

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

% **Date of decision: 26th September, 2019**

+ **TEST.CAS.51/2013**

RAGHBIR SINGH

..... Petitioner

Through: Mr. Joginder Tuli and Ms. Joshini
Tuli, Advs. with petitioner in person.

Versus

STATE (NCT OF DELHI) & ORS

..... Respondents

Through: Mr. Phool Kumar, Adv. for R-5.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This petition was filed seeking Letters of Administration on the basis of registered document dated 30th April, 2009, claimed to be the validly executed last Will of Chaudhary Ved Pal Singh son of Munshi Ram resident of 3345/222, Vishram Nagar, Tri Nagar, Delhi, in favour of the petitioner.
2. Besides Govt. of NCT of Delhi, two sons of the deceased Chaudhary Ved Pal Singh namely P.K. Chaudary and Shiv Kumar were impleaded as respondents No.2&3 and Delhi Development Authority (DDA) as respondent No.4.
3. The petition was entertained and notice thereof ordered to be issued and citation ordered to be published.
4. The two natural heirs of the deceased namely P.K. Chaudary and Shiv Kumar could not be served by ordinary process at the addresses furnished by the petitioner and finally vide order dated 9th September, 2015, were ordered to be served by publication and which was effected. None appeared for

them. However, there is no formal order proceeding *ex-parte* against the said respondents No.2&3.

5. The said respondents No.2&3 namely P.K. Chaudary and Shiv Kumar are now proceeded against *ex-parte*.

6. One Kalawati filed objections to the petition and is found to have been impleaded as respondent No.5 in the amended Memorandum of Parties dated 21st May, 2019 on record.

7. The petitioner filed IA No.977/2017 under Order X Rule 2 of the Code of Civil Procedure, 1908 (CPC) for examination of the said Kalawati and which application was allowed and Kalawati is found to have been examined on oath on 26th May, 2017, 19th August, 2017 and 25th October, 2017.

8. Before proceeding further, I may record that Will on the basis of which Letters of Administration is claimed, is only with respect to land measuring 430 acres being part of Khasra No.1608 to 1672 situated in Village Mehrauli, New Delhi and also records that the deceased Chaudhary Ved Pal Singh, besides the said Will, had for consideration also executed other documents of sale of the said land in favour of the petitioner. The petitioner, in this respect in his evidence has also filed an unregistered Agreement to Sell dated 30th April, 2009 and an unregistered Money Receipt dated 10th May, 2009 purportedly executed by Chaudhary Ved Pal Singh in his favour.

9. The respondent No.5 Kalawati, in her objections claims to be the wife of Moolchand son of Bhuramal Seth who is stated to be the recorded owner of the land aforesaid. It is her contention that Moolchand executed a Will and Power of Attorney in her name with respect to the property. On the

contrary, the petitioner claims that Moolchand bequeathed the land aforesaid to Chaudhary Ved Pal Singh under a registered Will dated 29th February, 1996.

10. I have enquired from the counsel for the petitioner, whether the Will of Moolchand in favour of the deceased Chaudhary Ved Pal Singh has been proved in any proceeding.

11. The answer is in the negative.

12. The respondent No.5 Kalawati, thus does not claim to be an heir of the deceased Chaudhary Ved Pal Singh and only disputes the title of Chaudhary Ved Pal Singh to the land aforesaid, by claiming to be the widow of Moolchand, original owner of the land from whom the deceased Chaudhary Ved Pal Singh claimed a Will in his favour with respect to the land.

13. The aforesaid would show that the dispute raised by the only contesting respondent No.5 Kalawati is a title dispute and the respondent No.5 Kalawati did not have any caveatable interest. Objections to a Will can be filed only by legal heirs or others who inherit the property of the deceased under the applicable law of succession. It has been held in ***Krishna Kumar Birla Vs. Rajendra Singh Lodha*** (2008) 4 SCC 300, that any person questioning the existence of title in respect of the estate or capacity of the testator to dispose of the property by Will in a ground outside the law of succession would be a stranger to the probate proceedings inasmuch as none of such rights can be effectively adjudicated therein. Mention in this regard may also be made of ***Arjun Som Dutt Vs. Madhvi Bery*** 2014 SCC OnLine Del 1365, ***Prof. B.R. Grover Vs. The State*** 2012 SCC OnLine Del 3838 and ***Pankaj Shah Vs. Rafat*** 2018 SCC OnLine Del 8943.

14. I must however mention that the Supreme Court in ***G.Gopal Vs. C. Baskar*** (2008) 10 SCC 489 has held that a person who has even a slight interest in the estate of the testator is entitled to file a caveat. This conflict between ***Krishna Kumar Birla*** supra and ***G. Gopal*** supra was noted by the Supreme Court in ***Jagjit Singh Vs. Pamela Manmohan Singh*** (2010) 5 SCC 157 and the question referred to a larger Bench. However, the facts in this case are entirely distinguishable from ***G.Gopal*** supra inasmuch as respondents/caveators in that case were grandchildren of the testator. Supreme Court, in ***Saroj Agarwalla Vs. Yasheel Jain*** 2016 SCC OnLine SC 1165 has held that in cases of determination of caveatable interest, the test to be applied is whether the claim of grant of probate prejudices the respondents rights because it defeats another line of succession in terms whereof the respondent/caveator asserted his/her rights. In my opinion, what thus emerges is that 'interest' in the estate would not involve an interest of title claimed in a property owned by the testator, as it is well settled that a Probate Court cannot go into questions of title. Caveatable interest would thus mean that the caveator can claim a right, title or interest in the property under any Personal Law of succession as applicable to the parties, in the event of intestacy of the testator. I am supported in my view by ***Kusum Bharat Asarpota Vs. Jagdish Asarpota*** 2014 SCC OnLine Bom. 680 and ***Ashok Kumar Shukla Vs. Mohammed Rafiq Haji Usman Momin*** 2013 SCC OnLine Bom. 1167 holding that any person questioning the existence of title in respect of the estate or the capacity of the testator to dispose of the property by Will on a ground outside the law of succession cannot be said to have a caveatable interest.

15. The objections, even though filed by the said respondent No.5

Kalawati, thus ought not to have thus been entertained and she ought not to have been impleaded as respondent No.5 and the said error in procedure has resulted in this proceeding remaining pending in this Court for over six years and extensive statement on oath of the said respondent No.5 in exercise of powers under Order X Rule 2 having been recorded, when title dispute could not have been adjudicated in testamentary proceedings.

16. The Joint Registrar is not found to be authorised under Chapter II Rule 3 of the Delhi High Court (Original Side) Rules, 2018 to be empowered to decide applications under Order X of the CPC or to record statements of the parties in pursuance thereto. Unfortunately, neither the Joint Registrar then seized of the matter nor any of the counsels ever looked into the said aspect and mechanically allowed the proceedings to go on, when considering the nature of these proceedings, the enquiry sought to be done under Order X was not within the adjudicative scope of the proceedings in which it was being undertaken.

17. The proceedings came up before this Court on 14th May, 2019, when the following issues were framed:

- “(i) Whether the document dated 30th April, 2009 is the validly executed last Will of the deceased Chaudhary Ved Pal Singh? OPP*
- (ii) Relief.”*

and the parties relegated to evidence and the title of 430 acres of land aforesaid was also enquired from the counsel for the defendant No.4 DDA.

18. The counsel for the respondent No.4 DDA, on 14th August, 2019 informed that out of land admeasuring 430 acres, only about 5 acres of land had not been acquired and the remaining entire land had been acquired and

is part of colonies already developed and inhabited by DDA. It was also informed that DDA was unable to comment on possession and ownership or status of unacquired land.

19. The counsel for the petitioner, on 14th August, 2019 admitted that he was not aware of the aforesaid position.

20. It appears that the entire proceedings were being pursued, without any spade work.

21. Be that as it may, the petitioner in his evidence, besides filing affidavit by way of examination-in-chief of himself has filed affidavit by way of examination-in-chief of one Ram Kishan as PW-2 and which affidavit by way of examination-in-chief has been proved as Ex.PW-2/1.

The said affidavit is as under:

“1. I say that I am one of the witnesses to the last Will and Testament of late Sh. Chaudhary Ved Pal Singh, the Testator/deceased, dated 30.04.2009 and in that capacity I am competent to depose this affidavit.

*The Registered will dated 30.04.2009 executed by Sh. Chaudhary Ved Pal Singh in favour of the Petitioner is already exhibited as **EX PW1/A**.*

2. I say I am also a witness to the Agreement to Sale dated 30.04.2009 duly executed between the Petitioner and the Deceased/Executor with respect to Suit Property, which was also notarized in my presence by the Notary.

*The Agreement to Sell and Payment Receipt are already exhibited as **EX PW1/E(COLLY)**.*

3. I say that I was present on 30.04.2009 and I saw and heard the contents of this Will being read over and explained to Sh. Chaudhary Ved Pal Singh.

4. I say that having heard and understood the contents of the Will, Sh. Chaudhary Ved Pal Singh 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.

5. *I say that in my presence, the testator signed and executed the Will.*

6. *I further say that the Testator requested the deponent to sign the same as attesting witness.*

7. *I say that I having personally seen the Testator sign and execute the Will, as also having received a personal acknowledgement from him of him having executed his will.*

8. *I, at the Testator's request, affixed my signatures thereupon on the Will dated 30.04.2009 as an attesting witness.*

9. *I say that the executor got the will dated 30.04.2009 in favour of the Petitioner registered with the Sub Registrar Office (North District) on 15.05.2009 in my presence.*

I depose accordingly."

22. The petitioner, appearing as PW-1 and Ram Kishan appearing as PW-2 appeared before the Commissioner appointed for recording evidence on 31st July, 2019.

23. Since the petitioner, appearing as PW-1 does not claim to be an attesting witness to the document claimed to be the validly executed last Will on the basis of which Letters of Administration is sought, need to refer to his testimony is not felt.

24. PW-2 Ram Kishan, in his examination-in-chief on oath before the Commissioner, stated as under:

"I have filed my affidavit Exhibit PW-2/1 which bears my signatures at Points 'A & B' alongwith document Exhibit PW-1/A which bears my signatures at Point 'A' and Exhibit PW-1/E which bears my signatures at Point 'A'."

25. As would immediately be evident from above, PW-2, claiming to be

the attesting witness to the document claimed to be the Will sought to be proved, has neither in his affidavit by way of examination-in-chief nor when appearing for tendering the said affidavit into evidence identified the signatures of the deceased Chaudhary Ved Pal Singh on the document nor has deposed about the other witness, if any present at the time of execution. All that PW-2 has identified is, his own signatures at point 'A' on the document claimed to be the Will.

26. Though in most cases the counsel for the objector in a Test.Cas. in cross-examination is found to prove the Will by excessive, un-required cross-examination, in this case did not cross-examine PW-2. Thus, the document on which Ex.PW-1/A has been put, claimed to be the validly executed last Will of the deceased Chaudhary Ved Pal Singh, has not been proved, neither in examination-in-chief nor in cross-examination.

27. The Will having not been proved in accordance with Section 68 of the Evidence Act, 1872 read with Section 63 of the Indian Succession Act, 1925, ought not to have been admitted into evidence and Ex.PW-1/A put thereon is ordered to be struck off.

28. The document, on the basis of which Letters of Administration was claimed, having not been proved to be the validly executed last Will of the deceased Chaudhary Ved Pal Singh and the petitioner otherwise not claiming to be a natural heir of the deceased Chaudhary Ved Pal Singh, the petition is dismissed.

29. Mr. Phool Kumar, Advocate, who throughout the aforesaid proceedings has been only requesting for the matter to be passed over to enable Mr. Rajeev Lochan, Advocate stated to be the Advocate for the objector Kalawati to appear, has not been called upon to address.

30. The original documents dated 30th April, 2009 and 10th May, 2009 and the original Death Certificate of Chaudhary Ved Pal Singh taken out from the sealed cover during the aforesaid dictation are returned to the cover but the need to seal the same again is not felt.

31. The respondent No.5 Kalawati having chosen not to argue, no costs.

RAJIV SAHAI ENDLAW, J.

SEPTEMBER 26, 2019

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