

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

% **Date of decision: 4<sup>th</sup> February, 2020.**

+ **TEST.CAS. 87/2016**

**AMIT KUMAR**

**..... Petitioner**

Through: Mr. Ajay Kumar Singh & Mr. Vinay  
Kumar, Advs.

Versus

**STATE OF NCT OF DELHI AND OTHERS... Respondents**

Through: None.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

1. This petition under Section 276 of the Indian Succession Act, 1925 seeks probate of the document dated 5<sup>th</sup> September, 2000 claimed to be the validly executed last Will of deceased Balwant Bhai Patel, resident of House No.2967/A, Dharampura Gali No.2, Gurudwara Gali, Kailash Nagar, Gandhi Nagar, New Delhi, who died on 21<sup>st</sup> January, 2014 leaving the petitioner as his son and the respondents no.2 to 4 viz. (a) Anjana Ben Joshi, (b) Pinki Ben Patel and (c) Naina Birendra Kumar Patel as his daughters, as his only natural heirs, his wife Jai Shree Ben Patel having pre-deceased him on 6<sup>th</sup> May, 2000.

2. The petitioner, in the petition itself pleaded that the document dated 5<sup>th</sup> September, 2000 did not name the petitioner or anybody as executor thereof and he was filing this petition as a beneficiary. Though in accordance with Section 222 read with Section 276 of the Indian Succession Act a petition seeking probate did not lie and in accordance with Section 278 read with Section 232 of the Indian Succession Act only a petition seeking Letters of Administration with document claimed to be the

Will annexed thereto, could have been filed but without noticing the said aspect, on 27<sup>th</sup> October, 2016 when the petition came up first before this Court, notice thereof was ordered to be issued and citation ordered to be published with direction to the respondent no.1 to file valuation report.

3. The order dated 6<sup>th</sup> July, 2017 records the appearance of the advocate for the respondent no.2 who sought time to file reply. The orders dated 27<sup>th</sup> August, 2019 and 27<sup>th</sup> September, 2019 record that none had appeared for respondents no.3 and 4 despite service and the respondent no.2, though earlier appeared through an advocate had stopped appearing and had not filed any reply / objections. Though there is no order recording that citation had been published but the record reveals that citation as ordered was published. None filed objections in response thereto also. Accordingly, vide order dated 27<sup>th</sup> September, 2019, the petitioner was relegated to lead evidence.

4. The petitioner, in his evidence has examined himself as PW1 and Mr. Dinesh Doshi as PW2 and closed his evidence.

5. The petitioner, appearing as PW1, in his affidavit by way of examination-in-chief Ex.PW1/A, proved the Death Certificate, issued by Gam Panchayat, Dharmaj, District Anand, Gujarat of the deceased as Ex.PW1/2. Though he has also sought to prove the document dated 5<sup>th</sup> September, 2000 as the validly executed last Will of the deceased but being not an attesting witness thereto, his evidence in that respect is irrelevant. Else, the petitioner in his affidavit by way of examination-in-chief has deposed on other matters which are not of relevance in a testamentary case.

6. PW2 Dinesh Doshi, Advocate in his affidavit by way of

examination-in-chief Ex.PW2/1 has deposed, that (i) he is one of the attesting witnesses of the Will dated 5<sup>th</sup> September, 2000 executed by the deceased; (ii) the Will was executed and signed by the deceased in his presence; (iii) one Anuradha Rao was also present when the Will dated 5<sup>th</sup> September, 2000 was executed and signed by the deceased; (iv) the said Anuradha Rao explained the contents of the document dated 5<sup>th</sup> September, 2000 to the deceased in his presence and deceased read and understood the document dated 5<sup>th</sup> September, 2000 and then put his signature thereon; (v) he had put his signatures on the document dated 5<sup>th</sup> September, 2000 in the presence of the deceased and Anuradha Rao; (vi) Anuradha Rao had also put her signature on the document dated 5<sup>th</sup> September, 2000 in his presence and in the presence of the deceased; (vii) the Will dated 5<sup>th</sup> September, 2000 was executed and signed by the deceased in the presence of himself and Anuradha Rao; and, (viii) the deceased was of sound mind and had executed the Will dated 5<sup>th</sup> September, 2000 of his own volition.

7. However PW2 Dinesh Doshi, while appearing before the Joint Registrar on 6<sup>th</sup> November, 2019, merely tendered his affidavit by way of examination-in-chief in evidence and identified his own signatures thereon i.e. on his affidavit by way of examination-in-chief Ex.PW2/1, at points 'A' and 'B'. PW2 Dinesh Doshi, claiming himself to be the attesting witness of a document claimed to be validly executed last Will dated 5<sup>th</sup> September, 2000 of the deceased Balwant Bhai Patel, though the most crucial witness in this proceeding in rem, to prove the Will of deceased, has not proved the document dated 5<sup>th</sup> September, 2000 as the Will.

8. Per Section 63 of the India Succession Act, 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.”*

9. Per Section 68 of the Indian Evidence Act, 1872,

***“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.”*

10. What follows from a conjoint reading of the aforesaid provisions, a Will, which is required by law i.e. Section 63 of the Indian Succession Act, to be attested, can be proved by attesting witness only, if alive. Here PW2 Dinesh Doshi, claiming to be attesting witness, is alive. The said attesting witness, to prove the document as Will, was required to depose compliance of each of the aforesaid three ingredients aforesaid of Section 63 of Indian Succession Act. Though PW2 Dinesh Doshi in his affidavit by way of examination-in-chief so deposed but affidavits by way of examination-in-chief are prepared by counsels sitting in their office and at which time the document qua which the deponent deposes is not before the deponent of the said affidavit by way of examination-in-chief. The document is generally in the Court file which is then not available in lawyers chamber or at the time of attestation of the affidavit by way of examination-in-chief. Thus the statements contained therein are without reference to the document claimed to be the Will. It is incumbent on the deponent to, while appearing in the Court and tendering the said affidavit by way of examination-in-chief in evidence, identify the signature of the executant and signatures of himself and other witnesses on the document, and without which a document as the Will cannot be said to have been proved. Per Section 67 of the Indian Evidence Act, if a document is alleged to be signed by any person, the sign must be proved. To prove the sign, the witness has to identify the signature on the document. PW2 Dinesh Doshi, when appearing before the Joint Registrar, did not do any such thing.

11. Thus, the document claimed to be the Will in the present case has not been proved in accordance with law.

12. It is sad that inspite of observations in this regard having been made also in *Jatinder Singh Bhatia Vs. State* 2018 SCC OnLine Del 9622, *Trilok Kumar Vs. Ish Kapur* 2018 SCC OnLine Del 12047, *Govindan Chettiar Vs. Akilandam* 1997 SCC OnLine Mad 209, *Suresh Bathre Vs. Aam Janta* 2012 SCC OnLine MP 2650, evidence continues to be led in such lackadaisical fashion without even bothering to prove the document for which the litigant has been made to litigate for the last four years. Supreme Court in *Bhaiya Girja Datt Singh Vs. Gangotri Datt Singh* AIR 1955 SC 346 held that it cannot be presumed from the mere signature appearing at the foot that they had been appended by the person, whose they purport to be.

13. Though owing to the aforesaid, the petition should be dismissed but only for the reason that the petitioner should not be burdened for the negligence of advocates appointed and for the reason that none of the natural heirs of the deceased have chosen to contest the petition and none else has filed objections thereto, I deem it appropriate to allow the petition.

14. The petition is thus allowed.

15. Letters of Administration under Section 232 of the Indian Succession Act, 1925 is ordered to be issued to the petitioner with copy annexed thereto of Ex.PW1/1 as the validly executed last Will of deceased Balwant Bhai Patel, resident of House No.2967/A, Dharampura Gali No.2, Gurudwara Gali, Kailash Nagar, Gandhi Nagar, New Delhi who died on 21<sup>st</sup> January, 2014 subject to the petitioner depositing the requisite stamp

duty and subject to the petitioner furnishing administration bond of the value of the properties sought to be administered under the Letters of Administration with one surety of the like amount.

16. The petition is disposed of.

**FEBRUARY 04, 2020**

‘gsr’ ..

**RAJIV SAHAI ENDLAW, J**

