Application No. 397 of 2013
in
T.O.S. No. 17 of 2009

PUSHPA SATHYANARAYANA, J

This is an application filed under Section 302 of the Indian Succession Act filed by the executor of the Will executed by deceased Paul Thomas Raj alias P.T. Raj.

2. From the materials available on record, it is seen that earlier, this Court had granted probate of the Will of Paul Thomas Raja alias P.T. Raj on 14.11.2011. As per the Will, there are two items of the properties and the same have to be divided among the legatees, who are six in number. It is stated by the applicant that a number of discussions were held with the legatees and a meeting was held on 31.3.2012 in which, according to the applicant, the respondent expressed callous and manifested attitude and was not co-operative. Therefore, the applicant has come up with the prayer seeking a direction of this Court to dispose of the schedule items calling for sealed tenders. The applicant has also mentioned that the proceeds would be divided equally among the legatees after deducting the expenses and also his remuneration of 5% of the gross sale proceeds. The executor also has sought for permission to seek police aid, if

required and to collect the mesne profits from the beneficiaries who are in occupation of the properties.

3. The defendant, who is respondent in the above application, vehementaly contested the same denying all the allegations made in the affidavit in support of the application. According to the defendant, the application itself is not maintainable as the purport of Section 302 of the Indian Succession Act has been misunderstood and misinterpreted by the applicant. The defendant also contended that there was no discussion held with them as mentioned in the application. The alleged meeting on 31.3.2012 was not a formal meeting arranged and organised in the manner implied in the petition. It is stated that it was an informal visit to the defendant's house who let them in out of courtesy and nothing fruitful was arrived at on that day as the meeting turned chaotic as there were arbitrary demands made by the plaintiff. According to the defendant / respondent, there was not even an attempt made by the executor to ascertain whether division of the properties among the legatees is possible. There was no attempt to divide the property by metes and bounds, however, small the same may be. The executor / applicant had not even given the offer of first right of purchase to the respondent who is the co-owner. The further contention of the defendant is that the

demand of 5% of the sale proceeds as remuneration by the executor exposes the real intention behind the application. It is also his contention that the executor, being the trusted friend of the testator, instead of acting in good faith, has been exhibiting commercial interest and fixing the remuneration for himself. The defendant also denied the fact of payment of mesne profits as set out in the application. Therefore, the defendant sought for dismissal of the application under Section 302 of the Indian Succession Act.

4. Heard Mr. Alexander, executor in person and Ms. Beulah John Selvaraj, learned counsel appearing for the respondent and perused the records.

5. Before discussing the merits of the case, the ambit of Section 302 of the Indian Succession Act has to be gone into. Section 302 reads as follows:-

> "302. **Directions to executor or administrator.--** Where probate or letters of administration in respect of any estate has or have been granted under this Act, the High Court may, on application made to it, give to the executor or administrator any general or special directions in regard to the estate or in regard

to the administration thereof."

6. The Section empowers the High Court or the District Court to give general or special instructions regarding the estate of the deceased or its administration to the executor. The above Section also enables any party interested in the administration to take out such an application.

7. From a bare reading of the Section, it is clear that the Court has got power to settle questions arising between the executor and the legatees or between the legatees. However, the Court has got no power to decide the question of title. Any direction sought for under Section 302 of the Indian Succession Act should be confined to the management and administration of the estate. The word "direction" does not mean determination of the rights of the parties. It strictly relates to undisputed matter of management. The intention of the legislature was to give the power to the Court to advise an executor or a trustee as to the Management and administration of the properties which would be best suited for the benefit of the legatees and not affect any right of the parties. Any direction as regards the administration of the estate means only the maintenance and administration of the estate or compromise

proceedings.

8. For better understanding of the case, this Court feels that it would be worthwhile to refer to the Will in question and the relevant passages of the Will are usefully extracted below:-

> "4. Item No. 1 in the schedule below was the absolute property of my late wife Sarojini who died intestate in respect of the property. I am entitled for 1/3rd share in the property . The said property is about 3224 sq.ft in extent. My 1/3rd share comes to 1075 sq.ft. I now bequeath my 1/3rd share in item No. 1 which is 1075 sq.ft. to all the six persons named above. Thus each one of them will get 179 sq.ft absolutely after my demise in addition to what they are already entitled to. After my demise, if any one of has constructed any structure at his or her cost he or she may claim that portion of item No. 1 on which his or her structure stands. If that portion exceeds what he or she is entitled to, then he or she will compensate for others who get less consequently.
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> 5. Item No. 2 is the land comprised in it which is one ground of 2400 sq.ft. This land has been allotted to me by the Govt. of India in recognition of my service in the defense. I am entitled to the land absolutely. I am bequeathing this land also to all

> the six persons named above who will each take 400 sq.ft. absolutely after my demise. After my demise, if any one of them has erected any super structure at his or her own cost he or she may claim that portion of the land on which his or her super structure stands. If that portion exceeds what he or she is entitled to i.e., 400 sq.ft of land he or she will compensate for others who get less or nothing consequently. Further what others get after such claim by the individual or individuals should also be a viable unit or size. Otherwise, the person who claim the constructed area should take what others cannot use and pay compensation accordingly.
>
> 6. The rate of compensation shall be the market value in all the above circumstances mentioned in paras 4 and 5. Compensation will attract interest at 12% per annum from the date of my demise."

9. Furthermore, it would not be out of place for this Court to make a mention that any disputed points of law or fact cannot be included in the term "direction" as the legislature did not intend so. In other words, the Court cannot give any direction that may affect the right of the parties. The term "direction" also would include any order from the Court to the executor to administer the property and Section 302 of the Act will decide the dispute between the executor

and the legatees or among the legatees. According to my understanding, as there is no provision for appeal provided in the Act, the Legislature had intended that the Court should have the power to advise and issue orders to the executor to deal with the property as intended by the testator in a manner that is most advantageous to the parties beneficially interested.

10. This Court also does not fail to refer to the decision of the Hon'ble Apex Court in ***Chandrabhai K.Bhoir & Others vs. Krishna Arjun Bhoir & Others [2009 (2) SCC 315]*** wherein S.B.Sinja. J. (as he then was) speaking for the Bench, held as follows:-

> "…. The testamentary court in exercise of its jurisdiction under Section 302 of the Act cannot enforce a contract qua contract; only because the Executor is a party thereto…."

As regards the role of Executor of the Will, the observation made by Their Lordships may be usefully re-produced hereunder:-

> "A probate is granted in respect of a Will. An Executor is appointed to administer the estate of the testator in terms thereof. The Will ordinarily should be administered having regard to the last wishes of the testator himself.
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> ……………………………… ……………………………..
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> A probate when granted binds the whole world. It is a judgment in rem. **<u>The Executor, therefore, has to administer the estate of the testator in terms of the Will and not on the basis of the settlement arrived at by and between the parties which would be inconsistent with the terms of the Will</u>**. In case of any conflict between the terms of the Will and the settlement, the former will prevail. The court, thus, in exercise of its jurisdiction under Section 302 of the Act can enforce only the terms of the Will and not the terms of the agreement.
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> (Emphasis supplied)

11. The defendant in the instant case, has objected to the proposal of selling the properties under the Will as according to him, it is not to the benefit of the legatees. The complaint of the defendant also is that he was not given the first chance of purchase of the property. Unless the executor establishes that there was no possibility of division of the property by metes and bounds or any of the legatee / well wisher is willing to purchase the other share of the property, the question of giving a direction to sell all the properties by sealed tender is not warranted. The applicant has not established before this Court that he made attempts for division of the properties with consent of the parties. The applicant is only an executor and he must render

accounts to the Court and divide the property as per the Will to the persons who are entitled under it. As such, this Court cannot grant any order affecting the rights of parties *'inter se'.* As stated earlier, any order passed under this Section is neither appealable or revisable. Therefore, the Court must take utmost care to follow the restrictions. In the absence of any such evidence, in the interest of the legatees, the present application cannot be allowed. As the probate order has already been issued by this Court, the same cannot be superseded by another order by this Court in the absence of *bona fide* in the application.

12. In so far as the remuneration asked for by the applicant, as rightly pointed out by the respondent that the claim of the executor, who is only a custodian of the property, seeking 5% of the gross sale proceeds as remuneration, shows that there is no trust in his deeds but only exhibiting commercial interest.

13. It is useful to refer to AIR (36) 1949 Calcutta – 462 IN THE GOODS OF AKSHOY K.GHOSE, wherein it has been held as follows:-

> *"37. .... The Court never allows an executor or trustee any remuneration for his*

time and trouble specially where there is an express legacy for his pains. That is so even when it appears that the executors have deserved more and benefited the estate to the prejudice of his own affairs, such as was the case made out in the petition of the executors in this case resulting in the order of 28th March 1945. The leading authority for this proposition is Robinson V. Pett (1784) 24 E.R.1049: (3 P.Wms.249) and the Lord Chancellor made it quite clear in that case that an executor or administrator shall have no allowance for his care and trouble and the reason which the learned Lord Chancellor gave was that if such pretences were allowed, the trust estate might be loaded and rendered of little value besides the great difficulty of settling and adjusting the quantum of such allowance. There is no hardship in that rule of law because a trustee or an executor may refuse to accept the trust or renounce the executorship. This rule has been followed in India and Wadia J. in Shrivramdas V. B.V.Nerurkar, I.L.R (1937), Bom.843: (AIR (24) 1937 Bom.374) followed it and also drew attention to another reason for that rule, viz., the ground of prudence that a trustee may not put himself in a position in which his interest and duty come in conflict.".....

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39. Principles governing allowances to non-resident trustees or payment of commission to them as was the case in Re Freeman's Settlement Trust (1888) 37 Ch.D.148: (57 L.J.Ch.160) stand on an entirely different footing and appear to have no application to the facts of the present case. Lindley L.J. In Re Thorley reported in (1891) 2 Ch. 613 at p.624: (60 L.J.Ch.537) observes as follows:-

"The trustees and the executors apart from the will could not charge for their trouble in carrying on the business of the testator. It would be competent to them if they did not like to carry on that business to have nothing to do with it. They need not take it unless they like it. No implied right of remuneration would arise from the mere fact that they executed the trust which they elected to perform. Nor could they in point of law frame a declaration based on any implied contract of payment for the simple reason that they are the paymasters and the payees; they are the persons to employ themselves and they cannot create any implied obligation to pay out of

> *such estate ..... They cannot get a shilling out of the estate either in law or in equity for their services except under the Will.*
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> *40. .... The ratio in that decision is expressed clearly by Panckridge J. in the following terms:*
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> *"The Court will not construe testamentary directions of this nature as trusts enforceable at the instance of the appointee unless the testator indicated his intention in unambiguous language."*

14. From the above, it is clear that the executor is not entitled to any remuneration or compensation for the personal trouble and loss of time taken by him. If the executor does not want to continue as the executor, he should make a special case before the Court before accepting the executorship.

15. The powers of the Court under Section cannot be allowed to be abused by asking the Court to sanction sale of the property when the beneficiaries are opposing.

16. In view of the above discussion, I find no merits in this application and the same is dismissed being devoid of merits.

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