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

Reserved on: 29th April, 2019
Pronounced on: 15th May, 2019

+ **TEST.CAS. 40/2012**

PREM PRAKASH DABRAL

..... Petitioner

Through: Mr. Sandeep Sharma, Advocate with
Mr. Hunnyveer Singh, Advocate.

versus

STATE & ORS

..... Respondents

Through: Respondent No. 5 in person.

JUDGMENT

SANJEEV NARULA, J

1. Petitioner by way of present petition under Section 276 of the Indian Succession Act, 1925 seeks probate of the Will of late Sh. Kali Prasad Dabral dated 29th October 2004.

Case of the Petitioner

2. Sh. Kali Prasad Dabral, (hereinafter 'the deceased') passed away on 4th August 2011 and was survived by the four Class-I heirs, Prem Prakash Dabral (Petitioner No.1), Jaya Prakash Dabral (Respondent No. 2), Renu Nauriyal (Respondent No.3) and Rekha Mishra (Respondent No. 4). The deceased was the lawful sole owner of the property bearing no. C- 1/35,

Janak Puri, New Delhi and upon his demise the said property has devolved onto the Petitioner by virtue of the last will and testament of the deceased dated 29th October 2004. As per this registered will, the deceased also bequeathed all his money in his bank accounts, pension accounts, NSCs, FDRs in favour of the Petitioner to the exclusion of the remaining Class-I heirs. The reasons for exclusion of the Respondents, as have been stated in the will, are that the elder son, Respondent No. 2, was disowned on 4th December 1993 from all the moveable and immoveable properties of the deceased for not performing his duties as a son and for acting beyond the reach of the deceased. Respondent Nos. 3 and 4 have been excluded from the will because the deceased had spent a considerable amount in their marriage and he did not wish to bequeath any further property/money to them. Petitioner being the sole legatee is entitled to the abovesaid property to the exclusion of all other family members of the deceased and to the grant of probate of the Will dated 29th October 2004.

3. At the time of filing of the Petition, Respondent No. 5, wife of Respondent No. 2, was in possession of a portion of the abovesaid property. Later, she was directed to hand over the said portion of the property to the Petitioner *vide* Judgment dated 22nd January 2014 in RSA 190/2011, titled as ***Prem Prakash Dabral v. Shikha Dabral & anr.***

Proceedings in the Petition

4. The notice in the present petition was issued on 31st May 2012. Chief Revenue Controlling Authority was directed to submit a valuation report in

respect of immovable property No. C- 1/35, Janak Puri. Citations were directed and published in daily edition of “Statesmen”.

5. On 10th September, 2012, Respondent No. 2 who was present in person stated that he as well as Respondent Nos. 3 and 4 have no objection to the grant of probate and would file a No-Objection before the Court. Subsequently, the No-Objection affidavits were filed and on 2nd April 2013, Petitioner was directed to file affidavit by way of evidence and the matter was directed to be listed before the Joint Registrar for tendering of evidence and marking of exhibits.

6. On 22nd May 2013, statements of **PW-1**, Sh. Prem Prakash Dabral, **PW-2**, Sh. Rakesh Sharma (attesting witness) and **PW-3**, Sh. S.K. Dabral (attesting witness no. 2) were recorded. The matter was then listed before Court on 3rd September 2013, when Ms. Shikha Dabral, wife of Respondent No. 2 appeared and stated that the Will set up by the Petitioner is a collusive Will. She further stated that Respondent No. 2, her husband had abandoned her and his minor child and they were left in the premises bearing No. C-1/35, Janak Puri, New Delhi. The Court permitted her to file objections to the present petition. On 22nd July 2014, she was impleaded as a party to the present proceedings and arrayed as Respondent No. 5. She was given liberty to file an affidavit by way of evidence. Subsequently, on her request, several more opportunities were given to her to file affidavit by way of evidence, but to no avail.

7. In the meantime, Respondent No. 5 filed IA No. 11322/2016, for recalling the Petitioner for cross-examination. The said application was allowed by this Court on 12th January 2017 and Respondent No. 5 was permitted to cross-examine the Petitioner (**PW-1**). He was cross-examined on several dates and after closure of the Petitioner's evidence, Respondent No. 5 was again directed to file affidavit by way of evidence. She did not avail this opportunity. Ultimately, on the statement of Respondent No. 5 that she does not intend to examine any witness, Respondent's evidence was closed on 27th September 2018.

Evidence led by the Parties

8. Three witnesses deposed on behalf of the Petitioner- Sh. Prem Prakash Dabral **PW-1** (Petitioner), Sh. Rakesh Sharma **PW-2**, (attesting witness) and Sh. S.K. Dabral (attesting witness no. 2) **PW-3**. The testimony of the aforesaid attesting witnesses has gone un-rebutted and only the Petitioner has been cross-examined by Respondent No. 5. Respondent No.5 however, has led no evidence.

Submissions of the parties

9. The Court has heard Mr. Sandeep Sharma, learned counsel for the Petitioner and Respondent No. 5 who appeared in person along with her daughter.

10. Mr. Sandeep Sharma urged that the Will has been duly proved in accordance with law. He also argued that there is no opposition to the present Will as Respondent Nos. 2 to 4, who have a caveatable interest have filed affidavits stating that they have no objection to the grant of the probate of the Will in favour of the Petitioner. He further submits that Respondent No. 5 is raising frivolous objections, only to delay the present proceedings. The objections raised by her, even otherwise have no basis in law. She did not lead any evidence despite several opportunities granted to her, resulting in closing of her right to lead evidence. Respondent No. 5 was in possession of the property No. C-1/35 Janak Puri, New Delhi, as also mentioned in the Will. The disputes relating to her possessory rights were decided in favour of the Petitioner and against Respondent No. 5 in RSA No. 190/2011. This Court, in its judgment dated 22nd January 2014, decided the aforesaid appeal and held that Respondent No. 5 has no right in the aforementioned property as it is not a shared household. It was accordingly decided and held that the Petitioner (Appellant in RSA No. 190/2011) will be entitled to possession of the kitchen and bathroom situated on the ground floor of the aforementioned property. He further submitted that since 2017, the entire property is in the possession of the Petitioner.

11. Per contra, Respondent No. 5 argued that the Will is collusive and she was never in illegal possession of the property. During the cross examination conducted on 17th October 2017, Petitioner was unable to give details of the movable properties of the Testator. He was also unable to give

the status of the bank account, pension account and NSC's and FDR's mentioned in para 7 of the petition. Respondent No. 5 further argued that there is a possibility that there are multiple Wills executed by the Testator. In support of this contention, she emphasized that when the Petitioner was questioned as to who has the custody of the original Will, he responded that the Will was in his custody. This response, according to the Objector, indicates that there is perhaps another Will which has not been shown to the Court, since the original Will- the subject matter of the present petition is already on record. It was further argued that the Petitioner evaded the question during cross examination and his answers were vague and not specific to the questions put to him. Lastly, it was argued that the Petitioner was not entitled to the Probate as he is not the named Executor in the Will.

Findings and Analysis

12. The Will [**Ex. PW 1/3**] has two attesting witnesses. The said attesting witnesses filed their affidavits at the time of filing the present petition, verifying the execution of the will. The said witnesses also deposed by filing affidavits during examination-in-chief, wherein both the attesting witnesses have deposed that on 29th October 2004 they were present at the time of signing of the Will. Rakesh Sharma (**PW-2**), by way of examination in chief deposed that:-

"1. I say that I am one of the witnesses to the last Will and Testament of late Sh. Kali Prasad Dabral, the Testator/deceased, dated 29.10.2004 and in that capacity I am competent to depose this affidavit.

2. I say that I was present on 29.10.2004 and I saw and heard the contents of this Will being read over and explained to Sh. Kali Prasad Dabral. I say that having heard and understood the contents of the Will, he out of his own free Will and volition acknowledged before us that the Will had been correctly drafted as per his instructions and correctly recorded his last desires. I say that in my presence, the testator signed and executed the Will. I further say that the Testator requested the deponent to sign the same as attesting witness. I say that having personally seen him sign and execute the Will, as also having received a personal acknowledgement from him of him having executed his will, at his request, affixed my signatures thereupon on the Will dated 29.10.2004 as attesting witness. "

13. PW- 3, Sh. S.K. Dabral (**PW-3**), by way of examination in chief deposed as under:

"1. I say that I am one of the witnesses to the last Will and Testament of late Sh. Kali Prasad Dabral, the Testator/deceased, dated 29.10.2004 and in that capacity I am competent to depose this affidavit.

2. I say that I was present on 29.10.2004 and I saw and heard contents of this Will being read over and explained to Sh. Kali Prasad Dabral. I say that having heard and understood contents of the Will, he out of his own free Will and volition acknowledged before us that the Will had been correctly drafted as per his instructions and correctly recorded his last desires. I say that in my presence, the testator signed and executed the Will. I further say that the Testator requested the deponent to sign the same as attesting witness. I say that having personally seen him sign and execute the Will, as also having received a personal acknowledgement from him of him having executed his Will, I, at his request, affixed my signatures thereupon on the Will dated 29.10.2004 as attesting witness."

14. Both the witnesses have not been cross-examined and their testimonies therefore are uncontroverted by any of the Respondents. Petitioner's cross examination also does not contradict their statement. Respondent No. 5, who argued in person, has highlighted the response of Petitioner to a particular question to emphasize the theory of existence of multiple wills, the relevant question and it's reply reads as under:-

"Q. Who has the original will currently?

Ans. The original Will is in my custody."

15. Relying on the above-noted response, it is argued that since the original Will dated 29th October 2004 is on record of this Court, the statement of the witness is contrary to the factual position, thereby implying that the Will submitted in the Court is not the genuine Will of the Testator and there are multiple Wills. This contention is without merit, as the aforesaid response of the witness cannot be considered in isolation so as to discredit the genuineness of the Will. Mr. Prem Prakash Dabral- Petitioner produced the original Will before this court. Thus the Will was in his custody. On the date of cross-examination, 2nd February 2018, no doubt the original Will was on the record of this Court and his response is erroneous, however this solitary inaccuracy in his statement should not be given undue weight to doubt the genuineness of Will before this Court.

16. The other contention of Respondent No.5 to discredit the testimony of the Petitioner is based on the observations made by the Court on 26th November 2013, regarding endorsement on the index of a copy of reply supplied to her. The said order reads as under:

"Objections have been preferred by the objector Smt. Shikha Dabral, to which the petitioner has already filed a reply on record. Though as per the endorsement on the index it appears that the copy stands supplied to the objector, the objector present in person states that she has not received any copy. The signature of acknowledgement do not appears to be that of the objector. Let a complete copy of the reply be served on the objector, within one week, who may file rejoinder within six weeks thereafter."

17. The above noted plea is without substance. The aforementioned observations of the Court are being read out of context. There is no evidence lead by Respondent No.5 on this issue. The observation of the court cannot be read and construed to mean that the Petitioner is in the habit of indulging in forgery, as is being alleged by Respondent No.5. She has also questioned the genuineness of the Will by relying upon the cross examination of the Petitioner. Her contention is that Petitioner's response on certain questions was not specific, especially when he was questioned regarding the place where the Will of the Testator was found. She also argued that the original Will was brought on record belatedly, giving rise to suspicion. Although, there may have been a delay on the part of the Petitioner to file the original Will, however, the fact remains that the original Will was on record at the time of recording the statement of the witnesses to prove the Will and thus the objection is without merit. The Objector has also contended that the Will

is collusive, on the ground that the Will was executed by the Testator under influence and does not express true intention of the Testator. In support of this contention, the Objector has relied upon the statement of the Testator recorded in House Case No. 5/95 filed by the Testator for recovery of possession and damages of the property against Objector No. 5 and her daughter. The trial Court therein, had granted the possession to Respondent No. 5, inter alia on the ground that the disowning of Sh. Jaya Prakash (Respondent No. 2) was only a ploy and did not have any legal effect. It is argued that the declaration made by the Testator in his Will regarding disownment of Respondent No. 2, does not reflect his true intention. In support of this contention, Objector has also relied upon the judgment in the case of *S.P. Thiruvannukarasu v. S.P. Loganathan and Anr*, AIR 119 MAD 328. Further, Respondent No. 5 has also referred to a petition being *CM. (M) No. 268/2000*, filed before this Court, wherein directions were sought to dispose of the pending cases between the parties. It is contended that in the said petition, Respondent No. 2 (husband of Respondent No.5) had also sought directions in respect of the case No. 5/95 (supra) which was filed by the Testator. According to her, this confirms the collusion between the Testator and Respondent No. 2. Reference has also been made to other proceedings being the Petition under Section 25 of the Guardians and Ward Act, 1890 for the custody of minor child, Trisha. It is also contended that the immovable property C-1/35 JanakPuri, New Delhi, was the matrimonial house of Respondent No. 5 and the parental home of daughter Trisha. Kali Prasad Dabral (Testator), therein, has admitted that there was a joint family and that there were matrimonial disputes between her and Respondent No. 2 and therefore the Will was created in collusion to deprive her and her

daughter of their basic rights. The objections of Respondent No. 5 revolves around the plea that the Will was created to deprive her of the possessory rights in the property. The property in question belongs to the Testator. There is no dispute on this issue. In the case of intestate succession, Respondent No. 5 not being Class-I legal heir of the deceased, would not have any right in the said property by way of succession. The Will in question excludes Respondent Nos. 2 to 4 and bequeaths the property in favour of the Petitioner. The said Respondents, who had interest in the estate of the deceased have no objection to such exclusion and do not oppose the petition. This exclusion in para 7 of the will reads as under:-

"Whereas by virtue of this Will I, in absolute healthy and sound state of mind hereby bequeath my entire above mentioned property in favour of my younger son namely Shri Prem Prakash Dabral to the exclusion of my all other legal heirs and after my death only my younger son i.e. Shri Prem Prakash Dabral shall be the exclusive, owner of the said property i.e. property, bearing municipal no. C-1/35, Janakpuri, New Delhi-110058 including entire rights in the plot underneath and all fittings and fixtures installed therein.No other family member shall have any right, title or interest of any nature whatsoever in my above mentioned property."

18. The Testator also took note of the fact that Respondent No. 5 and her daughter Ms. Trisha were occupying a portion of the property in question. This fact is noted in para 8 of the Will and the Testator expressed his desire that his younger son, namely, Sh. Prem Prakash Dabral- Petitioner shall be the only competent person to continue the said litigation. The said declaration in the Will reads as under:-

"Whereas it is clarified that presently a portion of this above mentioned immovable property i.e. one bedroom with attached bath and kitchen on ground floor is under illegal occupation of one Smt. Shikha who is: the wife of my elder son namely Shri Jaya Prakash and along with the said Smt. Shikha her daughter namely Ms. Trisha is also living. Apart from this, I have also rented out a portion of the ground floor comprising of two rooms and attached bathroom and kitchen to one Shri Deepesh Sood at a monthly rent of Rs.3,500/- and I am presently receiving, the rent from the said tenant being landlord/owner Apart from this portion the remaining entire building/property is under my possession and control. Litigation' with regard to the illegal possession of Smt. Shikha and her daughter Ms. Trisha is already pending in the civil court being initiated by me vide civil suit no.5 of 1995. (New suit no. 1285 of 2000) titled as Shri Kali Prasad Dabral V/s Mrs. Shikha Dabral & Anr. After my death my younger son namely Shri Prem Prakash Dabral only shall be the only competent person to continue the said litigation representing me and he alone shall be the person to enjoy the outcome of this litigation or any other future litigation as may be required to be taken up in this regard."

19. Therefore, it is clear from the wording of the Will that the Testator was aware of the marital discord between his son Jaya Prakash Dabral and his wife (Smt. Shikha-Respondent No. 5). Conscious of this fact, he wished that his younger son, namely, Sh. Prem Prakash Dabral would be the sole beneficiary of the property in question. The wish expressed by the Testator and the reasons given for excluding Respondent No. 2 to 4 from the benefits of the Will, appear to be genuine. Having regard to the fact that Respondent No. 5 was in occupation of a portion of the property, it is also to be noted that there was also a litigation pending in respect of the same. The suit being ***Sh. Kali Prasad Dabral vs. Shikha Dabral & Anr.***, Civil Suit No. 5/95

(New Suit No. 1285/2000) for recovery of possession from Respondent No. 5. In this background, if the Testator disowned his elder son, it cannot be said that the Will in question is a collusive one. A Will is a document, which would come in the operation only after the death of the Testator and on the date of signing and executing, it would have no legal effect. The Testator perhaps was disillusioned and aggrieved by the fact that he is unable to remove Respondent No. 5 from the property in question. He desired that his son Jaya Prakash Dabral be excluded from the Will and in order to ensure that in the event of his death there is no claim raised by Respondent No. 5 in respect of his property, he made a declaration disowning his son as mentioned in para 6 of the Will, which reads as under:-

"Whereas my both daughters are happily married and well settled in their life and have already spent considerable amount, as per my capacity in their marriage and therefore I do not wish to give any further property/money to them. Further I have, also already disowned my elder son namely Shri Jaya Prakash on 4th December, 1993 as he did not perform his duties as a son and was also acting beyond my control and therefore I was very much annoyed with him thereby I have severed all my relations with him and thus disowning him from my movable and immovable properties. Presently I am living with my younger son namely Shri Prem Prakash Dabral at H.No.A-3/201, First Floor, Janak Puri, New Delhi and he is looking after all my needs and is serving me with all dedications and therefore I have special love and affection for him."

20. The aforesaid declaration in the Will, therefore, cannot be said to be collusive. Even otherwise the aforesaid declaration would not have any legal

consequence, as the will could not have been relied upon during the lifetime of the Testator. The legal effect of disowning Respondent No. 2 also has no effect in law. The declaration in the Will was by way of abundant caution so that Respondent No. 2 or 5 may not raise any claim in respect of the said property. Thus, the objection of Respondent No. 5 regarding collusion has no merit. In light of the above discussion, it is held that Petitioner has proved the document dated 29th October 2004 (**PW1/3**) to be the last Will of the deceased late Sh. Kali Prasad Dabral.

21. The other objections raised by the Objector are legal ones. It is contended that since the Petitioner is not the named Executor of the Will, he is not entitled to probate in view of Section of 222 of Indian Succession Act 1925 (hereinafter 'the act'). It is contended that the petition does not contain the necessary ingredients as provided in Section 276 of the act. It is also argued that the Petitioner during his cross examination was not able to disclose the details of the movable properties or give status of bank account, pension account etc.

22. As far as the objection regarding the petition being bereft of the necessary ingredients is concerned, the same is without merit. Section 276 of the Indian Succession Act, 1925 reads as under:

"276. Petition for probate.-(1) Application for probate or for letters of administration, with the will annexed, shall be made

by a petition distinctly written in English or in the language in ordinary use in proceedings before the Court in which the application is made, with the will or, in the cases mentioned in sections 237, 238 and 239, a copy, draft, or statement of the contents thereof, annexed, and stating--

- (a) the time of the testator's death.
- (b) that the writing annexed is his last will and testament,
- (c) that it was duly executed,
- (d) the amount of assets which are likely to come to the petitioner's hands, and
- (e) when the application is for probate, that the petitioner is the executor named in the will.

(2) In addition to these particulars, the petition shall further state,--

(a) when the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge; and

(b) when the application is to a District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.

(3) Where the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another State, the petition shall further state the amount of such assets in each State and the District Judges within whose jurisdiction such assets are situate."

23. The Petitioner has annexed the death certificate with the Will which is **Ex. PW-1/2** and the same gives the details of date and time of death of the Testator. The amount of assets that are likely to come to the Petitioner are

also mentioned in para 12 of the petition giving the details of the estate to be One Crore and Sixty Five lakh. The Will bequeaths both immovable property and the amounts lying in the bank account, pension account, FDR's to the Petitioner, to the exclusion of the other legal heirs. The fact that the Petitioner has not given specific details of the movable assets does not reflect upon the authenticity or genuineness of the will and the petition cannot be dismissed on this ground. Now, coming to the objection of grant of probate in absence of a named executor. To deal with the said objection it is useful to first refer to Section 222 and Section 232 of the Act, which reads as under:

“222. Probate only to appointed executor.-(1) Probate shall be granted only to an executor appointed by the will.

(2) The appointment may be expressed or by necessary implication.”

"232. Grant of letter of administration to universal or residuary legatees

--When--

(a) The deceased has made a will, but has not appointed an executor, or

(b) The deceased has appointed an executor who is legally incapable or refuses to act, or who has died before the testator or before he has proved the will, or

(c) The executor died after having proved the will, but before he has administered all the estate of the deceased, a universal or a residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of

the whole estate, or of so much thereof as may be unadministered."

24. A perusal of the said provision indicates that probate of will can be granted to an executor appointed by the will and a Testator may appoint an executor either expressly or by necessary implications. The aforesaid Will more particularly, para 7 of the will read in juxtaposition with the other provisions of the will indicates that the properties of the Testator have been bequeathed to the Petitioner in interest as well as in possession immediately upon the death of the testator as an absolute owner. However, the Petitioner was not appointed either expressly or by necessary implication, to administer the testator's property and to carry into effect the provisions of the will. Thus on a fair, proper and comprehensive reading of the material provisions of the will, it emerges that the Petitioner was not appointed as the executor of the Will; rather he was appointed as the sole/Universal legatee under the Will. However, on a combined reading of Sections 222 and 232 of the Act, what flows is that in cases where an executor has not been appointed either expressly or by necessary implications, the procedure to be adopted in such cases would be to grant letters of administration with the will annexed, in favour of the Universal legatee or a residuary legatee, if they are able to prove the will.

25. As already noted the Petitioner has been able to prove the said Will to be the last and final Testament of Sh. Kali Prasad Dabral. The Testator has not appointed any executor for the will either expressly or by necessary

implications however, Petitioner has been appointed as the Universal legatee, in respect of the whole of the property left by him at the time of his demise. Therefore, considering the fact that substantial time has lapsed since the time the case was filed and no such objection was taken earlier and the Petitioner has been found to be a universal legatee who has duly proved the will to be the last and final testament of the deceased, Respondent No.5's objection regarding there being no named executor to seek dismissal of the petition at this stage, does not hold its ground.

26. This court, in light of the decisions of the Supreme Court in *FGP Ltd. vs. Saleh Hooseini Doctor*, (2009) 10 SCC 223 and *Shambhu Prasad Agarwal v. Bhola Ram Agarwal* (2000) 9 SCC 714 and various High Courts in *Shirin BamanFarazarzi of Bombay Zoroastrian Iranian inhabitant v. Zubin BomanFaramarzi*, reported in 2014 (4) MHLj 217, *Inder Chand Nayyar v. Sarvadeshik Arya Pratinidhi Sabha*, reported in AIR 1997 Del 34, *Sanjay Suri v. State & Ors*, reported in AIR 2004 Del 9 and *Lallubhai Chhotabhaiu by LRs v. Vithalbhai Parshottambhai*, reported in AIR 1982 Guj 222, is of the view that Petition seeking grant of Probate of a will can be allowed to be converted into a petition for Letters of Administration with Will annexed. Thus, there is no conceivable reason as to why the beneficiary/Petitioner herein must be prohibited from continuing the said proceedings. Directing the Petitioner to seek a formal conversion of the proceedings from one for grant of probate to one for issuance of letters of administration would be futile, since, it is not in dispute that Petitioner is entitled to file a petition for issuance of Letter of Administration with the

will annexed. Since the Petitioner has been deprived of the benefits enshrined in the will for a considerable time, it is in interest of justice that the Petition should not be dismissed merely on this highly technical ground and should come to an end as early as possible.

27. In view of the aforementioned facts and evidence, the Letters of Administration with the Will annexed is issued favour of the Petitioner enabling him to administer the estate of Late Shri Kali Prasad Dabral, subject to the Petitioner filing the requisite Court fee in terms of the valuation reports and submitting an administrative bond with one surety and on depositing the appropriate court fee in accordance with law.

28. The Petition is allowed in the above terms. No order as to cost.

SANJEEV NARULA, J.

15th May, 2019

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