

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

% **Date of decision: 20th February, 2019.**

+ **TEST.CAS. 50/2016**

ASHOK KUMAR BAWA & ANR **Petitioners**

Through: Mr. Abhinav Dhingra, Adv.

Versus

STATE & ORS

..... **Respondents**

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Probate is sought by the two petitioners viz. Ashok Kumar and Naresh Mohan Bawa of the document dated 25th January, 2012 claimed to be the validly executed last Will of Late Sh. Sunil Kumar Bawa, son of Late Sh. Charanjit Lal Bawa who died at Dehradun on 10th October, 2015 leaving an immovable property No.101, Navjiwan Vihar, New Delhi.

2. The petition came up first before this Court on 12th July, 2016 when finding the pleadings in the petition to be inadequate, the petitioners were directed to file an affidavit disclosing the particulars as detailed in the said order. Though the petitioners filed an affidavit but the same on 22nd August, 2016 was found to be inadequate and another opportunity granted. The petitioners thereafter filed an application under Order I Rule 10 of the CPC and vide order dated 3rd October, 2016 notice of the probate petition to the close relatives disclosed and citation of the petition ordered to be issued and direction also issued to the Chief Controlling Revenue Authority to submit the report of valuation of the property.

3. The order dated 8th October, 2018 records that close relatives impleaded as respondents no.2 to 19 had been served and had not filed any objections and had not entered appearance. The petitioners were accordingly relegated to leading evidence.
4. The petitioners in their evidence have examined petitioner No.2 and the two attesting witnesses and closed their evidence.
5. The counsel for the petitioners has been heard.
6. The petitioners are not the named executors in the document claimed to be the Will and are not entitled to maintain a petition seeking probate. Under Section 222 of the Indian Succession Act, 1925, probate can be granted only to appointed executor. The remedy of the petitioners as beneficiaries of the document, was to seek Letters of Administration with copy of the Will annexed. The petition is thus liable to be rejected. However, since the petition was entertained, the said lacuna is ignored.
7. Only a photocopy of a certified copy of the purported Will is on record and Ex.PW1/A is found to have been put thereon only. On enquiry, where is the original document claimed to be the Will, the counsel for the petitioners states that the original has not been produced and only a photocopy of a certified copy of the Will has been produced and on which Ex.PW1/A has been put. On being asked to show the certified copy of the Will, the counsel for the petitioners states that the same is also not available with him.
8. I am of the view that even if the petitioners have lead evidence of circumstances entitling the petitioners to lead secondary evidence, it was incumbent on the petitioners to summon the record of the Sub-Registrar with

whom the Will is registered and for the purported witnesses to the Will to identify their signatures as attesting witnesses on the copy of the registered Will on record brought by the Sub-Registrar and mere identification of signatures of the testator as w4W3Q 44ell as the attesting witnesses on the photocopy of certified copy does not suffice.

9. On enquiry, as to the relationship of the petitioners to the Testator, it is stated that the petitioners are the cousins of the Testator. On further prodding, attention is invited to the affidavit filed in pursuance to the directions aforesaid prior to issuance of notice of the petition and wherefrom it transpires that the two petitioners are the sons of the brother of the father of the Testator. As per the said table, the parents of the Testator and the sole sibling of the Testator had pre-deceased the Testator and the Testator was unmarried and without any children.

10. The close relatives impleaded are informed to be the children of another brother of the father of the Testator. On enquiry, it is stated that the father of the Testator had two other brothers and the petitioners are the sons of one of the brothers and the respondents no.2 to 9 are the children of the other brother. The counsel however has no idea whether the father of the Testator had any sisters and states that there is nothing in that regard on the record.

11. A perusal of the list of Class-II heirs in Hindu Succession Act, 1956, claimed to be applicable to the deceased, shows that in the absence of any heir in categories I to VI therein, the estate of a male Hindu devolves on father's brother and father's sisters of the deceased. Though the two brothers of the father of the deceased are stated to have pre-deceased the deceased but

there is nothing to show whether any sister of the father of the deceased was/is alive.

12. The next category VIII in Class II supra is, mother's father and mother's mother of the deceased and qua which also there is no averment in the petition or in the evidence.

13. The next category IX is mother's brother and mother's sister of the deceased and qua them also there is nothing stated. The petitioners and the respondents No.2 to 9, as children of brother of father of Testator, would have a chance thereafter only i.e. if there are no sisters of father of Testator, no parents of mother of Testator and no brothers and sisters of mother of Testator.

14. It thus appears that the petition has been filed and is being pursued without giving an opportunity to the heirs in law of the deceased to contest the same.

15. Since the duty cast on the Court in testamentary jurisdiction is a solemn duty, the said lacuna cannot be overlooked.

16. Though the counsel for the petitioners states that an opportunity be given to implead the concerned persons but since as aforesaid the entire petition is misconceived, the same is not deemed appropriate and it is deemed appropriate that the petitioners file a fresh petition taking care of all the aforesaid lacunas.

17. Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J.

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