor identified Sh. Jagdish Prasad but

what was the name of the neighbor and what is the address of the neighbor is not stated in the noting of 12.4.1989 for the next date of hearing of 27.4.1989. The reports thereafter which were relied upon show that the appellants/respondent nos. 2 and 3 were served by munadi/drum beating when the house was found locked.

(ii) In my opinion, on the basis of the aforesaid types of reports of the process server it could not have been held by the trial court that the appellants/respondent nos. 2 and 3 were in fact served in the probate petition. Admittedly, for as many as three dates there is no acknowledgment of service in the form of appellants/respondent nos. 2 and 3 signing and receiving summons. The service of the appellants/respondent nos. 2 and 3 is presumed either because of their avoiding service or on account of service by drum beating, and which aspects are not in the presence of independent witnesses but are only in the presence of the petitioner in the probate petition and who was clearly an interested party.

(iii) I may note that learned counsel for the appellants/respondent nos. 2 and 3 has argued that whereas the petitioner Sh. Pyare Lal, and who is the real brother of the objectors Sh. Jagdish Prasad and Sh. Radha Krishan/appellants, has relied upon on unregistered Will dated

23.12.1983 whereby Sh. Umrao Singh allegedly gave his complete estate to the petitioner Sh. Pyare Lal, the appellants are relying upon an earlier registered Will dated 14.10.1983 (just two months earlier) of the deceased testator Sh. Umrao Singh and as per which Will all the three brothers i.e Sh. Pyare Lal/petitioner, Sh. Jagdish Prasad and Sh. Radha Krishan/appellants were equally given 1/3rd share in the estate of the deceased Sh. Umrao Singh.

(iv) I may note that there is a connected appeal being FAO No. 387/2010 and which has been filed by the same appellants of this appeal against the impugned judgment passed by the trial court dismissing the probate petition filed by the present appellants for seeking probate of the registered Will dated 14.10.1983, only on the ground that the present appellants had relied upon an earlier Will dated 14.10.1983, and since the probate petition no.314/1988 which was allowed vide judgment dated 25.10.1990 was for a later Will dated 23.12.1983 relied upon by the petitioner Sh. Pyare Lal in probate petition no. 314/1988 and which had been probated, and which probate is final as the Section 263 petition of the appellants stood dismissed, therefore, the probate petition filed by the appellants

for the Will dated 14.10.1983 of the deceased testator Sh. Umrao Singh had to be dismissed.

7. In order to examine the issue deeply, though the trial court has not done so, I have also examined as to whether registered post notices were issued for 19.7.1989 to the appellants/respondent nos. 2 and 3. However, in this regard it is curious that in the record of the probate petition filed by Sh. Pyare Lal being PC No. 314/1988 for 19.7.1989 there is a postal cover only for service of one respondent i.e respondent no.6/Smt. Lacho Devi and that there are no postal covers for the service of the appellants being Sh. Jagdish Prasad and Sh. Radha Krishan for the date of hearing being 19.7.1989. There is also nothing on record of the trial court in PC No. 314/1988 that registered covers were filed by the petitioner Sh. Pyare Lal or whether as to registered post notices were issued to the appellants Sh. Jagdish Prasad and Sh. Radha Krishan for 19.7.1989. Therefore, for 19.7.1989, and on which date it has been held that appellants being the respondent nos. 2 and 3 are served, there is no filing of or report of service by registered post AD.

8. Therefore, it is seen that appellants have been held to be served on reports of the process server which ought not to have been accepted as they were not supported by independent witnesses with

identification and the said reports only showed accompanying of the process server by an interested person being the petitioner Sh. Pyare Lal, with the fact that there are no postal covers filed for the date of 19.7.1989 for service of the appellants, and hence it has to be held that appellants were not served in the probate petition PC No. 314/1988.

9. In view of the aforesaid discussion, this appeal is allowed. The impugned judgment of the trial court dated 9.11.2009 dismissing the petition under Section 263 of the Indian Succession Act filed by the appellants is set aside. It is held that appellants, who are respondent nos. 2 and 3 in the probate petition were not served in the probate petition, and therefore, the *ex-parte* proceedings against them are set aside. This appeal is accordingly allowed by setting aside the impugned judgment dated 9.11.2009 and the appellants are now permitted to contest the probate petition PC No. 314/1988 in accordance with law.

10. Parties to appear before the District and Sessions Judge, Central, Tis Hazari Courts, Delhi on 13.12.2017, and the District and Sessions Judge will now mark the probate petition being PC No. 314/1988 to a competent court for disposal in accordance with law.

11. Trial court record be sent back so as to be available before the District and Sessions Judge on the date fixed.

FAO No. 387/2010

12. This appeal is filed against the judgment of the trial court dated 16.11.2009 whereby the trial court dismissed the probate petition filed by Sh. Jagdish Prasad and Sh. Radha Krishan seeking probate of the registered Will dated 14.10.1983 of the deceased testator Sh. Umrao Singh.

13. It is seen that the impugned judgment dated 16.11.2009 does not discuss any issue of whether Sh. Jagdish Prasad and Sh. Radha Krishan have proved or not proved the Will dated 14.10.1983, inasmuch as, by the impugned judgment the trial court has dismissed the probate petition filed by Sh. Jagdish Prasad and Sh. Radha Krishan on the ground that no purpose will be served in granting probate to Sh. Jagdish Prasad and Sh. Radha Krishan of the Will dated 14.10.1983 of the deceased testator Sh. Umrao Singh inasmuch as there is finality to the judgment dated 25.10.1990 granting probate in favour of Sh. Pyare Lal with respect to the later Will dated 23.12.1983 of the deceased testator Sh. Umrao Singh. Since I have allowed FAO No. 289/2010 and set aside the

judgment dated 25.10.1990 granting probate to Sh. Pyare Lal with respect to the Will dated 23.12.1983 of the deceased testator Sh. Umrao Singh, accordingly, the impugned judgment dated 16.11.2009 is set aside and this probate petition being PC No. 36/2006 filed by Sh. Jagdish Prasad and Sh. Radha Krishan will now be decided in accordance with law.

14. By this judgment I also direct that both the probate petitions being PC No. 314/1988 filed by the petitioner Sh. Pyare Lal and PC No. 36/2006 filed by Sh. Jagdish Prasad and Sh. Radha Krishan will be tried together, recording separate evidences, and both the probate petitions will be heard and disposed of together in view of the each petition having a bearing on the other.

15. Parties to appear before the District and Sessions Judge, Central, Tis Hazari Courts, Delhi on 13.12.2017 and the District and Sessions Judge will now mark the probate petition no. 36/2006 to a competent court for disposal in accordance with law.

16. Trial court record be sent back so as to be available before the District and Sessions Judge on the date fixed.

NOVEMBER 16, 2017ib/Ne

VALMIKI J. MEHTA, J