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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Reserve: March 05, 2010

Date of Order: March 22, 2010

+ CM(M) 305/2010

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Shri Gurmeet Singh Chopra

Through: Mr. Sant Lal & Mr. Pradeep Kumar, Advocates

22.03.2010

...Petitioner

Versus

Smt. Taruna Chopra & Ors.

Through: nemo

...Respondents

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether judgment should be reported in Digest?

JUDGMENT

1. By this petition, the petitioner has assailed an order dated 25th November 2009 whereby the learned trial court refused the petitioner to lead additional evidence to prove the Will dated 18th September 1998. It is submitted by the petitioner that the petitioner was entitled to the estate of the deceased on the basis of the Will left behind by the deceased. The petitioner was impleaded as legal heirs on the basis of the Will and the petitioner, therefore, has a right to prove the Will. The learned trial court observed that Will could not be a subject matter of the suit filed by the deceased/ plaintiff in whose place defendant no.3 was brought on record as an LR. Therefore, no additional evidence to prove the Will can be allowed.

2. It is submitted by the petitioner that no probate of the Will was required, therefore, he could lead evidence to prove the Will before the Civil

Court. He relied upon *Santosh Kakkar & Ors. v. Ram Prasad & Ors.* 1998 1 AD (Delhi) 938.

3. I consider that the contention of the petitioner is misconceived. The only court which has jurisdiction to adjudicate about the genuineness and validity of the Will is the Probate Court. The Probate Court has exclusive jurisdiction to decide about the Will and the Civil Court does not have jurisdiction to adjudicate about the genuineness of the Will. It is clear from the judgment of the Supreme Court in *Binapani Kar Chowdhury v. Sri Satyabrata Basu & Anr.* **AIR 2006 SC 2263**, wherein the Supreme Court observed as under:

*“4. Section 213 of the Indian Succession Act ('Act' for short) provides as to when the right of the executor or legatee is established. Sub-section (1) thereof provides that no right as executor or legatee can be established in any court 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 the Will annexed.) It is not in dispute that the said Section applies in the case of Wills made by a Hindu who is a resident of Calcutta. The trial court and the High Court have proceeded on the basis that having regard to section 213 of the Act, the suit cannot be decided unless the executor of the Will produces the probate. Section 213 clearly creates a bar to the establishment of any right under a Will by the executor or legatee unless probate or letters of administration of the Will have been obtained. This Court in *Mrs. Hem Nolini Judah v. Mrs. Isolyne Sarojbashini Bose*, AIR(1962) SC 1471, held as follows :*

"The words of S.213 are not restricted only to those cases where the claim is made by a person directly claiming as a legatee. The section does not say that no person can claim as a legatee or as an executor unless he obtains probate or letters of administration of the will under which he claims. What it says is that no right as an executor or legatee can be established in any Court of Justice, unless probate or letters of administration have been obtained of the will under which the right is claimed, and therefore, it is immaterial who wishes to establish the right as a legatee or an executor. Whosoever wishes to establish that right whether it be a legatee or an executor himself or somebody else who might find it necessary in order to establish his right to establish the right of some legatee or executor from whom he might have derived title, he cannot do so unless the will under which the right as a legatee or executor is claimed has resulted in the grant of a probate or letters of administration."

5. Therefore, where the right of either an executor or a legatee under a Will is in issue, such right can be established only where probate (where an executor has been appointed under the Will) or letters of administration (where no executor is appointed under a Will) have been granted by a competent court. Section 213 does not come in the way of a suit or action being instituted or presented by the executor or the legatee claiming under a Will. Section 213, however, bars a decree or final order being made in such suit or action which involves a claim as an executor or a legatee, in the absence of a Probate or Letters of Administration in regard to such a will. Where the testator had

himself filed a suit (seeking a declaration and consequential reliefs) and he dies during the pendency of the suit, the executor or legatee under his will, can come on record as the legal representative of the deceased plaintiff under Order 22 Rule 3 CPC and prosecute the suit. Section 213 does not come in the way of an executor or legatee being so substituted in place of the deceased plaintiff, even though at the stage of such substitution, probate or letters of administration has not been granted by a competent court”.

4. In *Chiranjilal Shrilal Goenka (deceased) through Lrs v. Jasjit Singh & Ors.* (1993) 2 SCC 507, the Supreme Court observed about the jurisdiction of the Civil Court as under:

“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 under section 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. It is already seen that the executrix was nominated expressly in the will is a legal representative entitled to

represent the Estate` of the deceased but the heirs cannot get any probate before the Probate Court. They are entitled only to resist the claim of the executrix of the execution and genuineness of the Will. The grant of probate gives the executrix the right to represent the estate of the deceased, the subject-matter in other proceedings. We make it clear that our exposition of law is only for the purpose of finding the jurisdiction of the arbitrator and not an expression of opinion on merits in the probate suit."

(emphasis added)

5. In view of the settled legal position, I consider that the learned trial court rightly did not allow the petitioner to lead evidence to prove the Will. The petition is hereby dismissed. However, the petitioner will have liberty to approach the Probate Court to get the Will probated and the petitioner may move an application before the trial court to keep the decision in the suit in abeyance till he obtains probate of the Will.

March 22, 2010
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SHIV NARAYAN DHINGRA J.