

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.07.2018

Coram

The Hon'ble Mr. Justice M.M.SUNDRESH  
and  
The Hon'ble Mr. Justice N.ANAND VENKATESH

O.S.A.No.92 of 2018  
and  
C.M.P.No.5717 of 2018

Sadhu A.N.Sircar Foundation  
rep. by its Board of Trustees  
E.Nandakumar ... Appellant/1<sup>st</sup> Respondent

Vs

1.M.Vijayalakshmi  
2.G.Bakyalakshmi ... 1 & 2 Respondents/Applicants  
3.Abraham Samarendiranath Sircar ... Respondent/2<sup>nd</sup> Respondent

Appeal preferred under Order XXXVI Rule 9 of O.S. Rules  
r/w Clause 15 of Letters Patent against the fair and decretal  
order dated 02.03.2017 made in A.No.2608 of 2012 in T.O.S.No.23  
of 2003.

For Appellant .. Mr.C.Jagadish

For Respondents.. Mr.V.Raghavachari  
for Mr.M.Venkatak Krishnan  
for R1 and R2  
Mr.T.M.Hariharan for R3

JUDGMENT

(Judgment of the Court was delivered by M.M.SUNDRESH, J.)

This appeal has been preferred against the order of the  
learned single Judge in the application filed seeking to revoke  
the letters of administration granted based upon the compromise  
signed between the appellant and the third respondent.

2. Admittedly, the compromise was signed between the appellant and the third respondent. This compromise also involves the property sold in favour of respondents 1 and 2. Pursuant to the letters of administration granted, a suit was filed subsequently by both the appellant and the third respondent. The suit was dismissed, as against which, an appeal was preferred by the appellant as well as the third respondent.

3. Heard the learned counsel appearing for the parties.

4. Learned counsel appearing for the appellant would contend that the compromise entered into between the appellant and the third respondent is binding on the parties. Therefore, even if the property sold in favour of respondents 1 and 2 is excluded, the remaining part will have to be approved. Even the testamentary Court has got its jurisdiction to apply Order 23 of Code of Civil Procedure in recording the compromise. To buttress his submissions, reliance has been made on the judgment of the Apex Court in *Om Prakash and Another Vs. Mishri Lal (dead) rep. by His Legal Representative Savitri Devi* ((2017) 5 SCC 451) and the judgment of the Division Bench of this Court in *P. Jothi Bai Vs. B. Dorairaj and 2 Others* (2001 (4) CTC 330).

5. Learned counsel appearing for respondents 1 and 2 would submit that there is no bonafide either in the compromise entered or in the appeal filed. Admittedly, the suit was filed subsequent to the letters of administration granted, which was based upon the compromise entered into between the appellant on the one hand and the third respondent on the other hand. Even on a perusal of the petition filed for probate, it is seen that this property was specifically not included. Therefore, the order of the learned single Judge cannot be interfered with particularly when the testamentary Court does not have any jurisdiction to grant letters of administration based upon the compromise entered into by the parties without going into the genuineness of the Will sought to be probated.

6. Learned counsel appearing for the third respondent would submit that the compromise entered into cannot be dissected in piecemeal giving benefit to the appellant alone. The contention of the appellant, if accepted, would non-suit the third respondent in processing the appeal filed against the dismissal of the suit in favour of respondents 1 and 2. The probate proceedings initiated by the third respondent was closed only based upon the compromise entered. Therefore, any variation of the compromise would adversely affect the interest of the third respondent. In support of the contention, learned counsel made reliance on the judgment in *Chiranjilal Shrilal Goenka (deceased) through LRs. Vs. Jasjit Singh and Others* ((1993) 2

SCC 507).

7. Admittedly, at the time of granting letters of administration, the genuineness of the Will sought to be approved by the respective parties viz., the appellant on the one hand and the third respondent on the other hand has not been gone into. Thus, the Will has not been proved in accordance with Section 68 of the Indian Evidence Act. In this connection, it is apposite to refer to the following paragraphs of the judgment in Chiranjilal Shrilal Goenka (deceased) through LRs. Vs. Jasjit Singh and Others ((1993) 2 SCC 507):

15. In Inswardeo Narain Singh v. Smt. Kanta Devi & Ors., AIR 1954 SC 280 this court held that the court of probate is only concerned with the question as to whether the document put forward as the last will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the Probate Court. Therefore the only issue in a probate proceeding relates to the genuineness and due execution of the Will and the court itself is under duty to determine it and preserve the preserve the original Will in its custody. The Succession Act is a self contained code in so far as the question of making an application for probate, grant or refusal of probate or an appeal carried against the decision of the probate court. This is clearly manifested in the fascicle of the provision of Act. The probate proceedings shall be conducted by the probate court in the manner prescribed in the Act and in no other ways. The grant of probate with a copy of the Will annexed establishes conclusively as to the appointment of the executor and the valid execution of the will. Thus it does no more than establish the factum of the will and the legal character of the executor. Probate court does not decide any question, of title or of the existence of the property itself.

16. The grant of a Probate by Court of competent jurisdiction is in the nature of a proceeding in rem. So long as the order remains in force it is conclusive as to the due execution and validity of the will unless it is duly revoked as per law. It binds not only upon all the parties made before the court but also upon all other persons in all proceedings arising out of the Will or claims under or connected

therewith. The decision of the Probate Court, therefore, is the judgment in rem. The probate granted by the competent court is conclusive of the validity of the Will until it is revoked and no evidence can be admitted to impeach it except in a proceeding taken for revoking the probate. In *Sheoparsan Singh v. Ramnandan Prasad Singh*, (1916) ILR 43 Cal., 694 PC the judicial committee was to consider, whether the Will which had been affirmed by a Court of competent jurisdiction, would not be impugned in a court exercising original jurisdiction (Civil Court) in suit to declare the grant of probate illegal etc. The privy council held that the Civil Court has no jurisdiction to impugn the grant of probate by the court of competent jurisdiction. In that case the subordinate court of Muzafarbad was held to be had no jurisdiction to question the validity of the probate granted by the Calcutta High Court. In *Narbheram Jivram v. Jevallabh Harjivan*, AIR 1933 Bombay, 469 probate was granted by the High Court exercising probate jurisdiction. A civil suit on the Original Side was filed seeking apart from questioning the probate, also other reliefs. The High Court held that when a probate was granted., it operates upon the whole estate and establishes the Will from the death of the testator. Probate is conclusive evidence not only of the factum, but also of the validity of the Will and after the probate has been granted, in is incumbent on a person who wants to have the Will declared null and void, to have the probate revoked before proceeding further. That could be done only before the Probate Court and not on the original side of the High Court. When a request was made to transfer the suit to the Probate Court, the learned Judge declined to grant the relief and stayed the proceeding on the original side. Thus it is conclusive that the court of probate alone had jurisdiction and is competent to grant probate to the will annexed to the petition in the manner prescribed under the Succession Act. That court alone is competent to deal with the probate proceedings and to grant or refuse probate of the annexed will. It should keep the original will in its custody. The probate thus granted is conclusive unless it is revoked. It is a judgment in rem.

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18.It is settled law that a decree passed by a court without jurisdiction on the subject matter or on the grounds on which the decree made which goes to the

root to its jurisdiction of lacks inherent jurisdiction is a coram non iudice. A decree passed by such a court in a nullity and is nonest. Its invalidity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings. The defect of jurisdiction strikes at the very authority of the court to pass decree which cannot be cured by consent or waiver of the party.

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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 rely 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.

8. The decisions relied upon by the learned counsel appearing for the appellant are not applicable to the case on hand. In the decision in Om Prakash and Another Vs. Mishri Lal (dead) rep. by His Legal Representative Savitri Devi ((2017) 5 SCC 451), the Apex Court was dealing with the case in which a decree was already granted by treating the appellant therein as a co-owner. It was only a dispute between the owner of the

property and the tenant. Therefore, the aforesaid decision is distinguishable on facts. In the decision rendered by the Division Bench in P.Jothi Bai Vs. B.Dorairaj and 2 Others (2001 (4) CTC 330), the ratio laid down therein was actually against the appellant. The Division Bench of this Court in fact approved the view expressed by the Division Bench of the Allahabad High Court in holding that the compromise can only be entered into after the granting of probate, which has not been done in the present case. It is apposite to refer the following paragraphs:

21. In the Allahabad case, the Division Bench has held that the compromise cannot be recorded in a testamentary proceeding, since the genuineness of the Will has to be proved before ever the probate can be granted in favour of the plaintiff in the following terms:

"It also appears that it will be contrary to public policy to introduce into the probate that is granted to the executor terms of a private compromise that might have been arrived at between him and any objector. So long as it is not revoked the probate is conclusive against the whole world and private arrangements between the parties in a proceeding would be quite out of place in it."

From the principles laid down by the Allahabad High Court, it is clear that once the probate is granted, the probate is valid against every one until the same is revoked, even if it is on the basis of compromise.

22. We entirely agree with the view taken by the learned Judges of the Allahabad High Court. The compromise can be acted upon if the same was entered into by all the legal heirs of the testator. When all the legal heirs of the testator joined together and entered into the compromise, the same is binding on them by virtue of their agreement or arrangement. When a few had joined together and compromised the dispute, definitely the same will not be binding on others who are not parties to the compromise. In this case, the appellant being not a party to the compromise, definitely the terms of the compromise entered into between the respondents will not bind her.

9.In such view of the matter, we do not find any merit in this appeal. Hence the same stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

10.While dismissing the appeal, we make it clear that it is well open to the appellant and the third respondent to go before the learned single Judge seeking to probate their respective Wills relied upon by them on its own merits. This order is passed by taking note of the order already passed by this Court in the appeal filed by the third respondent, which was passed only on the ground that there was a compromise entered into between the parties, which stands set aside pursuant to the order of the learned single Judge, confirmed by us in the appeal. Thus we make it clear that both the testamentary original suits will have to be decided on their own merits.

Sd/-  
Assistant Registrar (CO)

//True Copy//

Sub Assistant Registrar

mmi

To

1 The Sub Assistant Registrar,  
Original Side, High Court, Madras.

2. The Sub Assistant Registrar,  
Judicial Section, High Court, Madras.

+1cc to Mr.C.JAGADISH, Advocate, S.R.No.52057  
+1cc to Mr.T.M.HARIHARAN, Advocate, S.R.No.51674  
+1cc to Mr.M.VENKATAKRISHNAN, Advocate, S.R.No. 51480

O.S.A.No.92 of 2018

SKV(CO)  
TR(14/08/2018)

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