
**Mr. Probal Kumar Mukherjee,
Mr. Suhrid Sur.**

... for the appellant.

**Mr. Shyamal Chakraborty,
Mr. Bhaskar Chakraborty,
Mr. Debajyoti Mondal.**

... for the respondents.

Both the appeals are taken up together in order to avoid the prolixity of repetition of the facts involved in the case.

FMA 576 of 2024 is filed by the common appellant assailing an order by which an application for temporary injunction is rejected and FMAT 128 of 2024 is filed assailing an order by which Order XXXIX Rule 4 of the Code of Civil Procedure was allowed vacating the ad interim order of injunction passed in connection with the probate proceeding.

An application for probate was taken out by the appellant as an executor to the Will, which was apparently registered before the Registering Authority. The testator conveyed his last wish and desire and/or intention to distribute his properties in favour of the persons named therein to the extent, which is also indicated.

A caveat is lodged by the heirs of the pre-deceased son of the testator and an affidavit in support of an objection to grant a probate is also filed and it is not in dispute that the probate proceeding is converted into a contumacious cause.

Amidst the pendency of the said application for probate, an application for temporary injunction was taken out alleging that the objectors are dealing with the

properties and also threatening to dispossess the appellant. As a resultant effect, it created an impasse in managing the properties being the subject matter of the estate left by the said testator.

It is further alleged that the respondents are selling out the properties and also changing the nature and character thereof and, therefore, unless some protection is granted, the property may be dissipated and/or interfered with and it is the duty of the executrix as well as the Court to protect the same.

On the backdrop of the aforesaid facts narrated in an application for temporary injunction, an ad interim order of injunction was passed against the contesting respondents from transferring the properties forming the estate of the testator or any part thereof, for a specified period. It is also not in dispute that the said ad interim order of injunction is extended from time to time until the contesting respondents chose to seek for variation/vacation and setting aside the said ad interim order of injunction by filing a substantive application under Order XXXIX Rule 4 of the Code.

The sum and substance necessitating the filing of an application under Order XXXIX Rule 4 of the Code is succinctly adumbrated therein to the effect that the testator had included certain properties in excess of what he owned and possessed on the date of alleged execution of the registered Will.

It is further contended that under the Mohammedan Law, a person who professes Islam cannot divest his properties in excess of 1/3rd share and having done so, the Court must take into account the aforesaid facts while granting the ad interim order of injunction in respect of the estate shown in the affidavit of assets as well as the Will. It is also contended that the Will has not been executed strictly in terms of Section 63 of the Indian Succession Act, as it has not been attested by two or more persons. The allegation proceeds further to the

effect that the appellant is forcibly collecting the entire interest and usufruct of the properties mentioned in the affidavit of assets when the testator himself was not an absolute owner thereof. It is further alleged that the appellant being the resident of United States of America has no capacity to administer the estate of the deceased.

A further plea is taken that the said testator during his lifetime executed an oral hebanama, which was subsequently declared in writing in favour of the daughter in-law and, therefore, such property cannot be included and/or shown to be the property of the testator in the purported Will for which an application for probate is filed.

The Trial Court proceeded to allow the said application firstly on the ground that under the Mohammedan Law, bequeath by way of testament disposition is restricted to 1/3rd share of the entire estate and not beyond that. The Trial Court further proceeded on the premise that the purported Will was executed without taking the permission and/or consent of two daughters and the LRROR stands in the name of some of the objectors, which evidently shows that those properties were gifted by the testator and, therefore, cannot form the subject matter of the Will. The Court arrived at the conclusion that certain properties, which the testator does not own and possess having divested during his lifetime in favour of the objectors or some of them, therefore, an injunction cannot be passed against the said objectors.

What it appears from the tenet of the impugned judgment that the Probate Court has ventured to embark its journey on the peripheral of the prima facie title and the testamentary disposition beyond the specified share restricted under the Mohammedan Law.

It is no longer *res integra* that the Probate Court cannot enter into the title of the parties in respect of the properties nor can decide the same. The Probate Court

cannot travel beyond the peripheral of its domain, which is restricted. The genuinity and authenticity of the Will is sought to be probated. It is no gain saying that mere grant of probate does not confer title into a person nor takes away the title and there is no fetter on the part of the parties to approach the regular Civil Court for declaration of their title even if it forms part of the Will or the affidavit of assets filed by the propounder of the said Will.

Though the provision relating to temporary injunction under the Code has its applicability when the same is sought for yet the Court exercising limited jurisdiction should not transgress the peripheral of such jurisdiction in deciding the application for temporary injunction. The restriction under the Mohammedan Law with regard to the extent of disposition does not come within the ambit of jurisdiction of the Probate Court as it impinges upon the divestation of right, title and interest in accordance with the provisions of the said law, which can be decided in a regular civil proceeding.

The Probate Court being the Court of conscience simply authenticates the Will and its genuinity, no further or beyond. Though the grant of probate is in rem but it is perceived in relation to a Will and can never be construed to have conferred any title into a person nor extinguishes the same. The Will has another mode of disposition affecting the normal rule of succession and in the event the dispute as to the title is raised, it would not be proper for the Probate Court to decide the same; either at an interlocutory stage or at the time of final hearing of the said proceedings.

The Probate Court enjoins power to protect the estate and to see that it is not diminished or dissipated in course of such proceedings and we do not find any obstacle on the part of the Probate Court in exercising the equitable jurisdiction to protect the properties to be interfered with until the final decision is taken

thereupon.

It is sought to be contended before us that if a question as to the effect of the hebanama executed by the testator during his lifetime is raised, the Court should not shirk its eyes to the aforesaid fact and proceed to pass an order of temporary injunction in respect of the properties, which the testator did not possess and/or own at the time of execution of the Will.

As indicated above, a distinction is to be drawn between an existence of prima facie case and prima facie title. While dealing with an application for temporary injunction, the Court restricts its consideration on the existence of prima facie case and does not decide a prima facie title. While ascertaining the existence of a prima facie case, it appears from the record that the Will, which is registered, contains an exhaustive description of the property, which the testator declares to have owned and possessed as on the date of its execution. It does not appear from the stand of either of the parties that the injunction is sought in respect of the properties, which is not included in the Will and, therefore, the moment the testator has disclosed the properties being the subject matter of the said Will, it is an onerous duty of the Court as well as executrix to protect the same until the final cause is determined by the Court.

Section 211 of the Indian Succession Act postulates that on the death of a testator, the executrix is regarded as his legal representative for all intent purposes and various provisions contained in the Indian Succession Act create a duty on the executrix to act on the basis of the last wish and desire of the testator and also to protect the properties forming the subject matter of the probate application.

It is beyond the conceivable competence of the Probate Court to enter into the title in respect of the properties forming part of the Will and, therefore, any attempt to travel beyond the competence and jurisdiction

so conferred is always regarded as an exercise of power in excess of the jurisdiction or in other words acting in absence of the jurisdiction so conferred, which cannot be said to be valid and legal in the eye of law.

Whether the testator has an absolute capacity of disposal of the properties beyond 1/3rd share cannot form a subject matter of probate proceedings. Another question, whether the hebanama was executed by the testator during his lifetime, more particularly, before the execution of the Will is another question, which impinges upon the title and/or capacity to alienate, which also cannot come within the circumference of the jurisdiction exercised by the Probate Court.

We are conscious that even if the probate is granted, there is no fetter on the part of the parties to approach the Civil Court for declaration of their title for the simple reason that the Probate Court exercises limited jurisdiction and, in unequivocal terms, does not possess the power to decide the title of the parties. The Trial Court has proceeded on a terrain, which is beyond the conceivable limits and the jurisdiction set up for the Probate Court and, therefore, we cannot countenance to the views so expressed in the impugned order.

The manner in which an application under Order XXXIX Rule 4 of the Code is decided is not acceptable nor in consonance with the law enunciated in this regard and, therefore, needs interference.

The order no. 20 dated 16th March 2024 passed in OS (Will) No. 10 of 2023 by the learned District Judge, Purba Bardhaman, is hereby set aside.

Since the application for temporary injunction was dismissed solely on the ground that the ad interim order has been vacated on an application under Order XXXIX Rule 4 of the Code and, therefore, the injunction application is liable to be dismissed.

Since we have held that the order allowing the application under Order XXXIX Rule 4 of the Code is not

in tune with the law applicable in this regard and having set aside the same, the order dismissing the application for temporary injunction is also set aside.

Both the Counsels for the parties submits that in view of the setting aside of the order passed on an application under Order XXXIX Rule 4 of the Code, there is no question of re-hearing of the application for temporary injunction as the temporary injunction was restricted to the alienation and/or encumbrance of the properties being the subject matter of the probate.

In such view of the matter, the application for temporary injunction is disposed of restraining the respondents from alienating, transferring and/or dealing with the properties being the subject matter of the probate proceedings till the disposal of the application for grant of probate.

We, therefore, request the learned District Judge, Purba Bardhaman, to make endeavour to dispose of the proceedings as expeditiously as possible preferably within six months from the date of communication of this order.

It goes without saying that the learned District Judge may refuse unnecessary adjournment to either of the parties except one necessitated by unforeseen and unavoidable circumstances. It also goes without saying that the findings made on the application for temporary injunction are mere tentative and do not have any persuasive impact at the time of deciding the proceeding finally.

With these observations, the appeal and the connected application being CAN 1 of 2024 are disposed of.

There shall, however, be no order as to costs.

(Harish Tandon, J.)

(Madhuresh Prasad, J.)

