

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ FAO 294/2010

Reserved on: 02.02.2011

Decided on :17.02.2011

MOHD. USMAN (DECEASED) THR. LRS & ORS

..... Appellants

Through Ms.Deepika V.Marwaha, Advocate

VERSUS

STATE & ANR.

.... Respondents

Through Mr.Daljinder Singh, Advocate
for R-2.

CORAM:

HON'BLE MR. JUSTICE MOOL CHAND GARG

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|--|----|
| 1. Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. To be referred to Reporter or not? | No |
| 3. Whether the judgment should be reported in the Digest? | No |

MOOL CHAND GARG,J

1. The appellant has questioned the order dated 22.04.2010 passed by the ld. ADJ, whereby the ld. ADJ has revoked the probate of the will granted in the year 1987 on the basis of a revocation petition filed by the first respondent in December, 2000. It is submitted that the said revocation petition was not within time and therefore, the revocation petition ought to have been dismissed.

2. The only ground taken by the respondent was that a fraud was played upon the court inasmuch as, the appellant while seeking probate of the will of late Khwaja Sayeed-u-ddin had not mentioned the name of his son in the list of the legal heirs when the probate petition was filed by late Mohd.Usman in the year 1984.

3. It was the case of Laxmi Devi (predecessor in interest of the respondents) that she purchased 125 sq. yards out of the total land of the Qabristan admeasuring 600 sq. yards approximately in the year 1972 from one Asa Ram. It was her case that Asa Ram had purchased 400 sq. yards from Akbari Devi despite having no proof to show that

Akbari Devi had title or interest in the suit property. No averment was made in the revocation petition filed in the year 2000 as to when the cause of action arose for filing of the petition.

4. According to the appellants, the limitation for filing such petition is three years from the date when the right to apply accrues. It is submitted that in this case the judgment in the probate case was passed on 1.8.1997. Laxmi Devi, the objector had the knowledge of the same since 1989 inasmuch as a suit was filed against her by Ram Chander to create evidence of title, wherein Mohd. Usman had filed an application under Order 1 Rule 10 CPC dated 06.03.1989 for impleadment as a party in the suit wherein it was stated that he is the Mutwali of the property as per the Will and has letters of administration in his favour. Thus, after 14 years of the grant of the probate and 12 years of the knowledge, the revocation application was time barred. It would be appropriate to take note of the aforesaid application moved by late Mohd. Usman, which reads as under:-

“An application under Order 1 Rule 10, Read with Section 151 of C.P.C. to be impleaded as a defendant in the above noted case, on behalf of Mohd. Usman, Mutawalli of Qabristan Hakim Badruddin, Idgah Road, Delhi.

Sir,

The applicant respectfully showeth as under:

1. That the applicant is the lawful Mutawalli of Khwaja Sayeed-uddin, duly appointed under a WILL executed by the deceased Khwaja Sayeed-uddin in respect of the property i.e. Qabristan being No. 11382, Khasra No. 471/472, Ahata Hakim Badruddin, Mauza Kadam Sharif, Idgah Road, Delhi.

2. That a Letter of Administration was applied by the applicant in Probate case No. 207/83 and a order for the grant of letter of administration was passed on 1.8.1987 by the court of District Judge, Delhi.

3. That Khawaja Sayeed-uddin during his life time through the applicant as attorney instituted a suit against Smt. Angoori Devi, Girdhari Lal, Shri Abdul Wahab, and Municipal Corporation of Delhi, for Permanent and Mandatory Injunction and for Possession of the portion of the graveyard in the

possession of the said defendants which bears municipal No. 11382, and is situated at Ward No. XV, Idgah Road, Mauza kadam Sharif, near Dargah Khwaja Baqi Billah Sahib, Delhi. In the said suit an order for injunction was passed by the Court of Shri Om Prakash, Sub Judge 1st Class Delhi, bearing suit No. 260 of 1981, to the effect- that the defendants were restrained not to part with the possession or transfer the property in dispute till the decision of the suit. The said suit is still pending in the Court of Shri A.S. Dateer, Sub Judge 1st Class, Delhi, the stay order dated 4.10.1982 is still in force, and now is fixed for hearing before the said court for 8.5.1989.

4. That a poster has been published by Smt. Lakshmi Devi, wife of Shri Shiv Narain, resident of A-I/280, Paschim Vihar, New Delhi, that she is the owner of the property bearing No. 11382, Mauza kadam Sharif, Chowk Singhara, Nabi karim, Delhi and a stay order has been granted by this Hon'ble Court.

5. That the details of the suit are not available to the applicant. It appears that one of the defendants in suit No. 260/81 Smt. Angoori Devi, and Girdhari lal might have transferred or created some document of transferring the property in favour of the plaintiff/ Lakshmi Devi.

6. That the applicant apprehends that Smt. Lakshmi Devi or any other person through her would demolish the existing structure in Qabristan and would construct a multi story building in the garb of injunction obtained from this Hon'ble Court against a frivolous person who has no such right in the property without impleading the applicant who is Mutawalli of the said property i.e. graveyard.

7. That the rights of the applicant are adversely affected in the said suit and are most interested person and any order passed by this Hon'ble Court shall adversely affect the interest of the applicant/ Mutawalli, who is the incharge and in management of the property and who has to preserve the property as graveyard.

8. That the applicant did not have knowledge of this fact earlier than the poster were published and pasted on walls etc. on 3.3.1989 in the locality.

9. That the applicant is a necessary party in the said proceeding pending in this Hon'ble Court and is also affected person and fully aware of the facts of this case.

It is, therefore, respectfully prayed that the applicant Mohd. Usman may kindly be ordered to be impleaded as mutawalli of Qabristan known as Ahata Khwaja Hakim badruddin, as an defendant and to file the written statement and to contest the suit on merits and the plaintiff be also directed to amend the plaint impleading the applicant as defendant and supply all the documents and plaint thereupon, in the interest of justice.

Prayed accordingly,

6.3.1989
Applicant
Mohd. Usman”

5. It is also a matter of record that this application was allowed vide order dated 20.09.1989. The relevant portion of the order reads as under:-

“Furthermore the applicant Mohd. Usman has asserted that he is the lawful Mutawali of Khwaja Sayeed-uddin appointment made under a WILL and further a Letter of Administration was issued on 01.08.1987 by Ld.District Judge, Delhi in respect of same suit property.

It is also on record and even admitted by plaintiff during arguments that Late Shri Khwaja Sayeed-uddin has filed a suit for injunction and possession against Smt.Angoori Devi Girdhari Lal etc. who are the legal heirs of Shri Asa Ram from whom plaintiff is alleged to have purchased the plot.”

6. The appellant also submitted that in the year 1983 late Khwaja Sayeed-uddin during his life time filed a suit for possession and injunction against the legal heirs of Asa Ram, through whom Laxmi Devi claimed interest. It was mentioned therein that Mohd. Usman was his attorney and the will was executed in his favour. After the death of Khwaja Sayeed-uddin the probate petition was filed in the year 1984 and the original will was summoned from suit bearing No. 405/1996. In the said suit Mohd. Usman was substituted as a legal representative of Khwaja Sayeed-uddin after his death. In that case, legal heirs of Asa Ram contested the application under Order 22 CPC and in that case the statements of Mohd.Usman and Karam Ilahi, witness to the Will, was recorded, wherein it was stated by Mohd. Usman that Khwaja Sayeed-uddin had one son. The said statement was recorded in front of the

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predecessor in interest of the respondent. The typed copy of the statement reads as under:-

“Mohd. Usman S/o Mohd. Ahmad aged 59 years r/o
1319, Pahari Bhogala Bazar Churiwala, Chitli Delhi.

A.W.1/1 Will was executed in my favour by the plaintiff. He delivered it to me.

XXXXXXXXX Cross by the counsel for the defendant No.1.

It is incorrect to suggest that A.W.1/1 is forged documents or there is no Will from the plaintiff.

XXXXXXXXX Cross-examination by counsel for defendant No.4.

Plaintiff was a distant relation to me. He was cousin of my father by cousin I mean he was son of the maternal aunt of my father Khwaja Sayeed-uddin and only one son who is presently in Pakistan. He had two daughters. None of them reside in India. They are in Pakistan and in Saudi Arabia. He had no brother in India. None of the children of Khwaja Sayeed-uddin except one daughter is Indian Citizen. I do not know the name of the Indian Citizen of daughter who is settled abroad. It is incorrect that it is forged document. It is incorrect that I am deposing falsely

Sd/- S.J.”

7. In the above case, Laxmi Devi was impleaded later on. It is thus submitted that Laxmi Devi became fully aware about the factum of Khwaja Sayeed-uddin having left his son in the year 1987.

8. As regard the plea taken by the respondent that the letter of administration was prepared in this case on 20.01.1997, it has been submitted by the appellant that once the probate was granted in the year 1987, preparation of certificate was just mere formality and would not extend the limitation.

9. It is also submitted that even otherwise, the order of revocation was passed in the probate petition, which was for the benefit of general public. There was a citation for the general public in the newspaper. By that time, the applicant had purchased the property in question as claimed by her and therefore, she being an interested party if at all was interested in revocation of probate petition could have filed such a petition within limitation.

10. It is also submitted by the appellant that by filing the present

application for revocation, Laxmi Devi and her legal heirs admit that the present land belonged to Hakim Badruddin and Late Khwaja Sayeed-uddin became its first Mutawali as per the Partition Agreement between the family members in 1950, photocopy of the certified copy obtained from the court record was filed in the trial court. The mere absence of a citation of a legal heir does not invalidate the grant, as the respondent herein or his predecessor in interest was never entitled to any citation. Further Laxmi Devi alleged predecessor in interest of Asa Ram and his legal heirs had never challenged the probate.

11. The appellant has relied upon the following judgments:-

- (i) *Anil Behari Ghosh vs. Latika Bala Dassi & Ors.*, AIR 1955 SCC 566
- (ii) *Sadananda Pyne Vs. Harinam Sha & Anr.*, AIR (37) 1950 Cal. 179
- (iii) *Ranmaya Gaorangini Vs. Betty Mahbert & Ors.*, AIR 1927 Cal. 207
- (iv) *Smt. Yuvrani Tank Rajeshwari Devi Vs. Harilala & Ors.*, AIR 1978 Madhya Pradesh 201
- (v) *(Dost) Muhammad Khan Sahib & Ors. Vs. Kadir Batcha Sahib*, AIR 1926 Mad. 466.

12. A perusal of these judgments goes to show that Article 137 of the Limitation Act is applicable to the probate proceedings. The limitation to file the application either for the grant of probate or for its revocation is only three years from the date when the cause of action accrues.

13. In *Anil Behari Ghosh's case (supra)*, it has been held that the omission to citations to persons who should have been apprised of the probate proceedings may well be in the normal case a ground for revocation of the grant. But this is not an absolute right irrespective of other consideration arising from the proved facts of a case. The law has vested a judicial discretion in the court to revoke a grant where the court may have prima facie reasons to believe that it was necessary to have the will proved afresh in the presence of interested parties. The court may refuse to grant annulment in cases where there is no likelihood of proof being offered that will admitted to probate was either not genuine or had not been genuinely executed.

14. According to the appellant, the present is not a case where Laxmi Devi or her successor in interest has any locus standi to challenge the genuineness of the will. Admittedly, Laxmi Devi does not claim interest

in the property through the son of deceased Khwaja Sayeed-uddin, who was not impleaded as a party to the present proceedings. None of the legal heirs of Khwaja Sayeed-uddin filed any action for the revocation of the probate.

15. It would be appropriate to take note of para 16 of the judgment in *Anil Behari Ghosh's case (supra)*, which reads as under:-

16. It was further argued on behalf of the appellant that the appeal should be allowed and the grant revoked on the simple ground, apart from any other considerations, that there had been no citation issued to Girish. In our opinion, this proposition also is much too widely stated. Section [263](#) of the Act vests a judicial discretion in the court to revoke or annul a grant for just cause. The explanation has indicated the circumstances in which the court can come to the conclusion that "just cause" had been made out. In this connection the appellant relied upon clause (a) quoted above which requires that the proceedings resulting in the grant sought to be revoked should have been "defective in substance." We are not inclined to hold that they were "defective in substance." "Defective in substance" must mean that the defect was of such a character as to substantially affect the regularity and correctness of the previous proceedings. If there were any suggestions in the present proceedings or any circumstances were pointed out to show that if Girish had been cited he would have been able to enter a caveat, the absence of citation would have rendered those proceedings "defective in substance." It may be that Girish having been found to have been the next reversioner to the testator's estate in case of intestacy and on the assumption that Charu had murdered the testator, Girish might have been entitled to a revocation of the grant if he had moved shortly after the grant of the probate on the simple ground that no citation had been issued to him.

The omission to issue citations to persons who should have been apprised of the probate proceedings may well be in a normal case a ground by itself for revocation of the grant. But this is not an absolute right irrespective of other considerations arising from the proved facts of a case. The law has vested a judicial discretion in the Court to revoke a grant where the court may have prima facie reasons to believe that it was necessary to have the will proved afresh in the presence of interested parties. But in the present case we are not satisfied in all the circumstances of the case that just cause within the meaning of section [263](#) had been made out. We cannot ignore the facts that about 27 years had elapsed after the grant of probate

in 1921, that Girish in spite of the knowledge of the grant at the latest in 1933 did not take any steps in his lifetime to have the grant revoked, that there was no suggestion that the will was a forgery or was otherwise invalid and that the will was registered one and had been executed eight years before the testator's unnatural death. Hence the omission of citations to Girish which ordinarily may have been sufficient for a revocation of the grant was not in the special circumstances of this case sufficient to justify the court to revoke the grant.

16. Thus, in nutshell according to the appellant, the order granting revocation of the probate granted in the year 1987, in the year 2000 was bad in law inasmuch as, firstly, the appellant had no locus standi to file the revocation petition after 13 years; secondly, she was fully aware of the proceedings and that stand of the appellants with regard to the will left by Mohd. Usman and the grant of probate in favour of the appellants in the year 1987 itself. Thus, the filing of revocation petition was not sustainable and ought to have been dismissed by the Id. ADJ.

17. On the other hand, the respondents have alleged that Laxmi Devi, deceased had filed a petition under Section 263 of Indian Succession Act, in the said Probate Petition on 11.12.2000 (the said Revocation Petition is at page 133 of the paper book as Annexure-S), in which Laxmi Devi had raised several objections. First objection is that she had purchased part of the piece of land measuring 125 sq. yds. forming part of Khasra No. 471 (old), 103(new), bearing Municipal No. SV/11382 Mauza Kram Sharif, Nabi Karim, Delhi from one Ram, through registered Sale Deed dated 02.03.72. Secondly, it has been alleged by Laxmi Devi in her petition that the said Will of Khawaja Sayeed-uddin dated 02.07.73 has been forged by Karam Illahi. Thirdly Laxmi Devi also stated that in the death certificate filed in the Probate petition by deceased Mohd. Usman, the name of the deceased is mentioned as "K.S.Ahmed" and his Nationality is mentioned as "Pakistani", hence the Testator was not Indian National. According to the probate petition Khawaja Sayeed-uddin was an Indian national and never migrated to Pakistan, so the said death certificate is also in question, Fourthly one son of Khawaja Sayeeduddin has not been made a party or cited in the relations of Khawaja Sayeeduddin in Annexure-A,

attached with the probate petition.

19. As regards the locus standi of Laxmi Devi, it is submitted that, firstly, Laxmi Devi had filed a suit for mandatory injunction or possession against Ram Chander and in that said suit Mohd. Usman had filed an application under Order 1 Rule 10 CPC for impleading him as party. Later on, he was impleaded in the said suit. Similarly, Laxmi Devi was also impleaded in the suit filed by Khwaja Sayeed-uddin against Akbari Devi in which she became party subsequently during the pendency of the suit. The said suit was also based on the probate order passed in the probate petition in the year 1987.

20. It has been submitted that in this case the fraud has been committed by the appellant by filing a probate petition inasmuch as they had not impleaded one of the sons of late Khwaja Sayeed-uddin as a party to the proceedings and, therefore, the probate was obtained by playing the fraud upon the court. In such a case, revocation application can be filed under Section 263 of the Indian Succession Act. When fraud is played upon the Court, no limitation is applicable. He has relied upon a judgment in the case of *S.P.Chengalvaraya Naidu (dead) by LRs Vs. Jagannath (dead) by LRs & Ors.*, AIR 1994 SC 853.

21. It has also been submitted that even otherwise, with regard to grant of probate, it came to the notice of the objector only in the year 2000 when Mohd.Usman appeared in the court of Special Judge and deposed that he had received the letter of administration and it was thereafter the cause of action to file the revocation petition has arisen.

22. As regard locus standi, it was submitted by the respondent that since the judgment delivered by the probate court is a judgment in rem, the respondent was entitled to file the revocation petition and to take legal objections as were available.

23. Moreover, deceased Mohd. Usman had been filing suits against several persons of the Locality and also become a party to the suit filed by deceased Laxmi Devi, S/o Shri Shiv Narain on the basis of the said Probate Order obtained by him by playing fraud upon the court, hence the respondent No.2 is entitled to file the Revocation Application before the Probate Court.

24. In *S.P.Chengalvaraya Naidu's case (supra)*, it has been held that,

“The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. It can be said without hesitation that a person whose cause is based on falsehood has not right to approach the Court. He can be summarily thrown out at any stage of the litigation. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party.”

25. I have heard submissions from both sides. The admitted facts of which notice can be taken by this Court for the purpose of considering the bar of limitation are:-

- (i) The probate was granted on 1.8.1987.
- (ii) In a suit filed by Laxmi Devi against Ram Chander, the application was filed by Mohd.Usman under Order 1 Rule 10 CPC on 6.3.1989 for impleadment as a party.
- (iii) In that application, Mohd.Usman has disclosed about his interest in the suit property and having received a letter of administration with respect to the said property in Probate Case No.207/1983 in terms of the order passed by the Id.ADJ on 1.8.1987.
- (iv) The said application was allowed vide order dated 20.09.1989, wherein reference of Mohd.Usman being a lawful Motwali of Khwaja Sayeed-uddin under a will for which he also obtained a letter of administration on 1.8.1987 stands mentioned.
- (v) In suit bearing No. 405/1996 Mohd. Usman was substituted as legal representative of Khwaja Sayeed-uddin after his death.
- (vi) The general citation with regard to the probate petition was also issued in newspaper and in case, the respondent has any interest in the property, she could have filed the objections at that time.

26. In these circumstances, it can be specially concluded that appellant had come to know about the grant of probate petition in the year 1989 itself. Grant of probate had been reported by Mohd.Usman in that case as well as in the subsequent proceedings, yet no action was taken by the respondent for revocation of the probate petition within stipulated period of three years.

26. No doubt, in a statement made by Mohd. Usman it was admitted that Khwaja Sayeed-uddin had one son. However, it was also admitted that he was residing in Pakistan. Merely because that his son was not impleaded as a party, the appellant having not suffered any loss on that count, cannot seek revocation of the probate granted only on that basis. There is nothing on record that any of the legal heirs filed any objection to the grant of probate or on account of grant of probate in the absence of one of the sons of Khwaja Sayeed-uddin, whose particulars are also not aware, the grant of probate is vitiated. The law laid down by the Apex Court in the case of *Anil Behari Ghosh (supra)* protects the appellant to that extent.

27. Nothing has been shown by Laxmi Devi as to how she was entitled to question the grant of probate after 13 years once she had knowledge about the grant of probate in the year 1987 itself.

28. Thus, on all counts, the revocation petition filed by the respondent was neither bona fide nor maintainable and was also barred by limitation. The learned ADJ in the impugned order has simply gone with the presumption that a fraud was played upon the court when the letter of administration were obtained and, therefore, the limitation could not have been taken as a defence. However, the ld. ADJ has not considered the fact of the respondent having full knowledge about the grant of probate in the year 1989. The ld. ADJ has also not considered the effect of non-impleadment of the LRs, one of the sons of the deceased Khwaja Sayeed-uddin to the probate petition. The ld.ADJ has also not considered the effect of such omission to the grant of probate petition. Even though, the ld. ADJ has taken note of Section 263 of the Indian Succession Act to make out a case for the reason to bring her petition for revocation for just cause but there is no substantiation as to how, the respondent gets a locus standi to claim that she was entitled

to seek revocation of the probate petition for just cause in this case.

29. As observed earlier, this is a case only where one of the LRs was not added in the list of LRs. This alone as stated by the Apex Court specifically in the case of *Anil Behari Ghosh (supra)* would not vitiate grant of probate inasmuch as such omission does not create an absolute right for revocation of the grant.

30. Consequently, the order of the Id. ADJ cannot be sustained. The same is therefore set aside. The appeal is allowed with no orders as to costs. TCR be sent back forthwith along with a copy of this order.

MOOL CHAND GARG,J

FEBRUARY 17, 2011
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