

29.08.2023

FA 113 of 2017

Court : 04
Item : 1143
Matter : FA
Status : OP
Bench ID : 266048
Transcriber : NANDY

Yash Vardhan Mall
Vs.
Tejash Doshi

Mr. Sabyasachi Chowdhury, Senior Advocate
Mr. Rajarshi Datta, Advocate
Mr. Subrata Das, Advocate

.....for the Appellant

Mr. Nirmalya Dasgupta, Advocate
Ms. Urmila Chakraborty, Advocate
Ms. Pritha Basu, Advocate
Mr. Debartha Chakraborty, Advocate
Ms. Patrali Ganguly, Advocate

.....for the Respondent

1. By an order no. 19 dated 17.04.2021 passed in Act XXXIX Case No. 27 of 2015, the application for probate was dismissed on an application taken out by the respondent no. 1 under Section 151 of the Code of Civil Procedure.
2. The application for probate was taken out by the appellant concerning the Will and testament executed by testatrix on 01.03.2013 which was registered on 22.05.2013. The testatrix left behind her husband and two minor daughters. The said Will contemplates that her husband, the respondent shall act as an executor and trustee of the said Will and in the event, the said respondent is unable to carry out or act as a sole executor, then the appellant can act as a sole executor. The application contains the averments that the respondent is reluctant in taking the probate of the said Will and, therefore, such application is taken out by the appellant as an executor in terms of the directions contained in the said Will.
3. The respondent took out an application under Section 151 of the Code for dismissal of the said application on the premise that the said Will dated 01.03.2013 is not a last Will and testament of the testatrix; and in fact;

subsequent Will was executed by her on 22.04.2013 and the application does not have any reference in this regard. It was also averred that an application for probate being PLA 123 of 2016 is filed by the respondent before this Court for grant of probate of the said Will and the same, having converted into a contentious cause at the behest of the appellant is *sub-judice*.

4. The Court below on the basis of the aforesaid facts admits the said application for probate having filed in relation to a Will and testament dated 01.03.2013 which according to the learned Judge is not a last Will and testament of the testatrix.
5. The aforesaid narration of the facts as unfurled, revealed that the probate filed at the instance of the respondent is converted into a contentious cause and we are given to understand that the recording of evidence of the respective parties are in progress.
6. Obviously, the moment the challenge is made to the purported Will dated 22.04.2013, unless the adjudication is made with regard to its genuinity, authenticity and the capacity of the testator to execute the same, it would not be regarded as last Will and testament. Furthermore, in the event, the objection is sustained then the Will for which the instant application for probate is filed, shall be regarded as last Will.
7. We are not unmindful of the proposition of law that there is no fetter in law to revoke, cancel or supersede the Will executed earlier by executing a subsequent Will and the law does not act as deterrent in upholding the last cherish and desire of a person.
8. We do not think that the course adopted by the Trial Court in rejecting an application for probate is a proper

mode as the objector may emerge successful in contesting the probate proceeding, shall be bound to file a fresh application for probate on the basis of the same facts which will only give a new get up to the existing litigation. We are also not unmindful of the proposition of law relating to the stay of a proceeding filed later but such Rule cannot have a rigid application as in attending circumstances the Court may invoke an inherent power to stay an earlier proceeding *ex debito justitiae*.

9. In view of the above, the order impugned dated 17.04.2017 is modified to the extent that in view of the dismissal to the proceeding i.e. Act XXXIX Case 27 of 2015, it shall remain stayed until the final adjudication is made in PLA 123 o 2016 filed by the respondent.
10. With these observations, the appeal being **FA 113 of 2017** is **disposed of**.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)

