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IN THE HIGH COURT OF DELHI AT NEW DELHI

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TEST.CAS. 17/2023 & I.A. 4359-60/2023

VIKAS MALHOTRA

..... Petitioner

Through: Mr.Sanjeev Mahajan,
Mr.Sarthak Chiller &
Mr.Puneet Yadav, Advs.

versus

THE STATE OF NCT OF DELHI & ORS. Respondents

Through: Ms. Pavitra Kaur, Advocate for
R-1.

Mr.Joy Basu, Sr. Adv. with
Mr.Varun Sarin, Mr.Kanak
Bose & Mr.Naman Khatwani,
Advs. for R-2.

Mr.Karan Nagrath, Adv. for R-
3.

Mr.YP Narula, Sr. Adv. with
Mr.Abhey Narula, Adv. for R-4
& R-5.

Mr.Ujas Kumar, Adv. for R-7.

Ms.Damini Chawla, Adv. for
R-8 & R-9.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

ORDER

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14.03.2023

I.A. 4361/2023 (Exemption)

1. Allowed, subject to all just exceptions.

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2. The learned senior counsel for the respondent nos.4 and 5, who appears on advance notice, objects to the maintainability of the present petition filed under Section 276 of the Indian Succession Act, 1925 (hereinafter referred to as 'ISA'). He submits that the present petition is not accompanied with the original alleged Will dated 02.08.2019 allegedly left behind by Late Ms. Mala Marwah, the deceased. Placing reliance on the judgment of this Court in *Delhi Sikh Gurdwara*



Management Committee v. Munir et Singh & Ors., 2017 SCC OnLine Del 9049; of the Calcutta High Court In the matter of: *Madhav Prasad Birla (D)*, AIR 2005 Cal 1; and *Smt. Ashoka Dhar & anr. v. Dr. Partha Banerjee & ors.*, 2011 SCC OnLine Cal 2791; and of the Kerala High Court in *Chithalan v. C. Ammu Amma & Ors.*, 1968 KLJ 123, he submits that filing of the original Will on the basis of which the Letter of Administration is prayed for is a mandatory requirement.

3. On the other hand, the learned counsel for the petitioner draws my reference to paragraph 5 of the petition to submit that presently the original Will is not traceable and the petitioner, as an Executor of the Will, is presuming that the same is lying somewhere at the last place of abode of the deceased, that is, 31, Hanuman Road, New Delhi, which is presently in the occupation of respondent nos.2, 8 and 9.

4. Further, placing reliance on the judgment of the Supreme Court in *Durga Prashad v. Debi Charan and Others*, (1979) 1 SCC 61, he submits that the presumption on non-production of the original Will under Section 70 of the ISA is a weak one and can be drawn only where the respondents are able to show circumstances which may justify an inference that the Testatrix might have destroyed the Will so as to not make it enforceable. He submits that this will be a question of fact which will have to be determined once the parties have led their evidence and have had a chance to state their case.

5. I have enquired from the learned counsel appearing for the respondent no.2, as also from the learned counsel for the respondent nos.8 and 9, if the original Will on basis of which the present petition has been filed is available with them. They have stated that presently the original Will is not traceable and is not in their possession. The respondent nos.2, 8 and 9 shall file an affidavit to the above effect.

6. As far as the plea of maintainability of the present petition is



concerned, Section 276(1) of the ISA reads as under:-

“276. Petition for probate.—(1) Application for probate or for letters of administration, with the Will annexed, shall be made by a petition distinctly written in English or in the language in ordinary use in proceedings before the Court in which the application is made, with the Will or, in the cases mentioned in sections 237, 238 and 239, a copy, draft, or statement of the contents thereof, annexed, and stating—

- (a) the time of the testator’s death,
- (b) that the writing annexed is his last Will and testament,
- (c) that it was duly executed,
- (d) the amount of assets which are likely to come to the petitioner’s hands, and
- (e) when the application is for probate, that the petitioner is the executor named in the Will.”

7. A reading of the above provision would show that an application for probate or for letters of administration, shall be accompanied with the Will of which probate or letters of administration is prayed for. Exception to this mandatory condition is provided under Sections 237, 238 and 239 of the ISA, which read as under:-

“237. Probate of copy or draft of lost Will.—When a Will has been lost or mislaid since the testator’s death, or has been destroyed by wrong or accident and not by any act of the testator, and a copy or the draft of the Will has been preserved, probate may be granted of such copy or draft, limited until the original or a properly authenticated copy of it is produced.

238. Probate of contents or lost of destroyed Will.—When a Will has been lost or destroyed and no copy has been made nor the draft preserved, probate may be granted of its contents if they can be established by evidence.

239. Probate of copy where original exists.—When the Will is in the possession of a person



residing out of the State in which application for probate is made, who has refused or neglected to deliver it up, but a copy has been transmitted to the executor, and it is necessary for the interests of the estate that probate should be granted without waiting for the arrival of the original, probate may be granted of the copy so transmitted, limited until the Will or an authenticated copy of it is produced.”

8. A reading of Section 237 of the ISA would show that where *inter alia* the Will has been lost or mislaid since the Testator’s death, however, a copy or the draft of the Will has been preserved, probate may be granted of such copy or draft, limited until the original or a properly authenticated copy of the Will is produced.

9. In the present case, as noted hereinabove, it is the case of the petitioner that the original Will is presently not traceable and is presumed to be lying at the last place of abode of the Testatrix. Paragraph 5 of the petition is reproduced hereinunder:-

“5. That Late Ms. Mala Marwah on 02.08.2019 executed her last Will and testament. This Will was duly attested by witnesses. This is the last Will and Testament of the deceased Ms. Mala Marwah.

The certified copy has been filed alongwith list of document. The original Will at present is not available with the Petitioner and would be probably be somewhere at her last place of abode i.e. 31, Hanuman Road, New Delhi. The property 31, Hanuman Road, New Delhi which at present is in exclusive possession of the Respondent No.2 and his two sons Respondent No.8 and 9.”

10. Though the respondent nos.2, 8 and 9 have stated that the original Will is not in their possession, they shall state so on affidavit and on receiving the response from the other respondents or any other person who may object to the grant of probate/letters of administration, the Court would have to reach a conclusion if the



presumption under Section 70 ISA, that is, of the Testatrix having revoked the Will by way of destruction thereof, can arise.

11. In *Durga Prashad* (supra), the Supreme Court explained the legal position that would arise on a conjoint reading of Section 276 with Sections 237, 238 and 239 and Section 70 of the ISA, in the following words:-

“31. The correct legal position may therefore be stated as follows:

- (1) That where a will has been properly executed and registered by the testator but not found at the time of death the question whether the presumption that the testator had revoked the will can be drawn or not will depend on the facts and circumstances of each case. Even if such a presumption is drawn it is rather a weak one in view of the habits and conditions of our people.*
- (2) That the presumption is a rebuttable one and can be rebutted by the slightest possible evidence, direct or circumstantial. For instance, where it is proved that a will was a strong and clear disposition evincing the categorical intention of the testator and there was nothing to indicate the presence of any circumstance which is likely to bring about a change in the intention of the testator so as to revoke the will suddenly, the presumption is rebutted.*
- (3) That in view of the fact that in our country most of the people are not highly educated and do not in every case take the care of depositing the will in the banks or with the Solicitors or other-wise take very great care of the will as a result of which the possibility of the will being stolen, lost or surreptitiously removed by interested persons cannot be excluded, the presumption should be applied carefully.*
- (4) That where the legatee is able to prove the circumstances from which it can be inferred that there could be absolutely no reason whatsoever for revoking the will or that the act of revoking the will*



was against the temperament and inclination of the testator, no presumption of revocation of the will can be drawn.

- (5) *That in view of the express provision of Section 70 of the Act the onus lies on the objector to prove the various circumstances, viz., marriage, burning, tearing or destruction of the will.*
- (6) *When there is no obvious reason or clear motive for the testator to revoke the will and yet the will is not found on the death of the testator it may well be that the will was misplaced or lost or was stolen by interested persons.”*

12. The Supreme Court has clarified that where the original Will is not found at the time of the death of the Testator, the question whether the presumption that the Testator has revoked the Will can be drawn or not, will depend on the facts and circumstances of each case. Even if such a presumption is drawn, it is rather a weak one. The presumption is a rebuttable one and can be rebutted by the slightest possible evidence, direct or circumstantial, by proving that the Will contains a clear disposition and there is nothing to indicate the presence of any circumstance which is likely to bring about a change in the intention of the Testator so as to revoke the Will suddenly. The onus that the Will was revoked shall lie on the objector. Where there is no obvious reason or clear motive for the Testator to revoke the Will, it may well be that the Will was misplaced or lost or was stolen by interested persons. The presumption, therefore, would be that the Will still operates.

13. In *Delhi Sikh Gurdwara Management Committee* (supra), the Court was considering a case where evidence had been led by the parties, and the learned Trial Court had found that even the attesting witness had denied the execution and attestation of the Will. The Court also found that there was no pleading or proof laid by the appellant therein that the original Will was not available because it



had been destroyed by an unintentional act or unintentional wrong or unintentional accident. In those circumstances the Court observed as under:-

“7. In my opinion dehors the findings of the court below with respect to the Will dated 27.7.2005, the suit was liable to be decreed on a purely legal proposition and which is contained in Sections 70 and 237 of the Indian Succession Act, 1925. As per these provisions unless and until the original Will is shown and proved to have been destroyed by an unintentional accident, no copy of the Will can be relied upon. This legal issue goes to the root of the matter. I must note that admittedly in the present case the original Will dated 27.7.2005 has not seen the light of the day. Sections 70 and 237 of the Indian Succession Act read as under:-

"Section 70. Revocation of unprivileged Will or codicil.-No unprivileged Will or codicil, nor any part thereof, shall be revoked otherwise than by marriage, or by another Will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged Will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same.

***Section 237. Probate of copy or draft of lost Will.-** When a Will has been lost or mislaid since the testator's death, or has been destroyed by wrong or accident and not by any act of the testator, and a copy or the draft of the Will has been preserved, probate may be granted of such copy or draft, limited until the original or a properly authenticated copy of it is produced."*

8. A conjoint reading of aforesaid Sections 70 and 237 of the Indian Succession Act shows that one of the methods for revocation of the Will is by destruction of the same. Whenever any reliance is placed upon the Will for grant of the probate or letters of administration etc, it has to be pleaded and proved that either the



original has not been destroyed and exists and is with a particular person or at a particular place or in the alternative it has to be pleaded and proved that the Will has been destroyed only by an act of accident or an unintentional act not amounting to revocation.

9. In the present case, admittedly there is no pleading or proof on behalf of the appellant/defendant that the original Will dated 27.7.2005 is not available because it has been destroyed by an unintentional act or unintentional wrong or unintentional accident. Once that is so Court cannot grant any benefit on the basis of the copy of the Will because original Will will have to be taken to have been revoked by destruction of the same.”

14. Apart from the fact that the Court did not take notice of the judgment of the Supreme Court in ***Durga Prashad*** (Supra), it was on the peculiar facts of that case that the Court held that in the absence of the original Will, the petition under Section 276 of the ISA would not be maintainable.

15. In ***Madhav Prasad Birla (D)*** (supra), an application was made before the High Court of Calcutta seeking exemption from filing the original Will. The Court held that but for the circumstances mentioned under Sections 237, 238 and 239 of the ISA, the original Will has to be filed. The Court, therefore, granted time to the petitioner therein to file the original Will. In the present case, as noted hereinabove, the petitioner has pleaded circumstances falling under Section 237 of the ISA for not filing the original Will. The effect thereof can only be considered only once the parties file their objections to the present petition. It is not the case of the petitioner that the petitioner has the original Will, however, for same reason seeks exemption from filing the same.

16. In ***Smt. Ashoka Dhar & Anr.*** (Supra), the Calcutta High Court reiterated that excepting cases under Sections 237, 238 and 239 of the



ISA, an application for probate and a grant of letters of administration has to be filed with the Will in original, if available. There can be no cavil to this proposition except the fact that in the present case, the petitioner states that the original Will is not available with him.

17. In **Chithalan** (Supra), the High Court of Kerala was considering a case where the learned Trial Court had declared a Will, for which, in fact, probate was not even prayed for, to be genuine. The Court found that it is for this reason that even the original of such Will was not filed. The Court found that the above finding of the Trial Court was wrong in entering a finding of the genuineness of the said Will. The Court again was not dealing with a situation where the petitioner had pleaded that the original Will was lost or was not available with him.

18. The above discussion has been necessitated only for the reason that the learned senior counsel for the respondent nos.4 and 5 has, placing reliance on the judgment of the Supreme Court in **TK Lathika v. Seth Karsandas Jamnadas**, (1999) 6 SCC 632, submitted that where an objection on the maintainability of the petition is raised, the Court must even prior to issue of notice, consider the same.

19. In the present case, having considered the objections raised by the learned senior counsel for the respondent nos.4 and 5, in my opinion, the present petition would be maintainable and the objection raised by the learned senior counsel for the respondent nos.4 and 5 would necessarily have to be considered only once the parties have filed their response to the present petition, and if the Court so warrants and directs, led their respective evidence on the same. For the reasons stated in paragraph 5 of the present petition, it cannot be said that the petition is liable to be dismissed in *limine* on the ground of non-filing of the original Will.

20. The learned senior counsel for the respondent nos.4 and 5 further submits that the present petition does not contain the proper



verification or the affidavit of ~~at least~~ one of the alleged witnesses to the alleged Will. In this regard, he draws my attention to Rule 2 of Chapter XXIX of the Delhi High Court (Original Side) Rules, 2018 and Section 281 of the Indian Succession Act.

21. I find merit in the said submission. The petition lacks the verification from atleast one of the alleged witnesses to the alleged Will. Though an affidavit of Shri Onkar Marwah, who claims himself to be one of the attesting witnesses to the Will dated 02.08.2019 of the deceased, has been filed, the same is not in the language as required under Section 281 of the ISA. However, for this reason alone, the present petition cannot be dismissed. It is settled law that the defect in verification or an affidavit is a curable defect.

22. At this stage, the learned counsel for the petitioner prays for leave to file the verification of the petition in terms of Section 281 of the ISA from Shri Onkar Marwah as also a further affidavit of Shri Onkar Marwah. He prays for and is granted a week's time to do so.

23. List on 24th March, 2023.

NAVIN CHAWLA, J

MARCH 14, 2023/rv