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

CM(M) 960/2009

SANJAY KUMAR AND ORS

..... Petitioners

Through: Mr. Alok Kumar, Mr. Neeraj Kumar
Gupta, Mr. Amit Kumar Singh & Mr.
Abhishek Paruthi, Advs.

Versus

STATE AND ORS

..... Respondents

Through: None.

AND

+ CM(M) 682/2010, CM No.9282/2010 (for stay) & CM No.5863/2011
(u/S 151 CPC)

SANJAY KUMAR & ORS

..... Petitioners

Through: Mr. Alok Kumar, Mr. Neeraj Kumar
Gupta, Mr. Amit Kumar Singh & Mr.
Abhishek Paruthi, Advs.

Versus

STATE & ORS

..... Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **29.08.2017**

1. The two petitions both under Article 227 of the Constitution of India are being listed together.
2. Today, only the counsel for the petitioners appears and none appears for the respondents.
3. Considering the fact that the petitions are 8/7 years old and owing to pendency thereof the proceedings before the Trial Court, from which these petitions arise, are lying stayed and considering the nature of the petitions, it is not deemed appropriate to adjourn the matter to await the respondents.

4. The respondents are proceeded against *ex parte*.
5. The counsel for the petitioners has been heard.
6. CM (M) No.960/2009 impugns the order dated 20th August, 2009 of ADJ-06 Central dismissing the application of the petitioners under Order XVIII Rule 17 read with Order VII Rule 14 of the CPC in a petition (being Pr. No.171/2005) filed by the petitioners under Section 276 of the Indian Succession Act, 1925 for probate of the document dated 25th December, 1988 claimed to be the validly executed last Will of Late Smt. Prabhoo Devi.
7. CM (M) No.960/2009 was entertained and notice thereof ordered to be issued and vide *ex parte* order dated 11th September, 2009 which continues to be in force, the proceedings before the Probate Court were stayed.
8. CM(M) No.682/2010 impugns the order dated 5th May, 2010 of the same ADJ dismissing the application of the petitioners for stay of the proceeding (being Pr. No.110/2007) filed by the petitioners for revocation of probate granted to the deceased respondent no.2 Kishan Chand of the Will dated 18th February, 1975 of Sh. Jagdish Parshad Sharma, husband of the aforesaid Smt. Prabhoo Devi. awaiting the outcome of CM(M) No.960/2009 and posting the proceedings for revocation of probate for final arguments on 22nd May, 2010.
9. The counsel for the petitioners on enquiry states that notwithstanding there being no interim order of stay of proceedings subject matter of CM(M) No.682/2010, the proceedings for revocation of probate have not been disposed of as yet and are still pending.

10. The ground on which the petitioners sought stay of proceedings for revocation of probate awaiting the outcome of CM(M) No.960/2009 was, that the petitioners desired that their petition seeking probate of the purported Will of Smt. Prabhoo Devi and their petition seeking revocation of the probate granted of the Will of Sh. Jagdish Parsad Sharma should be heard together.

11. The position which thus emerges is that it is only CM(M) No.960/2009 which is now to be considered inasmuch as whichever way it is decided, it will be up to the probate Court to thereafter consider whether to take up the two proceedings together or separately.

12. The counsel for the petitioners, with respect to the order dated 20th August, 2009 impugned in CM(M) No.960/2009, has argued that the document of which probate is sought therein is signed by three attesting witnesses and of which two died before commencement of the evidence of the petitioners and the third was ill and the son of the third attesting witness was examined as PW5 and who deposed that his father was unwell; however the death certificates of the other two attesting witnesses and the mental record of illness of the third attesting witness remained to be produced and for which purpose the application under Order XVIII Rule 17 read with Order VII Rule 14 of the CPC was filed.

13. The learned Additional District Judge (ADJ) has dismissed the aforesaid application reasoning that the petitioners having not produced the said documents at the appropriate time and there being no explanation therefor and the case being very old, no ground for granting an opportunity

to the petitioners for leading additional evidence or for filing fresh documents was made out.

14. Now that the proceedings have remained stayed before the Probate Court by interim order in CM(M) No.960/2009, the reason of the probate case being very old does not look so relevant. As far as the evidence sought to be produced is concerned, it appears to me that there could be no doubt about the genuineness of the death certificates of the two attesting witnesses or even of the third witness who is also reported to have since died. The certified copies of the death certificates are part of the public record and in fact can always be produced. As far as the medical record of the mental illness of the third attesting witness is concerned, it is stated that the medical records in the possession of the son of the third attesting witness, who was examined as PW5, only is required to be summoned and not from other places.

15. I have enquired from the counsel for the petitioners as to how the son of the third attesting witness will prove the medical record.

16. It is stated that the petitioners are in contact with the son of the third attesting witness and will beforehand examine the said record and summon the doctor / hospital required to prove the said record.

17. I am of the view that the respondents will have ample opportunity to cross-examine with respect to the said medical record and the genuineness thereof.

18. Resultantly, the order dated 20th August, 2009 impugned in CM(M) No.960/2009 is set aside and the application of the petitioners under Order XVIII Rule 17 read with Order VII Rule 14 of the CPC is allowed on the following conditions:

- (i) that the petitioners, if have not already filed the death certificates, file the same on or before 15th September, 2017, with advance copy to the counsel for the respondents;
- (ii) that the petitioners shall summon the son of the third attesting witness earlier examined as PW5 if required to be summoned and the doctor / hospital at their own responsibility and on the date to be fixed by the learned ADJ for the said purpose and if the witnesses or any of them do not appear on that date or do not depose on that date, the petitioners shall have no further opportunity;
- (iii) that if for reasons not attributable to the petitioners, the evidence of the said witnesses cannot be recorded on the date so given, the petitioners on the subsequent dates shall produce the said witnesses on their own responsibility and the conditions aforesaid shall apply to subsequent dates as well;
- (iv) the petitioners to pay to the counsel for the respondent before commencement of such fresh evidence, costs of Rs.25,000/- for the delay caused in the proceedings;
- (v) the petitioners thereafter also do not take any dates for addressing final arguments before the Trial Court.

19. CM(M) No.960/2009 is allowed in above terms.
20. CM(M) No.682/2010 is disposed of as infructuous in view of the order in CM(M)No.960/2009 and with liberty to petitioners to apply to the Probate Court for taking the two proceedings aforesaid on the same day.

No costs.

RAJIV SAHAI ENDLAW, J

AUGUST 29, 2017

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