

(2011) 07 CAL CK 0102

Calcutta High Court

Case No: APO No. 110 of 2006, GA No. 1355 of 2006 and EC No. 70 of 2005

Metro Promoters Pvt. Ltd.

APPELLANT

Vs

R.N. Thakur (since deceased)
Estate

RESPONDENT

Date of Decision: July 18, 2011

Acts Referred:

- Arbitration Act, 1940 - Section 16, 17, 35
- Arbitration and Conciliation Act, 1996 - Section 11, 19, 31(8), 34, 34(3)
- Succession (Amendment) Act, 1962 - Section 57
- Succession Act, 1925 - Section 211, 213, 213(1), 227

Hon'ble Judges: Pinaki Chandra Ghose, J; Harish Tandon, J

Bench: Division Bench

Advocate: Debasish Kundu, D. Basak and Prabir Banerjee, for the Appellant; H.K. Saha Roy M.S. Saha Roy, Debasish Sutradhar, Somenath Chakraborty, Nilesh Chatterjee and Ashim Ghoshal, for the Respondent

Final Decision: Dismissed

Judgement

1. The Court: The core question involved in the instant appeal is whether the award passed by the arbitrator is a nullity in absence of a probate to the will of the deceased party to the arbitral proceeding, in view of the embargo created u/s 213 of the Indian Succession Act.

2. Before deciding the above question of law it would be trite to narrate the brief facts of this appeal.

3. One R.N. Thakur, since deceased along with the other co-owners of the premises No. 29 Sadananda Road, Kolkata 700 026 entered into an agreement for development of the said property with M/s. Metro Promoters Pvt. Ltd., the Appellant herein. The said agreement contained an arbitration clause. By the said agreement it was agreed that the Appellant herein shall give four self-contained flats more or

less 3000 sft. of the sanctioned area in the proposed newly constructed building. Such area which was agreed to be allotted to the joint owners was on stipulation that the plan would be sanctioned for construction of 14000 sft. of area. However the Kolkata Municipal Corporation granted sanction for construction of an area of 10414 sft. only. It is contended by the Appellant, the developer, that the area which was agreed to be allotted to the joint owners on the basis of an understanding that there would be sanction for 14000 sft. of covered area should be decreased in the proportion as the plan could be sanctioned for 10414 sft. of covered area and the joint owners would be entitled to get constructed area of 2232 sft. instead of 3000 sft. in terms of the said agreement. Disputes cropped up between the Appellant and the said owners and two applications under the Arbitration and Conciliation Act 1996 were filed being AP 43/97 and AP 345/97 by the said R.N. Thakur, since deceased. The said applications were disposed by appointing sole arbitrator with a direction to complete the reference within four months after filing of the pleadings. Ultimately the arbitrator published an award on 3.9.2002, the operative portion is quoted below:

(a) the claimant do get an award against the Respondent for specific performance of the contracts by delivery of the flat with 750 sft. Area of he specification with car parking space mentioned in the supplementary agreement dated 02.01.1991 in the multi-storeyed building at 29 Sadnanda Road, Calcutta - 29 immediately on expiry of three months from date of receipt of copy of this Award as per Claim No. (a) of the claimant

(b) an award against the Respondent for damages for Rs. 80,000/- for non-delivery of the allocated flat and car parking space in the said building at 29 Sadnanda Road, Calcutta for the period from 02.03.1997 to 01.07.1998 as per claimant's claim No. (b)

(c) an award against the Respondent for further amount of damages calculated @ Rs. 5,000/- per month from 02.07.1998 till delivery of the flat and car parking space in the said building at 29 Sadnanda Road, Calcutta as per claimant's claim No. (c)

(d) an award against the Respondent for Rs. 2,88,000/- as compensation in the event of delivery of a flat with car parking space in the said building not in conformity with the area and description as given in supplementary agreement dated 02.01.1991 and going possession only a flat with area of 558 sft. and car parking space, as per claimant's claim No. (d)

(e) an award against the Respondent for interest @ 18% p.a. on the sum of Rs. 80,000/- from 02.07.1998 up to the date of this award. Post award interest on damages will be governed by the provisions of Section 31(8) of the Act No. 26 of 1996 in absence of any negative decision with regard thereto

(f) an award against the Respondent for costs of this arbitral proceedings amounting to Rs. 93,905/- as per details of costs mentioned in the schedule appended to this award as part of award, as pr claimant's claim No. (I)

(g) an award against the Respondent making the order for interim measure in respect of the awarded flat and car parking space absolute

(h) claim No. (h) for award for interest @ 18% p.a. on arbitral award till realization as made is rejected and refused.

4. The said award was challenged by the Appellant u/s 34 of the Arbitration and conciliation Act 1996 and the said application challenging the award was dismissed on the ground of limitation as having barred u/s 34(3) of the said Act. The said order was not carried further in appeal by the Appellant.

5. It would be pertinent to mention that during the arbitral proceeding the claimant, R.N. Thakur, since deceased, died and one Indranath Bhattacharjee was substituted in place of the said claimant being the executor to the will of the said deceased.

6. Subsequently the said award was put into the execution by the present Respondent.

7. At the time moving the execution application, the executing court appointed receiver to take possession of the said flat. It appears from the report of the receiver that the said flat has already been transferred in favour of Smt. Sudeshna Ghosh. An application as intervenor was filed by the said Smt. Sudeshna Ghosh in the said execution proceeding which was allowed. It has been contended by the said intervenor that she purchased the property from one M/s. Kripa Realtor Pvt. Ltd. who acquired the said flat from the Appellant company upon execution and registration of the deed of conveyance dated 24.9.1999. She further stated that she is No. longer interested to keep the said flat, if the money which she has invested for acquisition of the said flat is paid to her.

8. The executing court disposed of the said application for execution directing the Appellant herein to pay a sum of Rs. 18,50,000/- to the receiver in full and final satisfaction of the claim of the said intervenor in respect of the flat in question and the said intervenor was directed to hand over the possession to the receiver upon receipt of the said sum. Further direction is made for the payment of the sum of Rs. 2,50,000/- to the award-holder by the said receiver out of a sum of Rs. 5,00,000/- which was deposited by the Appellant in terms of an order of the executing court.

9. The said order is assailed in the instant appeal.

10. The Appellant has raised a plea that the award is a nullity having passed in contravention to Section 213 of the Indian Succession Act 1925.

11. Mr. Debasis Kundu, learned Counsel appearing for the Appellant submits that the original claimant namely R.N. Thakur, since deceased died during the pendency of the arbitral proceeding after making and publishing his last will and testament and the said will has not been probated by the competent court and as such the award passed in favour of the substituted claimant is not valid in view of Section 213

of the Indian Succession Act 1925. He relies upon a Division Bench judgment of this Court in case of [Mohanlal Dungarmal Futnani Vs. Vishanji Dungarmal Futnani and Others](#), to contend that the decree in terms of an order passed prior to obtainment of probate cannot be passed. Lastly it is contended that the decree passed in contravention to Section 213 of the Indian Succession Act 1925 is a nullity and is not executable.

12. Per contra, Mr. H.K. Saha Roy, learned Senior Counsel appearing for the Respondent submits that the executing court cannot go behind the decree and relies upon a judgement of the apex court in case of [Rajasthan Financial Corporation Vs. Man Industrial Corporation Ltd.](#), in case of [Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others](#), .and in case of [Bhawarlal Bhandari Vs. M/s. Universal Heavy Mechanical Lifting Enterprises](#), . To the same principle reliance is also placed upon a judgment of this Court in case of TCI Finance Ltd. v. Calcutta Medical Centre Ltd. and Anr. reported in 2006 (2) CHN 4 (SC). He strenuously argued that the court while passing the decree may do so with the clear direction/stipulation that the executor shall obtain and produce the probate of the will before the execution is levied, as has been held by The Supreme Curt in case of [Binapani Kar Chowdhury Vs. Sri Satyabrata Basu and Another](#), .

13. The learned Counsel appearing for the intervenor submits that by protraction of the litigation and escalation in price of the flat, in the mean time it is not possible at this juncture to acquire a subsequent flat in a nearby area with such paltry-sum of money.

14. Having heard the submissions made above, it is undisputed that an agreement between the Appellant and the joint owners of the premises No. 29 Sadananda Road, Kolkata - 700026 for development of the said property was executed. It is further stipulated therein that upon construction of the newly proposed building the joint owners including R.N. Thakur, since deceased would get four flats comprising in 3000 sft. area. Certainly certain disputes cropped up between the parties to the agreement and on an application u/s 11 of the Arbitration and Conciliation Act 1996 was fixed before this Court and Mr. Narendra Nath Sommaddar was appointed as sole arbitrator. Admittedly the claimant namely R.N. Thakur, since deceased died during the arbitral proceeding. One Indra Nath Bhattacharjee, being the executor of the will left by the said R.N. Thakur, since deceased, was substituted in place of the deceased claimant. An award was passed against the Appellant herein which was challenged unsuccessfully by the Appellant u/s 34 of the Arbitration and Conciliation Act 1996.

15. The said execution is resisted by the Appellant by raising a question as to the executability of the award being passed when the executor representing the estate of the deceased claimant on the strength of the will, has not obtained the probate.

16. It may be noticed at this stage that the Arbitration and Conciliation Act 1996 is promulgated and came in into force on and from 16th August 1996 by repealing the Arbitration Act 1940. In terms of Section 16 of the Arbitration Act 1940, the award does not become executable but should be made the rule of the court and then thereafter partakes the character of a decree but award passed under the provision of Arbitration and Conciliation Act 1996 is executable as decree u/s 35 of the said Act and does not require the sanction of the court as was required under the Arbitration Act 1940.

17. Section 213 of the Indian Succession Act 1925 which reads thus:

Right as executor or legatee when established. (1) No. right as executor or legatee can be established in any Court of Justice, unless a court of competent jurisdiction in India has granted probate of the will under which the right is claimed, or has granted letters of administration with the will or with a copy of an authenticated copy of the will annexed

(2) this section shall not apply in the case of wills made by Muhammadans or Indian Christians and shall only apply-

(i) in the case of wills made by any Hindu, Buddhist, Sikh or Jaina where such wills are of the classes specified in Clauses (a) and (b) of Section 57; and

(ii) in the case of wills made by any Parsi dying, after the commencement of the Indian Succession (Amendment) Act, 1962, where such wills are made within the local limits of the ordinary original civil jurisdiction of the High Courts at Calcutta, Madras and Bombay and where such wills are made outside those limits, in so far as they relate to immovable property situate within those limits.

18. By virtue of Section 211 of the Indian Succession Act 1925 the executor or an administrator as the case may be of a deceased person is his legal representative in all purposes and the property of the deceased vest in him as such.

19. A conjoint reading of Section 211 and Section 213 of the Indian Succession Act 1925 as quoted above, the executor or an administrator is a legal representative for all purposes and the estate of the deceased vest in him as such but such right as executor or a legatee can only be established in any court upon grant of the probate by a competent court. The initiation or filing of proceeding in court by the executor or administrator is not barred but the right as executor cannot be established unless the probate is granted. It is now settled from the catena of judgments that the bar created u/s 213 of the Indian Succession Act 1925 not only applies when the executor or administrator initiates or files a proceeding in court but also applies if any proceeding is initiated or filed against an executor or administrator.

20. The judgment relied upon by the Appellant rendered by this Court in case of Mohanlal Dungarmal Futnani (supra) to contend that the award passed in contravention to Section 213 of the Indian Succession Act 1925 is a nullity, is not

applicable to the facts of the instant case. The fact therein was that one Dungarmal Bachumal Futnani was carrying on the large number of business and died leaving a will where the Appellant of the Respondent No. 1 therein was appointed as executor to the said will. A dispute arose between the Appellant and the Respondent No. 1 and by an arbitral agreement executed between them representing their respective family members such dispute was referred and once such dispute was relating to construction of the will made by Dungarmal Bachumal Futnani. Ultimately an award was published and the same was filed before the court to make it a decree in terms of Section 17 of the Indian Arbitration Act 1940. While deciding such a point, the Division Bench of this Court held that the applicability of Section 213 is to a court of justice and not to a proceeding before the arbitrator in following words:

43. We have already held that in the case in hand the reference for construction of the Will was not for the purpose of establishing any right. But assuming that the reference was for the purpose of establishing a right even that, in our opinion, would not make any difference. When probate obtained prior to passing of the decree in a suit has been held to be sufficient compliance with Section 213 of the Indian Succession Act there is No. reason why probate obtained prior to the award being made a rule of court should not be held to be sufficient compliance with Section 213 of the Succession Act. What follows is that a decree in terms of the award shall not be passed until the Will has been probated. This construction, in our view, logically explains the reason for applicability of Section 213 to a "Court of Justice" and not to a proceeding before Arbitrator.

21. It is No. doubt true that the executing court cannot go behind the decree and have to accept the same with full rigour provided an objection is made as to its executability discharge and satisfaction. The judgement relies upon by the Respondent in support of such principle is No. more res integra and cannot be doubted. One of the ingredients of non executability of a decree is a nullity. Obviously if the executing court finds that the decree is a nullity its executability can be questioned and the executing court is not denuded of its power to decide such question.

22. Whether the award passed by the arbitrator can be said to be nullity as having been passed in contravention to Section 213 of the Indian Succession Act 1925 a nullity is a question begging an answer in this appeal. The Arbitration Tribunal is not bound by the CPC or the Indian Evidence Act as envisaged u/s 19 of the Arbitration and Conciliation Act 1996. Even if it is taken that No. decree can be passed for establishment of the right as executor or a legatee unless a probate is granted whether the same principle would apply in a case where the proceeding was initiated by the claimant who died in course of the proceeding leaving and publishing a Will and the executor is substituted as legal representative in the said proceeding. This Court in case [Gobinda Ballav Chakraborty Vs. Biswanath Mustafi and Others](#), held that an executor is a legal representative of the deceased for all

purposes and the grant of probate is not a condition precedent in following words:

4. Mr. Roy Choudhury the learned Counsel appearing for the Appellant contended that the suit in question was instituted by Bina Pani Debi and the said Bina Pani Debi was quite competent to institute the said suit and to continue the same. After the death of the said Bina Pani Debi the decree-holders, namely, the Sri Haldar and Sri Chakraborty made an application for being substituted in place and stead of the deceased Plaintiff Bina Pani Debi on an allegation that the said Bina Pani Debi had left a will and the said Sri Chakraborty and Sri Haldar were executors to the estate of the deceased Bina Pani Debi under the said will. The said application for substitution was allowed by the Court and Sri Chakraborty and Sri Haldar were impleaded as Plaintiffs representing the interest of the deceased Plaintiff Bina Pani Debi. Mr. Roy Choudhury contended that the executors do not derive their right on the grant of the probate of the will but they derive the right and title to the estate of the deceased by virtue of the will itself and such right takes place immediately on the death of the testator. Mr. Roy Choudhury contended that the executors were the legal representatives of the deceased for all practical purposes, and immediately on the death of the testator the right to his estate vested on the executors because the executor derived their title from the will in question and not from the grant of probate. Mr. Roy Choudhury contended that the court of appeal below misconceived the provisions of Section 213 of the Indian Succession Act and also the provisions of Section 227 of the said Act and proceeded on an erroneous view that as the probate was not granted before the passing of the decree in the said Title Suit the decree passed in the said Title Suit was a nullity. For the proper appreciation of the contentions of the learned Counsel for the parties it is desirable to set out the provision of Sections 213(1) and 227 of the Indian Succession Act.

Section 213 of the Indian Succession Act reads as follows:

213(1). No. right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in India has granted probate of the will under which the right is claimed, or has granted letters of administration with the will or with a copy of an authorised copy of the will annexed.

Section 227 of the Indian Succession Act provides as follows:

227. Probate of a will when granted establishes the Will from the death of the testator, and renders valid all intermediate acts of the executor as such.

It appears from the provisions of Section 213(1) of the Indian Succession Act that an executor or a legatee cannot establish his right as a legatee without obtaining probate of the will in question but there is nothing to prevent the executor from dealing with the property of the deceased without obtaining probate because u/s 211 of the Indian Succession Act, the executor is the legal representative of the deceased for ail purposes and the property of the deceased vests in him and the grant of probate is not a condition precedent to such vesting of estates in the

executor and or his acting as executor. Section 227 of the Indian Succession Act lays down the effect of granting probate to a Will and it is provided that when a probate of a will is granted all intermediate acts of the executor from the date of death of the testator are rendered valid by the grant of probate.

23. However a divergent view is taken by this Court in case of Arijit Mullick v. Corporation of Calcutta reported in 1979 (2) CriLJ 426.

24. No doubt upon the death of the testator the executor or administrator becomes the legal representative for all purposes in respect of the estate but the same is subject to the grant of the probate by the competent court. The executor is not precluded from taking such measures as necessary to administer or manage the estate and all such acts get ratified on grant of the probate u/s 227 of the Indian Succession Act 1925.

25. It would be pertinent to mention that at the time of admitting the instant appeal the Division Bench permitted the Respondents to take steps for grant of the probate of the said Will and in fact the probate is granted and has been filed before us.

26. Thus there is a probate granted to the Will by a competent court which establishes the Will and thus renders valid all immediate acts of the executor. Technicalities of procedure cannot overshadow the substantive right. When the appeal is taken there is a probate granted by the competent court. Procedure is nothing but a handmade of justice the Respondents are now armed with the probate and there cannot be any further quarrel with the non-compliance of Section 213 of the Indian Succession Act 1925. The apex court in case of Binapani Kar Chowdhuri (supra) directed the court to proceed with the hearing of the suit and to pass a decree but restricted the executability thereof till the probate of the Will is obtained. In the instant case, as stated above, the Respondents have obtained the probate and thus there is No. impediment in executing the decree.

27. Thus we do not find any substance in the submissions of the Appellant and the same fails.

28. The appeal is devoid of any merit. The appeal is also dismissed. In the circumstances, there shall be No. order as to costs.