

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

% **Date of decision: 9<sup>th</sup> March, 2018.**

+ **CS(OS) 102/2018**

**RAKESH KUMAR JUNEJA & ORS ..... Plaintiffs**

Through: Mr. R. M. Bagai, Adv.

Versus

**SURINDER PAL KAUR ..... Defendant**

Through: None

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

**IA No.3288/2018 (for exemption)**

1. Allowed, subject to just exceptions.
2. The application is disposed of.

**CS(OS) 102/2018 & IA No.3287/2018(of the plaintiffs u/O XXXIX R 1 & 2 CPC)**

3. The three plaintiffs, namely (i) Rakesh Kumar Juneja, (ii) Dinesh Kumar Juneja and (iii) Phool Juneja have filed this suit against the sole defendant for the following reliefs:-

“(a) pass a decree ordering cancellation of probate order dated 10.09.2015 and the formal order dated 27.05.2017 based thereupon;

(b) pass such other and further order(s) as this Hon’ble Court may deem fit and proper under the facts and circumstances of the present case.”

4. The suit is listed subject to the office objection as to court fees and jurisdiction.

5. The plaintiffs had earlier filed Test Case No. 73/2017 which had come up before this Court on 18<sup>th</sup> December, 2017 and which was dismissed vide detailed order dated 18<sup>th</sup> December, 2017. Rather than repeating the facts, it is deemed appropriate to reproduce the said order dated 18<sup>th</sup> December, 2017 herein:-

*“3. This Petition under Section 263 of the Indian Succession Act, 1925 seeks revocation of the probate ordered to be granted of the document dated 7<sup>th</sup> June, 2003 as validly executed last Will of Baba Chakravarthy Darvesh.*

*4. The case of the petitioners is (i) that DLF Housing and Construction Limited, being the developers of the colony of Greater Kailash, Part-II, New Delhi, vide Sale Deed dated 27<sup>th</sup> July, 1964 sold plot of land bearing no.E-255, Greater Kailash, Part-II, therein to one Gurdial Kaur; (ii) that the said Gurdial Kaur, vide Sale Deed dated 21<sup>st</sup> March, 1966, sold the said plot of land to Thakar Singh and Lashkar Singh; (iii) the said Thakar Singh and Lashkar Singh, vide Sale Deed dated 14<sup>th</sup> December, 1970, sold the said plot of land to one Satinder Singh; (iv) that the said Satinder Singh vide Sale Deed dated 2<sup>nd</sup> May, 1986 sold the said plot of land to the petitioners no.1&2 and to the husband of the petitioner no.3 who has died leaving the petitioner no.3 only as his natural heir; (v) that the petitioners since then are the owners in possession of the said plot; (vi) that on one Baba Chakravarthy Darvesh claiming that Gurdial Kaur aforesaid had executed a letter dated 23<sup>rd</sup> June, 1966 donating the aforesaid plot of land E-255, Greater Kailash, Part-II, New Delhi to him, the petitioners instituted a suit and in which a decree dated 6<sup>th</sup> October, 1998 was passed declaring the said*

letter to be void and non est and cancelling the same; (vii) that on learning, that Baba Chakravarthy Darvesh had executed a Sale Deed dated 27<sup>th</sup> November, 1996 with respect to the property in favour of one Hans Raj, the petitioner instituted yet another suit under Section 31 of the Specific Relief Act, 1963 for cancellation of the said Sale Deed and which is pending; (viii) that the respondent no.2 herein namely Surinder Pal Kaur has vide judgment dated 10<sup>th</sup> September, 2015 of this Court in FAO(OS) No.275/2013 obtained an order of grant of probate of the document dated 7<sup>th</sup> June, 2003 as validly executed last Will of Baba Chakravarthy Darvesh; and, (ix) that on the basis of the aforesaid probate, the respondent no.2 Surinder Pal Kaur is attempting to trespass over the property aforesaid of the petitioners and has already got electricity supply to the property disconnected.

5. The aforesaid Hans Raj has not been impleaded as a party to this petition, presumably because he was not a party to the Probate Case either.

6. It being a settled position in law that a Probate Court does not decide any questions as to title to immovable property which may be subject matter of the document of which probate is sought and being thus of the view that the petition does not disclose any cause for revocation of the probate inasmuch as the petitioners are neither claiming under any other / subsequent Will of Baba Chakravarthy Darvesh nor as natural heirs of Baba Chakravarthy Darvesh of whose Will probate has been granted, I have enquired from the counsel for the petitioners the need for seeking revocation.

7. The counsel for the petitioners has drawn attention to the orders dated 13<sup>th</sup> October, 2017 and 8<sup>th</sup> November, 2017 in application earlier filed by the petitioners in FAO(OS) No.275/2013 vide order dated 10<sup>th</sup> September, 2015 wherein

*probate of which revocation is sought was granted. The said orders disclose that the petitioners first applied for revocation in the said disposed of FAO(OS) and which application of the petitioners was dismissed with the observation that the remedy should be agitated in the first instance before the concerned forum i.e. before the learned Single Judge.*

*8. The aforesaid order of the Division Bench cannot be construed as holding the petition for revocation to be maintainable. A petition for revocation of probate would certainly lie in the Court of first instance, even if any appeals were preferred against the order of the Court of first instance. The petitioners thus were wrong in approaching the Appellate Court. The Appellate Court accordingly held the application of the petitioners to be not maintainable before it, without considering whether the petitioners at all have the locus / cause to maintain a petition for revocation of probate. The order of Appellate Court, merely observing that relief of revocation of probate should be applied before Court of first instance will not bind the Court of first instance if no case for entertaining a revocation petition is otherwise made out.*

*9. Thus there is no merit in the aforesaid contention of the counsel for the petitioners.*

*10. I may in this regard also notice that the Single Judge, vide judgment dated 14<sup>th</sup> December, 2009 in Test. Cas. No.48/2005 had dismissed the petition filed by the respondent no.2 for probate of the document dated 7<sup>th</sup> June, 2003 as validly executed last Will of Baba Chakravarthy Darvesh, reasoning that Baba Chakravarthy Darvesh himself did not have any title to the plot on the basis of the donation letter dated 23<sup>rd</sup> June, 1966 and the document of which probate was sought was also suspicious. However the Division Bench vide judgment dated 10<sup>th</sup> September, 2015 in FAO(OS) No.275/2013 preferred*

*thereagainst set aside the said judgment, reasoning that a Probate Court cannot examine and render finding on question of title and that whether the donation of the property made in 1996 (supposedly incorrect for 1966) was valid or not was not an issue that could be gone into by the Probate Court which at best could only conclude whether the Will was genuine or not.*

*11. The counsel for the petitioners then contends that the petitioners have a locus / cause to apply for revocation because on the basis of the probate granted by this Court, the petitioners are suffering and the electricity supply with respect to the plot has already been disconnected.*

*12. The same would again not entitle the petitioners to maintain this petition for revocation of probate, as, I repeat, the petitioners are not claiming as heirs, natural or testamentary, of Baba Chakravarthy Darvesh probate of whose Will has been granted and are otherwise also not claiming any title in the property aforesaid from Baba Chakravarthy Darvesh. Rather, the petitioners claim to have a decree in their favour in a suit filed against Baba Chakravarthy Darvesh and the title which the petitioners are claiming to the plot is independent of the deceased, of whose Will probate has been granted and even if the respondent no.2 Surinder Pal Kaur is causing any challenge to the title of the petitioners to the said property, the remedy of the petitioners is not by way of this revocation petition but otherwise.*

*13. The counsel for the petitioners has then relied on para 10 of **Elizabeth Antony Vs. Michel Charles John Chown Lengera** AIR 1990 SC 1576.*

*14. The said judgment, instead of helping the petitioners also holds that by granting a probate, the Court is not deciding the disputes as to title.*

15. The counsel for the petitioners has then relied upon the judgment of the Division Bench of the Madras High Court in **Chrome Leather Company Ltd. Vs. Q. Dawson** AIR 2013 Madras 5.

16. Undoubtedly, in the said judgment, a third party which had acquired the property at an auction sale was held to have a caveatable interest. However, the Division Bench of the Madras High Court in the said judgment did not notice **Krishna Kumar Birla Vs. Rajendra Singh Lodha** (2008) 4 SCC 300 holding that a caveatable interest is an interest in the deceased testator's estate which may be affected by grant of probate. It was further held that a person who would have succeeded to the testator's estate in case of intestate succession would ordinarily have a caveatable interest. It was further held that any other person must ordinarily show a special interest in the testator's estate—such a special interest may be that of a creditor of the deceased—however, the interest claimed as caveatable interest must not be one which could have the effect of destroying the testator's estate—any person claiming any interest adverse to the testator or his estate cannot maintain any application before the Probate Court and his remedy would be elsewhere. It was yet further held that a judgment rendered in probate proceedings though a judgment in rem would not be determinative of questions of title and questions of title, existence of property are beyond the jurisdiction of the Probate Court and remedy of person in respect of such types of questions is to file a separate suit.

17. The interest which the petitioners herein are claiming in property no. E-255, Greater Kailash, Part-II, New Delhi is destructive of the interest of the testator Baba Chakravarthy Darvesh and adverse to the estate of Baba Chakravarthy Darvesh and such interest is neither caveatable neither entitles the petitioners to seek revocation of probate already granted.

*The petitioners are not disputing the valid execution of the Will of Baba Chakravarthy Darvesh of which probate has been granted. What the petitioners are doing is disputing the rights of the deceased Baba Chakravarthy Darvesh to make a Will with respect to the property aforesaid.*

*18. No case for entertaining this petition under Section 263 of the Indian Succession Act is made out.*

*19. Dismissed.*

*20. The counsel for the petitioners at this stage states that liberty be granted to institute a suit.*

*21. There is no need for liberty inasmuch as what has been held above is that Revocation Petition is not maintainable. The petitioners can always take correct remedy in law.”*

6. The plaintiffs, instead of filing a suit restraining the defendant or any other person who may be disturbing or challenging the title claimed by the plaintiffs to the property have to either file a suit for declaration of their title and injunction, if in possession or if have lost possession, for recovery of possession on the basis of the title claimed by the plaintiffs. The plaintiffs, instead of doing so, have filed this suit for cancellation of the order dated 10<sup>th</sup> September, 2015 holding Surinder Pal Kaur entitled to grant of probate claimed by her and the order dated 27<sup>th</sup> May, 2017, perhaps issuing the probate, when as reasoned in detail in the order dated 18<sup>th</sup> December, 2017 reproduced above, the plaintiffs are not concerned with the probate granted by this Court inasmuch as the grant of probate only proves the document of which probate is granted as the validly executed last Will of the deceased and does not adjudicate the title of the deceased to the properties bequeathed.

7. Moreover, once a remedy under Section 263 of the Indian Succession Act 1925 is available for revocation of a probate, a civil suit for the relief of cancellation of the order granting probate and which order has attained finality, would not lie. The order/judgment granting probate is an order/judgment *in rem* and is not subject to any kind of collateral attack; while it remains in force, it is conclusive not only on persons parties to the judgment but upon all persons and on all Courts. The proper course is to apply for revocation under the provisions of the Act itself. No Civil Suit lies therefor. I have held so in ***Durga Devi Vs. Prem Lata Rai*** 2013 SCC OnLine Del 4638. Reference may also be made to ***Narbheram Jivram Purohit Vs. Jevallabh Harjivan*** AIR 1933 Bom 469, ***Panna Lal Vs. Hansraj Gupta*** AIR 1940 Cal 236, ***Kailash Chandra Vs. Nanda Kumar*** AIR 1944 Cal 385 (DB), ***Rukn-ul-Mulk S. Abdul Wajid Vs. Gajambal Ramalingam*** AIR 1950 Mys 57 (DB) and ***Thresia Vs. Lonan Mathew*** AIR 1956 TC 186 (FB).

8. The suit is as misconceived as the earlier Test Case No. 73/2017. It appears that an attempt is being made to avoid payment of requisite court fees which would be payable on the proper remedy if any to which the plaintiffs are entitled to. This suit has been filed valuing the same for the purposes of jurisdiction at over Rs. 2 crores but with payment of court fees of Rs. 500/- only. The counsel for the plaintiffs has come prepared only to argue on the aspect of the plaintiffs being entitled to sue under Clause (iii) of Article 17 of Schedule II of the Court Fees Act, 1870 and has brought with him copy of ***Suhrid Singh vs. Randhir Singh*** AIR 2010 SC 2807 in this regard. However, the question of court fees would arise only if the suit were

to be maintainable. The suit is not found to be maintainable and the plaint is rejected.

No costs.

*Dasti.*

**RAJIV SAHAI ENDLAW, J.**

**MARCH 09, 2018**

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