(2011) 08 CAL CK 0140

Calcutta High Court

Case No: G.A. No. 1635 of 2011, A.P.O.T. No. 246 of 2011 and P.L.A. No. 125 of 2010

In the goods of: Nurun Nahar (Deceased) and Seikh Abdus Sadek	APPELLANT
Vs	
S.K. Abdul Rasool and Others	RESPONDENT

Date of Decision: Aug. 12, 2011

Acts Referred:

- Probate and Administration Act, 1881 - Section 4, 59, 88
- Succession Act, 1925 - Section 187, 231(2)

Hon'ble Judges: Sambuddha Chakrabarti, J; Bhaskar Bhattacharya, J

Bench: Division Bench

Advocate: S. Deb, for the Appellant;J. Islam and Z. Islam, for the Respondent

Judgement

Bhaskar Bhattacharya, J.

This appeal is at the instance of an applicant for grant of probate of a Will executed by a Mohammedan testatrix and is directed against the order dated April 21, 2011 passed by a learned Single Judge of this Court and thereby dismissing the application for grant of probate, not on merit, but on the ground that the Executor had alternative remedy of institution of a suit for getting the same relief, as the mandatory requirement of obtaining a probate was not necessary in case of a Will left by a Mohammedan testatrix as provided in Section 231(2) of the Indian Succession Act, 1925.

2. Being dissatisfied, the Executor has come up with the present appeal.

3. Therefore, the only question that arises for determination in this appeal is whether notwithstanding the fact that the Indian Succession Act has excluded its operation in case of the grant of probate executed by a Mohammedan testatrix, the learned Single Judge refused to exercise jurisdiction vested in His Lordship by law by not entertaining the prayer for grant of probate of such a Will.

4. After hearing the learned Counsel for the parties and after taking into consideration the fact that Indian Succession Act has no application in respect of grant of probate in respect of a Will executed by a Mohammedan testator as provided in the said Act, we find that the law is equally settled that in respect of a Will executed by a Mohammedan lady, this High Court, by virtue of the power conferred under the Letters Patent, is entitled to invoke its testamentary jurisdiction which was in existence even prior to coming into operation of Indian Succession Act, 1925. By way of the amendment of the City Civil Court Act, 1953, only the power of grant of probate under Indian Succession has been taken away from this Court but the power to grant probate in respect of a Will executed by a Mohammedan lady still exists in this Court by virtue of the power conferred by the Letters Patent.

5. This High Court in the past has settled the position of law that although the grant of probate is optional in case a Will executed by a Mohammedan testator and that too, to a limit extent of the estate left by such testator, there is no bar in grant of probate of such a Will, if the same is applied for.

6. In this connection, we may profitably refer to the following observations of the Privy Council in the case of Mirza Kurratulain Bahadur v. Nawab Nuzhat-Ud-Dowla Abbas Hussein Khan alias Peara Saheeb, reported in 9 CWN 938 dealing with the source of jurisdiction to grant Probate of the Mohammedan testator at page 950:

Testamentary jurisdiction was first given to the Supreme Court by their original charters, that in Bengal dated in 1774 being the first. And it was then given as a branch of ecclesiastical jurisdiction, and was to be administered according to the ecclesiastical law as in force in the Diocese of London. In the course of the series of events by which the British territories in India grew from a group of trading settlements into an empire, various branches of jurisdiction which sprang originally form an ecclesiastical origin, have come to be applied by a number of legislative acts to new territories and new classes of persons, and administered by new tribunals. And in the progress of this development the ecclesiastical origin of such jurisdiction has been completely discarded, and the legislature has gradually evolved an independent system of its own, largely suggested, no doubt, by English law, but also differing much from that law, and purporting to be a self-contained system. Even in the case of the High Courts, the successors of the Supreme Courts (which alone possessed ecclesiastical jurisdiction) the testamentary jurisdiction which the charters purport to confer upon them is not given as a branch of ecclesiastical jurisdiction, and is not made dependent upon the law administered by English Courts. From an early date the Supreme Courts granted probates of Hindu and Mahomedan Wills. The practice varied greatly from time to time, and it was never perhaps very satisfactorily determined upon what basis the jurisdiction rested. It was, however, established that such probates might issue. But the Supreme Courts never applied the English rule as to the necessity for probate to Hindu or Mahomedan Wills, nor did they attribute to such probates when granted the English

doctrines as to the operation of probate. Under that system a Hindu or Mahomedan executor took no title to property merely as such by virtue of the probate. In the case of Mahomedan executors such a title was created for the first time by the Probate and Administration Act. These considerations seem to their Lordships strong to show that the effect of probate of a Mahomedan Will granted after the Probate and Administration Act must be that which is given by the terms of the Act itself, neither more nor less. What, then, is the effect of the Act? Section 4, supplemented by Section 88, vests the whole property of the testator in the executor. Section 59 makes the probate conclusive as to his representative title against debtors of the deceased and persons holding property of his, and gives a complete indemnity to those who pay debts or deliver up property to the executor holding the probate.

7. We may also refer to the following observations of a subsequent decision of a Division Bench of this Court in the case of Sayed Abdul Alim Abed v. Badruddin Ahmed and Ors. reported in 28 CWN 295where the Division Bench followed the aforesaid principles and held that Probate of a Will executed by a Mohammedan Testator although optional, yet if applied, should be considered on merit:

The question which next requires consideration is, whether, in the events that have happened, the Tribunal should proceed to investigate the question of genuineness of the alleged Will, while the matter is under examination by this Court in its testamentary jurisdiction. We have been reminded that there is no provision of the law which renders it obligatory in the case of a Mahomedan Will to take probate, and that after due proof, such Will is admissible in evidence, notwithstanding that the grant of probate has not been obtained. The leading authority on the point is the judgment of Sir Charles Sargent, C.J., in Shaikh Musa v. Shah Issa I.L.R.(1884) 8 Bom. 241 which construed Section 187 of the Indian Succession Act; this was accepted as good law in Sakina Bibi v. Mahomed Ishaque ILR (1910) 37 Cal. 839 and Mahomed Yusuf v. Hargovan Das I> I.L.R.(1922) 24 Bom. 753 . On the other hand, it has not been denied that probate may be obtained of a Mahomedan Will. The effect of a probate so obtained was considered by the Judicial Committee in Mirza Kurratulain v. Peara Saheb ILR 32 IndAp 24 where Sir Arthur Wilson considered the effect of Sections 4, 59 and 88 of the Probate and Administration Act, 1881; see also Krishna Kinkar v. Panchu Ram ILR (1889) 17 Cal. 272 .
(Emphasis supplied by us.)

8. We, thus, find that although the Probate of a Will executed by a Mohammedan testator is not compulsory for an Executor for managing the estate, if an Executor of such a Will decides to take Probate and approaches a Court having jurisdiction to entertain such application, the Court cannot refuse to exercise jurisdiction vested in it by law merely because by institution of a civil suit and proving the Will therein, the same can be enforced in accordance with law against the persons who deny the title of the legatee by virtue of such a Will.

9. We cannot lose sight of the fact that a decision of a civil suit is only binding upon the parties to the proceedings being a judgment in personam but a Probate granted by a Testamentary Court is a judgment in rem and is binding against the whole world and as such, the Executor has a right to apply for grant of Probate of a Will executed by a Mohammedan testator to bind the whole world by virtue of such Probate instead of filing repeated suits against different persons who deny such right under the Will.

10. We, thus, find that the learned Single Judge refused to exercise jurisdiction vested in His Lordship by law and such order cannot be supported. We, consequently, set aside the order impugned and remand the matter back to the learned Single Judge for disposal of the application for grant of Probate in accordance with law on merit.

11. In the facts and circumstances, there will be, however, no order as to costs.

12. I agree.