

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

% **Date of decision: 19th February, 2019**

+ **TEST.CAS. 57/2006**

SUMNESH KUMAR **..... Petitioner**

Through : Mr. D.R. Bhatia and
Ms. Vasundhara Nayyar, Advs.

Versus

STATE & ORS. **..... Respondents**

Through : None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Probate is sought by the named executor of the document dated 24th April, 2000 claimed to be the validly executed last Will of the Shakuntala Devi, wife of Ratan Lal, resident of C-9, Inder Puri, New Delhi, who died in Mumbai on 23rd October, 2004.
2. The petition was entertained and notice and citation thereof ordered to be issued including by publication in the newspaper.
3. The order dated 24th March, 2014 records that all the near relatives of the deceased had been served and had filed their no objection.
4. Counsel for the petitioner also states that affidavits of no objection have been filed by all the close relatives of the deceased and none has come forward to object to the grant in spite of citation issued.
5. Unfortunately, in spite of none contesting this petition, the same has remained pending for 13 years.

6. The counsel for the petitioner states that the attorney of the petitioner and the two attesting witnesses namely Sanat Banerjee and Rajiv Agarwal to the document claimed to be the Will have been examined and the counsel for the petitioner contends that the petitioner has proved the Will.

7. A perusal of Ex.PW-2/A and Ex.PW-3/A, being the affidavits by way of examination-in-chief of two attesting witnesses to the document claimed to be the Will shows that the Will has not been proved and that the execution of the Will in accordance with the requirements of Section 63 of the Indian Succession Act, 1925 has not been established.

8. Exhibit P-2 was put on the document claimed to be the Will, at the stage of admission / denial of documents on 23rd August, 2013, on the near relatives admitting the document. Proof of a document as a Will, specially in testamentary jurisdiction, which is a proceeding in rem, cannot be on the basis of admission thereof, at the stage of admission / denial of documents, by the respondents who are in any case not contesting the probate sought. The Court, on the basis of such admission, is not entitled to grant probate or letters of administration with copy of the Will attached. Such admission binds only the respondents and cannot bind others, or world at large, whom also such probate / letters of administration will bind.

9. Section 68 titled “Proof of execution of document required by law to be attested” of the Indian Evidence Act, 1872 provides that 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. Though the proviso to the said

Section provides that it is not necessary to call an attesting witness in proof of execution of a document which has been registered in accordance with the provisions of the Registration Act, 1908 unless its execution by the person by whom it purports to have been executed is specifically denied but the said proviso is inapplicable to a Will.

10. Section 63 titled “Execution of unprivileged Wills” of the Indian Succession Act, 1925 provides that every testator 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 acknowledgment 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.”

11. A combined reading of Section 68 of the Evidence Act and Section 63 of the Indian Succession Act shows that a Will is required by law to be attested. Thus in proof of execution thereof, examination of at least one attesting witness, if alive and available, is essential.

12. It is not as if the petitioner in the present case has not examined even one attesting witness to the Will. A Will is required by Section 63 supra to have minimum two attesting witnesses and Exhibit P-2 supra indeed shows two attesting witnesses thereto and both of whom have been examined. However, both of them in their identical affidavits by way of examination-in-chief have deposed:

- “1. I say that I am one of the Attesting Witnesses to the Will dated 24th April, 2000 executed by Smt. Shakuntla Devi, W/o Shri Ratan Lal, as such, I am competent to swear this Affidavit.
2. I say that the said Will dated 24th April, 2000 was got registered with the office of Sub-Registrar-VII, New Delhi on 28.04.2000 bearing Registration No.3259 in Vol. No.3, Book No.197, at Pages 108 to 110. Will dated 24th April, 2000 executed by Smt. Shakuntla Devi is marked as Exhibit PW-3/1.
3. I say that I was personally present at the time of the registration of the said Will dated 24th April, 2000 before the Office of the Sub-Registrar-VII, New Delhi and appended my signatures on the said Will dated 24th April, 2000.
4. I say that Smt. Shakuntala Devi was of sound mind and had executed the said Will dated 24th April, 2000 at her own free will.”

13. The only difference in the two affidavits is that the other has referred to the purported Will as Exhibit PW-2/1. However, it is not known which document is referred to as marks Exhibit PW-3/1 and Exhibit PW-2/1. The Will on record bears only Exhibit P-2 as aforesaid and neither bears Ex.PW-2/1 nor Ex.PW-3/1. The same indicates that the original Will bearing Ex.P-2 was not seen by either of the two witnesses.

14. What has to be seen is whether compliance of the conditions of Section 63 of the Indian Succession Act has been proved by the attesting witnesses.

15. In my opinion neither of the two attesting witnesses has proved the Will because neither (i) has deposed that the Testatrix put her signatures on Exhibit P-2 in his presence; all that has been said is that the witnesses were present at the time of registration of the Will; however presence at the time of registration cannot be construed as presence at the time when the Testatrix signs the Will; (ii) has identified the signatures on Exhibit P-2 as that of the Testatrix; (iii) has deposed that the Testatrix acknowledged to him her signatures on the Will; (iv) has deposed having put his own signatures on the Will in the presence of the Testatrix; and, (v) has referred to the other witness.

16. It has thus but to be held that the execution of the document, of which probate as a Will is sought, has not been proved.

17. Counsel for the petitioner seeks adjournment to again examine the witnesses.

18. I have considered this request as aforesaid. The petition is of 2006 vintage and has already been pending for 13 years. By the sheer length of time and from the fact that none has come forward to oppose it, it is deemed expedient, notwithstanding the aforesaid lacuna in the proof of Will, to allow the petition and order probate to be granted, cautioning the petitioner that in the event of any one approaching this court for revocation of the probate, the aforesaid facts will be taken into consideration.

19. I may also mention that though the Will describes the address of the Testatrix as of Delhi but the immovable property of the Testatrix is situated at Madras and there is nothing to indicate that any of the movable assets of the deceased is situated within the territorial jurisdiction of this court. The deceased died also outside the territorial jurisdiction of this court. The attorney of the petitioner has also not deposed of the deceased being ordinary resident of Delhi. Mere execution and registration of the Will at Delhi does not create jurisdiction under Section 372 of the Indian Succession Act. However, since notwithstanding above, petition was entertained, it is now not deemed appropriate to dismiss on this ground.

20. The petition is thus allowed. Probate is ordered to be granted of the Will Ex.P-2 as the validly executed last Will of Shakuntala Devi, wife of Ratan Lal, resident of C-9, Inder Puri, New Delhi, who died at Bangalore on 23rd October, 2004, with Ex.P-2 attached thereto, subject to the petitioner depositing the requisite stamp duty and furnishing administration bond of the value of the estate with a surety bond in the like amount.

The petition is disposed of.

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RAJIV SAHAI ENDLAW, J.

FEBRUARY 19, 2019

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