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

% Reserved on : 18.08.2026
Pronounced on : 18.11.2026
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CNR No. DLHC010291472019

\+ **FAO 276/2019**

KISHAN MURARI .....Appellant

Through: Mr. Pawan Reley, Mr. Akshay Lodhi, Ms. Simran Singh, Mr. Gaurav Kumar, Mr. Tanish Rawat, and Mr. Prakhar Agrawal, Advocates

versus

THE STATE (GOVT OF NCT OF DELHI) & ORS .....Respondents

Through: Mr. Navin Kumar Chaudhary and Mr. Parvind Kumar, Advocates for Respondent Nos. 2 and 3

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

CM APPL. 31195/2019 (condonation of delay)

1. By way of the present application, the applicant/appellant seeks condonation of delay of 49 days in filing the accompanying appeal.

2. For the reasons stated in the application, the same is allowed and the delay of 49 days in filing the accompanying appeal is

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condoned.

3. The present application stands disposed of accordingly.

FAO 276/2019

1. The present appeal seeks to assail the judgment passed by the learned Additional District Judge-01 (East), *Karkardooma* Courts, *Delhi* in **Probate Case No. 82/2016 (Old No. 48/15)**.

Vide the impugned judgment, the petition filed by the appellant under Section 276 of the Indian Succession Act, 1925 (hereinafter the "ISA"), seeking probate/letters of administration in respect of the Will dated 05.05.2006 stated to have been executed by his late mother, came to be dismissed on the ground that its execution had not been proved, since the original Will was never put to either of the attesting witnesses for identification of the signatures on it.

2. The case of the appellant before the Probate Court was that his mother, *Smt. Sushila Devi* W/o late *Sh. Mahaveer Prasad* (hereinafter the "testatrix"), was the absolute owner of a built-up property measuring 100 sq. yards, out of *Rect. No. 53, Killa No. 8, situated at Village Khureji Khas, now known as House No. 643, Guru Ram Das Nagar, Laxmi Nagar, Delhi-110092* (hereinafter the "subject property"), which she had purchased from one *Sh. Chaudhary Sunhara Singh* by way of the sale deed dated 04.09.1971. The testatrix was survived by three legal heirs, namely, the appellant, who is her son, and respondent nos. 2 and 3, *Smt. Chandrakanta* and *Smt. Rajrani*, who are her daughters. As per the appellant, the testatrix executed a Will dated 05.05.2006 (hereinafter the "subject Will") bequeathing the

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subject property to him, in the presence of two attesting witnesses, namely, *Sh. Chhotey Lal* and *Sh. Prem Prakash*. It was claimed that the testatrix was then in a sound disposing state of mind and that the appellant had looked after her during her last days. The testatrix passed away on 07.05.2006, two days after the subject Will is stated to have been executed. On 10.12.2015, the appellant filed the underlying petition under Section 276 of the ISA seeking probate/letters of administration in respect of the subject Will, along with the affidavits of both the attesting witnesses. On 16.12.2015, the original subject Will was filed before the Probate Court and taken on record.

3. Respondent no. 1/State, despite being served by way of publication, did not appear before the Probate Court. Respondent nos. 2 and 3 filed joint objections, *inter alia* stating that the subject Will was a forged and fabricated document, created by the appellant in collusion with the two attesting witnesses with the intention to grab the subject property. As per them, the testatrix died intestate and had always wanted the subject property to be divided equally among her three legal heirs. They further stated that on 05.05.2006, the testatrix was not in her senses as she had been ill for several days, and that it was respondent nos. 2 and 3 who had taken care of her during her last days.

4. On the basis of the pleadings of the parties, the Probate Court framed the following issues:

> "*1. Whether WILL in question has been legally executed by the deceased testator ? OPP*
> *2. Whether WILL in question is a forged and fabricated*

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document ? OPR-2&3
3. Relief."

5. In evidence, the appellant examined himself as PW-1 and exhibited the original subject Will as Ex. PW-1/2. He also examined the two attesting witnesses, *Sh. Chhotey Lal* (PW-2) and *Sh. Prem Prakash* (PW-3). Respondent no. 3 examined herself as R2W1 on behalf of respondent nos. 2 and 3.

6. *Vide* the impugned judgment, the Probate Court, though it answered issue no. 2 in favour of the appellant, decided issue no. 1 against him. It noted that the original subject Will was never shown to either of the attesting witnesses for identification of the signatures and thumb impression on it. As regards PW-2, relying on his statement in cross-examination that there was no other document on which he had put his thumb impression, the Probate Court concluded that he had not put his thumb impression on the subject Will at any point of time. As regards PW-3, it noted that he had identified the signature attributed to the testatrix, the thumb impression attributed to PW-2, and his own signature, only on a photocopy of the subject Will marked as Mark-A. It accordingly held that the subject Will had not been proved in terms of Section 68 of the Indian Evidence Act, 1872 (hereinafter the "Evidence Act").

The Probate Court noted that R2W1 had admitted in her cross-examination that she had not filed any document to show that the testatrix was suffering from prolonged illness and that no doctor was ever called home to see her. It held that, in these circumstances, it

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could not be concluded that the testatrix was not in a position to execute the subject Will or to visit the office of the Sub-Divisional Magistrate, and that nothing had come on record to show that the subject Will was forged and fabricated. It also observed that a Will not being proved is a different question from the Will being forged. In view of its finding on issue no. 1, the underlying petition was dismissed.

7. Aggrieved by the same, the appellant has preferred the present appeal.

8. Learned counsel for the appellant contends that the underlying petition has been dismissed on a curable technicality. It is contended that the original subject Will was on the judicial record throughout and stood exhibited as Ex. PW-1/2, and that both the attesting witnesses had supported its execution and attestation in their affidavits, which ought to have been read along with the original. It is further contended that no objection was raised on behalf of respondent nos. 2 and 3 when the original subject Will was exhibited or when PW-3 identified the signatures on the photocopy, and that the failure to show the original subject Will to the attesting witnesses was a procedural omission which ought not to have resulted in the dismissal of the underlying petition. Learned counsel also contends that the Probate Court misread the testimony of PW-2, who, by stating that there was no other document on which he had put his thumb impression, meant that the subject Will was the only document on which he had put his thumb impression at the office of the Sub-Divisional Magistrate. In support of

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his submissions, reliance is placed on *M. B. Ramesh (Dead) by LRs. Vs. K. M. Veeraje Urs (Dead) by LRs. & Ors.*[1].

9. *Per contra*, learned counsel for respondent nos. 2 and 3 submits that the subject Will has not been proved in accordance with law, as neither of the attesting witnesses identified the signature of the testatrix on the original. It is submitted that PW-3 identified the signatures only on the photocopy (Mark-A), which by itself does not establish the due execution and attestation of the original. It is thus submitted that the Probate Court rightly held that the requirement of Section 68 of the Evidence Act was not satisfied.

10. I have heard the learned counsels for the parties and carefully perused the record.

11. A Will is a document which the law requires to be attested. Section 63(c) of the ISA requires a Will to be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the Will, or received his personal acknowledgment of it, and each of whom must sign the Will in the presence of the testator. Section 68 of the Evidence Act, in turn, provides that such a document cannot be used as evidence until at least one attesting witness, if alive and capable of giving evidence, has been called to prove its execution. The attesting witness must, therefore, speak to the execution and attestation of the very document propounded before the Court. This is ordinarily done by showing the original Will to the witness, so that he can identify on it the signature or mark of the testator as well as his

[1] (2013) 7 SCC 490

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own.

12. The record reflects that the original subject Will was filed before the Probate Court on 16.12.2015 and has remained on the judicial file since. It was exhibited as Ex. PW-1/2 when the appellant tendered his evidence by way of affidavit on 07.02.2017. Both the attesting witnesses were examined on 03.05.2017. In their affidavits, Ex. PW-2/A and Ex. PW-3/A, each of them deposed that the testatrix had signed the subject Will in his presence and in the presence of the other attesting witness, and that both the attesting witnesses had signed it in the presence of each other and of the testatrix. When cross-examined, PW-2 stated that the testatrix had taken him to the office of the Sub-Divisional Magistrate, where his thumb impression was taken, and PW-3 stated that he, PW-2, and the testatrix had signed the subject Will at that office. However, neither of them was shown the original subject Will, either while tendering their affidavit or during their cross-examination. PW-2 was shown only his own affidavit filed in Court, after which the following was recorded:

> "*Ques. Whether this document was signed by you in the office of the SDM?*
> *Ans. Now I cannot say whether it is the same document or not.*
>
> *There is no other document on which I had put my thumb impression.(vol) I do not remember. When I put my thumb impression at the SDM office, one more person namely Prem signed that document. Except Prem and myself no other person put his thumb impression or signed that document. It is wrong to suggest that neither I appeared before the SDM nor I put my thumb impression on any document or WILL there. ...*"

13. PW-3, on the other hand, when asked in his cross-examination

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whether he could identify his signatures on any of the documents signed by him at the office of the Sub-Divisional Magistrate, answered in the affirmative and himself took out the photocopy of the subject Will (Mark-A) from the judicial file. The photocopy was then put to him, and he identified on it the signature of the testatrix at point 'X', the thumb impression of PW-2 at point 'Y', and his own signature at point 'Z'. The original subject Will was not put to him. No objection to this course was raised on behalf of respondent nos. 2 and 3.

14. Identification of signatures on a photocopy does not prove the execution of the original, and the testimony of PW-2 was never connected with the subject Will at all. As things stand, the subject Will cannot be said to have been proved in the manner required by Section 63(c) of the ISA read with Section 68 of the Evidence Act. The prayer of the appellant for grant of probate by this Court, therefore, cannot be accepted.

15. Learned counsel for the appellant has placed reliance on ***M. B. Ramesh*** (*supra*). In the said case, the Supreme Court explained that Section 71 of the Evidence Act is an enabling provision, which permits the execution of a Will to be proved by other evidence where the attesting witness denies or does not recollect its execution, but that it does not absolve the propounder of the obligation under Section 68 of the Evidence Act to examine an attesting witness who is alive and available. The Supreme Court also referred with approval to a decision of the Bombay High Court where, on finding a deficiency in the proof of a Will, the matter had been remanded for additional evidence. The

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relevant paragraphs from the said decision are reproduced hereunder:

> "*18. ... A will has to be executed in the manner required by Section 63 of the Succession Act. Section 68 of the Evidence Act requires the will to be proved by examining at least one attesting witness. Section 71 of the Evidence Act is another connected section "which is permissive and an enabling section permitting a party to lead other evidence in certain circumstances", as observed by this Court in para 11 of Janki Narayan Bhoir v. Narayan Namdeo Kadam and in a way reduces the rigour of the mandatory provision of Section 68. As held in that judgment Section 71 is meant to lend assistance and come to the rescue of a party who had done his best, but would otherwise be let down if other means of proving due execution by other evidence are not permitted. At the same time, as held in that very judgment the section cannot be read to absolve a party of his obligation under Section 68 of the Evidence Act read with Section 63 of the Succession Act to present in evidence a witness, though alive and available.*
>
> *...*
>
> *27. The approach to be adopted in matters concerning wills has been elucidated in a decision on a first appeal by a Division Bench of the Bombay High Court in Vishnu Ramkrishna v. Nathu Vithal. ... The High Court was of the view that if at all there was any deficiency, it was because of not examining more than one witness, though it was not convinced that the testatrix Gangabai had not executed the will. The Court remanded the matter for additional evidence under its powers under Order 41 Rule 27 CPC. The observations of Chagla, C.J., sitting in the Division Bench with Gajendragadkar, J. (as he then was in the Bombay High Court) in para 15 of the judgment are relevant for our purpose: (AIR pp. 270-71)*
>
> > *"15. ... We are dealing with the case of a will and we must approach the problem as a court of conscience. It is for us to be satisfied whether the document put forward is the last will and testament of Gangabai. If we find that the wishes of the testatrix are likely to be defeated or thwarted merely by reason of want of some technicality, we as a court of conscience would not permit such a thing to happen. We have not heard Mr Dharap on the other point; but assuming that Gangabai had a sound and disposing mind and that she wanted to dispose of her property as she in fact has done, the mere fact that the propounders of the will were negligent—and grossly negligent—in not complying with the requirements of Section 63 and proving*

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> *the will as they ought to have, should not deter us from calling for the necessary evidence in order to satisfy ourselves whether the will was duly executed or not.'"*"

16. In the present case, neither PW-2 nor PW-3 denied or failed to recollect the execution of the subject Will. The difficulty lies elsewhere, i.e., the original was never put to them. That said, the decision in *M. B. Ramesh* (*supra*) also makes it clear that a Court dealing with a Will must not allow the wishes of a testator to be defeated merely by reason of some technicality, and ought not to be deterred from calling for the necessary evidence to satisfy itself whether the Will was duly executed.

17. The record leaves no doubt that the deficiency arose from an oversight in the manner in which the attesting witnesses were examined, and not from any want of evidence. The original subject Will was on record from the very inception of the proceedings and stood exhibited. Both the attesting witnesses were alive and present before the Court, and their affidavits spoke to the execution and attestation of the subject Will. PW-3 stated that he could identify his signatures and turned to the judicial file himself, but the photocopy that he took out was put to him instead of the original.

18. Similarly, the statement of PW-2 relied upon by the Probate Court was made after he had been shown only his own affidavit, and he went on to state that he had put his thumb impression on a document at the office of the Sub-Divisional Magistrate which *Sh. Prem Prakash* had also signed. Whether that document is the subject Will could only have been answered by showing him the original.

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Without doing so, it could not have been safely concluded that PW-2 had never put his thumb impression on the subject Will.

19. A decision in probate proceedings operates *in rem* and determines the fate of the testamentary instrument for everyone concerned. Rejecting the subject Will on account of such an omission would amount to deciding the matter on a technicality rather than on its merits.

20. Accordingly, this Court is of the considered opinion that, in the peculiar facts of the present case, the ends of justice require that the appellant be given an opportunity to cure this deficiency. Consequently, the matter is remanded to the Probate Court, limited to issue no. 1, with the following directions:-

20.1. The appellant shall be at liberty to recall PW-2 and PW-3 for the purpose of putting the original subject Will (Ex. PW-1/2) to them to prove the execution and attestation of the subject Will.

20.2. Respondent nos. 2 and 3 shall be entitled to cross-examine afresh the witnesses so examined.

20.3. Upon conclusion of the evidence, the Probate Court shall decide issue no. 1 afresh on the basis of the entire evidence on record, uninfluenced by any observation made in the present judgment. The finding on issue no. 2, having been returned in favour of the appellant, shall remain undisturbed.

21. The parties are directed to appear before the Probate Court on 08.12.2026.

22. The appeal stands disposed of in the above terms and a copy of

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this judgment be communicated to the Probate Court concerned.

(MANOJ KUMAR OHRI)
JUDGE

NOVEMBER 18, 2026
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