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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Delivered on : 29th May, 2019

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CM(M) 648/2019

CHANDER KANTA MISHRA & ANR

..... Petitioners

Through : Ms.Geeta Luthra, Senior Advocate
with Ms.Asmita Narula, Advocate.

versus

RAJ SHARMA & ORS

..... Respondents

Through : Ms.Manpreet Kaur and Mr.Jaya
Goyal, Advocates for respondents
No.1 to 3.
Mr.S.C.Sharma and Mr.Charan
Singh, Advocates for respondents
No.4 & 5.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This petition is against the impugned order dated 24.12.2018 whereby an application of the petitioners under Order XXII Rule 3 read with Section 151 CPC was dismissed.

2. The learned senior counsel for the petitioner alleged late Major (Retd) Bhim Raj Sharma was predecessor in interest and ancestor of the parties. Petitioner No.1 is widow daughter of late Major (Retd) Bhim Raj Sharma; petitioner No.2 is son of late Major (Retd) Bhim Raj Sharma; respondents No.1 to 3 are legal heirs of deceased Pradeep Sharma; and respondents No.4 & 5 of legal heirs of deceased Ramesh Sharma who were sons of late Major (Retd) Bhim Raj Sharma.

3. On 29.10.1962, late Major (Retd) Bhim Raj Sharma, as *Karta* of the family and out of the funds and income of ancestral property purchased a plot of land bearing no. R-263, Greater Kailash, Part-I, New Delhi - 110048 and constructed a house thereon (hereafter referred as "said property"). On 07.07.1983, partition suit was filed by late Major (Retd) Bhim Raj Sharma and his daughter Dr.Shanta Sharma in this Court being CS(OS) No.1100/1983 wherein the share of late Major (Retd) Bhim Raj Sharma, his wife and three sons were declared to be $1/5^{\text{th}}$ each in the said suit vide preliminary decree of partition. On 15.08.1984, local commissioner was appointed to divide the said property by metes and bounds and it was assured by the parties through their counsels the sisters namely Chander Kanta Mishra and Dr.Shanta Sharma be also given their shares, hence share of each person was made to be $1/7^{\text{th}}$ and the property could not be divided by metes and bounds. In the year 1986, Ramesh Sharma died leaving behind the respondents No.4 & 5 his wife and son respectively. On 05.12.1989, Smt.Nirma Devi died and her share devolved upon remaining parties thus, making their share $1/6^{\text{th}}$ each. On 16.11.1997, Sh.Pradeep Sharma died leaving behind respondents No.1 to 3, as his wife, son and daughter respectively. No steps could be taken for partition of the said property due to unfortunate demise of Smt.Nirma Devi, Ramesh Sharma and Pradeep Sharma and said property remain undivided by metes and bounds.

4. On 03.08.1999 late Major (Retd) Bhim Raj Sharma and petitioners herein ultimately filed an application for modification of the preliminary decree of partition of the said property. Late Major (Retd) Bhim Raj Sharma also executed a Will dated 31.08.1997 whereby he

devolved his share to deceased Dr.Shanta Sharma to the exclusion of all other legal heirs. Hence, the share of Dr.Shanta Sharma becomes $1/6^{\text{th}}$ of herself and also $1/6^{\text{th}}$ which comes from her father he held in the said property, thus equivalent to $1/3^{\text{rd}}$ and petitioners No.1 & 2 have $1/6^{\text{th}}$ share each; respondents No.1 to 3 have $1/6^{\text{th}}$ share; and respondents No.4-5 have $1/6^{\text{th}}$ share in the said property.

5. On 18.11.2002 fresh suit for declaration and partition filed by Dr.Shanta Sharma and the petitioners herein being CS No.1929/2002. The written statements have been filed by respondents and during the pendency of abovesaid suit, Dr.Shanta Sharma died on 25.10.2014 and the copy of the death certificate is annexed as P-6. She was also a citizen of USA and residing there. She had no class I heirs and hence the petitioners being the real sister and brothers were very close to her and she executed a Will dated 21.05.2010 during her lifetime for which probate was granted and apostille certificate was also obtained qua her share in the property.

6. On the basis of the probate, the petitioners have become entitled to her share in the said property and each of them moved an application under Order XXII Rule 4 CPC to bring the demise of deceased Dr.Shanta Sharma on record and also to be impleaded as legal heirs of Dr.Shanta Sharma. Though they were already party to the suit, but the said application was contested and it was dismissed by the learned Trial Court by the impugned order dated 24.12.2018 with the following observations:-

*"I have heard the arguments and have perused the record carefully.
As far as ratio of Jethalal Thakkar(Supra) is concerned, same is not*

disputed. Perusal of record reveals that application has been made after a considerable period of delay and the factum of death of plaintiff no. 3 was not disclosed to the court, though the representative of plaintiff had appeared several times in the court from the date of death of plaintiff no. 3 till the application was moved however, keeping in view of the fact that plaintiff no. 1 and 2 who are claiming to be legal representatives of plaintiff no. 3 are already on record, therefore, suit can not abate.

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This paragraph clearly shows that there would be a list of properties alongwith this will which would have clarified as to which properties would devolve upon the plaintiffs and which property were to go in trust. The same is not clarified. Therefore, it cannot be said that plaintiff no. 1 and 2 can be substituted as LRs on the basis of will executed by plaintiff no. 3 in favour of plaintiff nos. 1 and 2 in respect of the subject matter of this suit. This suit is for partition of the property bearing no. R-263, G.K.-I, New Delhi, however, nowhere in the said will there is mention this property, therefore, it cannot be said that plaintiff no. 3 had executed a will in favour of plaintiff no. 1 and 2 herein in respect of suit property herein. First prayer of plaintiff to record the factum of death of plaintiff no. 3 is allowed. However, the second-prayer with respect to substitute plaintiff no. 1 and 2 as LR of plaintiff no. 3 on the basis of will rely upon cannot be allowed in view of the reasons given above. Though, it is needless to mention here that in case plaintiff no.. 3 had died issue less and plaintiff nos. 1 and 2 are the class-I legal heirs, they may exercise their rights accordingly. Application is disposed of with these directions. Put up for final arguments on 08.02.2019.”

The said application has been dismissed on the ground that details of the property was not clarified in the apostille certificate.

7. Before me two objections have been raised viz *a)* regarding bar of Section 213 and 228 of the Indian Succession Act, which notes:-

“213. Right as executor or legatee when established.—

(1) No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in India has granted probate of the Will under which the right is claimed, or has granted letters of administration with the Will or with a copy of an authenticated copy of the Will annexed.

228. Administration, with copy annexed, of authenticated copy of Will proved abroad.—When a Will has been proved and deposited in a Court of competent jurisdiction situated beyond the limits of the State, whether within or beyond the limits of 1[India], and a properly authenticated copy of the Will is produced, letters of administration may be granted with a copy of such copy annexed.”

It is alleged per sections above, the certificate of letter of

administration/probate need to be taken from this Court even if a probate is obtained from a foreign Court.

8. The learned senior counsel for the petitioner then referred to *Alagammal & Others vs Rakkammal* AIR 1982 Madras 354 which held:-

“With reference to wills executed outside India, in respect of which a foreign probate has also been obtained, the requirement of S. 213(1) of the Act would] be satisfied by obtaining under S. 228(1) of the Act an ancillary probate or what is termed in English Law as the resealing of the probate. Otherwise, the procedural requirement of the lex fori enacted under S. 213(1) of the Act may not be satisfied and if it is only with a view to enable parties claiming under a will executed outside India to make claims with reference to properties situated in India, the procedure under S. 228 of the Act has been prescribed. If this is not so, then as the probate obtained in respect of a will executed in a foreign country would be operative only within that country, persons entitled to other properties under the will, which are situate outside the country where the will was executed and the probate also was obtained, would be left without any means to assert their rights there to it must also be remembered that S. 228 of the Act is really in the nature of an enabling provision and when read with S. 270 of the Act, permits the obtaining of an ancillary probate. Section 270 of the Act is enacted on the principle that the presence of personal property of the deceased would be sufficient foundation of jurisdiction for purposes of granting probate.”

9. Heard.

10. The grant of probate is a proceeding in rem as has been held in *Basant Devi vs Ravi Prakash Ram Prasad Jaiswal* (2008) 1 SCC 267 as well as in *Chiranjilal Shrilal Goenka vs Jasjit Singh & Others* (1993) 2 SCC 507. Further in *Dr.Devika Damji Shah vs Rashmi Mukesh Shah and Another* 2012 Vol.114 (5) Bombay LR 2757 the Court held:-

“17. Mr. Shah on behalf of the wife drew my attention to the judgment of the Supreme Court in the case of Surinder Kumar & Ors. Vs. Gian Chand & Ors. AIR 1957 SC 875 showing the presumption that the judgment in a probate Court granting probate was a judgment in rem and must be presumed to have been obtained in accordance with the procedure prescribed by law. This essentially applies to Indian judgments. It would also apply to foreign judgments which are not in breach of the law relating to execution of the wills in force in India - Section 63 of the Indian Succession Act with regard to execution of the

will. If a foreign judgment has seen that the requirement of Section 63 of Indian Succession Act is followed, it would certainly be conclusive and also binding upon the parties who claim their rights thereunder. This exception is specifically set out in the judgment in the case of AIR 1950 Mysore 57 DB which has held that such a judgment in rem, including judgment of a foreign Court is binding upon the parties upon the operation of Section 41 of the Indian Evidence Act but only provided those Courts are competent to pronounce the judgment as contemplated in that section. The Court would be competent and its judgment would be conclusive if they followed the law applicable in India. Such a judgment would hold good until the probate granted under such judgment is revoked also under the law in force in India being Section 263 of the Indian Succession Act."

11. Per *Dr.Devika Dauji Shah* (supra), one need to see if provisions of Section 63 of the Indian Succession Act are satisfied and if the Will dated 21.05.2010 was signed by testator in presence of two attesting witnesses namely Rick R Medlock and Mischelle Robbins and if both the witnesses had signed the Will in presence of testator and in presence of each other and if the Probate was validly granted on 05.12.2014 by the Circuit Court of Clark County, Arkansas, Probate Division as accompanied by apostille certificate.

12. The Apostille Certificate is signed by the Secretary of the State to the State of Arkansas which has the following documents annexed to it viz, the Probate, the Will, and a Trust Deed. The probate has been granted for the Will dated 21.05.2010 of Dr.Shanta Sharma. The Will of Dr.Shanta Sharma annexed to Apostille Certificate is duly attested by the two attesting witnesses. It also speaks about the Trust as also schedule A of property. Article 8 of the Trust Deed notes:-

"Article Eight

Distribution of Trust upon Death of Grantor

Upon the death of the Grantor, this Trust (after the collection of any property which becomes payable to the Trustee as a result of a bequest, devise, beneficiary designation or otherwise, and after payment of any claims, expenses, or taxes which the Trustee determines should be paid from this Trust in accordance with Article Seven) shall be distributed as follows:

(1) Grantor may from time to time during her lifetime indicate her desire that specific gifts be made from this Revocable Trust, to be distributed upon Grantor's death. If Grantor makes known her desire in a writing referring to or attached to this Trust Agreement, upon the death of the Grantor, the Trustee shall distribute the specific gifts as if the specific gifts had been made in this Trust Agreement itself. The gifts shall be effective only upon the death of Grantor, and only if the writing is dated and signed by Grantor. In-dating the specific gifts document, it is not Grantor's intention to change the date of this Revocable Trust.

(2) Grantor directs that the successor Trustee distribute all other assets remaining in this Revocable Trust be distributed outright and free of trust equally to her siblings, Mahesh Sharma and Chandar Kanta Misra, or to their lineal descendants, per stirpes. In the event that Grantor's sister, Chandar Kanta Misra, does not survive Grantor, then one-fourth of the residual assets of the Trust shall be distributed to Grantor's nephew, Anant Misra, and one-fourth shall be distributed to Grantor's brother, Mahesh Sharma in his capacity as Trustee of the Shanta Sharma Educational Trust, as established in Article Nine of this, the Shanta Sharma Revocable Trust."

Schedule A
"SCHEDULE OF TRUST ASSETS
SHANTA SHARMA REVOCABLE TRUST

- 1. All real property owned by Grantor, at or subsequent to the execution of the above-named Revocable Trust;*
- 2. All bank accounts or certificates of deposit or other assets held by banks, including the contents of any safe deposit box or boxes in Grantor's name;*
- 3. All brokerage or investment accounts securities in any form owned by Grantor;*
- 4. All bonds or other instruments of indebtedness owned by Grantor;*
- 5. All cash owned by Grantor;*
- 6. Any and all personal property, including home furnishings, vehicles, boats, equipment or machinery, jewelry and personal effects of any kind whatsoever owned by Grantor."*

13. Thus, as per trust whatever is left of the properties of deceased after distribution of gifts incurring expenses etc. shall go to the petitioners herein. Admittedly the subject property is still left and needs to be partitioned. Hence, per bare reading of Will and Trust Deed, the petitioners need to be substituted as the legal heirs of late Dr. Shanta Sharma, as her left over assets need to be distributed amongst the petitioners only.

14. Qua validity of Probate attached to Apostille certificate, reference was made to Article 12 of Hague Convention concluded on 05.10.1961, which abolished the requirement of legalization for foreign public documents and it read as under:-

*“The States signatory to the present Convention,
Desiring to abolish the requirement of diplomatic or consular
legalisation for foreign public documents,
Have resolved to conclude a Convention to this effect and have agreed
upon the following provisions:*

Article 1

*The present Convention shall apply to public documents which have
been executed in the territory of one Contracting State and which have
to be produced in the territory of another Contracting State.*

*For the purposes of the present Convention, the following are deemed
to be public documents:*

- a) documents emanating from an authority or an official connected
with the courts or tribunals of the State, including those emanating
from a public prosecutor, a clerk of a court or a process-server
("huissier de justice");*
- b) administrative documents;*
- c) notarial acts;*
- d) official certificates which are placed on documents signed by
persons in their private capacity, such as official certificates recording
the registration of a document or the fact that it was in existence on a
certain date and official and notarial authentications of signatures.*

However, the present Convention shall not apply:

- a) to documents executed by diplomatic or consular agents;*
- b) to administrative documents dealing directly with commercial or
customs operations.”*

15. India has a treaty signed on 14.07.2005 with USA and it read as under:-

“1. Apostille:

*India, since 2005, is a member of the Hague Convention of October 5,
1961 that abolished the requirement of legalization of foreign public
documents. Apostille is acceptable in 105 member-countries of the
Convention (For more info please visit the website: www.hcch.net).
**Apostille is done for personal documents like birth/death/marriage
certificates, Affidavits, Power of Attorney, etc. and educational
documents like degree, diploma, matriculation and secondary level
certificates etc.** Any document Apostilled in one member country is
acceptable in all the other 104 member-countries, signatory to the
referred convention of 1961 thus greatly simplifying the process of
attestation by making it needless to get the documents attested in each
or for each of the countries separately.”*

16. If these *personal documents* cover the *probate* granted by a foreign Court, may have to be looked into by the learned Trial Court, but considering the Apostille Certificate attached to Will, Trust Deed and a probate, there is no reason why the application under Order XXII CPC filed by the petitioner be not allowed, though the effect of the probate granted, its legality, applicability need to be tested in trial, in accordance with law.

17. In view of above, the petition is allowed and impugned order dated 24.12.2018 passed by the learned Trial Court is set aside. Consequently, the application of the petitioner under Order XXII Rule 3 CPC stands allowed. The amended memo of parties be filed within four weeks with advance copy thereof to the learned counsel for the respondents.

18. Both the parties to appear before the learned Trial Court for further direction on 27.07.2019, the date already fixed. Copy of this order be communicated to the learned Trial Court for information and compliance.

19. No order as to costs.

YOGESH KHANNA, J.

MAY 29, 2019

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