

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

% Judgment reserved on : 31.08.2015
Judgment delivered on: 26.11.2015

+ **FAO 330/2006**

MADHU GHANSHYAM HINGORANI Appellant

Versus

STATE AND ORS. Respondents

Advocates who appeared in this case:

For the Appellant : Mr. S.K. Mathur, Advocate

For the Respondents: Mr. Kanwal Chaudhary, Advocate for R-8

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER,J

BACKGROUND:

1. This is a statutory appeal filed against the judgment of the District Judge dated 11.08.2006. The learned District Judge vide the impugned judgment has dismissed the appellant's petition under Section 276 of the Indian Succession Act, 1925 (in short the Act) for grant of probate of Will dated 14.03.1996 [in short the Will (Ex.PW4/A)] said to be executed by Late Ms. Vidya Revachand Hingorani (in short the testatrix).

1.1 The testatrix expired on 11.09.1997. Upon the testatrix's death, the appellant instituted the petition under Section 276 of the Act, on 24.12.1999. Apart from the State, which was impleaded as respondent no.1 to the said petition, there were 9, other respondents, who were arrayed as parties to the

probate action. While respondent no.2 to 8 are the siblings of the deceased testatrix, respondent no.9 is the purchaser of the Property Bearing no.101, G Block, Saket, New Delhi, admeasuring 250.8 sq. meters (in short the Saket property), which is a subject matter of the aforementioned Will. Respondent no. 10 is the daughter of respondent no.9.

1.2 The appellant is the wife of the elder brother of the deceased testatrix and is a resident of New York, USA.

2. The learned District Judge has dismissed the appellant's petition on two grounds. First, that the appellant has not been able to discharge the onus placed on her with regard to the execution of the Will. This, conclusion, has been reached by the learned District Judge based on the testimony of one, Mr. Shailender Bhardwaj (PW2), who was one of the persons who had attested the Will. Second, the petitioner had not impleaded the brother of the deceased testatrix. This conclusion has been reached in paragraph 16 of the impugned judgment. Though, the name of the brother is not given in the impugned judgment, one can safely assume, it could only allude to the husband of the appellant, who was not formally impleaded as a respondent along with other siblings in the probate action.

2.1 It is common ground that the Will dealt with only one asset of the deceased testatrix, which is, the Saket property. Furthermore, it is also a common ground between contesting parties, that is, the appellant and Mrs. Kavita Hingorani (i.e. respondent no.8 in the present appeal), that the, Saket property was sold to respondent no.9, one, Mrs. Santosh Singh, also known as Mrs. Santosh Rani. Respondent no.10, as noticed above, is the daughter of respondent no.9. Before me, respondent no.9 and 10, though represented by counsel, did not address any arguments in the matter.

3. In this context, the following brief facts are required to be noticed :-

3.1 The deceased testatrix was a spinster. According to the appellant, the testatrix executed the aforementioned Will on 14.03.1996 in presence of two witnesses. These being: one, Ms. Dhaneshwari Devi, advocate and, as indicated above, Mr. Shailender Bhardwaj (PW2).

3.2 The Will was registered in the office of the Sub-Registrar.

3.3 Even according to the appellant, the testatrix during her life time, entered into an agreement to sell with regard to the Saket property and, consequent thereto, received a sum of Rs.55 Lakhs from the buyer. In the probate petition, the appellant further averred that the said sum of Rs.55 Lakhs was kept in a bank account with one, Mr. G.V. Hingorani; the husband of respondent no.8.

3.4 The testatrix, as noticed above, died, on 11.09.1997, in Rishikesh, in the State of U.P.

3.5 It is, in these circumstances, that the probate petition was filed on 24.12.1999, as indicated above. Citation was issued to general public, which was published in the National Herald. Consequent thereto, objections to the probate petition were filed by respondent no.8.

3.6 It appears that upon impleadment of respondent no.9 and 10, they filed their objection in the form of replies to the petition.

3.7 In support of the probate petition, the appellant, besides herself, cited three witnesses. The first witness was: Ms. Meera Abhichandani (PW1), who was appellant's power of attorney holder. This witness was not produced for examination; therefore, no reliance can be placed on her testimony. The second witness was, as indicated above, Mr. Shailender Bhardwaj (PW2). He was one of those, who had attested the Will. The appellant, who also stepped into the witness box, is referred to in the trial court record as PW3. The fourth witness was, one, Mr. Sher Singh, a UDC

in the Sub-Registrar's office. This witness was referred to as PW4.

3.8 On the other hand, respondent no.8 did not examine anyone but herself. In the trial court record, she has been referred to as RW1.

3.9 Though, respondent no.9 and 10 had filed their objections, during the course of the proceedings, they withdrew their replies/objections and thus, indicated to the trial court that they had no objection to the grant of probate in favour of the appellant. Consequently, the trial court was required to deal with only the objections filed by respondent no.8.

4. The appellant in her testimony before the trial court, largely took the stand which, she had taken in her probate petition. There was, however, an elaboration of the details with regard to the amount received by the testatrix against the agreement to sell executed by her qua the Saket property. The particulars of the buyer, which were not adverted to in the probate petition were referred to in the affidavit-of-evidence tendered by the appellant by way of examination-in-chief. While the appellant persisted with her stand that only a sum of Rs.55 Lakhs had been received by the testatrix and not a sum of Rs.1.46 Crores, as claimed by respondent no.9, she also disclosed that a suit for specific performance being: CS (OS) 2047/2000, had been filed by respondent no.9 against her, in this court.

4.1 In her testimony, the appellant thus, categorically denied the claim of respondent no.9 that she had paid a sum of Rs.1.46 Crores to the deceased testatrix against a total consideration of Rs.1.50 Crores agreed to with respect to the Saket property. As a matter of fact, respondent no.9 and 10, in their reply, filed before the trial court, had taken the stand that apart from a balance sum of Rs.4 Lakhs, which they are willing to pay, the remaining consideration out of a total sum of Rs.1.46 Crores had been paid to the deceased testatrix. Respondent no.9 and 10 have also taken the stand that

they are in possession of the Saket property; a fact which was not disputed before me.

4.2 The appellant in her examination-in-chief also adverted to an affidavit dated 15.10.1997 (Ex. PW4/3) said to have been executed by respondent no.8 wherein, she is said to have deposed on oath that the Will in issue was a genuine and valid, and had been executed by the deceased testatrix without any coercion, and that, as per the said Will, the appellant had become the absolute and exclusive owner of the Saket property.

4.3 In her cross-examination, the appellant disclosed that she became aware of the testatrix's wish to execute the Will when she was asked by her to accompany her to the Sub-Registrar's office for the purposes of getting the Will registered. The appellant went on to state that both she and her husband accompanied the testatrix to the Sub-Registrar's office though, she could not remember as to whether she had signed the Will, as a witness, or any register in the office of the Sub-Registrar. The appellant also adverted to the fact that she had carried the original Will, with her, after it had been registered. The appellant further deposed that upon being informed about the death of the testatrix by the husband of respondent no.8, she visited India, on 18.09.1997.

4.4 In her cross-examination, the appellant accepted the fact that negotiations with respect to sale of the Saket property ensued during the life time of the testatrix, as also, the fact, that the Will in issue pertained only to the Saket property. The appellant went on to allude to the fact that the Saket property was sold with "our consent" (which I would presume included the appellant's husband, who was the elder brother of the deceased testatrix).

4.5 The appellant further accepted the fact that the deceased testatrix had purchased an immovable property at Rishikesh by utilizing the funds

received as advance against the agreement to sell executed qua the Saket property.

4.6 Furthermore, the appellant deposed that the deceased testatrix had invested the remaining amount in a fixed deposit qua which Mr. G.V. Hingorani i.e. the respondent no.8's husband was made a nominee. The appellant, however, denied the suggestion that the testatrix had changed her mind after the execution of the Will and sold the property to respondent no.9 or that, her relationship with the testatrix had got strained after the execution of the Will. The appellant also denied the suggestion that she had used undue influence on the testatrix to have her execute the Will in her favour.

4.7 The appellant also denied the suggestion that respondent no.8 had looked after the deceased testatrix during her illness and that, as a reward, she had sold her property and given the proceeds to respondent no.8. The appellant in fact, asserted that respondent no.8 had refused to take care of the testatrix during her illness when, contacted over the telephone by her, for the reason, that her own husband was suffering from a heart ailment.

4.8 The appellant, however, admitted that the Will was prepared by her lawyer. The appellant, however, denied that the testatrix by making Mr. G.V. Hingorani (i.e. respondent no.8's husband) as a nominee of the funds received against execution of the agreement to sell, intended to give those funds during her life time, to them.

4.9 In so far as Mr. Shailender Bhardwaj (PW2) was concerned, his testimony was recorded on two occasions i.e. 23.01.2004 and 31.03.2004. On the first occasion, he deposed that the deceased testatrix had executed the Will in his presence and in the presence of Ms. Dhaneshwari Devi, the advocate of the appellant. PW2 identified the signatures and thumb impression of the testatrix as well as those which were appended by him at

point X and the signature of Ms. Dhaneshwari Devi at point Y on the Will in issue. PW2 also went on to state that the Will was registered on the day it was executed i.e. 14.03.1996. PW2 also alluded to the fact that he had signed and appended his thumb impression before the Sub-Registrar, and that, the testatrix was in a sound disposing mind and had executed the Will, voluntarily, without coercion.

5. PW2, however, on being recalled, to some extent, deviated from his earlier testimony. Since much of the case turns on the testimony of PW2, I intend to extract the relevant part verbatim as it appears on the record.

“..I am peon in the Akil Bhartiya Netra heen school. I personally did not know Mrs. Vidya Rewachand Hingurani. I was introduced to the testatrix through one Mrs. Dhaneshwari. Mrs. Dhaneshwari Adv., lives at the back side where I reside. Vol. She has now expired 4-5 months ago. The testatrix and Mrs. Dhaneshwari Adv. requested me to subscribe to the said will as a witness. On their request I signed as a witness on the said will. One day prior to the registration of the will, I was asked by Mrs. Dhaneshwari Adv. to accompany her for registration of the will the next day. I did not sign on the will on the day when she made the above mentioned request. I was introduced to the testatrix on the same day when the will was regd. I and Smt. Dhaneshwari Adv. went together to the Sub Registrar Office and the testatrix came alone. I was given / shown the original will by Smt. Vidya Hingurani, testatrix. I inquired from her as to whether she had not **brought any other witness, she answered me in the negative and told me to sign as a witness.** When she shown me the will for the first time, it was already signed by her. Smt. Dhaneshwari Adv. signed in my presence. Thereafter I signed as a witness. Vol. Testatrix had signed in the office of Sub Registrar. It is wrong to suggest that Mrs. Dhaneshwari Adv. did not sign in my presence. It is wrong to suggest that when the will first shown to me, it was bearing the signature of Smt. Dhaneshwari Adv. as well. It is correct that Vidya Devi Hingurani had signed in the office of Sub Registrar for the purposes of registration. It is incorrect to suggest that I am deposing falsely....

..I had seen the will. When I saw the will first time it was signed by the testatrix. I do not remember whether it was dated or not. I do not remember when date encircled A was put (only the part of date shown to the witness). It is wrong to suggest that I am deposing falsely...”

(emphasis is mine)

6. Mr. Sher Singh, UDC (PW4) stated in his testimony that the Will as per the record was executed by the testatrix, and that, its registration was reflected in the record. PW4, however, stated that he had no personal knowledge with regard to the registration of the Will; his testimony was based on record, available in the Sub-Registrar’s office.

7. Respondent no.8 (RW1), while adhering to a stand that the relationship between the testatrix and the appellant was strained, accepted that she had no written documents in her possession which would support her assertion. Respondent no.8 also accepted the fact that her husband had withdrawn a sum of Rs.38 Lakhs from the bank which had created the FDR in respect of the funds received from the purchaser of the Saket property pursuant to the death of the testatrix. Respondent no.8 went on to state that she was not aware as to whether or not her husband had informed the bank about the existence of the Will in issue, and that, there were other legal heirs, who may have a right on the amount withdrawn by her husband.

7.1 Respondent no.8, however, denied the suggestion that the Will in issue was in force or that it had not been revoked by the testatrix. Respondent no.8 also stated; albeit voluntarily, that the testatrix had told her that the Will was executed by her, under pressure.

8. Having examined the record and, the testimony of the witnesses, what has emerged clearly, is that, the testimony of Mr. Shailender Bhardwaj (PW2) is crucial to the case in arriving at the conclusion whether the Will in

issue, had been executed by the testatrix.

8.1 The learned DJ has come to the conclusion that the appellant has not been able to discharge the onus that the Will was executed by the testatrix. In reaching this conclusion, the trial court has relied on the testimony of Mr. Shailender Bhardwaj (PW2) who, stated in his cross-examination that he had accompanied Ms. Dhaneshwari Devi, the advocate engaged by the appellant, to the Sub-Registrar's office, and that, at that point in time, he was shown the Will, for the first time, which had already been signed by the testatrix.

8.2 Based on this, the learned DJ, relying on the provisions of Section 63 (c) of the Act, came to the conclusion that since, PW2 had not seen the testatrix sign the Will, the execution of the Will was not proved.

8.3 According to me, this conclusion of the learned DJ is flawed for more than one reason. First of all, PW2, seems to have deviated from his testimony given on 23.01.2004. As indicated above, on that date, he had said that the testatrix had executed the Will in his presence and in the presence of Ms. Dhaneshwari Devi, the advocate of the appellant. He in fact, identified not only the signature and the thumb impression of the testatrix but also those which had been appended by him and Ms. Dhaneshwari Devi.

8.4 PW2 has gone on to state that the Will was registered on the same date in his and Ms. Dhaneshwari Devi's presence before the Sub-Registrar. On being recalled for cross-examination by respondent no.8's counsel, he stated that he and Ms. Dhaneshwari Devi were the only two persons who were present at the Sub-Registrar's office and that, he was shown the Will for the first time, which, apparently, already bore the signatures of the testatrix.

8.5 What is, however, vital is that PW2 categorically states that the

testatrix told him to sign as a witness on the Will. PW2 affirmed the fact that the testatrix had appended her signatures on the Will before the Sub-Registrar for the purposes of bringing about registration of the Will. PW2 also went on to state that Ms. Dhaneshwari Devi had appended her signatures on the Will, in his presence.

8.6 Having regard to these facts, it is quite clear that PW2 received personal acknowledgment from the testatrix that she had appended her signatures and her thumb impression on the Will. Provisions of Section 63 (c) of the Act provide that the Will shall be attested by two or more witnesses, each of whom, should have seen the testator sign or affix his mark to the Will or have seen some other person sign the Will in the presence and by the direction of the testator or, have received from the testator a personal acknowledgment of his signature or mark or the signature of such other person. Furthermore, each of the witnesses are required to sign the Will in the presence of the testator but it is not necessary for more than one witness to be present at the same time. Furthermore, no particular form of attestation is necessary.

8.7 Clearly, in the present case, PW2 received, as indicated above, personal acknowledgement of the testatrix that she had appended her signatures and thumb impression on the Will. Thus, even if one were to go by his testimony, which PW2 gave on 31.03.2004 (on being recalled for cross-examination by the counsel for respondent no.8), no legal infirmity could have been appended to the execution of the Will on this ground.

8.8 That apart, the affidavit of respondent no.8 (Ex.PW3/4) clearly indicates that she had not questioned the genuineness and the legal validity of the Will. In fact, she went as far as to state that respondent no.1 was the sole and exclusive owner of the Saket property. Quite clearly, respondent

no.8, for reasons best known to her, chose to take a different stand while filing her objections; something went awry in the interregnum.

8.9 Neither in the impugned judgment, the District Judge has noticed this aspect of the matter nor was any suggestion been made to the appellant (PW3) that the affidavit (Ex. PW3/4) was not genuine. In fact, in the objections filed by respondent no.8, she categorically states in paragraph 9 that she was not in a position to comment whether the Will had been lawfully executed by the deceased testatrix without any influence or coercion. A perusal of the objections filed would show that her resistance to the probate action was premised principally on one singular fact, which was, that the testatrix having disposed of the Saket property, during her life time, could not seek probate of the Will. For the sake of convenience, paragraph 9 of the objections filed by respondent no.8 is extracted hereafter.

“..With reference to para 5, I am not aware and cannot comment whether the said Will was lawfully executed by late Vidya Hingorani without any influence or coercion. At any rate the petitioner cannot rely on the said Will or seek a probate, as late Vidya Hingorani during her life time had acted contrary to her intention stated in the said Will and agreed to dispose of the said property which was to be bequeathed to the petitioner..”

9. Apart from the above, the stand taken by respondent no.8, in her objections, was that, the money received on the sale of the Saket property, was kept in the bank account belonging to her husband, Mr. G.V. Hingorani, as he was appointed as the nominee / beneficiary vis-a-vis the said amount. To be noted, out of the total sum of Rs.55 lakhs, supposedly received by the testatrix, Rs.38,27,760/- was kept in the bank account.

9.1 I may indicate herein that in so far as the probate court is concerned, it

is required only to examine as to whether a valid and a legal Will has been executed. Therefore, while the affidavit of respondent no.8 (Ex. PW3/4) may not legally tilt the matter one way or the other, with regard to the proof of execution of the Will, the affidavit though, does go to show the shift in the stand of respondent no.8 which, in a sense, explains the change in stand by respondent no.8.

10. Having said so, the other question which arises is : whether the Will continued to subsist after the testatrix during her life time had initiated the process of disposing the property i.e. the Saket property.

10.1 For this purpose, one would have to advert to the definition of the term, 'Will', as given in the Act. Section 2(h) of the Act, defines, the Will, to mean a legal declaration of the intention of a testator with respect to his property, which he desires to be carried into effect after his death. Therefore, the essential characteristics of a Will, are as follows : (i). that there is a legal declaration of the intention of the testator; (ii). the legal declaration pertains to his property; and (iii) lastly, he desires that the declaration should take effect, or in other words, operates after his death.

10.2 It is, therefore, stated that a Will is an instrument by which a person disposes of his property and the disposition is to take effect after his demise. Therefore, by its very nature, the testament is both ambulatory and revocable during the life time of the testator. [See *Uma Devi Nambiar Vs. T.C. Sidhan, (2004) 2 SCC 321*].

10.3. The question therefore, arises is : whether the testament / legal declaration made in the instant case continued to operate as a Will?

10.4 The facts, which have emerged, clearly demonstrate that all three ingredients, which are required in law, for a document to be termed as a Will (Ex.PW4/A), were present. The fact that the testatrix during her life time

entered into an agreement to sell qua which, admittedly, a suit is pending adjudication, would not, to my mind, alter the nature of the document. The revocation, if any, can only take place in accordance with the provisions of Section 70 of the Act. Section 70 of the Act, inter alia, provides that no unprivileged Will or codicil nor any part thereof, can be revoked [otherwise than by the operation of law (say, in the case of marriage of the maker of the Will, see : Section 69 of the Act)] except by some writing declaring an intention to revoke, which is executed in the same manner, in which an unprivileged Will is required to be executed under the Act or, by burning, tearing, or destruction of the same either by the testator or by some other person in his presence and by his direction with the intention of revoking the Will in issue. The modes of revocation of a Will, are exhaustive under the Act. [See *Surender Nath Chatterjee Vs. Sivas Mookherjee, AIR 1922 Calcutta 182*].

10.5 In the facts of the instant case, the evidence placed on record does not establish conclusively that the testatrix had taken the final step to revoke the Will in issue, altogether. The testatrix's decision to enter into an agreement to sell and thereupon, receive monies in the form of advance, did not, in law, translate into revocation of the Will in issue. Whether or not the testatrix would have taken that decision, ultimately, can only be in the realm of speculation as the event of her death interceded in the meanwhile. Revocation of a Will, under law, is, as solemn an act as, the execution of the Will itself. Mere intention to revoke the Will cannot supplant the legal requirement of revoking the Will, as provided under Section 70 of the Act. [See *Lati Kabala Dasi Vs. Anil Behari Ghose, AIR 1953 Calcutta 103*].

10.6 Therefore, the objection taken to the probate action by respondent no.8 that no probate could be granted in the circumstances that the testatrix

had initiated steps for selling the Saket property, in my view, is not sustainable in law.

11. Before I proceed further, let me deal with certain specific arguments advanced by Mr. Chaudhary in the written submissions filed by him.

11.1 The first and foremost argument advanced by Mr. Chaudhary on behalf of respondent no.8, was that, the Will in issue was executed under suspicious circumstances for the following reasons : (i). That the text of the Will was prepared by the lawyer of the appellant, Ms. Dhaneshwari Devi; (ii). The attesting witness (PW2) was appointed by Ms. Dhaneshwari Devi; (iii). The appellant had accompanied the testatrix to the office of the Sub-Registrar for getting the Will registered; (iv). Lastly, that the appellant had carried the original Will with her to USA.

11.2 In other words, the argument of Mr. Chaudhary was that the aforesaid circumstances demonstrated that the appellant had taken a prominent part in the execution of the Will in issue, which conferred upon her a substantial benefit. In support of these submissions, Mr. Chaudhary had relied upon the following judgment :-

***Niranjan Umesh Chandra Joshi Vs. Mirdula Jyoti Rao,
2007 (1) AD (SC) 477.***

11.3 The aforesaid argument was elaborated upon by Mr. Chaudhary by contending that the testatrix was over awed, influenced and pressurized by the appellant to execute the Will in issue, and this, was demonstrable by the fact that immediately after the appellant had left the country, the testatrix executed an agreement to sell qua the Saket property. The fact that the testatrix deposited a part of the consideration in the bank account and made the husband of respondent no.8 a nominee / beneficiary in respect of the same, would show, according to the learned counsel that she had no

intention to bequeath the Saket property to the appellant.

11.4 It was, further, submitted by Mr. Chaudhary that the Will was not proved as PW2 in his cross-examination clearly stated that when the Will in issue was shown to him for the first time, at a point in time when it was already signed by the testatrix. Thus according to Mr. Chaudhary, there was no proper execution of the Will. It was contended by the learned counsel that the witness (in this case, PW2) should have put his signatures *ánimo attestandi*'. In other words, an attesting witness, should have either seen the executant append his / or her signature on the Will or should have received his or her personal acknowledgement of the same. Mr. Chaudhary said that this aspect was missing in the instant case. The reliance for this proposition was placed on the following judgment :-

***N. Kamalam (Dead) and Anr. Vs. Ayyaswamy and Anr.,
AIR 2001 SC 2802.***

11.5 Lastly, Mr. Chaudhary contended that the testatrix was a spinster and that her relatives were Class-II heirs. Based on this, learned counsel submitted that the appellant ought to have impleaded the brother of the testatrix. In this behalf, the provision of Section 263, Explanation (b), of the Act was sought to be relied upon. It was, thus, stated that the citation issued would not suffice in the instant case as the circulation was made only in India, by the brother of the testatrix who was not a party and was a resident of USA.

12. In so far as the first aspect of the matter is concerned, as to whether the Will in issue can be said to have been executed in suspicious circumstances, what has to be appreciated is the following :-

12.1 In the objections filed with the trial court, no such pleas were raised. In fact, as noticed by me, in the foregoing paragraphs of my discussion,

respondent no.8, in paragraph 9 of her objections, has clearly stated that she was not able to comment as to whether or not the Will was lawfully executed by the testatrix without any influence or coercion. Therefore, clearly, the submissions made by Mr. Chaudhary are not backed by relevant pleadings or evidence.

12.2 As rightly contended by Mr. Mathur, during the course of the arguments, the testatrix was an educated lady who at the time of her death was only 63 years of age and worked as a Vice-Principal in a Girl's School. Furthermore, the testimony of the PW2 clearly establishes that at the time of execution of the Will, the testatrix was in a sound disposing mind.

12.3 Therefore, the mere fact that the appellant had arranged for a lawyer, who in turn had asked PW2 to attest the Will, by itself, would not have me reach a conclusion that the Will in issue, was executed either under undue influence and/ or coercion or as alleged in suspicious circumstances. This is more so, in the circumstances that the testatrix passed away nearly one and a half years after the execution of the Will. In case the testatrix wanted to revoke or supersede the Will, she could have easily done so either by executing the document of revocation or by executing a fresh Will.

12.4 The fact that the appellant had left the country, immediately, after the execution of the Will is not disputed by respondent no.8. Therefore, the other argument advanced by Mr. Chaudhary in support of his argument that there was undue influence exerted by the appellant by relying upon the fact that the appellant had carried the original Will with her would also have no relevance. The Will, as is well settled in law, is both an ambulatory and a revocable document. As indicated above, the testatrix could have easily executed a fresh Will, if she so desired.

12.5 In so far as the submission made by Mr. Chaudhary that PW-2 had

stated that when, he attested the Will, it had already been signed by the testatrix, has been dealt with by me hereinabove in extenso. In the context of evidence which has emerged and the provisions of Section 63(c) of the Act, which have been discussed at length by me, suffice it to say, in this particular case, even if one were to go by the testimony given by PW2 (after he was recalled by respondent no.8), it is clear that he had received indication from the testatrix in the Sub-Registrar's office that she had appended her signature on the Will. In my opinion, the validity of Will cannot be questioned on this score as well.

13. The last submission of Mr. Chaudhary with regard to the purported legal flaw in the institution of the probate action, on account of the fact that the brother was not impleaded as party is also a plea which is not tenable in the instant case.

13.1 A perusal of paragraph 7 of the probate petition, would show that the appellant had set out the names of all near relatives. These relatives were also impleaded as parties to the probate action. The record shows notices were issued to the relatives, some of whom were shown as residents of USA. Apart from respondent no.8, none of the others came forth to contest the petition. Even in this court, notices were issued to respondent no.2 to 7 (i.e. the relatives of the deceased testatrix) apart from respondent no.8 to 10. Despite service none of them entered appearance in the matter.

13.2 As indicated above, the appellant is the wife of one of the brothers. Quite clearly, that brother was not interested in contesting the petition filed by his wife, who was the sole beneficiary of the Will in issue. This objection was not taken by respondent no.8, before the trial court. The trial court seems to have, on its own, cited this as one of the reasons for dismissing the probate petition.

13.3 In my view, in the given facts and circumstances, the probate petition could not have been dismissed, on that ground. The provisions to Section 263, Explanation (b), cited by Mr. Chaudhary would have no applicability as that provision empowers the court to revoke or annul the grant of probate in cases where it is obtained fraudulently by making false suggestions or by concealing material particulars of the case. No such allegation was made by respondent no.8 nor did the court return any findings in that respect.

14. For the reasons given above, the appeal is allowed. The impugned judgment is set aside.

15. Accordingly, probate is granted in favour of the appellant. The Registry will act on the judgment and issue a probate in the form prescribed in Schedule-VI of the Act, as applicable to the instant case, upon the appellant fulfilling necessary formalities including payment of the requisite court fee.

16. Parties shall, however, bear their own cost.

RAJIV SHAKDHER, J

NOVEMBER 26, 2015

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