
Chandra Prabha Vs Satish Chand Sharma and Others

FAO (OS) No"s. 359-361 of 2010

Court: Delhi High Court

Date of Decision: Aug. 12, 2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) â€” Order 1 Rule 10, 151#Evidence Act, 1872 â€” Section 41#Trusts Act, 1882 â€” Section 55, 56, 59, 68, 71

Citation: (2011) 8 AD 353 : (2011) 125 DRJ 308

Hon'ble Judges: M.L. Mehta, J; A.K. Sikri, J

Bench: Division Bench

Advocate: K.S. Siddhu, with Ms. Maldeep Sidhu, for the Appellant; Prakash Gautam, Advocate for the Respondent No. 1 and Ms. Swaty S. Malik, Advocate for the Respondent No. 2, for the Respondent

Final Decision: Dismissed

Judgement

M.L. Mehta, J.

This appeal is directed against the order dated 23rd February, 2010 passed by learned Single Judge whereby three

applications viz. IA No. 6043 of 2007, IA No. 6044 of 2007 and IA No. 6045 of 2007 filed by the appellant plaintiff in her suit CS(OS) No. 526

of 2007 came to be dismissed.

2. The admitted facts are that the appellant/ plaintiff is daughter of Pt. Moolchand Sharma who died on 25th December 1939 leaving behind his

widow and five minor children i.e. three sons (Mr. S.C. Sharma, Mr. R.C. Sharma and Mr. H.C. Sharma) and two daughters (Chander Lekha

and appellant Chander Prabha). A will was executed by Pt. Moolchand Sharma dated 10th December, 1937 whereby he vested his entire

property, movable as well as immovable, in five persons (trustees) who were to manage the said property and ensure that the family of the

deceased was maintained, educated and married. The said Will was proved and registered before a Senior Subordinate Judge, Delhi on 14th

December, 1940 in probate proceedings. The probate came to be granted by the Court on 28th May, 1941. The mother of the appellant also

passed away in 1942 and her sister (Chander Lekha) got married in the year 1942. The appellant was married in the year 1951. On 12th July,

1954, a Transfer Deed was executed by the Trustees in favour of H.C. Sharma and S.C. Sharma who had attained majority. Since Mr. R.C.

Sharma was minor at that time, his share continued to remain with Pt. Moolchand Trust. Mutation in the names of Mr. S.C. Sharma and Mr. H.C.

Sharma was effected on 7th July, 1956. The share of Mr. R.C. Sharma was transferred by the trustees in his name on 11th October, 1958, after

he attained majority. Admittedly, the shares of the sons of late Pt. Moolchand Sharma were mutated in their names and that they themselves or

through their Lrs are in possession of their shares in the property.

3. It is also admitted that in a suit being CS (OS) 2166 of 1999 titled as S.C. Sharma and Others v. R.C. Sharma and Others, the appellant

moved an application dated 4th November 1993 under Order 1 Rule 10 CPC for impleadment and she was allowed to be impleaded as

defendant No. 9 in the said suit limited to her rights/ benefits as per the Will of her deceased father. It is also a matter of record that on 29th June,

1996 a suit being CS (OS) 1573 of 1996 titled as Chadra Prabha v. Satish Chand Sharma and Ors. was filed by the appellant seeking relief of

declaration, rendition of accounts and permanent injunction against the defendants including her brothers. One of the pleas taken in the said suit

was that she came to know of the factum of the Will on 19th July, 1999 i.e. ten days before her files the application for impleadment under Order

1 Rule 10 CPC in suit bearing number CS (OS) 2166/1990. The present suit came to be filed on 12th March, 2007 by the appellant / plaintiff. It

is also an admitted fact that she filed an application being IA No. 11875/ 2006 u/s 55 of Indian Trust Act, 1882 in suit being CS (OS) No. 2166

of 1990 claiming her rights on the basis of the Will and seeking withdrawal of the rent of the properties deposited by the tenants. The said

application of the appellant/ plaintiff came to be dismissed by Justice Sanjay Kishan Kaul of this Court vide order dated 29th May, 2007.

Admittedly the said order has not been challenged by the appellant/ plaintiff and has attained finality. The appellant thereafter got her name deleted

from the array of defendants in CS (OS) No. 2166 of 1990 vide order dated 3rd December 2009 of the said this Court. It is further an admitted

fact that appellant also filed a suit being CS(OS) No. 2272/2001 in this Court claiming relief for her maintenance and that the same has been

withdrawn by her.

4. The present suit being CS (OS) No. 526 of 2007 was filed by the appellant/ plaintiff seeking a decree for execution of the Trust Deed, seizure

and impounding of entire estate of the deceased and for directions to defendant No. 4 to produce the accounts of the trust properties and another

records pertaining to the trust in which his father late Bawa Milkha Singh was the trustee and also for appointment of a receiver who may take care

of the estate until the date this Court appoints trustees for administration of the trust. It was during pendency of this suit that the aforesaid three

applications were filed by the appellant which came to be dismissed by learned Single Judge vide the impugned order dated 23rd February, 2010.

5. Application IA 6043 of 2007 u/s 151 CPC read with Section 55 and 56 of the Indian Trust Act was based on the averments that though she

was a beneficiary of the trust properties and was entitled to have a share therein, she has been denied her share in the trust properties, which

should have been collected by the trustees and deposited in the Court. She averred that the rent proceeds from the trust properties were being

deposited in CS(OS) 2166 /1990 and vide order dated 8th August, 2006, the defendants have used a portion of the amount deposited without her

knowledge. She prayed for grant of rent proceeds out of the trust properties of her share or atleast Rs. 5 lac per month till pendency of the suit as

a financial support to her since she was living a life of poverty and has been dependent on her husband and sons throughout.

6. IA 6044 of 2007 was filed for execution of the trust of which she claimed to be a beneficiary. She prayed for appointment of a trustee or the

trustees u/s 71 of the Indian Trust Act alleging the trustees having failed in their duties to deposit her share with the District Judge, and instead

having transferred the trust properties to the male beneficiaries in collusion with them in order to deprive her of her lawful entitlements. She averred

that the trustees have acted detrimental and prejudicial to her interests and for all these reasons she prayed that the Court should appoint trustee/

trustees to safeguard her benefit and interests.

7. In IA 6045 of 2008 filed u/s 68 of the Act, she has averred that the trustees of late Moolchand Sharma have acted in mala fide manner. In this

regard, it has been alleged that the probate was applied only by one trustee namely Bawa Milkha Singh and the same was granted to him. Prayer is

made for attachment of the trust properties and its profits till the pendency of the suit and to administer the trust property in the best beneficial

interest of the plaintiff/ appellant.

8. Learned Single Judge while dismissing the aforesaid three applications observed that without going into the merits of the case as to whether the

suit as such is maintainable or not, the rival submissions raised by the parties need to be examined at the time of trial of the matter. The contentions

raised before us by learned Senior Advocate Dr. K.S. Siddhu on behalf of the appellant on merits are the same as urged before the learned Single

Judge. It was submission of learned Senior Counsel that creation of trust by Will executed by late Pt. Moolchand Sharma was not complete

without there being acceptance thereof by the trustees. That being so, he submitted that though it was not a trust but a situation similar to trust

which he termed as resultant trust or nominal trust. He submitted that in such a situation, when there was no trust and the property was in the hands

of third person, the said third person would be trustee de son tort which would mean a person who acquired possession of the property by fraud.

He submitted that the trustees colluded with the male beneficiaries i.e. appellants Es three brothers and transferred the properties in their favour by

playing fraud. In this regard, he submitted that the probate is a fraudulent document which was granted in favour of only one of the five trustees

namely Bawa Milkha Singh who applied and obtained, whereas the other four names of the trustees were not in the probate proceedings, but on

the margin of the said document and subsequently corresponding changes and interpolations were made therein. He also submitted that in place of

trustee Mr. Prem Lal Gupta, the name of Mela Ram was added as one of the trustees fraudulently. He submitted that the transfer documents in

favour of her brothers Mr. H.C. Sharma Mr. S.C. Sharma and Mr. R.C. Sharma were outcome of fraud, forgery and conspiracy by the trustees

and her brothers. It was one of the grounds of appellant that because of this fraudulent acts of omission and commissions on the part of trustees

and her brothers, that aforesaid three applications were filed to protect the trust property and to prevent the irreparable injuries to her. Learned

Counsel submitted that on the face of these documents, the learned Single Judge ought to have expressed his prima facie opinion on provisional

basis, instead of observing that the averments need to be tested. In any case, it was submitted by learned Senior Counsel that the appellant has

been denied her share of proceeds of the trust properties which should have been collected and deposited by the trustees in the Court and that

despite having a share in the properties, she has been living a life of poverty and depravity. Learned Senior Counsel submitted that since the

trustees had failed in their duty to deposit their share with the District Judge and instead had transferred the trust properties to the male

beneficiaries, the Court ought to have appointed Trustee(s) u/s 74 of the Act. He urged that for the administration of the trust properties and the

beneficial interest of the appellant, the trust properties and its profits need to be attached immediately during pendency of the suit. These

contentions were made by the Learned Counsel on the submission that the trust is not extinguished, but it survives.

9. On the other hand, learned counsel for the respondent in this regard submitted that the issues as sought to be agitated by the appellant are not

permissible in the present proceedings inasmuch as the probate was not only granted more than 60 years back, but the same has since been acted

upon by the parties. The appellant has nowhere sought of cancellation or revocation of the said probate and that being so, it has obtained finality

and would constitute judgment in Prem and thus be binding on all the parties including the appellant. Learned counsel also submitted that the trust

on completion of the task assigned to it, has extinguished and that being so, the present suit as such was not maintainable.

Learned counsel for the appellant placed reliance on Smt. Rukmani Devi and Others Vs. Narendra Lal Gupta, ; Chiranjilal Shrilal Goenka

(Deceased) through Lrs. Vs. Jasjit Singh and Others, and Crystal Developers Vs. Smt. Asha Lata Ghosh (Dead) through LRs. and Others, .

10. We have considered the rival submissions of learned counsel for the parties and gone through the record. The admitted facts emerging from the

pleadings of the parties and material on record have been noted above. With regard to execution of the Will on 10th December 1937 by Pt.

Moolchand Sharma, there is no dispute. As per this Will, the entire property, movable as well as immovable, was vested in five persons/trustees

who were to manage the same and to ensure that the family of the deceased was maintained, educated and married. The said Will was proved and

registered before the competent Court on 14th December 1940 in the probate proceedings and probate was granted on 28th May, 1941.

Admittedly, the said probate has neither been revoked nor cancelled, nor any steps taken by anyone, much less the appellant in challenging the

same. That being so, it cannot be disputed that the probate has attained finality and thus binding upon all including the appellant. In the case of Smt.

Rukmani Devi (supra), the Supreme Court held thus:

2. It is well-settled that the decision of the probate court is a judgment in rem. The High Court rightly held that till the order granting probate

remains in force it is conclusive as to the execution and validity of the Will till the grant of probate is revoked. Apart from the fact that a decision of

the probate court would be a judgment in rem not only binding on the parties to the probate proceedings but it will be binding on the whole world.

Therefore, a solemn duty is cast on the probate court Section 41 of the Indian Evidence Act, 1872 provides that a final judgment or order of a

competent court in the exercise of probate jurisdiction is conclusive proof of what is decided therein that is about the genuineness of the Will, To

be precise, a probate granted by a competent court is conclusive of the validity of such will until it is revoked and no evidence can be admitted to

impeach it except in a proceeding taken for revoking the probate Apart from anything else, the citation having been issued to the appellants and

having been served upon them, their failure to enter a caveat to contest the proceedings would preclude them from contesting the validity of the

Will in other proceedings.

11. Similarly in the case of Crystal Developers (supra) the Supreme Court held as under:

29... u/s 263, as stated above, grant of probate or letters of administration is liable to be revoked on any of five grounds mentioned therein. One of

the grounds as stated above in failure on the part of the grantee to exhibit/ file an inventory an inventory or statement of account. Similarly, the

probate or letter of administration is liable to be revoked if the grant is obtained fraudulently. Can it be said that revocation of the probate on the

ground of non-exhibiting an inventory or statement of account will make the grant abinitio void so as to obliterate all intermediate acts of the

executor? If it is not abinitio void in the case of non-filing of inventory or statement of account then equally it cannot be abinitio void in case of a

grant obtained fraudulently. In other words, what applies to clause (e) of the explanation equally applies to clause (b) of the explanation. At this

stage, we clarify that if the intermediate act of the executor is not for the purpose of administration of the estate or if the act is performed in breach

of trust then such act(s) is not protected. However, acts which are in consonance with the testator/Es intention and which are compatible with the

administration of the estate are protected. Therefore, on reading sections 211, 227 along with section 263, it is clear that revocation of the grant

shall operate prospectively and such revocation shall not invalidate the bona fide intermediate acts performed by the grantee during the pendency

of the probate.

12. Similarly in the case of Chiranjilal Shrilal Goenka (supra) the Supreme Court while reiterating the law that it is only the probate court alone

which has the jurisdiction and not the civil court, which is to adjudicate upon the probate proceedings held as under:

16. The grant of a Probate by Court of competent jurisdiction is in the nature of a proceeding in rem. So long as the order remains in force it is

conclusive as to the due execution and validity of the will unless it is duly revoked as per law. It binds not only upon all the parties made"" before the

court but also upon all other persons in all proceedings arising out of the Will or claims under or connected therewith. The decision of the Probate

Court, therefore, is the judgment in rem. The probate granted by the competent court is conclusive of the validity of the Will until it is revoked and

no evidence can be admitted to impeach it except in a proceeding taken for revoking the probate. In Sheoparsan Singh v. Ramnandan Prasad

Singh ILR (1916) Cal. 694 PC the judicial committee was to consider, whether the Will which had been affirmed by a Court of competent

jurisdiction, would not be impugned in a court exercising original jurisdiction (Civil Court) in suit to declare the grant of probate illegal etc. The

privy council held that the Civil Court has no jurisdiction to impugn the grant of probate by the court of competent jurisdiction. In that case the

subordinate court of Muzafarbad was held to be having no jurisdiction to question the validity of the probate granted by the Calcutta High Court.

In Narbheram Jivram Purohit Vs. Jevallabh Harjivan, probate was granted by the High Court exercising probate jurisdiction. A civil suit on the

Original Side was filed seeking apart from questioning the probate, also other reliefs. The High Court held that when a probate was granted., it

operates upon the whole estate and establishes the Will from the death of the testator. Probate is conclusive evidence not only of the factum, but

also of the validity of the Will and after the probate has been granted, it is incumbent on a person who wants to have the Will declared null and

void, to have the probate revoked before proceeding further. That could be done only before the Probate Court and not on the original side of the

High Court.

20. On a conspectus of the above legal scenario we conclude that the Probate Court has been conferred with exclusive jurisdiction to grant

probate of the Will of the deceased annexed to the petition (suit); on grant or refusal thereof, it has to preserve the original Will produced before it.

The grant of probate is final subject to appeal, if any, or revocation if made in terms of the provisions of the Succession Act. It is a judgment in rem

and conclusive and binds not only the parties but also the entire world. The award deprives the parties of statutory right of appeal provided u/s

299. Thus the necessary conclusion is that the Probate Court alone has exclusive jurisdiction and the Civil Court on original side or the Arbitrator

does not get jurisdiction even if consented to by the parties, to adjudicate upon the proof or validity of the Will propounded by the executrix, the

applicant.

13. In view of the law as laid down by the Supreme Court in the aforesaid cases, we have no hesitation to arrive at a conclusion that the challenge

to the probate on all the allegations as noted hereinabove was misplaced in the present proceedings. On one hand the learned senior counsel

argues that there was no Trust at all and on the other he argues for the entitlement of relief of appellant, being beneficiary Trust. If there was no

trust as alleged then the suit as filed was not maintainable. The Probate Court alone will have the jurisdiction to entertain the challenge to grant of

probate. Till such time, the probate was revoked or cancelled by a competent court, it was a judgment in rem and was binding on all the parties

including the appellant. In fact by way of present suit, the appellant seems to be invoking jurisdiction of this Court in challenging the probate

granted by a Court of competent jurisdiction more than 60 years before. This aspect would require further testing by the Court of learned Single

Judge as to whether the suit in present form was maintainable or not.

14. By virtue of probate, the Will got recognition of its execution and validity. In fact, there is no dispute that Will executed by Pt. Moolchand

Sharma, the basis of probate, was a genuine one. The appellant is also relying upon the said Will. By virtue of the said Will, a trust was created by

Pt. Moolchand Sharma with the specific task of devolving the properties on male beneficiaries namely sons of the Testator, while making a

provision for the maintenance, education and marriage and residence for other family members. A reading of the Will makes it clear that the

Testator Pt. Moolchand Sharma clearly and in unequivocal terms mentioned that after his death, all the properties would go to his sons in equal

shares, subject to certain conditions such as right of residence of his wife, marriage of his daughters, maintenance and education of all his children,

including the appellant. The right and benefit those were to accrue to the appellant were limited to education, maintenance and marriage. The

appellant got married many years before and is now stated to be aged around 80 years. That being so, all that was required to be performed by

the trustees has already been accomplished qua the appellant. The trustees have already accomplished the tasks assigned to them decades before.

Apparently, the trust appears to have extinguished: On this aspect as well in the trial court of Learned single judge will have to examine as to

whether suit was maintainable in view of Section 59 of the Act. All this is the matter of adjudication after trial, subject to the jurisdiction of the

Court.

15. It is to be noted that the appellant also became a party in Suit No. 2166/1990 and was arrayed as defendant No. 9. Similar relief was sought

by her in that suit. The relief, as sought by her, was declined by this Court vide order dated 29th May, 2007. The court observed as under:

I am unable to persuade myself to agree with the contention of learned counsel for defendant No. 9 for the reason that the intent of the Will is

clear. One cannot lose sight of the fact that the Will was made on 10.12.1937 and has to be construed to indicate the intent of the testator. The

intent is clear that the three sons should be the beneficiaries of the property. There are certain provisions made for the residence of the wife and the

children. The object of providing so was that the children would be required to be educated, maintained, supported and then married. That has

already happened in the case of defendant No. 9 who has chosen to file these applications decades after the matter had attained some finality on

account of mutation with the L and DO, awards being passed and the decree being passed by this Court.

16. In that factual situation, the appellant chose to get her name deleted from the aforesaid suit 2166/1990. Not only that, the appellant also filed

another suit No. 2272 of 2007 based on almost similar averments and seeking similar reliefs, which was also subsequently withdrawn by her. It is

also noted that the appellant had earlier filed another suit being suit No. 1573 of 1997 seeking reliefs of declaration, rendition of accounts and

permanent injunction against her brothers and their LRs in respect of the same properties. The plea sought to be taken for withdrawing from the

Suit No 2166 of 1990 and 2272/2007 is that she was wrongly advised that the document dated 10th December 1937 was instrument of the trust

and not the Will and that these cases were going on without any legal basis.

17. In view of our discussion above, we are of the opinion that there is no illegality or infirmity in the impugned order of the learned Single Judge.

Nothing in the order shall amount to expression of opinion on the merits of the case. The appeal stands dismissed.