

(2014) 11 CAL CK 0013

Calcutta High Court

Case No: GA 791 of 2013 and PLA 267 of 2005

Shankar Lal Saraf

APPELLANT

Vs

Madhu Devi Saraf

RESPONDENT

Date of Decision: Nov. 7, 2014**Acts Referred:**

- Trusts Act, 1882 - Section 63

Citation: (2015) 3 WBLR 974**Hon'ble Judges:** Arijit Banerjee, J**Bench:** Single Bench

Advocate: Pradip Ghosh, Tilak Bose, Sr. Advs., Sarbapriya Mukherjee and Sananda Ganguly, Advocate for the Appellant; Ratnanko Banerji, S.N. Mookherjee and Ranjan Deb, Sr. Advs., Lopita Banerji, Srijib Chakrabarti, Soumabho Ghosh, Ranabir Roy Chowdhury, Shaunak Mitra, Aashish Choudhury and Jai Kumar Surana, Advocate for the Respondent

Judgement

Arijit Banerjee, J.

One Shankar Lal Saraf was a person of substantial means. He died having made and published a Will dated May 11, 2005 wherein he named his wife being the respondent no. 1 in the present proceeding as the sole executrix of the Will. The respondent no. 1 obtained probate of the said Will by an order dated October 7, 2005 passed by this Court in PLA No. 267 of 2005.

2. About 8 years later one of the daughters of the testator viz. Sweetie Todi filed an application for revocation of probate of the said Will being GA No. 173 of 2013. The present application being GA No. 791 of 2013 has been filed by the respondent no. 3 in GA No. 173 of 2013 for deletion of his name from the array of respondents in GA No. 173 of 2013.

The applicant's case:

3. The applicant contends that he is not a necessary or proper party to the application for revocation of probate of the said Will. He contends that the petitioner in GA No. 173 of 2013 being Sweety Todi who has applied for revocation of probate does not have any cause of action against the applicant. The applicant was not a party to the probate proceeding and is not concerned with it in any manner. He is neither a legal heir of the testator nor a beneficiary under the said Will. He is not concerned with what the executrix did with the estate of the deceased. His further case is that all transactions during the continuance of probate are valid and even if the probate is subsequently revoked such transactions are not invalidated. Hence, even if he had transactions with the executrix touching the estate of the deceased during the continuance of the probate, just because the probate may be revoked subsequently would not make such transactions bad. In this connection, the applicant relies on the decision of the Hon'ble Supreme Court in the case of [Crystal Developers Vs. Smt. Asha Lata Ghosh \(Dead\) through LRs. and Others,](#) . The applicant, thus, contends that no liability can be foisted on him and his presence before the court hearing the application for revocation of probate is not at all necessary. He has been unnecessarily dragged into the matter and his name should be deleted from the array of respondents in GA 173 of 2013.

The case of the petitioner (Sweety Todi):

4. The application has been vehemently opposed by Mr. Pradip Ghosh, Ld. Senior Counsel, appearing on behalf of Sweety Todi. It has been alleged in the affidavit-in-opposition filed by Sweety Todi and also contended in course of submission made on her behalf that several crores of rupees have been diverted from the estate of the deceased to the applicant or to companies controlled by the applicant. This has been done by the respondent no. 1 being the executrix under the undue influence and dictates of the applicant who is the son-in-law of the respondent no. 1. It is contended by reference to Section 63 of the Indian Trusts Act, 1882 that the respondent no. 1 is in a position of a trustee viz-a-viz. the estate of the deceased and any estate or property including money of the estate of the deceased which have been diverted to third parties can be traced and followed into the hands of such third persons like the applicant in the present case. In this connection, Mr. Ghosh has relied on the decision of the Privy Council in the case of Guardian Trust and Executrix Co. of New Zealand-vs.-Public Trustee of New Zealand reported in (1942)1 ALL. ER. 598.

5. Mr. Ghosh has further referred to Paruck's Indian Succession Act, 10th Edition page 935 and has submitted that an executor after receiving notice of intended application for revocation of probate, must stay his hands. He should not pay any legacy bequeathed under the Will. If the legatee threatens him for payment, he should apply for directions from the court. If without taking these precautions he pays any legacy, he does so at his peril and on the subsequent revocation of probate he may be personally liable to make good the loss.

6. Mr. Ghosh has also relied on a decision of the English Court in the case of Thomson-vs.-Clydesdale Bank Ltd. reported in (1891-94) ALL. ER. Reprint 1169 in support of his submission that if trust property is found in the hands of a third person which he is acquired by wrongful means, such property can be recovered from such third person by way of tracing. According to him, several crores of rupees amounting to over Rs. 70 crores have been diverted to the applicant and/or the companies controlled by him wrongfully from the estate of the deceased and such monies can be recovered from the applicant. As such, the applicant is a necessary and proper party to the application for revocation of probate. He contends that the applicant is trying to shy away from court in order to avoid cross-examination by praying for deletion of his name from the array of respondents in the application for revocation of probate.

The Court's view:

7. I have considered the rival contentions of the parties. The applicant prays for deletion of his name from the array of respondents in the application for revocation of probate taken out by Sweetly Todi. The applicant contends that the application for revocation of probate discloses no cause of action against the applicant and he is not a proper or necessary party to such application. He further contends that any transaction entered into by the executrix with the applicant during the continuance of probate of the Will of the deceased will not be invalidated even if the probate is subsequently revoked. The fulcrum of the applicant's argument is the decision of the Hon"ble Apex Court in the case of Crystal Developers-vs.-Asha Lata Ghosh (supra). On the basis of the said decision the applicant contends that all intermediate acts done by the executrix from the date of grant of probate of the Will till the date of revocation will be valid.

8. However, on a careful reading of the said decision of the Hon"ble Apex Court it does not appear that all intermediate acts during the continuance of probate are given a blanket protection. Acts which are in consonance with the testator's intention and which are compatible with the administration of the estate are protected. However, if the intermediate acts of the executor/executrix are not for the purpose of administration of the estate or if the acts are performed in breach of trust then such acts are not protected. 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.

9. The question, therefore, remains whether the moneys advanced from the estate of the deceased to the applicant, which is admitted, were by way of bona fide loans and whether the same was for the purpose of administration of the estate. It is admitted by the applicant in his affidavit-in-reply that at present approximately Rs. 20.05 crores is outstanding as loan to the estate of the deceased.

10. Rightly or wrongly, Sweety Todi in her application for revocation of probate has alleged that the monies given to the applicant by the respondent no. 1 out of the funds of the estate of the deceased were by way of mala fide diversion of funds of the estate. Reliefs have been prayed for in such application against the applicant herein. Whether or not the court hearing the application for revocation of probate will go into such matter is for that Court to decide. However, if such matter is gone into by the court hearing Sweety Todi's application for revocation of probate, the presence of the applicant before that court would be essential. To that extent, the applicant would be a proper and necessary party to such application.

11. The applicant would at liberty to raise the point sought to be urged in the instant application, at the hearing of the application for revocation of probate. If that court decides that the reliefs claimed against the applicant are beyond the scope of the application and as such the applicant is not a proper and necessary party, the application would naturally be dismissed against the applicant herein and it is expected that he would be compensated by award of costs in his favour.

12. If the court hearing the revocation of probate application is inclined to consider the reliefs claimed against the applicant, it is desirable that the applicant establishes before that court that the monies received by him from the estate of the deceased were by way of bona fide loans to avail of the protection of the decision of the Hon'ble Apex Court in the case of Crystal Developers-vs.-Asha Lata Ghosh (Supra). Rightly or wrongly, Sweety Todi has made allegations against the applicant in the application for revocation of probate and has claimed reliefs against the applicant. Hence it cannot be stated that such application for revocation of probate does not disclose a cause of action against the applicant as contended by him.

13. For the reasons aforesaid, I am not inclined at this stage to strike out the name of the applicant from the array of respondents in GA No. 173 of 2013. This application, therefore, fails and is dismissed. There will be no order as to costs.