

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

Date of decision: 20th November, 2013.

+ **RFA 168/2005**

SMT. DURGA DEVI **Appellant**

Through: Mr. Sudhanshu Tomar, Adv.

Versus

SMT. PREM LATA RAI & ORS. **Respondents**

Through: None.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. The appeal impugns the judgment and decree dated 12.08.2004 of the Court of Additional District Judge (ADJ), Delhi of dismissal of suit No.811/2001 filed by the appellant.

2. The said suit was filed by the appellant on 13.12.2001, pleading:

(a) that the appellant is the owner in physical possession of property, bearing No.50-B situated in the Revenue Estate of village Sultanpur Extension, Gurgaon Road, Mehrauli, New Delhi, measuring 55 sq. yds. being part of Khasra No.418, having purchased the same from the respondent No.3 Sh. Satya Parkash Rai vide Agreement to Sell, Power of Attorney, Will, Affidavit etc. all dated

19.07.1994;

(b) that the respondent No.3 Sh. Satya Parkash Rai had in turn purchased the said property from the respondent No.2 Smt. Heerawati Rai vide similar documents dated 26.05.1994;

(c) that in fact Sh. Chabban Rai husband of the respondent No.2 Smt. Heerawati Rai was the owner of the said land who had died in the year 1988-89 leaving behind the respondent No.2 Smt. Heerawati Rai as his widow and the respondent No.1 Smt. Prem Lata Rai his daughter as his only legal heirs and the said land devolved on the respondent No.2 Smt. Heerawati Rai only, as the respondent No.1 Smt. Prem Lata Rai was a married daughter and did not acquire any rights in the land under Section 50 of the Delhi Land Reforms Act, 1954;

(d) that the respondent No.1 Smt. Prem Lata Rai however started claiming to be the owner of the said land by virtue of a Will executed by her father Sh. Chabban Rai in her favour and had applied for probate of the said Will;

(e) that the appellant filed an application under Order 1 Rule 10 of the CPC in the said probate proceeding averring that the probate

proceedings were collusive between the respondents No.1&2 and were filed with the intention to divest the appellant of the title in the land, but the said application was dismissed;

(f) that ultimately probate of the said Will set up by the respondent / defendant No.1 was granted on 14.12.1998.

Accordingly, a declaration of ownership rights and a declaration to the effect that the probate granted of the alleged Will of Sh. Chabban Rai was illegal, null and void and liable to be cancelled and injunction restraining the respondents from dispossessing the appellant from the suit land were claimed.

3. The impugned judgment records that the respondents/defendants contested the suit *inter alia* on the ground that since on the demise of Sh. Chabban Rai, under his Will which had been probated, his daughter respondent No.1 had become the owner of the land and the respondent No.2 had no right thereto, she could not have transferred any rights in the land in favour of the appellant/plaintiff.

4. The impugned judgment further records that the following preliminary issue was framed in the suit:

“Whether the suit is maintainable in view of the probate granted by the probate courts”

5. The learned ADJ has vide the impugned judgment decided the aforesaid preliminary issue against the appellant/plaintiff, finding/observing/holding:

(i) that there was no merit in the contention of the counsel for the appellant/plaintiff that the subject land being governed by the Delhi Land Reforms Act, 1954, Sh. Chabban Rai could not have bequeathed the same under a Will and the respondent No.1 could not have become the owner thereof under the said Will, since the total land of Sh. Chabban Rai was 200 sq. yds. and which could not be agricultural, having been urbanized, thus the provisions of the Land Reforms Act did not apply thereto;

(ii) that since the Will had been probated and thereunder the land had been bequeathed to the respondent No.1, the respondent No.2 from whom the appellant/plaintiff claimed to have acquired rights therein had no right with respect thereto;

(iii) that if it was the contention of the appellant/plaintiff that the probate had been wrongly granted, the remedy of the appellant/plaintiff was to seek revocation of the probate and not by way of a separate suit.

6. This appeal was admitted for hearing and the counsel for the respondents No.1&2 appeared. None appeared for the respondent No.3 inspite of service by publication. Though the appeal was listed on 04.07.2011, 14.11.2011, 20.04.2012 and 08.05.2012 but none appeared for the respondents No.1 & 2 also. The appeal came up for hearing on 08.11.2013 when also none appeared for respondents No.1&2 or even the appellant; however adverse orders were deferred and the appeal directed to be listed w.e.f. 11.11.2013 with notation in the cause list of this Court of 'Notice of Default to the counsels for the parties'. The appeal has been so listed since then. Today counsel for the appellant has appeared. None has appeared for respondents No.1 &2 inspite of passover. Need is thus not felt to await the respondents No.1&2 and the counsel for the appellant has been heard.

7. The counsel for the appellant/plaintiff has contended that the respondent No.2 had similarly sold another part of the land and which was ultimately purchased by one Smt. Geeta Devi; she had also filed a similar suit as the appellant/plaintiff herein and which suit was also dismissed by the same learned ADJ by identical, though separate judgment. It is further stated that the said Smt. Geeta Devi had also preferred RFA No.131/2005 to

this Court and which has been allowed vide order dated 17th April, 2012, copy of which has been handed over in the Court.

8. I may state that a reference to RFA No.131/2005 is found in orders dated 08.07.2010, 20.12.2010 and 31.03.2011 in this appeal also.

9. A perusal of the said order dated 17th April, 2012 allowing RFA No.131/2005 titled Smt. Geeta Devi Vs. Smt. Prem Lata Rai shows the counsel for the parties therein to have agreed to setting aside of the judgment and to remand of the suit from which that appeal has arisen, for adjudication in accordance with law.

10. The counsel for the appellant/plaintiff further informs that the said remanded suit is now pending in the Court of Sh. V.K. Bansal, ADJ, Tis Hazari Courts, Delhi and is listed next on 7th January, 2014.

11. It has however been enquired from the counsel for the appellant as to what is wrong with the reasoning in the impugned judgment. The appellant/plaintiff is admittedly only an agreement purchaser claiming to be in possession of the property. The appellant/plaintiff has not instituted any suit for specific performance of the said Agreement to Sell. It is not in dispute that the subject land belonged to Sh. Chabban Rai. The appellant/plaintiff is not disputing the title of Sh. Chabban Rai to the said

land. The only question for adjudication thus was whether the probate obtained by the respondent No.1 of the Will of Sh. Chabban Rai was in collusion with the respondent No.2 who had as sole heir of Sh. Chabban Rai transferred the property to the appellant/plaintiff. Section 263 of the Indian Succession Act, 1925 empowers the Probate Court to revoke or annul a probate for 'just cause' and which, as per the explanation to the said section is deemed to exist where the grant was obtained fraudulently or by concealment of material facts. The learned ADJ thus was correct in holding that the remedy of the appellant/plaintiff was by way of applying for revocation of the probate in as much as, as long as the probate existed, the Will of Sh. Chabban Rai with respect to the subject land in favour of the respondent No.1 has to be accepted by all other Courts and the title/interest, even if any, acquired by the appellant/plaintiff from the respondent No.2, would be of no avail.

12. The counsel for the appellant/plaintiff has invited attention to the order of dismissal of the application filed by the appellant for impleadment in the probate proceedings. A perusal thereof shows that the said application was dismissed *inter alia* on the ground that the appellant/plaintiff had raised a title dispute and which could not be subject

matter of probate. However, the said observation in the said order is erroneous, in as much as the appellant/plaintiff was not challenging the title to the subject property of Sh. Chabban Rai but was claiming title to the said property through one of the natural heir of Sh. Chabban Rai. The Division Bench of this Court in *Indian Associates Vs. Shivendra Bahadur Singh* 104 (2003) DLT 820 has held that such a person is a necessary and a proper party to the probate proceedings also.

13. Merely because the appellant/plaintiff suffered an order erroneous in law and did not take any remedy thereagainst, is no ground to find error with the impugned judgment which otherwise is found to be correct in law. Though the order dated 17th April, 2012 allowing RFA No.131/2005 refers to Section 44 of the Indian Evidence Act, 1872 which permits a party to a suit or other proceeding to show that any judgment, order or decree which is relevant and has been proved by the adverse party was obtained by fraud or collusion and which appears to have swayed this Court in holding that the appellant in that case was entitled to prove in the suit that the probate of Will of Sh. Chabban Rai had been obtained by respondent No.1 by fraud and in collusion with respondent No.2 but when the Legislature has provided a remedy of revocation of a probate under Section 263 of the

Succession Act, the question of fraud or collusion has to be adjudicated in the said revocation proceeding only and not by way of a separate suit. The jurisdiction of the Civil Court to entertain such a plea would thus be impliedly barred. Such a view is found to be in consonance with the principle of primacy of probate proceeding.

14. However it is also a fact that the respondents No.1 & 2 in RFA No.131/2005 agreed to setting aside of a similar judgment and to trial on merits of the suit. It is felt that consistency in orders/judgments should be maintained and there ought not to be two different orders/judgments in two identical proceedings, particularly when one of the said orders is a consensual one.

15. In this view of the matter, it is deemed appropriate to follow the order dated 17th April, 2012 passed in RFA No.131/2005 and to set aside the impugned judgment and decree and to remand the suit filed by the appellant/plaintiff also for disposal in accordance with law. Though I have hereinabove held that the jurisdiction of the civil Court, to entertain a plea on which revocation of probate can be sought, is impliedly barred but it is not a case of inherent lack of jurisdiction but on the principle of primacy of probate proceedings. Else a Civil Court is competent to adjudicate validity

of Will and would thus also be competent to hold whether the validity upheld in one proceeding is fraudulent and collusive. Thus, it is felt that the said bar of jurisdiction of civil Court will not come in the way of the civil Court to which the suit is being remanded trying the same.

16. The appeal is accordingly allowed in aforesaid terms; the respondents having not contested the appeal, no order as to costs. Decree sheet be drawn up.

17. The parties to appear before the Court of Sh. V.K. Bansal, ADJ, Tis Hazari Courts, Delhi on 7th January, 2014. The Trial Court file requisitioned in this Court be returned forthwith.

RAJIV SAHAI ENDLAW, J.

NOVEMBER 20, 2013

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