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

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Judgment Reserved on: 25.01.2019
Judgment pronounced on: 16 .04.2019

+ **FAO 520/2016**

SUJATA KOHLI

..... Appellant

Through: Mr. Anil Goel and Mr. Rizwan Aftab,
Advocates.

Versus

THE STATE & ORS.

..... Respondent

Through: Mr. Rajiv Duggal & Mr. Bharat
Kumar, Advocates with R-2 in person

CORAM:

HON'BLE MR. JUSTICE VINOD GOEL

VINOD GOEL, J:

1. This is an appeal under section 299 of the Indian Succession Act, 1925 against the Judgment dated 30.07.2016 passed by the court of Ld. Additional District Judge-06, Central District, Tis Hazari Court, Delhi ('ADJ') in Probate Case no.58/10 (new no.42342/16) dismissing the petition of the appellant/petitioner for grant of Letters of Administration in respect of Will dated 21.03.2002.

2. The appellant filed a petition for grant of Letters of Administration in respect of Will executed by her father late Sh. Hari Mohan Bhandari dated 21.03.2002. It was registered with the

concerned Sub Registrar. By virtue of this Will, the deceased bequeathed all his movable and immovable properties amongst his legal heirs. The testator had died on 16.09.2009. The appellant is one of the beneficiaries under this Will.

3. The short question that has arisen in this appeal for adjudication is whether the Will dated 21.03.2002 was proved in accordance with section 63 of the Indian Succession Act, 1925 ('ISA') and Section 68 of the Indian Evidence Act, 1872 ('IEA').

4. Section 63 of the 'ISA' enlists the requirements to execute a will as under:

“63. Execution of unprivileged wills.-Every testator, not being a soldier employed in an expedition or engaged in actual warfare, 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 acknowledgment of his signature or mark, or of 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.”

5. From a bare reading of the above provision, it is clear that one of the mandatory requirements of due execution of a Will is its attestation by two or more witnesses. Proof of a Will shall strictly be in terms of the above said provision. To say that a Will has been duly executed, the requirements mentioned in clauses (a), (b) and (c) of Section 63 of the 'ISA' are to be complied with i.e., (a) the testator has to sign or affix his mark to the Will, or it has got to be signed by some other person in his presence and by his direction; (b) that the signature or mark of the testator, or the signature of the person signing at his direction, has to appear at a place from which it could appear that by that mark or signature the document is intended to have effect as a Will; and (c) the most important pre-requisite being that the Will has to be attested by two or more witnesses and each of these witnesses must have seen the testator sign or affix his mark to the Will, or must have seen some other person sign the Will in the presence and by the direction of the testator, or must have received from the testator a personal acknowledgment of signature or mark, or of the signature of such other person, and each of the witnesses has to sign the Will in the presence of the testator.

6. Section 68 of the 'IEA' elaborates the way by which a document, which is required to be attested, is to be proved. It 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.

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.”

7. According to the above provision, a document required by law to be attested 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 an evidence. Such witness has to be necessarily examined before the document required by law to be attested can be used in evidence.

8. On a conjoint reading of Section 63 of ‘ISA’ with Section 68 of ‘IEA’ it appears that a person propounding the Will has to prove that the Will was duly and validly executed. It cannot be done by simply proving that the signature on the Will was that of the testator, it must also be proved that the attestation was also made properly as required by clause (c) of Section 63 of ‘ISA’. It is true that Section 68 of ‘IEA’ does not require that both or all the attesting witnesses must be examined, but at least one attesting witness has to be called for proving due execution of the Will. Although Section 63 of ‘ISA’ requires that a Will has to be attested at least by two witnesses, Section 68 of ‘IEA’ provides that a document, which is required by law to be attested, shall not be used as evidence until one

attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the Court. In a way, Section 68 of the 'IEA' gives a concession to those who want to prove and establish the authenticity of a Will in a Court of law by examining at least one attesting witness even though a Will has to be attested at least by two witnesses mandatorily under Section 63 of the 'ISA'. But what is significant and to be noted is that one attesting witness examined should be in a position to prove the due execution of a Will. To put in other words, if one attesting witness can prove execution of the Will in terms of clause (c) of Section 63, viz., attestation by two attesting witnesses in the manner contemplated therein, the examination of other attesting witness is not required.

9. The requirements of a duly executed Will under section 63 of the 'ISA' were elaborated by the Hon'ble Supreme Court in ***Janki Narayan Bhoir v. Narayan Namdeo Kadam***, (2003) 2 SCC 91 as under:

“8. To say a will has been duly executed the requirements mentioned in clauses (a), (b) and (c) of Section 63 of the Succession Act are to be complied with i.e. (a) the testator has to sign or affix his mark to the will, or it has got to be signed by some other person in his presence and by his direction; (b) that the signature or mark of the testator, or the signature of the person signing at his direction, has to appear at a place from which it could appear that by that mark or signature the document is intended to have effect as a will; (c) the most important point with which we are presently concerned in this appeal, is that the will has to be attested by two or

more witnesses and each of these witnesses must have seen the testator sign or affix his mark to the will, or must have seen some other person sign the will in the presence and by the direction of the testator, or must have received from the testator a personal acknowledgement of signature or mark, or of the signature of such other person, and each of the witnesses has to sign the will in the presence of the testator.”

10. The position in **Janki Narayan’s case** (supra) was re-iterated by the Hon’ble Supreme Court in **Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh, (2009) 4 SCC 780** where it was held that:

“11. As per provisions of Section 63 of the Succession Act, for the due execution of a will:

- (1) the testator should sign or affix his mark to the will;*
- (2) the signature or the mark of the testator should be so placed that it should appear that it was intended thereby to give effect to the writing as a will;*
- (3) the will should be attested by two or more witnesses, and*
- (4) each of the said witnesses must have seen the testator signing or affixing his mark to the will and each of them should sign the will in the presence of the testator.”*

11. Out of the two attesting witnesses of the Will dated 21.03.2002, the appellant examined Shri S.C Rastogi (PW-2). In his affidavit tendered in examination in chief, PW-2 testified “1. That I knew late Shri Hari Mohan Bhandari very closely for the last about thirty years. 2. I say that late Shri Hari Mohan Bhandari had executed his ‘Will’ which was duly registered at the office of the Sub-Registrar, Pitampura, Delhi and I had signed the said Will on 21.03.2002 as one

of the attesting witnesses. 3. I say that the Will is genuine and be acted upon.” In his cross-examination he stated “xxxxxxx At the time of execution of Will, apart from me and testator, there was one advocate and one or two other persons, whom I did not know. After signing by me, said Will was signed by that advocate and none else.”

12. The above testimony of PW2 does not meet the requirements of section 63 of ‘ISA’ as elaborated by the Hon’ble Supreme Court in ***Janki Narayan Bhoir’s case*** (supra) and re-iterated in ***Yumnam Ongbi Tampha Ibema Devi’s case*** (supra). The testimony of the attesting witness PW-2 falls much short of the requirements under section 63 of the ‘ISA’. PW-2 did not state that (i) he and the other attesting witness had seen the testator signing or putting his mark on the Will; and (ii) he and the other witness have signed the will as witnesses in the presence of the testator. Therefore the appellant has miserably failed to prove the due execution of the Will dated 21.03.2002.

CM NO. 41317/2016 (for additional evidence)

13. The appellant seeks to adduce additional evidence and tender a better affidavit of PW-2 Shri S.C Rastogi to meet the requirements of section 63 of the ‘ISA’. He emphasized that it was the fault of the counsel who drafted the affidavit of PW-2 S.C Rastogi which lacks the requirements under section 63 of the ‘ISA’. He argued that because of the negligence of a lawyer, the appellant should not be made to suffer.

14. Here it would be relevant to advert to Order 41 Rule 27 of the Code of Civil Procedure, 1973 (‘CPC’), which reads as under:

27. Production of additional evidence in Appellate Court.—

(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) **the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or**

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced or witness to be examined.

(2) Whenever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.”

15. The Hon’ble Supreme Court in *Malayalam Plantations Ltd. v. State of Kerala*, (2010) 13 SCC 487 summarised the principles embodied under Order 41 Rule 27 CPC in the following terms:

“16. If any petition is filed under Order 41 Rule 27 in an appeal, it is incumbent on the part of the appellate court to consider at the time of hearing the appeal on merits so as to find out whether the documents or evidence sought to be adduced have any relevance/bearing on the issues involved. It is trite to observe that under Order 41 Rule 27, additional evidence could be adduced in one of the three situations, namely, (a) whether the trial court has illegally refused the evidence although it ought to have

been permitted; (b) whether the evidence sought to be adduced by the party was not available to it despite the exercise of due diligence; (c) whether additional evidence was necessary in order to enable the appellate court to pronounce the judgment or any other substantial cause of similar nature.

17. It is equally well settled that additional evidence cannot be permitted to be adduced so as to fill in the lacunae or to patch up the weak points in the case.”

(Emphasis supplied)

16. The requirement under section 63 of the ‘ISA’ are mandatory. When a Will is to be proved in the court of law, the witness is not to be informed of the requirement of Section 63 ‘ISA’ by the propounder of the Will or his/her counsel. What had actually transpired at the time of execution of Will should be testified truly by the witness. The deposition of a witness is not a mere formality but the truth must be narrated by the witness himself in his affidavit. Examination-in-chief and cross examination of a witness is an opportunity to extract the truth from him which then can be used to arrive at a just decision by the Court. If the testimony of a witness does not support the case of one of the parties, the lacuna cannot be allowed to be filled up by bringing on record another affidavit to replace the testimony of the witness and thus manipulate and twist the facts.

17. Once the facts have been testified by PW-2, the same cannot be replaced by another set of facts in order to remove the lacuna to benefit the propounder of the Will. This witness cannot be made intelligent by the propounder of the Will or her counsel to change his

testimony. The witness cannot be allowed to make out a new story by twisting the facts. Any attempt by the counsel for the propounder of the Will to re-draft the Affidavit of the witness is not only against legal ethics but is also an interference in the administration of justice. A counsel, while drafting an affidavit should act as a responsible officer of the court and be fair while recording the facts as narrated to him by the deponent failing which the affidavit should not be read in evidence.

18. Order 41 Rule 27 CPC does not come to the rescue of the appellant. It does not contemplate a situation permitting the appellant to substitute the testimony of the witness. The facts which took place at the time of executing, attesting and signing of the Will had already surfaced in the affidavit of PW-2 and in his cross-examination. As such there is no merit in the application which is accordingly dismissed.

19. In the facts and circumstances of the case and in view of the law discussed, this Court finds no reason at all to interfere with the impugned order dated 30.07.2016. The appeal along with the applications being CM No. 41316/16 and CM No.41317/16 is dismissed with no order as to costs.

(VINOD GOEL)
JUDGE

APRIL 16, 2019