

14.09.2023
Sl. No.60(DL)
srm

C.O. No. 515 of 2023

Sanmita Dutta

Versus

Jaya Mukherjee

Mr. M.P. Gupta,
Mr. Debajyoti Deb,
Mr. Somdyuti Parekh

...for the Petitioner.

Ms. Abhijit Ray,
Mr. Santu Nandy

...for the Opposite Party.

The revisional application arises out of an order dated November 24, 2022 passed by the learned Chief Judge, City Civil Court at Calcutta in O.C. Case No.11 of 2021, arising out of Probate Case No.39 of 2019.

The probate case became contentious. The petitioner contested the Will. The petitioner is the daughter of the alleged testator and the plaintiff/opposite party was the caregiver of the testator. The application for probate was filed by the opposite party with a copy of the Will, on the plea that the original Will dated April 3, 2018 had been illegally withheld by the petitioner and had been kept in her custody.

Specific pleading has been made in paragraph 8 of the plaint that the daughter of the testator/petitioner, bore a

grudge against the opposite party and started various legal proceedings against her. A writ petition being WP No.8481 (W) of 2019 had been filed. The said writ petition had gone against the opposite party and the opposite party preferred an appeal being MAT No.849 of 2019 before the Hon'ble Division Bench of this Court. The appeal was disposed of by an order dated June 27, 2019.

By an order dated November 16, 2021 at the time of hearing of an application for temporary injunction, the plaintiff was directed to produce the original Will with a further direction that the application for injunction would be decided upon production of the original Will. The plaintiff filed an application for recalling of the said order.

The defendant/petitioner also filed an application seeking dismissal and/or rejection of the proceedings. The ground for such claim was that the document which was annexed to the Will was not genuine. The same was inadmissible in law. It was impossible to verify the genuinity or the authenticity of the signature of the testator in the document. The document was manufactured and fabricated, being a photocopy of an alleged Will which was not in existence. The proceedings were not maintainable in view of the fact that the original Will, which ought to have been

annexed along with the application had neither been produced in court nor annexed to the application.

The learned court below, upon hearing the parties, rejected the application filed by the petitioner. The court held that the specific case of the plaintiff was that the Will was in the possession of the petitioner, which was being intentionally and illegally withheld by her. Upon consideration of Section 276, 237, 238 and 239 of the Indian Succession Act (hereinafter referred to as the said Act), the court was of the view that the proceedings could not be rejected at the threshold. An opportunity should be given to the plaintiff to prove the execution of the Will. Whether the Will had been misplaced or lost or was being withheld by the opposite party, were matters of evidence. Without evidence on such issues, it would not be proper for the court to reject the suit solely on the ground of non-production of the original Will. The court also recalled its own order dated November 16, 2021 by which the plaintiff was asked to produce the original Will.

Mr. Gupta, learned Advocate appearing on behalf of the petitioner submits that the probate proceedings should be nipped at the bud. Section 276 of the said Act was a mandate upon the propounder of the Will to produce the original Will along with such application. Such provision, not having been

followed, the suit was liable to be dismissed. Mr. Gupta further submits that the court had assigned no reasons at all for recalling its earlier order, by which the plaintiff was directed to produce the original Will. The application for recalling did not disclose any ground at all. The said application was a reiteration of the contentions of the plaintiff against the petitioner, which were already stated in the plaint case. Hence, in the absence of any pleading as to why the order should be recalled, the learned court below should not have recalled his own order.

Mr. Gupta further submits that power of recalling and review were the same. The grounds set forth in Order XLVII Rule 1 of the Code of Civil Procedure are also grounds for recall. Next, it is submitted that the decision in *Inderchand Jain (Dead) through LRS. Vs. Motilal (Dead) Through LRS.* Reported in (2009) 14 SCC 663 had settled the law on such point. There must be either mistake or error apparent on the face of record or discovery of relevant documents, which had come in possession of the party seeking review, after the order was passed. The same principle and was applicable in case of recall of an order. According to Mr. Gupta, no such case for recall, has been made out.

Further reliance has been placed on the decision of Ashish Dhiman & Anr. vs. State and Ors. (In Re: Special Leave to Appeal (Civil) No.26252/2008), in which the Hon'ble Apex Court had held that the provision of Section 276 of the said Act was unambiguous and when the original Will could not be produced despite several directions by the learned trial court, the application for acceptance of the same at a subsequent date was liable to be rejected.

Mr. Ray, learned Advocate appearing on behalf of the opposite party submits that the existence of the Will was mentioned before the High Court. The High Court recorded that a probate proceeding was pending. There was a complaint before the police authorities with regard to the alleged wrongful withholding of the Will. There were also proceedings against the opposite party in a criminal court initiated by the petitioner. The dispute with regard to the Will and right of user of the moveable and immovable property of the testator, had been continuing since long. The disclosure of the copy of the Will with the probate application was not an afterthought.

The order of the learned Single Judge in W.P. No.8481(W) of 2019, directing the Officer-in-Charge, Amherst Street Police Station to evict the opposite party from the property in question, was set aside and the Hon'ble Division

Bench directed that the ingress and egress of the petitioner would not be disturbed. The matter was remanded to the learned Single Judge for hearing, upon exchange of affidavits. The learned Single Judge, upon recording that an application for grant of probate of the Will was already pending, thought it inappropriate to intervene and pass further orders in the writ petition. The direction upon the Officer-in-Charge of the concerned police station to ensure free ingress and egress of the petitioner in respect of the property in question, was continued. It was not something which was manufactured or fabricated at a later stage. It is submitted the Section 276 of the said Act is subject to the provisions of Sections 237 to 240 of the said Act.

Considered the rival contentions of the parties. The issue to be decided in this revisional application is whether the learned trial judge should have dismissed the suit at its very inception, without proceeding with the evidence, or not. Mr. Gupta submits that the suit which could not succeed in the absence of the original Will, should not be allowed to be dragged unnecessarily. A suit which was bound to fail, should be nipped at the bud. Such contention of Mr. Gupta is not accepted by the Court at this stage as Section 237 of the said Act categorically provides that when a Will is lost or

misplaced since the testator's death or destroyed by wrong or accident, a probate can be granted on the basis of the draft of the Will or a copy of the Will which has been preserved, until the original or a proper authenticated copy thereof, is produced.

Section 238 provides, when a Will is destroyed or lost and no copy has been made nor a draft preserved, probate can also be granted if the contents can be proved on evidence. Section 240 of the said Act provides that letters of administration can be granted when no Will is forthcoming, but the court has reason to believe that the Will is in existence.

Under such circumstances, the above three provisions of law clearly indicate that Section 276 of the said Act is not a complete mandate upon the propounder of the Will to annex a copy of the original Will along with the application. In cases where there are specific pleadings that the Will is either lost or destroyed or is not in the possession of the propounder and even a copy has not been preserved, probate can be granted if the execution of the Will is proved by evidence. At the very inception of the suit, when the evidence has not been led, it will not be proper for the court to dismiss the suit. The affidavit of the defendant, that she did not have the original Will in her custody, cannot be adequate ground for dismissal

of the suit. The suit as it stands discloses a cause of action and is not barred by any law. It is not a suit in which the mandate of law has not been followed. The case has to be proved by the opposite party in evidence. The provisions of Section 267 of the said Act may also be invoked at an appropriate stage.

Under such circumstances laid down in Sections 237 and 239 of the said Act, the propounder is to prove the execution of the Will. If the propounder discharges such onus, it is for the defendant to prove that the Will was either not genuine and/or not executed by the testator or had been revoked.

Such, issues cannot be decided at the stage of hearing of the application for dismissal, without evidence proper evidence.

Reference to a decision of the Hon'ble Guwahati High Court in the matter of *Bhanvarilal Sharma vs Raj Kumar Sharma* reported in *AIR 2003 Gau 90*, is made. The relevant paragraph is quoted below:-

“9. Regarding the second point that the original Will was not filed before the District Judge at the time of presentation of the petition for Probate or thereafter. Under the provisions of Sections 237, 238 and 239. Probate may be granted and also an application for Probate may be filed even without filing the original Will. Here, in the present case Mr. Borah has submitted that the Original Will was lying with the respondent herein at the time when the petition for probate was filed before the District Judge. In such a case, under Section 267 of the Act, the one who is in possession of the Will and other testamentary papers may be directed by the Court to

produce the testamentary papers including the Will during the proceeding for grant of the Probate.”

The decision of the Hon’ble Apex Court in the matter of *Ashish Dhiman & Anr. (supra)*, is not applicable. When evidence was being recorded and the evidence of the respondent in a connected matter was complete, the appellant therein, filed an application for acceptance of the Will. The Delhi High Court rejected the prayer as several opportunities had been given but was not produced. SLP was preferred and the SLP was dismissed. The fact situation in the said decision was different as the evidence had been closed.

Under such circumstances, this Court does not find any reason to interfere with the order impugned. Secondly, the court rightly recalled its own order dated November 16, 2021 as the order was the result of an error arising out of a misconception of law. The direction for production of the Will at the time of hearing of the injunction application was contrary to the provisions of law, discussed hereinabove. Sections 237 to 240 of the said Act had been overlooked by the learned court below.

In the decision of *My Palace Mutually Aided Co-operative Society vs. B. Mahesh & ors.* decided in *Civil Appeal No.- 5784 of 2022* and in the matter of *Ram Prakash*

Agarwal vs. Gopi Krishan reported in (2013) 11 SCC 296, the Hon'ble Apex Court held that in the event a party had obtained a decree or order by playing fraud upon the court, or where an order had been passed by mistake of the court, the court would be justified in rectifying such mistake, either by recalling the said order or by passing any other appropriate order.

Under such circumstances, the order impugned does not call for interference.

As it is stated that the suit is at the stage of evidence, this Court directs the learned court below to dispose of the suit within a period of six months from the next date fixed, considering the peculiar facts of the case.

The revisional application is, thus, disposed of.

There shall be no order as to costs.

Parties are directed to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)