IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: February 24, 2021

\+ TEST.CAS. 40/2019

NIKHIL NANDA & ANR. ..... Petitioners

Through: Mr. Gaurav Puri, Mr. Sarthak Gupta and Mr. Rajesh Chugh, Advs.

versus

STATE OF NCT OF DELHI & ANR. ..... Respondents

Through: Mr. Madhu Sudan Bhayana, Adv. for R-l Mr. Amit Baisoya, Adv. for R-2

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. This petition under Section 276 of the Indian Succession Act, 1925 was initially filed by two petitioners (namely Nikhil Nanda and Ritu Nanda), with the following prayers:

> *"In view of the above stated facts and circumstances, it is therefore prayed that this Hon'ble Court may be pleased to:*
>
> *a. Grant, in favour of the Petitioner being the named Executor, Probate of the Will dated 04-01-2018 duly executed by the Testator, Late Shri Rajan Nanda @ R P Nanda Son of Late Shri Har Prasad Nanda and*
>
> *b. Pass such other or further order/s or such directions, as this Hon'ble Court may deem fit, just and proper in the circumstances of the case and also to meet the ends of justice."*

2. In substance, Nikhil Nanda petitioner No.1 is seeking Probate of the document purported to be the Will dated January 04, 2018 of the deceased Rajan Nanda @ R.P. Nanda. It is stated in the petition that petitioner being the appointed executor / administrator to the Will has distributed amongst the beneficiaries the immovable property(s) mentioned in the Will and also the movable properties.

3. It is stated in the petition that the testator Rajan Nanda @ R.P. Nanda, who expired on August 05, 2018, in Gurugam, Haryana, has executed a registered Will dated January 04, 2018, duly attested by Vinod Dixit and Dr. S.R. Ahuja.

4. It is the case of the petitioner No.1 and Ritu Nanda that the said Will was duly registered with the office of Sub-Registrar-V (1), New Delhi as Document No.17 in Additional Book No.3, Vol. No. 42 at pages 72 to 83 on January 04, 2018.

5. In the present petition, notice was issued to the State on May 27, 2019 and citations had been published in the newspaper 'The Statesman' (English) Delhi edition and 'Navbharat Times' (Hindi) Delhi edition. Objections have not been filed despite publication of the citations. Notice was duly served on the State and Valuation report has been filed by the SDM, Badkhal regarding valuation of immovable property, i.e., 2, Friends Colony, and Asst. Collector (Grade-I) Sub Division (Defence Colony), District South-East, New Delhi has submitted report dated August 08, 2019 along with bank statement of Account in HSBC in the name of late R.P. Nanda.

6. Affidavits supporting the petition / 'No Objections' have been filed by the petitioner No.1 and the respondent No.2 to the effect that they do not have any objection if the relief as prayed for, is granted in

favour of Ritu Nanda / petitioners.

7. Petitioner No.1 also entered the witness box and tendered the evidence by way of affidavit (Ex.PW1/X) in examination-in-chief. Along with documents exhibited, he has proved the petition as Ex. PW1/1A and the Death Certificate of the deceased as Ex. PW1/1 (OSR). Though, he has also sought to prove the document exhibited as Ex. PW 1/2 (OSR) dated January 04, 2018 as the validly executed last Will of the deceased Rajan Nanda but not being an attesting witness thereto, his evidence in that respect is irrelevant. Further, the petitioner has proved the passport of the testator as Ex. PW-1/3 (OSR).

8. PW-2 Vinod Dixit, in his evidence by way of affidavit (Ex.PW2/X) has deposed, that (i) he is one of the attesting witnesses of the Will dated January 04, 2018 executed by the deceased testator; (ii) the Will was executed by the deceased in his presence; (iii) one Dr. S.R. Ahuja was also present when the Will dated January 04, 2018 was executed; (iv) he along with Dr. S.R. Ahuja signed the said Will in presence of each other as well as the Testator; (v) that the said Will was registered in the office of Sub Registrar V(l), New Delhi on January 04, 2018, where the Deponent / he along with the Testator as well as Dr. S. R. Ahuja, the other Attesting Witness, were also present.

9. Appearing before the Joint Registrar on November 14, 2019, PW-2 Vinod Dixit has tendered his evidence by way of affidavit (Ex.PW2/X) in examination-in-chief and identified his signature at Point A & B on Ex. PW2/X. He relied upon the document, which is Ex.PW1/2 (OSR) and identified his signatures at Point C on Will.

10. Dr. S.R. Ahuja PW-3, in his evidence by way of affidavit (Ex.PW3/X) has deposed, that (i) he is one of the attesting witnesses of

the Will dated January 04, 2018 executed by the deceased testator; (ii) the Will was executed by the deceased testator in his presence; (iii) one Vinod Dixit was also present when the Will dated January 04, 2018 was executed; (iv) he along with Vinod Dixit signed the said Will in presence of each other as well as the Testator; (v) that the said Will was registered in the office of Sub Registrar V(l), New Delhi on January 04, 2018, where the Deponent / he along with the Testator as well as Vinod Dixit, the other Attesting witness, were also present.

11. Dr. S.R. Ahuja tendered his evidence by way of affidavit (Ex.PW3/X) in examination-in-chief, and he identified his signature at Point A & B on Ex.PW3/X. He relied upon the document which is already exhibited as Ex.PW1/2 (OSR) and identified his signatures at Point D on Will.

12. After the evidence was concluded, the orders in this case were reserved on January 06, 2020 for pronouncement on January 27, 2020. In between the petitioner No.2 i.e., Ritu Nanda the wife of the testator and mother of Nikhil Nanda (petitioner No.1) and Nitasha Nanda (respondent No.2) expired. The petitioner No.1 filed an application being I.A. No.1140/2020 under Order XXII Rule 2 CPC read with Section 104 of Indian Succession Act, 1925 (ISA) to bring on record the legal heirs of deceased petitioner No.2 Ritu Nanda. The said application though signed by the petitioner No.1 Nikhil Nanda was also supported by an affidavit of respondent No.2 Nitasha Nanda.

13. It is stated that the petitioner No.2 Ritu Nanda was suffering from cancer and she expired on January 14, 2020 and is survived by two legal heirs, who are already parties in the present petition i.e., petitioner No.1 Nikhil Nanda and respondent No.2 Nitasha Nanda, her son and

daughter respectively.

14. It is further stated in the application that as per the Will of the Testator dated January 04, 2018 the offshore account, contents of the same were to be inherited by the petitioner No.2 since deceased, and after her, the contents of above said offshore account shall vest with her legal heirs, who are petitioner No.1 and respondent No.2 in the present petition.

15. It is averred in the petition that the funds lying in the offshore account were self-owned funds earned by the Testator and he had full disposing power over the funds. It is further averred that the said offshore account has no nomination and as per the prevalent laws of Jersey, the probate in the first instance has to be granted by the Courts where the deceased was ordinarily residing at the time of his death.

16. It is stated that the value of moveable property namely Offshore Bank Account (GBP) with HSBC Bank, HSBC Expat Jersey, HSBC House, Explanade, ST Helier, Jersey JE11HS being Account No.406162-11997114 for which probate is required as mentioned in the Will dated January 04, 2018 to which Ritu Nanda (since deceased) is to succeed in terms of the said Will is approximately GBP 568,943.69. It is further stated that there is no liability of the Testator and therefore net value of the assets that Ritu Nanda (since deceased) is likely to succeed in terms of the Will dated January 04, 2018 is GBP 568,943.69.

17. It is the submission of Mr.Puri that the death of Ritu Nanda during the pendency of the petition shall not affect the present petition, inasmuch as the Court can still grant the prayer made by Nikhil Nanda petitioner No.1 in this petition as Ritu Nanda in her Will dated October 29, 2018 has bequeathed the offshore account in favor of Nikhil Nanda

(petitioner No.1) and her daughter Nitasha Nanda, who is already a party to the proceedings impleaded as respondent No.2. That apart, according to him, in terms of Section 104 of the ISA, *"if a legacy is given in general terms, without specifying the time when it is to be paid, the legatee has a vested interest in it from the day of the death of the testator, and, if he dies without having received it, it shall pass on to his representatives."* In support of his submissions, he has relied upon the following three judgments: -

i. In ***Re: Narendra Nath Mitra*** MANU/WB/0032/2012

ii. ***Ramjee Pandit and Ors. v. Dhramdeo Pandit and Ors.*** MANU/BH/1020/2007

iii. ***Raj Rani Bhasin v. State*** MANU/DE/0540/2009

18. On the other hand, I may state that the learned counsel for the State has taken an objection with regard to the prayers made in the petition. According to him, even though the petitioner is seeking probate with regard to only the offshore account but seeing the prayer, it is general in nature.

19. I may state that an application for amendment of the petition with regard to prayer clause was filed being I.A.11381/2020 which has been allowed by this Court vide order dated December 11, 2020 to which the counsel for the State and respondent No.2 have given 'No Objection' for the grant of prayer as made in the amended petition which is reproduced in Para 23, below. That apart, the counsel for the State also stated that report has been filed by the concerned Asst. Collector (Grade-I) Sub Division (Defence Colony), District South-East, New

Delhi vide status report dated August 08, 2019 along with Bank statement (filed on August 09, 2019).

20. It is also a matter of a record that Nikhil Nanda (petitioner No.1) had filed an application being I.A. 1140/2020 for bringing the legal heirs of the original petitioner No.2 Ritu Nanda (since deceased) on record and the same was allowed vide Order dated December 11, 2020, and the amended memo of parties was taken on record which reads as under:-

*"**AMENDED MEMO OF PARTIES***

1. Sh. Nikhil Nanda
S/o Late Sh. Rajan Nanda,
R/o 12, Jor Bagh, New Delhi-03.

2. Smt. Ritu Nanda, (Deceased)
S/o (sic) Late Sh. Rajan Nanda,
R/o 2, New Friends Colony, New Delhi-65.

Through its Legal Heirs
2a) Sh. Nikhil Nanda,
S/o Late Sh. Rajan Nanda,
R/o 12 Jor Bagh, New Delhi-03

2b) Ms. Nitasha Nanda,
D/o Late Sh. Rajan Nanda,
R/o 2, New Friends Colony, New Delhi-65
……………..Petitioners

Versus

1. State of National Capital Territory of Delhi Through Secretary,
6, Raj Niwas Marg, Ludhlow Castle
Civil Lines, New Delhi-110054

2. Ms. Nitasha Nanda,
D/o Late Sh. Rajan Nanda,
R/o 2, New Friends Colony, New Delhi-65
……………..Respondents"

21. Having heard the learned counsel for the parties and perused the record, it is noted that initially the petition was filed with Nikhil Nanda as petitioner No.1 and Ritu Nanda as petitioner No.2. During the pendency of this petition, after the orders were reserved on January 06, 2020 Ritu Nanda the original petitioner No.2, expired. Accordingly, an application under Order XXII Rule 2 CPC being IA 1140/2020 was filed to bring on record the legal heirs of petitioner No.2, i.e., Ritu Nanda. The said application was allowed on December 11, 2020. I have already reproduced the amended memo of parties in para above.

22. I may state here, an issue was raised by the Court whether in view of the death of Ritu Nanda, a fresh petition is required to be filed by petitioner No.1 and respondent No.2, based on the Will of Ritu Nanda. In that regard, Mr. Puri had relied upon Section 104 of ISA along with three judgments of which reference has been made above in support of his contention that this Court can still grant the prayer made by the petitioner No.1 Nikhil Nanda in this petition as Ritu Nanda (petitioner No.2-since deceased) also in her Will dated October 29, 2018 has bequeathed the said offshore account in favour of Nikhil Nanda (petitioner No.1 and 2(a)) and Nitasha Nanda (petitioner No.2(b) and respondent No.2) and in any case, Nikhil Nanda and Nitasha Nanda have stepped into the shoes of Ritu Nanda after her death. Suffice to state, in terms of Section 104 of ISA, if the legatee dies after testator without receiving the bequest, it shall pass on to his / her representatives. In ***Narendra Nath Mitra (supra)***, in Para 4 it was held by Calcutta High Court as under:

> *"4. Before dealing with contention of the caveators some other provisions of the Act have to be examined.*

Generally, the legatee has a vested interest from the date of the death of the testator. If the legatee dies after the testator, without receiving the bequest, it shall pass to his representatives (See Sections 104 and 105). Under Section 105, if the legatee does not survive the testator the legacy lapses. However, Section 109 provides that where a bequest is made to a testator's child or lineal descendant and that legatee dies in the lifetime of the testator, the bequest will not lapse but shall take effect as if the death of the legatee had happened immediately after the death of the testator. Reading these sections together one forms an opinion that if a legatee dies without receiving the legacy, after the death of the testator, the legacy passes to his representatives. <u>Therefore, in my judgment the heirs of such a legatee are also treated like legatees, under sections 104 and 105. Even if the legatee dies before the testator and he happens to be his child or lineal descendant, his heirs are treated similarly</u>."

(emphasis supplied)

23. I find that petitioner No.2(b) and respondent No.2 Nitasha Nanda has given her No Objection for the petitioner Nikhil Nanda seeking amendment of the prayer clause of the petition in the following manner:

<u>"PRAYER</u>

"In view of the above stated facts and circumstances, it is therefore, prayed that this Hon'ble Court may be pleased to:

a. Grant in favour of the Petitioner being the named executor, probate with regard to only Offshore Bank Account (GBP) with HSBC Bank, HSBC Expat Jersey, HSBC House, Explanade, ST Helier, Jersey JE 11HS being Account No. 406162-11997114 in the Will dated 04.01.2018 duly executed by the Testator Late Shri Rajan Nanda @ R.P. Nanda, S/o Late Shri Har Prasad Nanda and"

24. So, it is seen that respondent No.2 Nitasha Nanda has No Objection for the petitioner No.1 be granted probate of Will dated January 04, 2018 of Testator Late Rajan Nanda @ R.P. Nanda with respect to Offshore Bank Account (GBP) with HSBC Bank, HSBC Expat Jersey, HSBC House, Explanade, ST Helier, Jersey JE11HS being Account No. 406162-11997114.

25. Having said that, it is to be seen, whether the Will dated January 04, 2018 is the duly executed Will of late Rajan Nanda. In order to prove the Will, the petitioner has examined himself as PW1 in these proceedings and also had produced two attesting witnesses to the Will namely Vinod Dixit (PW2) and Dr. S.R. Ahuja (PW3). The requirement of attestation has been spelt out in Section 63 (c) of the Indian Succession Act, 1925 which reads as under:

> *"63 (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."*

26. Section 68 of the Indian Evidence Act, 1872 also states 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."*

27. From the deposition of the two attesting witnesses, the following position emerges:

<u>Evidence by way of Affidavit of Dr. S.R. Ahuja.</u>

I, Dr. S. R. Ahuja, S/o S/o Late P R Ahuja, R/o 1115/15, Faridabad, Haryana. Aged 71 years do hereby solemnly affirm and declare as under:

1. That I am one of the Attesting Witnesses to the WILL dated 04-01-2018 of Late Sh. Rajan Nanda @ R P Nanda who expired on 05-08-2018 at Medanta, The Medicity Hospital, Gurugram, Haryana. The WILL dated 04.01.2018 is exhibited as Exb. PW-1/2 and the signatures of the deponent are marked as Point - C.

2. That I state that the said WILL was executed by Late Sh. Rajan Nanda @ R P Nanda in presence of the Deponent as well as the other Attesting Witness, namely, Mr. Vinod Dixit S/o Sh. R.P. Dixit, R/o A-592, Sarita Vihar, New Delhi 110 076.

3. That the Deponent and Mr. Vinod Dixit signed the said WILL of Late Sh Rajan Nanda @ R P Nanda, as Attesting Witnesses, in the presence of each other as well as the Testator, Late Sh. Rajan Nanda @ R P Nanda.

4. That the Deponent states that the WILL dated 04-01-2018 executed by Late Sh. Rajan Nanda @ R P Nanda was registered in the office of Sub Registrar V(1), New Delhi on 04-01-2018, where the Deponent alongwith the Testator as well as Mr. Vinod Dixit, the other Attesting Witness, were also present.

5. That the Petitioner No. 1, Sh. Nikhil Nanda S/o Late Sh. Rajan Nanda, was appointed by the Testator as an Executor of the WILL.

Evidence by way of Affidavit of Mr. Vinod Dixit.

I, Vinod Dixit, S/o Sh. R.P. Dixit, R/o A-592, Sarita Vihar, New Delhi 110 076, Aged 57 years, do hereby solemnly affirm and declare as under:

1. That I am one of the Attesting Witnesses to the WILL dated 04-01-2018 of Late Rajan Nanda @ R P Nanda who expired on 05-08-2018 at Medanta, The Medicity Hospital, Gurugram, Haryana. The WILL dated 04.01.2018 is exhibited as Exb. PW-1/2 and the signatures of the deponent are marked as Point - C.

2. That I state that the said WILL was executed by Late Sh. Rajan Nanda @ R P Nanda in presence of the Deponent as well as the other Attesting Witness, namely, Dr. S.R. Ahuja S/o Late P R Ahuja, R/o 1115/15, Faridabad, Haryana.

3. That the Deponent and Dr. S.R. Ahuja signed the said WILL of Late Sh. Rajan Nanda @ R P Nanda, as Attesting Witnesses, in the presence of each other as well as the Testator, Late Sh. Rajan Nanda @ R P Nanda.

4. That the Deponent states that the WILL dated 04-01-2018 executed by Late Sh. Rajan Nanda @ R P Nanda was registered in the office of Sub Registrar V(1), New Delhi on 04-01-2018, where the Deponent alongwith the Testator as well as Dr. S. R. Ahuja, the other Attesting Witness, were also present.

5. That the Petitioner No. 1, Sh. Nikhil Nanda S/o Late Sh. Rajan Nanda, was appointed by the Testator as an Executor of the WILL.

28. That even in the deposition before the Joint Registrar on November 14, 2019, the attesting witnesses have stated as under:

Statement of Vinod Dixit (PW2)

"I tender my affidavit of evidence in examination-in-chief, which is Ex.PW2/X and the same bears my signature at Point A & B.

I rely upon the document which is already Ex.PW-1/2 and my signatures are at Point C on Will."

<u>Statement of Dr. S.R. Ahuja (PW3)</u>

"I tender my affidavit of evidence in examination-in-chief, which is Ex.PW3/X and the same bears my signature at Point A & B.

I rely upon the document which is already Ex.PW-1/2 and my signatures are at Point D on Will."

29. The said attesting witnesses have not been cross-examined neither by the Counsel for the State nor by the Counsel for respondent No.2.

30. From the contents of the affidavits of the attesting witness, it has come on record that; (i) Late Rajan Nanda @ R.P. Nanda had executed the Will in their presence; (ii) They have signed the Will of Late Rajan Nanda @ R.P. Nanda as attesting witness in the presence of each other as well as the Testator; (iii) The Will dated January 04, 2018 as executed by Late Rajan Nanda @ R.P. Nanda was registered in the Office of Sub-Registrar V(1), New Delhi on January 04, 2018 where they were present.

31. But at no place, the attesting witnesses say that, they identify the signatures of the executant and the signature of the other attesting witness on the document and without which a document such as the Will cannot be said to have been proved. As per conjoint reading of Section 63 of the India Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872, 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 signatures on the document. Even while tendering evidence by way of affidavit in examination-in-chief before this Court on November 14, 2019, attesting witnesses have only identified their own signatures on the Will dated January 04, 2018 (Ex.PW1/2) (OSR), but had neither

identified the other witness signature nor that of the testator.

32. So, the requirement of Section 63 ISA has not been fulfilled inasmuch as the said attesting witnesses, to prove the document as Will, were required to depose compliance of each of the three ingredients of Section 63 of ISA. Be that as it may, a mistake of the witness or that of the counsel, the petitioner must not be penalised. ***(Ref: Amit Kumar v. State of NCT of Delhi and Ors., Test Cas. 87/2016).*** Considering this fact that no one is opposing the relief sought and the testimony remains unchallenged and the petitioner No.2(b) and respondent No.2 Nitasha Nanda has also supported the petition and gave her No Objection, it is not deemed necessary to ask the petitioner to re-examine the attesting witnesses. So, it is held that petitioner No.1 Nikhil Nanda has succeeded in proving the document (Ex.PW1/2 (OSR)) to be a validly executed Will of Rajan Nanda @ R.P. Nanda dated January 04, 2018.

33. Further, the testator was the resident of Delhi at the time of his death, as stated by the petitioner in para 14 of the amended probate petition as reproduced hereunder. Thus, this Court has the jurisdiction to entertain this petition.

> *"14. The Petitioners submits that the Testator had permanent places of abode in Delhi. The Testator used to reside at 2, Friends Colony West, New Delhi-110065. The Testator expired in Medanta, The Medicity Hospital, Gurugram and most part of his estate is also situated in Delhi. Hence, this Hon'ble Court has territorial and pecuniary jurisdiction to grant Probate to the Petitioners."*

34. In view of the above, the petitioners have made out a case for grant of probate in favour of petitioner No.1 Nikhil Nanda in respect of the Will dated January 04, 2018 (Ex.PW1/2 (OSR)) with regard to Offshore Bank Account (GBP) with HSBC Bank, HSBC Expat Jersey,

HSBC House, Explanade, ST Helier, Jersey JE11HS being Account No. 406162-11997114, he having been appointed as its executor under the said Will.

35. Accordingly, the petition is allowed and disposed of. Probate is granted, of the Will dated January 04, 2018 (Ex.PW1/2) (OSR) executed by late Rajan Nanda @ R.P. Nanda, in favour of the petitioner No.1 Nikhil Nanda, in respect of the above-mentioned Offshore Bank Account (GBP) with HSBC Bank, HSBC Expat Jersey, HSBC House, Explanade, ST Helier, Jersey JE11HS being Account No. 406162-11997114, subject to the requisite Court fees / stamp duty being furnished in accordance with the report dated August 08, 2019 (filed on August 09, 2019) submitted by Asst. Collector (Grade-I) Sub Division (Defence Colony), District South-East, New Delhi and upon submission of the administration bond and surety, in accordance with law, to the satisfaction of the Registrar General of this Court.

V. KAMESWAR RAO, J

FEBRUARY 24, 2021/*aky/jg*