

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

Reserved on: 1st July, 2019

Pronounced on: 12th September, 2019

+ **TEST.CAS. 40/1999, I.A. 25066/2015, I.A. 25616/2015 & I.A. 6433/2019**

MASTER CHANKAYA

..... Petitioner

Through: Mr. Kuljeet Rawal, Advocate.

versus

STATE AND OTHERS

..... Respondent

Through: Mr. Ashish Virmani, Mr.
Gollamudi Sri Harsha Datta and
Mr. Saksham Grover, Advocates.
for R-3

JUDGMENT

SANJEEV NARULA, J

1. The present petition under section 226 of the Indian Succession Act, 1925 seeks grant of probate in respect of the document dated 10th January 1995, purported to be the validly executed last 'Will' of deceased Shri Dharam Chand Sharma (hereinafter 'the Testator'), grandfather of the Petitioner. The Petitioner being a minor on the date of filing of the petition was represented through his father [Sh. Kapil Sharma]. It was averred in the Petition that Sh. Kapil Sharma, being the father of the beneficiary, shall act upon the probate, if so granted by the Court in favour of the petitioner.

2. Briefly stated, the case of the Petitioner is that Shri Dharam Chand Sharma died on 23rd January 1996, he was Hindu by religion and during his lifetime and at the time of his death he was living at House No R-752, New Rajinder Nagar, New Delhi. The Testator out of his free will, without any coercion and pressure from any corner, having disposing and sound mind, executed and signed document dated 10th January 1995, bequeathing all his movable and immovable assets/ properties in favour of the Petitioner.

3. Petitioner listed out the heirs of the deceased in Annexure E which reads as under:-

1. Mr. Lalit Kumar Sharma S/o Late Dharam Chand Sharma R/o R 752, New RajinderNagar, New Delhi - son of the Testator.

2. Mr. Kapil Sharma S/o Late Dharam Chand Sharma, R/o R-752, New Rajinder Nagar, New Delhi —son of the Testator.

3. Mrs. Kokila Sharma W/o Davender Sharma R/o Ananda Nillayam 4-A Main Road, Chellekere, Bangalore- 43. - daughter of the Testator.

4. On 23rd September 1999, the Court issued notice to Chief Revenue Controlling Authority/Deputy Commissioner – Central Delhi calling upon him to file a valuation report of the property mentioned in the document dated 10th January 1995. Citation was ordered to be affected on 16th November 1999. The valuation report dated 19th January 2001 has been received from the Chief Revenue Controlling Authority and is on record.

5. Respondent Nos. 2 [Lalit Kumar Sharma] and 3 [Kokila Sharma] are the son and daughter of the Testator respectively. Both of them oppose the

grant of probate. In the objections filed by them, the purported Will is disputed and it has been specifically averred that the purported document [Ex. PW 1/15] is a forged and fabricated document. Further, it is contended that all legal heirs viz. Kapil Sharma, Lalit Sharma and Kokila Sharma are entitled to 1/3rd share each of the estate of Late Sh. Dharam Chand Sharma. More specifically, the objections read as under:

"15. The petition is barred under section 223 of the Succession Act, which specifically bars the grant of probate in favour of a minor. Moreover, Mr. Kapil Sharma is not a legal guardian of the Petitioner.

16. The alleged Will dated 10.01.1995 is not a genuine document and does not bear the signatures of the deceased; the alleged Will was kept concealed for three and half years by Mr. Kapil Sharma, which raises a strong suspicion as to the authenticity of the purported Will. Further, the document dated 10.01.1995 is surrounded by suspicious circumstances and is an unregistered document and has not been properly attested.

17. The alleged Will dated 10.01.1995 is full of contradictions which shows that the alleged Will does not seem to have been signed by the deceased. A perusal of same would reveal that at first, the deceased stated that he would help the respondent during his life time in para 6 and thereafter, disowned him totally in para 7. In para 8, it is stated that he had earmarked a nominal sum to enable the purchase of a flat. As per the alleged Will, Mr. Kapil Sharma was expressly disowned and disinherited by the deceased but still stands to benefit as per para 9 of the Will.

18. The deceased was not happy and was sick and tired of the ill treatment meted out to him by Sh. Kapil Sharma and his wife, which is evident from the police report addressed to SHO Rajinder Nagar dated 10.10.1995. The deceased was not in

talking terms with his son Kapil Sharma for about 1 ½ years before his death. Further, a perusal of the letters dated 26.10.1995 and 30.11.1995 addressed by the deceased to his relatives shows that the deceased wanted to exclude Mr. Kapil Shanna from his estate and the deceased had discussed this issue with the Respondent No. 3.

19. On the other hand, the deceased had a good relationship and loved the younger son Sh. Lalit Sharma since he lived with the deceased throughout the life time of the deceased.

20. At the time of the death of the deceased, the Petitioner Chanakya was hardly aged about 3 ½ years and he could not have won the mind and love of the deceased to the extent that the deceased fully endowed his entire moveable and immoveable assets to him, with no mention of the other grandchildren.

21. The Respondent No.3 visited the deceased many times during the period 10.01.1995 and 23.01.1996 i.e. the date of the purported Will and the date of the death of the deceased. Yet, the deceased never disclosed the factu111 of any Will to the Respondent No. 3.

22. The deceased was very close to his neighbor Mr. R.S. Dewan who is an advocate and used to consult the said neighbor for small issues. The deceased would not have made a Will without his knowledge.

23. The deceased Sh. DC Sharma did not have much precious jewelry etc. to give to the Respondent No. 3 on her wedding in 1976, as claimed in the said Will dated 10.01.1995. The deceased did not share close ties with the alleged witnesses of the Will."

6. Before proceeding further to decide the Petition, it is essential to take note of certain facts that are relevant in view of the order of this Court dated 20th October 2005, whereby it was directed that the present probate petition be tried together with CS (OS) 1632/1996 (**Lalit Kumar Sharma vs. Kapil**

Sharma & Anr). Relevant facts which led to filing of the suit are discussed herein under.

6.1. Late Sh. Dharam Chand Sharma who is stated to be the testator of the alleged Will dated 10th January 1995, passed away on 23rd January 1996. Immediately thereafter, Respondent No. 2 Sh. Lalit Sharma filed a suit for partition on 22nd May 1996 bearing CS (OS) 1632/1996. The probate petition was filed much later on 22nd August 1999 i.e. nearly three years from the date of filing of the suit. The parties to the said suit are legal heirs of Late Sh. Dharam Chand Sharma i.e. Lalit Kumar Sharma, Sh. Kapil Sharma and Smt. Kokila Sharma. On the service of the summons in the suit on aforesaid Defendants, written statement was filed by Sh. Kapil Sharma (Defendant No. 1, Father of Petitioner) on 22nd April 1997, wherein, it was alleged that there is a Will dated 10th January 1995 signed by Late Sh. Dharam Chand Sharma, bequeathing the subject property in favour of the Petitioner [Master Chanakya]. On the basis of the pleadings in the suit, the following issues were framed by the Hon'ble Court vide order dated 16th July 2003:

"1. Whether the present suit is barred under the provisions of Order IX Rule 9 of the Code of Civil Procedure? ·OPD

2. Whether late Dharam Chand Sharma had executed WILL dated 10th January 1995 as alleged? OPP (Subsequently onus amended to be 'OPD' as per order dated 20.10.2005 passed by this Hon 'ble Court)

3. Whether the suit is properly valued for the purposes of Court Fee? OPD)

4. Whether the Plaintiff is entitled to the relief of Partition as prayed for in the suit? OPP

5. Relief."

6.2. Thereafter, on 24th January 2005, in the present Petition, the following issues were framed:

"1. Whether the deceased Sh. D.C Sharma executed Will dated 10.01.1995? OPP

2. Whether the Will dated 10.01.1995 of deceased is forged and fabricated document? OPP (sic OPD)

3. Whether the present petition is not maintainable in the present form? OPD

4. Whether proper court fee has not been paid as alleged? OPD.

5. Whether the probate petition is barred by section 223 and 226 of the Indian Succession Act? OPD.

6. Relief"

6.3. The Petitioner was required to file the list of witnesses along-with examination in chief of the witnesses within six weeks. However, despite various opportunities given by the Ld. Joint Registrar, neither the list of witnesses nor the affidavits of evidence were filed. This led to the passing of an order dated 9th September 2005, whereby the suit as well as the probate Petition was placed before this Court.

6.4. On 20th October 2005, when the probate as well as the suit was

listed, two separate orders were passed in both the proceedings as follows:

"CS (OS) 1632/1996

1. The matter has been placed before the Court by the Joint Registrar on account of default on the part of the plaintiff to file Affidavits of evidence and list of witnesses. Time was granted for the said purpose on 24th January, 2005 and learned counsel for the plaintiff states that the affidavits and list of witnesses have been finally filed on 3rd October, 2005. The same are permitted to be placed on record subject to payment of costs of Rs.4,000/- to Delhi Advocates Law Library Fund. The costs be paid within two weeks.

2. In so far as the issue of exhibiting the documents pursuant to the affidavits is concerned, learned counsel for defendant No.1 states that he has certain objections as some of the documents have not been filed in the present proceedings. It is stated by learned counsel for the plaintiff that the original documents have been filed in the probate proceedings. It will be open to defendant No.1 to raise objections in accordance with law.

3. The issues were framed on 16.7.2003. The present suit is one for partition. Defendant No.1 in opposition to the claim of intestate succession has propounded the Will of Late Shri Dharam Chand Sharma dated 10th January, 1995. Defendant No.1 has also separately filed probate petition No.40/1999 for grant of probate of the said Will. There are also certain, technical objections taken by defendant No.1 to the suit on which issues have been framed.

4. In view of the aforesaid, it is agreed that in so far as issue No.2 is concerned, relating to the execution of the Will, the onus is on defendant No.1. Issue No.2 should accordingly be read as under:

"2. Whether late Dharam Chand, Sharma had executed WILL dated 10th January, 1996 as

alleged? OPD-1."

5. In my considered view, it is necessary that both the suit and the probate petition be tried together. I am also of the considered view that in view of the fact that the onus in so far as execution of the Will is concerned is naturally on defendant No.1, the defendant No.1 should be directed to lead evidence first in the suit. A perusal of the issues framed on 16.07.2003 clearly shows that onus of issue Nos.1 and 3 are already on the defendant. Only issue No.4 has onus on the plaintiff which is relief of partition. Thus the relief of partition would depend on whether defendant No.1 is able to prove the Will dated 10th January 1995.

6. Since the affidavits have already been filed by the plaintiff, the defendants are directed to file their affidavits by examination-in-chief within 8 weeks since defendant No.1 is stated to be out of country. It is made clear to learned counsel for defendant No.1 that extra long time has been granted in view thereof and no further time shall be granted.

7. The joint Registrar is appointed as the local commissioner to record evidence.

8. List before the joint Registrar for further directions on 9th January, 2006."

The order passed in probate petition reads as under:

"Probate No.40/1999

The matter has been placed before the Court for default on the part of the petitioner as the petitioner has failed to file the affidavits by way of examination-in-chief of witnesses despite time granted by the Court on 28.07.2004.

At request of learned counsel for the petitioner last opportunity granted to file the affidavits by way of examination-in- chief within 8 weeks subject to payment of Rs-3000/- as costs to Delhi

Advocates Law Library Fund. The costs to be paid within two weeks.

On completion of evidence of the petitioner, respondents/objectors are permitted to file their examination-in-chief. The Joint Registrar is appointed as the local Commissioner to record evidence. It is already directed that the evidence shall be recorded in both the suit and present probate petition together though separate evidence will be led in both the matters.

List before the Joint Registrar" for' further directions on 9th January, 2006"

6.5. Since the onus to prove the Will was on the Defendant (Petitioner herein), it was directed that Defendant No.1 would lead evidence 'first' rather than the Plaintiff, as prescribed under Order XVIII, CPC. In the probate petition it was directed that only on the completion of evidence of the Petitioner, the Respondents/Objectors would be required to file their examination in chief. It was further made clear that the Probate and the Suit would be tried together and the evidence in both matters would be recorded together, though separate evidence would be led in both the matters.

Proceedings subsequent to the Order dated 20th October 2005 [Probate Petition]

7. The Petitioner was directed to file a list of witnesses along with the affidavit by way of examination-in-chief of his witnesses.

8. Petitioner being minor led evidence through his father - Shri Kapil Sharma, by way of affidavit dated 23rd December, 2005. Thereafter an application under Order 7 Rule 14 of CPC was filed seeking permission to place certain documents on record. The said application was rejected and the matter travelled up to the Supreme Court. The Court allowed the appeal and set aside the orders passed by the Division Bench and the Single Bench of this Court and directed that the additional documents filed by the Petitioner be taken up for consideration. The matter was then renotified for evidence of the Petitioner. On 15th September 2009, PW-1 [Mr. Kapil Sharma] tendered his affidavit of evidence by way of examination-in-chief [Ex. PW1/A and Ex. PW1/A1].

9. PW-1 proved various documents marked as PW-1/1 to P/W- 1/67. By way of affidavit dated 23rd December, 2005 he deposed that the Will was signed by the attesting witnesses as well as by the deceased grandfather of the Petitioner and confirmed their respective signatures. The relevant paragraphs read as under:

“8. I say that it was his desire that the assets should go in the hands of his grandson and so he made a Will without any coercion or pressure and he signed and executed the Will dated 10th Jan 95 which is now falsely is being disputed by the Lalit Kumar Sharma and Kokila Sharma. **I say that each page was signed by him and attested by two attesting witnesses, namely Smt. Manjit Sharma and Smt. Raksha Nagar. I have seen my father signing and writing and 1 am acquainted with his signatures. I say each page of the Will was signed by him.**

...

I say that both the witnesses signed the Will as attesting witnesses. In the presence of my deceased father and my

deceased father also signed the Will in the presence of both the witnesses. The Will is Exhibit PW1/15. (Already on record).

9. I submit that at the time of filing of the present petition both of them have affirmed on verification to the said petition by way of verification and affidavit to this effect. Now falsely it is being alleged by my brother that Smt. Nagar has sworn affidavit denying that the same saying it is false and forged document. I deny the same.”

Thereafter PW-1 was cross examined and his evidence was finally concluded on 29th November 2012.

10. The Petitioner then sought to examine PW-2 [Smt. Manjeet Sharma], who has purportedly witnessed the document dated 10th January 1995; however, she failed to appear before the Court, despite several opportunities. On 15th April 2014 time was sought to examine the said attesting witness and the following order was passed:-

"Matter is taken up today as 07/04/2014 was declared Court Holiday.

Matter is fixed for remaining petitioner's evidence. PW-2 Smt. Manjeet Sharma is not present today. Learned counsel for plaintiff has informed that since the matter was fixed for 07/04/2014 and the witness Smt. Manjeet Sharma has come to India for the purpose of her cross examination, but 07/04/2014 was declared as Court Holiday and as such she is not able to come to the court today due to her other exigencies.

On an inquiry raised by the court if she can make it convenient to come for her evidence tomorrow or on coming Saturday i.e. 19/04/2014 (since she has come from Germany), it is informed by the learned counsel for plaintiff that the witness has other

exigencies as well and as such she cannot come for her cross examination this week or next week or even in the month of April, 2014.

This matter pertains to the year 1999. Common issues of this matter and the connected matter CS (OS) 1632/1996 were framed on 24/01/2005 and the plaintiff has not been able to conclude his evidence till date. It appears that petitioner is delaying his own matter.

However, no adverse order is being passed today as this matter was fixed for 07/04/2014. However, keeping in view the conduct of this witness and also keeping in view the facts that the matter pertains to the year 1996/1999 last opportunity is granted to PW-2 to remain present in the court for her cross examination on 6th May, 2014 as the last opportunity.

At this stage learned counsel for plaintiff submits that it would not be possible for PW-2 to remain present even on 06/05/2014 because of some other exigencies in India. Considering the conduct of the witness in as much as she is not available for her cross examination in the entire month of April 2014 despite being present in India, this request of ld. counsel for the plaintiff cannot be acceded to. Last opportunity is granted to the plaintiff to produce/ bring / summon PW2 for the purpose of her cross examination on the next date of hearing.”

11. On 6th May 2014, again there was no appearance on behalf of the said witness. Taking note of the above, the evidence of PW-2 was closed. The matter was renotified for further evidence of the Petitioner. The said order was challenged in a Chamber Appeal [OA No. 115/2014] which was allowed and one final opportunity was granted to the Petitioner to produce PW-2 subject to payment of a cost of Rs. 20,000/- to be paid to Respondent

Nos. 2 and 3. It was further directed that the affidavit of evidence by way of examination-in-chief of PW-2 should be filed within three days. On 26th November 2015, yet another opportunity was granted to the Petitioner to examine PW-2 but Petitioner failed to avail the same. Meanwhile the Petitioner also led evidence of witnesses from the Office of Food Supplies, Weights Measures and Consumer Affairs, Govt. of NCT Delhi in order to prove ration card of deceased and from the office of Electoral Registration office from assembly constituency Rajindra Nagar, to prove certain documents. On 19th July 2016, learned counsel for the Petitioner made a statement that he would like to close the evidence of the Petitioner in affirmative. Taking the said statement on record, the Court closed the evidence of the Petitioner. Then matter was directed to be listed for Respondent's evidence.

12. The Objector No. 2 [Sh. Lalit Sharma] and Objector No. 3 [Ms. Kokila Sharma] filed their affidavit by way of evidence. While Objector No. 2 was under cross examination, the matter got listed before the Court and the learned Counsels for the Objectors made a statement that they did not wish to lead evidence and are ready to argue the matter. Taking note of the said statement, the Court *inter alia* passed the following order:-

“...2. Both the Respondents state that they do not want to lead evidence and they are ready to argue the matter, it is stated however that in view of the order dated 20th October 2005, the adjudication of the probate petition is being unnecessarily delayed. On enquiry from the learned counsel for the parties, I am informed that in terms of the aforesaid order, evidence is being recorded separately in both the suit as well as the probate

petition. In the probate petition, the Petitioner has led his evidence. The Respondent No. 2 in the probate petition who is the Plaintiff in the present suit states that he has filed an affidavit by way of evidence for recording the statement of the Plaintiff in the suit. It is also argued that the probate petition is now ripe for arguments. Learned counsel for the probate petitioner, seeks one day's accommodation to examine the issue.”

13. Pursuant thereto, learned counsels for the parties were heard at length.

Issue Nos. 1 & 2 in the Probate Petition

14. As per the case of the Petitioner, the Will has allegedly been attested by Smt. Manjeet Sharma and Smt. Raksha Nagar.

15. Admittedly, none of the above named persons have been examined. Thus, the short question before the Court that arises for consideration is that, if the Petitioner has failed to examine any one of the attesting witnesses, whether the document dated 10th January 1995 can be said to have been proved on the basis of evidence before the Court and if so, what would be its effect.

First witness: Smt. Raksha Nagar

16. Petitioner never summoned nor sought to produce Smt. Raksha Nagar as a witness before this Court. On the contrary, on 8th September 2005, an affidavit of Smt. Raksha Nagar came to be filed by Respondent No. 2 along with its list of documents wherein it has been stated that Late Shri D.C. Sharma did not prepare any Will in his lifetime in her presence and she has not witnessed or signed any such document. Smt. Raksha Nagar is stated to

have passed away, as noted in the order dated 26th November 2014. The affidavit of Smt. Raksha Nagar produced by Respondent No. 2, cannot be the sole determining criteria to decide the authenticity of the document dated 10th January 1995 as the said witness has not deposed before this court.

Second witness: Smt. Manjeet Sharma

17. As far as the second attesting witness Smt. Manjeet Sharma is concerned, despite various opportunities granted to the Petitioner, she was not examined. On 6th May 2014, Mr. Rajesh Rawal, Advocate appearing on behalf of the Petitioner informed the Court that the witness was not available and sought accommodation on the ground that she would be coming from Germany for the purpose of the deposition. The said order *interalia* read as under:-

" At this stage Sh. Rajesh Rawal, Adv for petitioner has appeared and has informed the court that PW2 is not available today.

On the last date of hearing it was specifically informed to the court that the witness (PW2) is coming from Germany for the purpose of her deposition only and the court made every endeavor to accommodate this witness by giving option to the counsels for the petitioner as well as to the witness to appear on any date in the month of April 2014 but it was stated to be not feasible and ultimately today's date was fixed for evidence of PW2. Witness is not present even today. It is informed by Id. counsel for the petitioner that there is some member in the family of this witness who is suffering from a chronic ailment like cancer and she is busy there and hence cannot appear before this court for her evidence. He therefore prays for some more time. Id. Counsel for respondent no. 2 strongly opposes the request for adjournment by stating that witness is intentionally not appearing before this court.

I have perused the proceedings. Cross examination of PW1 was concluded on 29/11/2012 and matter was adjourned for recording remaining petitioner's evidence on 07/05/2013 on which date petitioner did not take any steps for summoning its witness. On the next date i.e. 06/11/2013 PW2 was not present and it was informed that PW2 was abroad and she would not be available for the next five months and a date thereafter was sought which was not opposed by the ld. counsel for respondent no.2 and matter was accordingly adjourned for 07/04/2014 taking in view the convenience of PW2. However, the matter could not be taken up on 07/04/2014 on account of Court Holiday and it was taken up on 15/04/2014. Order dated 15/04/2014 is quiet specific with respect to presence of PW2 in India and also the reason why she would not be able to appear before the court in the month of April 2014. PW2 is not present in the court even today.

The court is of the opinion that plaintiff has to prove its case by brining witness in time and it is not the prerogative of any witness that he/she would not appear before the court on a particular date or during a specific period or would appear as per his/ her own convenience. Even otherwise, this matter pertains to the year 1999. In these circumstances, the court is of the view that PW2 is not interested to appear before this court for her evidence. Evidence of PW2 is accordingly closed.

Two more affidavits of petitioner's witnesses i.e. Ms. Raksha Nagar and Ms Kokila Sharma are on record. Matter be renotified for tendering of affidavit and cross examination of these two witnesses on 26 November, 2014.

At this stage ld counsel for petitioner submits that he may also be permitted to summon the official witnesses as per list of witnesses already filed on record.

He may do the needful as per law.”

As noted in the order, the request of the petitioner was declined and evidence of PW-2 [Manjeet Sharma] was closed. Thereafter, on an appeal being filed by Petitioner, another opportunity was given to examine her. The Petitioner yet again was unable to produce her before the Court. Thereafter, Petitioner voluntarily closed his evidence in affirmative on 19th July 2016 and took a conscious decision not to examine the said witness.

18. On the other hand Respondents have filed their affidavits by way of examination-in-chief, however, both the Respondents made statements before this Court as recorded in the order dated 17th May 2019, that they do not wish to lead evidence qua the testamentary case, since it is their stand that the Petitioner has failed to prove the document Ex. PW 1/15, the alleged Will of Late Sh. D.C. Sharma dated 10th January 1995. However, evidence of the Respondent is not relevant, as the burden of proving the Will is on the Petitioner.

19. The Will has to be proved in accordance with Section 68 of the Evidence Act, 1872 which reads as under:-

" 68. Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence: 1[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act,

1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

20. In addition to the above provision, other relevant Section dealing with the execution of the Will is Section 63 of the Indian Succession Act, 1925 which reads as under:-

" **63. Execution of unprivileged Wills.** —Every testator, not being a soldier employed in an expedition or engaged in actual warfare,¹² [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules:—

a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

21. Section 63 of the Indian Succession Act provides that an unprivileged Will is to be attested by two or more witnesses each of whom has seen the testator signing or affixing his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator and each of the witnesses shall sign the Will in the presence of the testator. The attestation by two or more witnesses is mandatory. The mode of proving a

Will has to be in accordance with Section 68 of the Indian Evidence Act. On a conjoint reading of the two provisions, it emanates that the Will had to be proved by producing at least one of the attesting witnesses. From a reading of the above noted provisions, it also emerges that if there is an attesting witness who is alive and capable of giving evidence then subject to the process of the Court, he has to be necessarily examined, before the document required by law to be attested can be used in any evidence.

22. In the present case, concededly one of the attesting witnesses namely Smt. Raksha Nagar has passed away. The second attesting witness Ms. Manjeet Sharma is stated to be alive and has not been examined. In order to prove the Will document, the Petitioner has placed reliance on the evidence of PW-1 [Kapil Sharma], who has stated that he was acquainted with the signatures and the handwriting of the respective attesting witnesses and the testator on the Will document. He exhibited the Will as PW- 1/15.

23. Before evaluating the evidentiary value of the testimony of PW-1, it is relevant to refer to another significant provision of the Indian Evidence Act, i.e. Section 69, which reads as under:-

“69. Proof where no attesting witness found.—If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.”

24. The aforesaid provision is applicable in a case where the attesting witness is either dead or out of the jurisdiction of the Court or kept out of the way by the adverse party or cannot be traced despite a diligent search. In the present case, the testimony of PW-1 does not help the Petitioner in proving the Will. PW-1 has not seen the testator or the attesting witnesses signing the Will. Thus, the evidence of PW-1 cannot be considered relevant for proving the Will. The Petitioner ought to have resorted to all due methods provided under Order 16 of Civil Procedure Code, 1908 to summon the attesting witnesses before resorting to other evidence. Mere statement of the Petitioner about non-availability of the attesting witness and that the whereabouts of the attesting witness is not known does not attract the application of Section 69 of the Indian Evidence Act. Only when the witness does not appear pursuant to court summons and after all the processes under Order 16 Rule 10 are exhausted, Will can be proved in the manner indicated under Section 69 of the Indian Evidence Act i.e. by examining the witnesses who can prove the handwriting of the testator or executants. The judgement of the Madras High Court in *N.Durga Bai vs Mrs.C.S.Pandari Bai*, TOS.22 of 2010 discussing the similar aspect is relevant, wherein it has been held as under:

“...14. Now, coming to the other contention of the plaintiffs in the proof affidavit to the effect that the attesting witnesses could not be traced and their whereabouts are not known is taken into consideration. Mere assertion in the evidence itself is not sufficient to dispense with the proof of diligent search which was supposed to be made to establish the fact that their whereabouts are not known to the plaintiff. In the proof affidavit P.W.1 in the chief examination except stating that two of the attesting witnesses Munusamy and R. Subramani

whereabouts are not known to them and the scribe who drafted the Will also passed away, the plaintiff has not stated anything about the diligent search made by them to find out the address of the attesting witnesses. It is the stand of the Plaintiffs' counsel that since the attesting witnesses were also working with the testator in the Binny Mills and after the Mill was closed in the year 1984 the attesting witnesses' whereabouts are not known to them. In this regard when a careful reading of the Will Ex. P1 it is seen that the addresses of the attesting witnesses were clearly given in the place while signing as identifying witness. One of the attesting witnesses Munusamy's address was shown as No. 10, Bharathi Nagar, Kolathur, Chennai-99 and his avocation is shown as business. Similarly, another attesting witness namely Subramani son of Ramasamy, and his address was given as No. 7, Elumalai Street, George Colony, Chennai-11 and his occupation also shown as IP Limited. i.e. India Pistons Limited Company. **When the specific address of the attesting witnesses has been given, the entire evidence of P.W.1 when carefully seen they have not made any attempt to summon these witnesses before this Court by resorting to Order 16 Rule 10 of CPC. No coercive step was also taken as against them to procure their presence before the Court...**

25. It is not the case of the Petitioner that the attesting witness in the instant case cannot be found. In fact all throughout, the Petitioner has contended that he is aware of the whereabouts of the witness and time and again assured that he would produce the said witness before the Court. This is evident from several orders passed by this Court. Later, Petitioner dropped the said witness on the ground that whereabouts were not known and the Petitioner was therefore unable to produce the said witness before the Court. The Petitioner did not exhaust all the remedies for producing the witness before this Court. The Petitioner could have resorted to Order 16 Rule 10 of Civil Procedure Code, 1908 for the purpose of seeking appearance of the

attesting witness. No assistance was taken from the Court to summon the said witness. Thus, the evidence led through PW-1 [Kapil Sharma] cannot be taken into consideration for dealing with the issue relating to proof of Will. In this regard, reference can be made to the judgement of the Supreme Court in *Babu Singh and Ors. v. Ram Sahai*, AIR 2008 SC 2485, which reads under as:

“Evidence Act, 1872 Section 69- Applicable in absence of attesting witness only when the party moves court for purposes under Order 16 Rule 10 CPC but despite issuance of summons, the witness fails to obey the summons, can the Will be proved in the manner indicated in Section 69- Mere statement of counsel of the plaintiff that the attesting witness was won over by the opposite party not sufficient to prove his absence- Handwriting of the attesting witness and signature of the person executing the Will must be proved- Burden of proof then shifts on others- Civil Procedure Code, 1908, Order 16 Rule 10.

Section 69 of the Evidence Act would apply, inter alia, in a case where the attesting witness is either dead or out of the jurisdiction of the court or kept out of the way by the adverse party or cannot be traced despite diligent search. Only in that event, the Will may be proved in the manner indicated in Section 69 i.e. by examining witness who was able to prove the handwriting of the testator or executants. The burden of proof then may be shifted to others.

Whereas, a Will ordinarily must be proved keeping in view the provisions of Section 63 of the Succession Act and Section 68 of the Evidence Act, in the event the ingredients thereof, are brought on record, strict proof of execution and attestation stands relaxed. However, signature and handwriting, as contemplated in Section 69, must be proved.

The Calcutta High Court in Amal Sankar Sen case, AIR 1945 Cal 350, rightly observed: (AIR p.352)

"...In order that Section 69, Evidence Act, may be applied, mere taking out of the summons or the service of summons upon an attesting witness or the mere taking out of warrant against him is not sufficient. It is only when the witness does not appear even after all the processes under Order 16 Rule 10, which the Court considered to be fit and proper had been exhausted that the foundation will be laid for the application of Section 69, Evidence Act."

26. Further, in *Hare Krishna Panigrahi v. Jogneswar Panda & Ors.*, AIR 1939 Cal, 688, the Calcutta High Court, referring to Section 71 of the Evidence Act observed as under:

" ... This presupposes in my opinion that the witness is actually produced before the Court and then if he denies execution or his memory fails or if he refuses to prove or turns hostile, other evidence can be admitted to prove execution. In the case referred to above the witness was actually before the Court and afterwards turned hostile. In this case, however, the witness was not before the Court at all and no question of denying or failing to recollect the execution of the document did at all arise. The plaintiff simply took out a summons as against this witness and nothing further was done later on. In a case like this where the attesting witnesses not before the Court, S. 71, Evidence Act, has in my opinion, got no application. **In such cases, it is the duty of the plaintiff to exhaust all the processes of the Court in order to compel the attendance of any one of the attesting witnesses and when the production of such witnesses is not possible wither legally or physically, the Plaintiff can avail himself of the provisions of S.69 Evidence Act.** "

(emphasis supplied)

27. In *Amal Sankar Sen & Ors. v. The Dacca Co-operative Housing Society Ltd. (in liquidation)* by Inspector Liquidator, Co-operative Society, Dacca, *AIR (32) 1945 Calcutta 350*, it was held as under:

"As we have already stated, that proposition of law cannot be challenged at this date. In order that S.69, Evidence Act, may be applied, mere taking out of the summons' or the service of summons upon an attesting witness or the mere taking out of warrant against him is not sufficient. **It is only when the witness does not appear even after all the process under Order 16 Rule 10, which the Court considered to be fit and proper had been exhausted that the foundation will be laid for the application of Section 69 Evidence Act. The party, namely, the plaintiff, must move the Court for process under Order 16 Rule 10 Civil P.C., when a witness summoned by him has failed to obey the summons but when the plaintiff does move the Court but the Court refuses the process asked for we do not see why Section 69, Evidence Act, cannot be invoked.** The other view would place the plaintiff in an impossible position when the witness is an attesting witness to the document on which he has brought the suit, and the Court refuses coercive processes contemplated in Order 16 Rule 10 Civil P.C. "

(Emphasis Supplied)

28. The burden of proof in the present case, to prove the document dated 10th January 1995 claimed to be the validly executed last Will of the deceased lay on the Petitioner who propounded the same. Indisputably, none of the attesting witnesses have appeared before the Court to prove the Will. Thus, in view of the foregoing discussion, the Petitioner has failed to prove that the document dated 10th January 1995 is a Will executed by late Sh. D.C. Sharma and accordingly the said issue is decided against the

Petitioner. Since the attesting witnesses have not been produced and objectors have not led evidence, no finding can be given with respect to whether the document dated 10th January 1995 is forged and fabricated. Issue No. 2 is decided against the Respondents; however the fact remains that the said Will has not been proved.

Issue Nos. 3 and 5

29. Section 222 of the Succession Act, states that Probate shall be granted only to an executor appointed by the Will. Section 223 of the Succession Act bars the grant of probate to any person who is a minor.

30. It is undisputed that no executor has been appointed in the Will. Further, Section 246 of the Indian Succession Act, which states that if a universal or residuary legatee is a minor, letters of Administration shall be granted to the person to whom the care of his estate has been committed by competent authority i.e. by the guardian of the minor.

31. The Petitioner was a minor at the time of filing of the Petition. Sh. Kapil Sharma who acted as the guardian has not prayed for grant of letters of administration, but has rather filed a petition seeking probate, which is not permissible. The Issue Nos. 3 and 5 are thus decided against the Petitioner and in favour of the Respondents.

Issue No. 4

32. Respondents have not shown any basis to contend that the proper Court

fee has not been paid on the probate petition. Accordingly, the said issue is decided in favour of the Petitioner and against the Respondent.

Issue No. 6

33. In view of the fact that the Petitioner has failed to prove the Will in question, the present petition is dismissed. The Respondents are also held to be entitled to the cost of the litigation which is assessed as Rs. 3 lacs. The cost shall be paid by the Petitioner to the Respondents in equal share within a period of four weeks from today.

34. In view of the foregoing decision, the Petition along with the pending application, if any, is dismissed.

SEPTEMBER 12, 2019

ss

SANJEEV NARULA, J.