

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

Decided on: 26.07.2017

+ **FAO(OS) 47/2017, C.M. APPL.6946/2017**

VIKAS MEHRA

..... Appellant

Through : Sh. Sanjay Dewan with Ms. Palak Rohmetra,
Advocates.

Versus

STATE AND ORS.

..... Respondents

Through : Ms. P. Trehan, Advocate, for Respondent
No.2.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE S.P. GARG

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. The appellant herein filed the above said Test Case for grant of Probate of the Will dated 16.11.1984 registered on 07.12.1984. He is the son of one Jagdish Ram Mehra, son of Shri Karam Chand who died on 27.03.1990. It is claimed that his father had signed the Will. According to the averments in the probate petition, the Will made dispositions in respect of three properties situated at Delhi, Mussoorie (Uttarakhand) and Ferozpur Cantonment (Punjab). It is alleged that the deceased testator had bequeathed all his immovable assets to the appellant and the second petitioner in the probate proceedings. Two of appellants' siblings, i.e. a brother, Prem Kumar Malhotra and a sister, Darshan Bhatia, objected to the grant of probate, in the proceedings, initiated in 1993, by the appellant, for the purpose.

2. It is contended that during the proceeding, five witnesses were examined. Later, the objection filed by Ms. Darshan Bhatia, were compromised by her legal heirs through a Memorandum of Understanding exhibited as C-1 by virtue of which, the legal heirs of Smt. Darshan Bhatia withdrew their objections and the matter thereafter came for hearing before the learned Single Judge on 17.08.2016. It was on 17.08.2016, counsel for one of the legal heirs - Prem Chand Malhotra appeared before the learned single judge and sought liberty to lead evidence, which was granted by the Court, by order dated 17.08.2016.

3. On 04.01.2017, the learned single judge dismissed the probate petition, holding as follows:

“14. The counsel for the petitioner fairly states that none of the five witnesses examined have proved that the attestation of either of the attesting witnesses is in his handwriting, though states that the signatures of the deceased have been proved by summoning the records of the bank in which the deceased had a bank account.

15. On enquiry as to how the document dated 16th November, 1984 stated to be the Will can be said to have been proved when neither the provisions of Section 68 nor of Section 69 of the Evidence Act have been complied with, the counsel for the petitioner refers to Vasant Ram Vig Vs. State 2007 VII ADD 88 and to Subhash Nayyar Vs. Registrar, University of Delhi (2013) 134 DRJ 457 (DB) and to Section 90 of the Indian Evidence Act, 1872.

16. However a perusal of both the judgments supra shows that in both the cases, the attestation of at least one of the attesting witnesses to be in his handwriting was proved and thus neither of the judgments referred to can be relied on to canvass that even without complying with Section 69, the document claimed to be the Will can be said to be proved.

17. *The counsel for Mr. Jaideep Malhotra has in this context has placed reliance on para 18 of Babu Singh Vs. Ram Sahai (2008) 14 SCC 754 and has also referred to Bharpur Singh Vs. Shamsher Singh (2009) 3 SCC 687 to contend that presumption regarding document thirty years old, under Section 90 of the Evidence Act, is not applicable to a Will which must be proved in terms of Section 63(c) of the Succession Act, 1925 and Section 68 or Section 69 or Section 70 of the Evidence Act.*

18. *It thus appears that the petitioner has failed to prove the document of which probate as the validly executed last Will of the deceased has been sought in this petition.”*

4. After the above order was made, the appellant moved an application stating that after a lot of effort he found one Mr. Sushil Kumar Suneja, son of late Mr. Harprakash Suneja, one of the attesting witnesses to the document dated 16.11.1984. It was stated that the said Mr. Sushil Kumar Suneja only had appeared as a witness in the proceeding decided by the Court of Sh. Prithvi Raj, Additional District Judge referred to in the previous order dated 06.01.2017. The appellant sought opportunity to examine the said Sushil Kumar Suneja as a witness in the proceeding, but did not move a formal application in this regard only for the reason of para 9 of the order dated 06.01.2017. An opportunity was sought to examine the said witness and reliance was placed on *Maria Margarida Sequeria Fernandes v. Erasmo Jack De Sequeria* 2012 (3) SCALE 550 where with reference to Section 30 of the *Code of Civil Procedure, 1908* (providing for power to order discovery and the like) it was held that truth alone has to be the foundation of justice. The learned single judge dismissed the application and turned down the request, stating as follows:

“3. There can be no dispute with the proposition of law enunciated in Maria Margarida Sequeria Fernandes supra. However, the law at the same time lays down and provides the procedure to be followed by the Court and the quest for justice would cease to be so if exercised contrary to the law of procedure. It cannot be lost sight of that this proceeding is of 1993 vintage and though should have been dismissed on 4th January, 2017 only, was adjourned by way of indulgence to accommodate the counsel. Thereafter again on 6th January, 2017, the request of the counsel for the petitioner for adjournment was entertained and the order of dismissal of the petition not passed.

4. Justice means justice to all the parties to the litigation and cannot be done by wearing blinkers to see only some of the parties and ignore other parties to the litigation. Important rights accrued to the objector Mr. Jaideep Malhotra on 4th January, 2017 to have the petition dismissed on the petitioner being unable to satisfy the Court that the document of which probate as a Will was sought was indeed the Will of the deceased. Such rights cannot be defeated by repeatedly indulging the petitioner. The adjournment on 4th January, 2017 was granted only to allow the counsel for the petitioner to check further case law and the adjournment on 6th January, 2017 was granted, notwithstanding opposition from the counsel for the objector Mr. Jaideep Malhotra, only to enable the counsel for the petitioner to exercise various choices available to him on that date. Such adjournments cannot be used to recommence the proceedings de novo.

5. I am therefore unable to accede to the aforesaid request.”

5. The appellant urges that the learned single judge erred in not granting at least one opportunity to him, to establish the proper execution of the Will and the legality of the bequest. It was argued that being the son of an

attesting witness, Sushil Kumar Suneja was in the best position to say whether the Will was properly attested.

6. This court is of the opinion that there is no infirmity with the impugned order. After a detailed hearing, preceded by elaborate proceedings, the learned single judge recorded that the Will could not be proved. None of the witnesses examined earlier was able to establish that the Will propounded had been signed in the presence of the two attesting witnesses, by the testator. The probate petition was initiated in 1993; in these circumstances, the course now suggested by the petitioner/appellant, who claims to have traced the son of one attesting witness but at the same time, chosen to remain silent on the day the petition was dismissed, is not worthy of credence. As noted by the learned single judge, justice is not one sided; it is also about following the procedure, which means discharging the onus of proof at the time of the trial. Despite pendency of the proceedings for about 24 years, apparently due diligence was not exercised; the appellant seems to have woken-up after the time for proving the Will had passed. In the circumstances, the impugned order cannot be faulted.

7. For the above reasons, the appeal has to fail; it is dismissed.

S. RAVINDRA BHAT
(JUDGE)

S.P. GARG
(JUDGE)

JULY 26, 2017