



2025:DHC:979



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

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Date of Decision: 17.02.2025+ **RFA 155/2025, CM APPL. 9625/2025 & CM APPL. 9626/2025**

DEEPAK MALHOTRA

.....Appellant

Through: Dr. Ashutosh, Advocate.

versus

THE STATE (NCT OF DELHI) AND ANR

.....Respondents

Through: None

CORAM: JUSTICE GIRISH KATHPALIA**J U D G M E N T (ORAL)**

1. The appellant has assailed judgment and order dated 04.09.2024 of the District Judge, South West District, Dwarka Courts, New Delhi whereby preliminary issue on maintainability of the probate petition was decided against the appellant, thereby dismissing the petition. I have heard learned counsel for appellant but find it not to be a fit case to even issue notice of this appeal.

2. It appears that the appellant filed a probate case before the Trial Court, pleading that his mother Smt. Neelam Malhotra passed away on 23.04.2021, leaving behind three sons, who are the present appellant and the present respondents no. 2 & 3. In the said probate case, the present appellant further pleaded that mother of the parties was attached to the present appellant, being her youngest child, so she executed a Will dated

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GIRISH KATHPALIA

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15.04.2021 and thereby bequeathed all her property to the present appellant. As such, the present appellant prayed for grant of probate. The present respondents no. 2 & 3 filed their respective replies before the Trial Court, pleading that the document dated 15.04.2021 propounded by the present appellant was not a valid Will since the same was not attested by two witnesses as mandated by Section 63(c) of the Indian Succession Act.

3. On the basis of the above objections, the learned Trial Court framed a preliminary issue as to whether the document dated 15.04.2021 is a duly executed Will. Taking note of the provisions under Section 63 of the Indian Succession Act, the learned Trial Court held that the document in question cannot be treated as a Will since it was not attested by two witnesses, and therefore, the probate petition was not maintainable.

4. Hence, the present appeal.

5. Learned counsel for appellant submits that mother of the parties had succumbed to Covid pandemic, so this Court ought to exercise judicial activism and treat the said document as a valid Will. Further, it is contended by learned counsel for appellant that since the solitary witness attesting the said Will was gazetted officer, the requirement of the second witness ought to have been discarded. It is contended by learned counsel that during the period when mother of the parties passed away, there was complete lockdown due to Covid and it was punishable to contact any person.

6. I am not impressed with any of these arguments.

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7. The legal position, stipulated under Section 63 (c) of the Indian Succession Act is not challenged by the appellant insofar as there is mandatory requirement that the document propounded as a Will must have been attested by two or more witnesses, each of whom had seen the testator sign or affix her/his thumb mark to the Will. Admittedly, in the present case only one witness had signed the document in question. In the name of judicial activism, the Court cannot distort the legislative mandate.

8. I am unable to find any infirmity in the impugned judgment and order, so the same are upheld. The appeal as well as the accompanying applications are dismissed.

**GIRISH
KATHPALIA**

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GIRISH KATHPALIA, J

FEBRUARY 17, 2025/tp/ry

Click here to check corrigendum, if any