

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

% *Date of Judgment: 14.02.2013*

+ **FAO (OS) No.322/2010**

B.S. OBEROI Appellant

Through: Mr. Amit Sibal, Mr. Amit Kumar,
Mr. Piyush Kaushik &
Mr. Vinay P. Tripathi, Advs.

versus

P.S. OBEROI & ORS. Respondents

Through: Mr. Noor Alam, Adv. for Mr. Ravi
Verma, Adv. for R-1.
Mr. H.S. Phoolka, Sr. Adv. with
Mr. Sharat Kapoor & Mr. Virender
Verma, Advs. for R-3.
Mr. T. Mandal, Adv. for R-9 to 12.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J. .

1 The impugned order dated 16.04.2010 had dismissed the application filed by the plaintiff (B.S. Oberoi) under Order XXXIX Rules 1 & 2 of the Code of Civil Procedure (hereinafter referred to as the 'Code'), holding that the plaintiff is not entitled to any interim order vis-à-vis the suit property.

2 Record shows that the present suit is a suit for declaration as also for partition. The claim of the plaintiff is predicated on his right to claim intestate succession qua the Will dated 09.01.1974 of his deceased maternal grandfather Bakshi Shiv Charan Singh Puri (hereinafter referred to as the deceased). The deceased had died on 14.01.1993. During his lifetime, he got married twice. His first wife Veeranwali had predeceased him. From his second wife, he had four children i.e. one son and three daughters. The present plaintiff is the son of the predeceased daughter of the deceased namely Iqbal Oberoi. She had died on 14.06.2006, leaving behind three legal heirs, the plaintiff, her elder son P.S.Oberoi (defendant No.1) and her husband K.S.Oberoi (defendant No. 13). Defendant No. 13 expired in April, 2010.

3 Before advertng to the prayers made in the suit, relevant would it be to refer to certain proceedings which were filed prior to the suit.

4 The Will of the deceased dated 09.01.1974 was the subject matter of probate proceedings instituted in the year 1996. The subject matter of the Will comprised of two immoveable properties i.e. property No. 22-23, Friends Colony (West) and property No. 7-A, Ring Road. These immoveable properties in terms of the Will were bequeathed in favour

of Col. Ravi Inder Singh (elder son of the deceased). Iqbal Oberoi was bequeathed a sum of Rs.10,000/-. A subsequent Will dated 24.03.1985, almost on the same lines as the earlier Will, was also executed by the deceased. In this Will the share of Iqbal Oberoi was enhanced from Rs.10,000/- to Rs.2,00,000/- which was also the amount bequeathed to his other two daughters. Reply was filed by Iqbal Oberoi in this probate petition wherein she had accepted the Will; this reply was supported by a power of attorney dated 24.05.2006 purported to have been executed by Iqbal Oberoi in favour of her elder son/defendant No. 1. Registered memorandums of family settlement dated 02.08.2005 and 02.06.2006 were executed between the members of the family of the deceased and the statements of the parties namely Harinder Butalia (defendant No.8), Raj Bala Sabharwal (defendant No.7), Parminder Singh Oberoi/defendant No.1 (attorney holder of Iqbal Oberoi) as also the widow of Col. Ravi Inder Singh/defendant No.1 were recorded on 03.06.2006. The parties having entered into a compromise, the matter was fixed for orders on 03.07.2006. On 03.07.2006, the Probate Court had noted as under:-

““8. None of the parties pressed for any relief on the Will propounded by the petitioner and objected by the respondents and they divided the property amongst the Lrs of late Bakshi Shiv Charan Singh. They entered into a family settlement hence petition is treated as an ordinary civil suit and the matter is disposed of in terms of compromise deed as annexure P. Parties are directed to file the requisite court fee as applicable to the ordinary suit and the matter stands disposed of in terms of the compromise deed as annexure P. File be consigned to record room.”

5 The Probate Court was conscious of the fact that being a Probate Court it could not have recorded a compromise between the parties and as such had converted the petition into a civil suit and passed orders accordingly. Relevant would it be to state that on 03.07.2006, nothing more was done except the pronouncement of the order; the Court thought it fit to pass this order in a suit and accordingly converted the probate petition into a civil suit. This was in terms of the earlier statements recorded of the parties on 03.06.2006; suit was disposed of accordingly. The payment of court fee as applicable to a suit was alone left open; file had otherwise been consigned to the record room on that day itself. The decree sheet was drawn up on 06.11.2006 after payment of court fee.

6 It is in this background that the present suit came to be filed. The prayers made in the suit are as follows:-

“(A) pass a decree of cancellation of Court’s decree dated 6.11.2006, passed in Suit No. 171 of 2006 passed by learned ADJ (by converting the probate proceedings into a Civil Suit) and declare it as null and void ‘ab initio’ and not being binding against the plaintiff, and/or

B) pass a decree for partition of the suit properties mentioned in para 4 and/or

i) firstly pass a preliminary decree of partition of the suit property appointing shares of the co sharers; granting the plaintiff 1/12th share of the entire estate of Late Bakshi Shiv Charan Singh through Late Smt. Iqbal Oberoi.

ii) appoint a local commissioner to visit the suit property and suggest ways and means to partitioning the said property.

iii) consider the report of the local commissioner and pass a final decree in terms thereof, or in modification thereof, as this Court may consider fit and appropriate;

iv) in the event it is found that the said suit property is not partitionable by metes and bounds, this Court may direct other modes of partition including sale of the suit premises and apportioning the sale proceeds as per share of the co sharers.

(C) pass a preliminary decree for declaration holding and declaring that the defendants are liable to render accounts directing the defendants jointly and severally to render complete and honest account of the manner in which the properties and other movable assets forming part of the estate of Late Bakshi Shiv Charan Singh and Late Smt. Iqbal Oberoi have been dealt with since their death including all benefits derived therefrom and pursuant thereto appoint local commissioner before whom the defendants be directed to render full accounts. Further, upon rendition of the accounts, this court may be pleased to pass a final decree for such sum in favour of the plaintiff and against the defendants as may be found due and payable.

Pass a decree commanding the defendants jointly and severally to deliver or caused to be delivered and filed in this court all documents of title instruments to title allotment and/or all relevant documentation pertaining to all and any movable assets in the nature of investments or shares, FDRs, NSCs, Units, Bonds etc. standing in the name and/or accruing to Late Bakshi Shiv Charan Singh and Late Smt. Iqbal Oberoi individually or jointly.

(D) pass a decree for declaration in favour of the plaintiff and against the defendants that the alleged family settlement/s are null and void 'ab initio' and are not binding against the plaintiff, and

(E) pass a decree for declaration in favour of the plaintiff and against the defendants that the alleged agreement to sell dated 2.6.2006 is null and void ab initio and is not binding against the plaintiff, and

(F) pass a decree for declaration in favour of the plaintiff and against the defendants that the alleged memorandum of settlement dated 2.6.2006 is null and void ab initio and is not binding against the plaintiff, and

(G) pass a decree for declaration in favour of the plaintiff and against the defendants and the alleged power of attorney dated 24.05.2006 is null and void ab initio and is not binding against the plaintiff, and

(H) a decree of permanent injunction thereby restraining the defendants from transferring, alienating, assigning, selling or otherwise parting with possession, carrying out additions and alternations or disposing of the suit properties or creating any charge/lien in respect of the suit property in favour of any other person.”

7 Learned senior counsel for the appellant has vehemently submitted that the decree dated 06.11.2006 is illegal; it is *void ab initio* and a nullity; it is no decree in the eyes of law. Submission being that

the jurisdiction of the Probate Court is limited; it could either probate a Will or not probate it; it has no third option; it could not have passed any orders for the conversion of the probate petition into a civil suit as the order dated 03.07.2006 (quoted supra) shows that the parties had in fact abandoned the probate proceedings; there was nothing left for conversion; the question of Court fee and jurisdiction has also not been gone into. In furtherance of this submission, it is pointed out that Iqbal Oberoi had died on 14.06.2006 which was just 10 days after the statement of her attorney holder was recorded on her behalf which was on 03.06.2006; besides the fact that this power of attorney dated 24.05.2006 is also the subject matter of challenge in the present proceedings, even otherwise, the orders passed on 03.07.2006 were illegal for the reason that the factum of the death of Iqbal Oberoi had not been brought to the notice of the Court; the proceedings had in fact abated. On both counts, the decree is a nullity and it has to be necessarily ignored. Submission being that the order of the trial Court is predicated largely on this decree dated 06.11.2006 which itself is a nullity. The alleged family settlements arrived at between the parties was behind the back of the plaintiff; he being an NRI (Non Resident

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Indian) had not been informed of the proceedings; defendant No. 1 had got the power of attorney which was falsely procured from their mother; he was not authorized to make any statement on her behalf; the alleged power of attorney is also void. Further submission being that the learned Single Judge has proceeded on the assumption that the Will of Iqbal Oberoi is an admitted document which is clearly not so; the Wills of both Iqbal Oberoi (mother of the plaintiff) and K.S. Oberoi (father of the plaintiff) are the subject matter of challenge. By not granting an interim relief to the plaintiff, the properties which are the subject matter of the present suit would be withered away as even during the pendency of the suit one part of the property already stands sold and the interest of a third party having come into the picture, the impugned order has also taken this into account while declining relief to the plaintiff. The impugned order has not applied the triple test for the grant of an interim injunction in the correct perspective; on all counts the impugned order is liable to be set aside and interim protection be granted to the plaintiff pending the suit.

8 Arguments have been countered. It is pointed out that the plaintiff is the only member of the family who is alienated. All other parties have

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accepted the family settlements; the appellant had strained relations with his parents and both his father and mother had disinherited him in their respective Wills; his elder brother being the only person looking after them was duly authorized by his mother to act on her behalf and he had made a valid statement on 03.06.2006. Further submission being that the Probate Court was well within its right to convert the probate petition into a civil suit; the whole object being to bring the long drawn family litigation to a close and technicalities should not come in the way of imparting substantial justice.

9 On appreciation of the arguments of the respective learned senior counsels for the parties, what emerges is that the learned senior counsel for the appellant is largely aggrieved by the decree dated 06.11.2006 passed by the Civil Judge after having converted the probate proceedings into a civil suit. Although there is no dispute to the proposition that in a probate petition, the jurisdiction of the Probate Court is limited only to the issue of a probate of the Will and a compromise is not envisaged in probate proceedings, yet the trial Court was fully conscious and mindful of this legal position and after recording the statements of the parties on 03.06.2006, while

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pronouncing the order on 03.07.2006, had consciously not passed the order in the probate petition but had converted it into a civil suit; there was certainly no bar to the same. This was primarily with the object of not relegating the parties to any further litigation; it was with the object of curtailing the litigation. The purpose was to bring the lis of the parties to an end in view of the settlement arrived at between the parties. The order dated 03.7.2006 was pronounced in terms of the statements recorded of the parties on the earlier dated of 03.6.2006. The file had been consigned to the records on 03.7.2006 itself; the ministerial act of payment of court fee was alone left open; formal decree was only drawn up on 06.11.2006. Death of Iqbal Oberoi on 14.06.2006 which was between the conclusion of the hearing and the pronouncement of the judgment did not affect the judgment so pronounced as is evident from provisions of Order XXII Rule 6 of the Code; the argument of abatement propounded by the learned counsel for the appellant is wholly without merit. In these circumstances it can also in no manner be said that the probate petition had been abandoned by the petitioner and there was nothing left to convert.

compromises and settlements should be encouraged and especially so in family matters. There can in fact be no objection when the warring parties decide to bring their litigations to a close. The Supreme Court in Kale & Ors Vs. Deputy Director of Consolidation and Ors. (1976) 3 SCC 119 has held that what has to be constantly borne in mind by the courts is that where the members of a family are before the court, the approach to be adopted is to give effect to their family arrangements rather than to shoot them down on legalese and forensic technicalities; such arrangements being governed by a special equity peculiar to themselves and would be enforced if honestly made. The Apex Court in this judgment while dealing with the value to be attached to a family arrangement had quoted the principles of “Kerr on Fraud” which were noted to be pertinent observations regarding the nature of a family arrangement. These are as follows:

“The object of the arrangement is to protect the family from long drawn litigation or perpetual strifes which mar the unity and solidarity of the family and create hatred and bad blood between the various members of the family. Today when we are striving to build up an egalitarian society and are trying for a complete reconstruction of the society, to maintain and uphold the unity and homogeneity of the family which ultimately results in the unification of the society and, therefore, of the entire country, is the prime need of the hour.

.....

The Courts have, therefore, leaned in favour of upholding a family arrangement instead of disturbing the same on technical or trivial grounds. Where the Courts find that the family arrangement suffers from a legal lacuna or a formal defect the Rule of estoppels is pressed into service and is applied to shut out plea of the person who being a party to family arrangement seeks to unsettle a settled dispute and claims to revoke the family arrangement under which he has himself enjoyed some material benefits.”

This aspect has also been observed and affirmed by the Apex Court in Amteshwar Anand vs. Virender Mohan Singh & Ors., (2006) 1 SCC 148.

11 It would also be relevant to point out that this order dated 03.7.2006 had become the subject matter of challenge by the appellant by filing an application under Section 151 of the Code but the appellant suffered an adverse order in that application. He did not challenge that order dated 24.4.2008 which has since attained a finality. Present suit seeks to challenge the same orders and decree. This is evident from the prayers made in the suit (supra). Under Order XXIII Rule 3A of the Code there is an express bar to a suit for setting aside a compromise decree on the ground that it was unlawful which is the case sought to be set up by the appellant. The Division Bench in its order dated 13.4.2009

while disposing of FAO (OS) 103/2009 had in fact left the question of the maintainability of the suit open which has been taken as an express objection by the defendant in his written statement.

12 The impugned order has marshaled the facts in detail which have been noted in the correct perspective. The appellant/plaintiff does appear to be the estranged son of the family. In 1987, a memorandum of family settlement between the plaintiff, his parents and his brother was recorded evidencing that the plaintiff would have no share in the family properties. The plaintiff admittedly an NRI had been living abroad. In fact after an unfortunate first marriage, he had got married for the second time to a Muslim lady which was after conversion from Hinduism to Islam. The appellant is present in Court and he has been queried. He has admitted that he converted to Islam in 1980 after he married an Egyptian lady. This second marriage continued till March, 2003 when the parties got divorced under the Muslim law. His submission is that in 2004, he reconverted himself into a Hindu which factum has been disputed by the learned senior counsel for the respondents; submission being that there is no evidence of re-conversion. Learned counsel for the Appellant sought to rely upon FAO(OS) No.322/2010

Section 26 of the Hindu Succession Act, 1956 to contend that the appellant was a Hindu at the time when the succession opened and therefore the disqualification provided in Section 26 did not apply to him. However, upon considering Section 2(1) (c) and Explanation (C) to Section 2 of the said Act, counsel for the appellant conceded this argument as the provisions of Section 26 would really not be applicable in the present case since the appellants mother (deceased) never converted and the said provision applies to children born to a Hindu who has converted, which is not the position in the present case. The appellant was not an heir to begin with at the time when the succession opened. Further submission of the learned counsel for the respondents being that the appellant has not disclosed his personal status even before the learned single Judge; the Court has not been informed as to what the initials "B.S." stand for; whether it is Balvinder Singh or Bahadur Shah; further submission being that in fact an application to answer interrogatories has been served upon the appellant to disclose his status but he has chosen not to answer them. In fact even before this Court, the learned senior counsel under instructions from the appellant states that he does not wish to file any reply to the said application. The necessary

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corollary would be that the interrogatories have to be answered which application is now stated to be pending before the learned Single Judge.

13 The personal status of the appellant is thus not clear to the Court; if he continues to be a Muslim and has not reconverted himself to a Hindu, the question of the applicability of intestate succession under the Hindu Succession Act, 1956 would become questionable.

14 At the cost of repetition, the whole case of the appellant being founded upon the decree dated 06.11.2006 which as per him is illegal, is questionable as admittedly after his application challenging the order dated 03.7.2006 had been dismissed, no steps have been taken by him against that order which had been passed against him. The respective Wills of the parents of the deceased who had bequeathed their shares in their properties in favour of defendant No.1 are also under challenge in separate proceedings. The personal status of the appellant is also in doubt.

15 The triple test for the grant of an interim injunction was rightly appreciated by the learned single Judge noting that no prima-facie case is found in favour of the plaintiff and the balance of convenience, in this factual scenario, was also not in his favour. In fact if an interim

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injunction is granted it would be to the detriment of the respondents as no prima-facie case has been made out by the plaintiff.

16 Impugned order calls for no interference. Appeal is without any merit. It is dismissed with costs quantified at Rs.25,000/-.

INDERMEET KAUR, J.

SANJAY KISHAN KAUL, J.

FEBRUARY 14, 2013

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