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

+ **CM(M) 749/2018 & CM APPL. 26857/2018**

INDER PAL KAUR

..... Petitioner

Through

Mr. Rajat Wadhwa, Mr. Ravitanay
Singh, Advs.

versus

STATE & ORS

..... Respondent

Through

Mr. Kapil Gupta, Adv. for Mr. Sameer
Vashisht, ASC (Civil) – GNCTD /
respondent No. 1.
Mr. Harit Chhabra, Adv. for
respondent No. 2 to respondent No.4.

CORAM:

HON'BLE MS. JUSTICE ANU MALHOTRA

ORDER

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23.08.2018

Reply on behalf of the respondents no. 2 to 4 is on the record opposing the prayer made in the present petition assailing the impugned order dated 12.02.2018 of the learned Additional District Judge-02, West, Tis Hazari Courts, Delhi whereby the prayer made on behalf of the petitioner seeking recalling of a witness Rajbir Singh as one of the attesting witness to the Will dated 02.08.2009, who was examined as PW2 and whose testimony concluded on 23.08.2016 was declined with the prayer made on behalf of the petitioner also arrayed as the petitioner to the Probate Petition No. 55/15 before the learned Trial Court seeking the examination of the other attesting witness to the Will Mr. Daleep Rawat having also been declined, taking into account observing *inter alia* to the effect that the matter had reached at the stage of final arguments and the application had been

CM(M) 749/2018

page 1 of 3

filed with much delay and as a dilatory tactics and also the seeking of the recalling of the witness Rajbir Singh was a reflection to the effect that there were some lacunae in the case of the petitioner which the petitioner now seeks to fill in.

Submissions have been made on behalf of either side.

On behalf of the petitioner, reliance has been placed on the verdict of the Hon'ble Supreme Court in ***Janki Narayan Bhoir Vs. Narayan Namdeo Kadam (2003) 2 SCC 91*** to contend that though in terms of the Indian Evidence Act, 1872 in terms of the Section 71 thereof in the event an attesting witness denies or does not recollect the execution of the document, its execution may be proved by any other evidence, the applicability of Section 71 of the Indian Evidence Act, 1872 would come into play only after the examination of the two attesting witnesses to the will and in the event of one of the attesting witnesses having been unable to prove the execution of the will. The examination of the other attesting witness to the will in terms of the verdict of the Hon'ble Supreme Court referred to hereinabove would be essential.

On behalf of the respondents no. 2 to 4 as submitted through their reply and as orally contended, the prayer made on behalf of the petitioner is vehemently opposed submitting to the effect that the petitioner was well aware of the existence of the other attesting witness to the will Daleep Rawat since the institution of the petition and that recalling of Rajbir Singh would only give an opportunity to the petitioner to fill lacunae. It has also been submitted that the respondent no. 2 is a senior citizen.

On a consideration of the submissions made on behalf of either side
CM(M) 749/2018 **page 2 of 3**

and on a perusal of the impugned order, apparently the recalling of the witness examined as PW-2 Rajbir Singh examined on 23.08.2016 cannot be allowed as the said witness has already been examined and there is no scope of recalling him to fill in lacunae, if any, as rightly observed by the learned Trial Court vide the impugned order dated 12.02.2018.

However, it is considered appropriate in view of the verdict of the Hon'ble Supreme Court relied upon on behalf of the petitioner that the petitioner is granted only one single opportunity to examine the witness Mr. Daleep Rawat on the date fixed before the learned Trial Court i.e. 24.08.2018 subject to payment of costs of deposit of Rs.30,000/- to the respondents no. 2 to 4 on 24.08.2018 itself. In the event of the petitioner not producing the said witness and not making the payment of the costs as imposed hereinabove, the learned Trial Court shall proceed to hear the final arguments.

The petition is disposed of accordingly.

Copy of this order be sent to the learned Trial Court.

Copy of the order be given *Dasti* under the signatures of the Court Master.

ANU MALHOTRA, J

AUGUST 23, 2018/MK