

(2010) 09 CAL CK 0040

Calcutta High Court

Case No: G.A. No. 3499 of 2006, G.A. No. 1121 of 2008 and P.L.A. No. 127 of 2001

In Re: Amulya Dhan Paul
(deceased)

APPELLANT

Vs

RESPONDENT

Date of Decision: Sept. 14, 2010

Acts Referred:

- Succession Act, 1925 - Section 301, 317, 321, 333(2)

Citation: (2011) 1 CHN 52

Hon'ble Judges: Sanjib Banerjee, J

Bench: Single Bench

Advocate: Abhrajit Mitra and Sakya Sen, for the Appellant; P.K. Das and Rupak Ghosh, for the Respondent

Judgement

Sanjib Banerjee, J.

G.A. No. 3499 of 2006 is an application for removal of the executor u/s 301 of the Succession Act, 1925 with an alternative prayer for revocation of the grant of probate. The elder brother Applicant does not press the alternative prayer for revocation of the grant. G.A. No. 1121 of 2008 is by the same Applicant complaining of illegal conduct of the executor's part in connection with the creation of a tenancy in respect of a flat belonging to the estate.

2. The Will was made in March 1987. The testator died in August, 2000. The executor applied for grant of probate in 2001 to which the elder brother Applicant consented. Probate was granted on August 29, 2002. The assets forming part of the estate include five immovable properties. The principal immovable property is the land and building at 7A, Shyamananda Road, Kolkata-700025. It is the admitted position that this property is a four-storied building including the ground floor and is made up of what is described as the front portion and another described as the rear portion, the two being separated by the staircase running down the middle. There are three

other properties mentioned in the affidavit of assets of which the testator was the one-third undivided owner. These properties are at 1A, Khetradas Lane, 25, Ganesh Chandra Avenue; and, P28, Benaras Road. These three properties fetch substantial monthly rent and the testator was entitled to the undivided 1/3rd share thereof. The fifth immovable property mentioned in the affidavit of assets is a land and structure at Agarpara which also appears to be rented.

3. Clause 13(i)(a) of the Will provides that younger son and executor Ajit would have the front portion of the Shyamananda Road of the property which comprises of "the ground-floor, first-floor, second-floor, third-floor and the roof thereon shown in the plan annexed (to the Will) and marked "X"....

4. Clause 13(ii)(a) of the Will records that elder son Ranjit would be entitled to the northern or back portion of the Shyamananda Road property including "the ground floor, first floor, second floor and the roof thereon shown in the plan annexed (to the Will) and marked "X"...." The third floor is missed out in the reference but, despite some initial skirmish, the executor accepts that the entirety of the rear portion has been bequeathed to his elder brother.

5. Elsewhere in the Will both sons have been given equal share in the other immovable properties and there is no dispute in such regard. Clause 13(v) of the Will records that the testator was, at the time of execution of the Will, a 50% partner in a firm. The testator desired that younger son Ajit who was the other partner in the firm would become the absolute owner of the business carried on by the partnership firm "subject however to the obligation and liability to pay my son Ranjit Kumar Paul out of my said share in the said business a lumpsum amounting to Rs. 1,00,000/-.... such payment is to be made within a year from date of the grant of the probate." The clause also provided that if the payment was not made within the time envisaged, the sum or the outstanding balance would carry interest at the rate of 12% per annum from the date of default.

6. The application for removal of the executor was made in the year 2006. The principal grievances of the elder brother are that the executor did not comply with the statutory provisions, that he continued to be in charge and control of the estate and properties without taking any steps to make over the same to the legatees and that he misappropriated or used funds without any authority. During the pendency of the application for removal of the executor, the elder brother brought the other application on the ground that the executor was about to induct a person in the rear portion of the Shyamananda Road property. The insinuation was that the tenant was sought to be inducted at a nominal rent against an undisclosed upfront cash consideration received by the executor. By the time the second application was taken up, the tenant had already been inducted and there is an explanation of sorts which is proffered by the executor that needs to be noticed.

7. As to the statutory obligations that the executor has failed to discharge, according to the elder brother, the provisions of Sections 317 and 321 of the Succession Act are placed. In addition, Chapter VIII of Part IX of the Act is also placed. The elder brother says that it was the bounden duty of the executor to ensure that the immovable properties were made over to the elder brother or, at any rate, assent to legacy was given within reasonable time. The Applicant says that for a period of nearly five years after obtaining probate, the executor took no steps to make over possession of the rear portion of the Shyamananda Road property to the elder brother and the executor did not tender any payment on account of the substantial rents collected from the three immovable properties at Khetradas Lane, Ganesh Chandra Avenue and Benaras Road.

8. The acts of illegality or breach of obligation that the Applicant came to Court with have been detailed at paragraph 6 of the petition relating to G. A. No. 3499 of 2006. The first charge brought was that the executor was exclusively enjoying the 1/3rd share or the usufructs from the Khetradas Lane, Ganesh Chandra Avenue and the Benaras Road properties which fetched an aggregate monthly income in excess of Rs. 1.5 lakh. The second charge brought was that the rents collected from the tenants at the Shyamananda Road property were also retained by the executor. In addition, the Applicant says that the copies of the accounts subsequently furnished by the executor reveal expenses incurred in the name of administration, which may be in small amounts but add up to a sizable sum. A complaint on account of telephone charges, miscellaneous expenses and legal fees incurred from out of the moneys collected by the estate is brought and the Applicant says that there is hardly any scope for such expenditure and, in any event, if the executor had discharged his obligation within time, the expenses would not have to be incurred.

9. The further grievance that is made is that the executor inducted a tenant at the first floor flat on the rear portion of the Shyamananda Road property. The executor has explained that such flat was lying in a disused and dilapidated condition for a considerable period of time and that the tenant at the rear first floor flat had entered into an arrangement where such tenant was agreeable to hand over possession of the flat to the executor if the executor granted tenancy in respect thereof to another old tenant by the name of Shah who occupied another portion of the Shyamananda Road property. The executor has sought to justify the action by saying that Shah was to repair the dilapidated rear first floor flat and was to pay rent double the amount that the erstwhile tenant thereat was obliged to pay. Shah has got possession of the two rooms and a bit more on the back portion of the first floor of the Shyamananda Road property at a sum of about Rs. 1200/-per month in the year 2008.

10. The executor says that the elder brother is not entitled to the sum of Rs. 1 lakh which is recorded in Clause 13(v) of the Will. The executor states that subsequent to the Will and prior to the death of the testator, the testator had retired from the

partnership firm. For such purpose, the executor relies on a deed of retirement of January 31, 1999. The executor has also appended the accounts of firm A.K. Paul & Co. that the deed of retirement recognized would become the proprietorship concern of the executor. The executor says that out of the sum of approximately Rs. 7.23 lakh that was due to the testator upon the testator retiring from firm A.K. Paul & Co., a sum of Rs. 6 lakh was paid between the date of retirement and the end of financial year 1998-99. The executor contends that the balance sum of about Rs. 1.23 lakh was paid over the next year. Towards such end the executor relies on two sheets of paper appended to a supplementary affidavit affirmed by the executor in January, 2010 which reveal handwritten notes of payments recorded therein. These two sheets bear only the signature of the executor and do not appear to be any form of receipt granted by the testator. The three pages following the two sheets evidencing payments mostly in cash make up the accounts of firm A.K. Paul & Co., though by then it had become a proprietorship concern. The first page of the three broadsheets of the accounts show the position as at January 31, 1999 which is the date on which the deed of retirement was executed. The balance-sheet of the firm on such date reveals that a sum in excess of Rs. 7.23 lakh was due to the testator. The balance-sheet appended at the next page for the period February 1, 1999 to March 31, 1999 shows the reduction of the liability to the testator from Rs. 7.23 lakh to about Rs. 1.23 lakh. There does not appear to be any corresponding entry in the balance-sheet or anything else (despite a query put to the executor in such regard by Court) which would justify the manner in which payment of a sum of Rs. 6 lakh was made during the short period of two months to the testator. The third page is a balance-sheet for the next financial year where the testator's name does not appear and, therefore, the executor has attempted to use the three pages to show how the amount due to the testator was paid off and the entry was wiped off the firm's balance-sheets and accounts by the end of financial year 1999-2000.

11. These matters remained pending for a considerable period and the parties represented that the disputes between the brothers could be resolved. An amicable resolution of the disputes was ultimately not possible.

12. Counsel took special interest and a scheme was also prepared. It is not necessary to record as to why the parties could not ultimately resolve their disputes amicably. But it must be recorded that it has been submitted on behalf of the executor that notwithstanding the stand taken by the executor that the sum of Rs. 1 lakh on account of Clause 13(v) of the Will not being payable, the executor would pay such sum together with interest for the period of default to buy peace. In addition, it has also been submitted on behalf of the executor that the balance amount lying as on August 31, 2010 (which is evident from a copy of the bank statement handed over to Court today) in the account maintained by the executor at the South Calcutta Branch of Allahabad Bank may be divided in half and of the approximately Rs. 3 lakh in such account a sum of Rs. 1.5 lakh may be made over to the Applicant elder brother.

13. The Applicant has not accepted this offer of Rs. 1 lakh plus interest on the sum covered by Clause 13(v) of the Will and the additional amount of Rs. 1.5 lakh out of the money in the bank. The Applicant says that the acts of the executor complained of are such that he cannot be permitted to continue in office. The Applicant insists that, in particular, the act of inducting a new tenant at the Shyamananda Road property for obvious undisclosed illegal gratification would not permit this executor to continue in office.

14. During the pendency of the present proceedings, several orders were made of which the two passed on April 11, 2008 and May 12, 2008 are of some significance. The April 11, 2008 order noticed that even the Shyamananda Road property had not been divided between the brothers in accordance with the desire of the testator as contained in the Will. The order directed the executor to take the front or southern portion subject to the tenancies thereat and the Applicant elder brother to take the northern or the rear portion of the building subject to the tenancy thereat. Such exercise has been completed in presence of Counsel representing the executor who was appointed Special Officer for such purpose.

15. The order dated May 12, 2008 required that half of the amount collected by way of rent in respect of the Khetradas Lane, Ganesh Chandra Avenue and Benaras Road properties would be made over to the elder brother Applicant. The parties had also agreed by then to share some part of the amount that remained deposited in the bank.

16. There are several other orders that have been passed but the two aforesaid orders are of some relevance because they reveal the position that was brought about by the executor. From 2001 when the probate was granted till 2008, the executor could not ensure that the Shyamananda Road property was divided between the brothers in accordance with the Will though both brothers occupied some portions of the Shyamananda Road property. Secondly, the order dated May 12, 2008 goes to show that for a period of nearly seven years it was the executor who had the total control over the usufructs and rents out of the three other immovable properties at Khetradas Lane, Ganesh Chandra Avenue and Benaras Road without the elder brother Applicant being given his due share thereof.

17. The executor says that the scope of the present proceedings is limited. The executor relies on Sub-section (2) of Section 333 of the Succession Act and the fifth illustration thereto to suggest that an implied assent to legacy-is possible. The executor refers to other provisions of Chapter VIII in Part IX of the Act. The executor says that now that the brothers have got their respective shares in the Shyamananda Road property and that the executor and the Applicant take half of the total collection out of the rents and usufructs from the other properties, there is an implied assent and the minor complaints relating to alleged misappropriation are not even worthy of consideration by Court. The executor says that a sum of slightly over Rs. 50,000/- has been expended by way of telephone charges over 79 months;

that a sum of about Rs. 58,000/- has been spent on account of legal expenses for 79 months and a further sum of slightly over Rs. 1.3 lakh has been expended on account of maintenance charges, repair work and cost of stationery in respect of the entire estate for the same period of 79 months. The executor contends that a sum of about Rs. 700/- per month on account of telephone charges, another expenditure of about Rs. 800/- per month by way of legal costs and a further expenditure of about Rs. 1,700/- per month on account of maintenance, repair and stationery should not prompt any Court to conclude that there has been large scale of defalcation or misappropriation of the funds of the estate.

18. The executor is probably right on such count. Even though the executor is required to administer the estate without seeking to obtain any benefit therefrom, in these days an expenditure of the amount that the Applicant complains of would not demonstrate any act of defalcation of the funds of the estate by the executor, particularly considering that the total amount involved over 79 months is a sum of about Rs. 2.4 lakh whereas the monthly accrual to the estate is in excess of Rs. 1.5 lakh. Yet, the circumstances in which a tenant was inducted into the Applicant's portion of the Shyamananda Road property without either the Applicant or the Court being taken into confidence and the failure on the executor's part to ensure division of the Shyamananda Road property till the direction was issued by Court on April 11, 2008 would scarcely inspire any confidence in the conduct of the executor. It is also the admitted position that till May, 2008 or thereabouts it was the executor who received the entire complement of rent and collections from out of the three other immovable properties and the Agarpara property.

19. The executor has made himself liable to be removed u/s 301 of the Succession Act. There is the question of an alternative executor being found. It is submitted on behalf of the executor, obviously without prejudice, that the two brothers may be appointed executors. But the relationship between the two brothers is such that it would not be desirable to appoint them as joint executors. The Applicant elder brother is not desirous of taking upon the mantle as executor and suggests that an independent person be appointed executor.

20. Mr. Asish Chakraborty, Advocate is appointed administrator to complete the administration of the estate and the executor is directed to render all assistance to the administrator to ensure that the administration is completed within January 31, 2011. The administrator will cause the four immovable properties other than the Shyamananda Road property to be divided between the two brothers in such manner as may be found appropriate including by attornment of tenancies. The executor will cease to operate the bank account maintained with Allahabad Bank, South Calcutta Branch for which an order of injunction has already been passed on September 8, 2010. It will be the administrator who will operate such bank account and collect the rent and other usufructs which will be deposited to such account and, for the moment, will not be distributed to either the Applicant or to the

executor till the administration is more or less completed. The administrator will draw a consolidated remuneration of Rs. 1 lakh by way of remuneration from out of the money lying to the credit of the estate.

21. As to the implementation of Clause 13(v) of the Will, the administrator will do no more than assess whether the two brothers are agreeable to an amicable solution in such regard. If it is not possible for the parties to resolve the matter relating to such clause amicably, it will be open to the Applicant elder brother to institute appropriate proceedings against the younger brother in respect thereof.

22. Since Section 301 of the Succession Act conceives of an executor being removed, a lesser order of appointing an administrator to complete the administration will be permissible. The executor here is not altogether removed from office but he is directed to act as per the directions of the administrator in every matter. The executor will take every step in the matter upon obtaining permission therefore from the administrator. The executor will furnish the inventory report and accounts for the period immediately prior to this order in the Department within eight weeks. The final accounts and report will be filed by January 31, 2011 by the executor, countersigned by the administrator. The administrator will stand discharged upon the administration of the estate being completed and the final report and accounts being filed.

23. G.A. No. 3499 of 2006 and G.A. No. 1121 of 2008 are disposed of. There will be no order as to costs.

24. Urgent certified photocopies of this order, if applied for, be given to the parties subject to compliance with all requisite formalities.