

(2016) 01 P&H CK 0402
In the Punjab And Haryana At Chandigarh
Case No : Civil Revision No. 7513 of 2014

Avtar Singh Bains

APPELLANT

Vs

Gurdev Kaur and Others

RESPONDENT

Date of Decision : 20-01-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13
Evidence Act, 1872 — Section 41, Section 65, Section 68
Succession Act, 1925 — Section 213, Section 228, Section 237, Section 247, Section 263, Section 270, Section 43, Section 57, Section

Citation : (2016) 162 AIC 611 : (2016) 2 ICC 228 : (2016) 1 LawHerald 567 :
(2016) 2 PLR 508 : (2016) 4 RCRCivil 583

Hon'ble Judges : K. Kannan, J.

Bench : Single Bench

Advocate : C.L. Verma and Aditya Dassaur, Advocates, for the Appellant; Sunil Chadha, Senior Advocate and Kirpal Singh, Advocate, for the Respondent

Final Decision : Allowed

Judgement

K. Kannan, J.—I. Order de-exhibiting a Grant of Probate by foreign court- point of contention

1. The revision petition is against the order passed by the trial court de-exhibiting a document already admitted into evidence. The exhibit was a copy of letter of administration by the Supreme Court of British Columbia, Canada allowing for the copy of the Will to be produced for the purpose of litigation in India. The Will was purported to have been executed by the father of the plaintiff, Shri Chahan Singh Bains. An objection taken by the defendants was that the Will could not have been admitted into evidence without putting it through a rigmarole of proof as rejected under Section 68 of the Evidence Act. The court accepted it and directed the document to be de-exhibited.

II. Effect of Probate issued in a foreign country-petitioner's contention

2. The revision is brought by the plaintiff contending that a probate issued is a

judgment in rem under Section 41 of the Evidence Act and a copy of the Will produced under the order of the court through a letter of administration issued is bound to be acted upon by the court in India and there is no compulsion for proof of the Will again in terms of Section 68 of Evidence Act. The counsel would read me through the provisions of Section 41 of the Evidence Act to contend that the expression "court" used under the said provision would include a foreign court of competent jurisdiction as well. The counsel would refer me to the decision of the Supreme Court in Ashok Layland Limited Versus State of T.N. and another- AIR 2004 (SC) 2836 that has held that in the rule of evidence the proof of certain facts cannot be brought to challenge that includes conclusiveness of the grant as contemplated under Section 41 of the Evidence Act. To the same effect is the judgment of the Supreme Court of India in Surinder Kumar and others Versus Gian Chand and others-, AIR 1957 (SC) 875 that a person in whose favour a probate is issued must be presumed to have obtained it in accordance with the procedure prescribed by law and that it is a judgment in rem. The Bombay High Court in Devika Damji Shah Versus Rashmi Mukesh Shah and another- , 2012(5) ALL MR 547 has considered the effect of a probate issued by a foreign court and the Bombay High Court was holding that such a grant will be tested through the prism of Section 13 of the Civil Procedure Code.

III. Objection raised: Probate of foreign country conflicts with Indian law

3. There, therefore, is the point of contention taken by the respondent that Section 13 which declares a foreign judgment to be conclusive marks exceptions and to our case for application, the learned senior counsel Shri Chadha refers me to clauses (b) and (f) which read as under:-

"(b) where it has not been given on the merits of the case."

"(f) where it sustains a claim founded on a breach of any law in force in India"

The contention by the learned counsel is that the order issuing the Probate is not on merits and the point is not in accordance with Indian law.

IV. Examination of the features of the grant in the foreign country

4. A document which is put in court and on the basis of which a foreign judgment has been delivered would require to be examined. The certified copies of court orders have been presented before me and they would show that the order that was passed by the Supreme Court of British Columbia was issued as "in probate consisting the estate of Chanand Singh Bains." who died on 30th July, 2009 at Surrey, British Columbia. The grant has been made on 3rd September, 2013 that makes reference to the grant as issued to Kulvinder Bains and George Benning as joint Administrators and refers to this order as in continuation of the order dated 30th August 2013 and "until original Will or a more authentic copy thereof be brought into and left in the Registry." It is accompanied with a copy of the Will said to have been executed by Mr. Bains (deceased). This order reads that temporary grant was issued to Kulvinder Bains for the sole purpose of presenting

the Will of December 10, 2004 into evidence at a court proceeding in India and for all purposes ancillary thereto. This procedure is the provision for issuing a grant for the purpose of litigation and it is also incidentally available under Section 247 of the Indian Succession Act that allows for a grant to be issued for the purpose of litigation.

5. The order dated 30th August, 2013 is preceded by an order dated 27.08.2013 where the first order is issued on the application of Avtar Singh Bains which reads that the letter of administration with copy of the Will dated December 10, 2004 annexed was being issued on ".....hearing David A. Hunter, counsel for the Applicant, and Terence W.T. Yu, counsel for Garry Manpreet Grewal, Jasbir Kaur Grewal and Gurdev (Debo) Kaur Benning, and nobody appearing for Balbir Kaur Bhullar, Jagiro Kaur Bath, or Belhar Singh Bains, although duly served." The grant which is issued is, therefore, followed up with two orders: one, a letter for the purpose of producing a copy of the Will in court for litigation and another, a limited grant that was issued till the production of the original or a more authentic copy.

V. Grant on production of copy of the Will is possible in India and not in conflict with Indian law

6. The process of grant of a letter of administration in India is similarly possible even on production of only a copy which is called as a limited grant as contemplated under Section 237 of the Indian Succession Act. The said provision reads as under:-

"237. Probate of copy or draft of lost Will.-When a Will has been lost or mislaid since the testator's death, or has been destroyed by wrong or accident and not by any act of the testator, and a copy or the draft of the Will has been preserved, probate may be granted of such copy or draft, limited until the original or a properly authenticated copy of it is produced."

If the limited grant in this case has been issued and the grant records the fact that notice has been served on two persons who are the defendants in the suit, then it would show that the order has been passed by the court in the manner that the law provides for and in the manner that this court would recognize as conclusive. The exception made that it has not been given on the merits of the case must be understood from the reading of 3 orders together. The foreign judgment that issues a grant begins with a letter of administration issued after service of notice to the respondents and the subsequent order dated 30th August, 2013 merely refers the fact of an order already passed and a copy of the Will made available for the purpose of litigation. This order passed is consequential to the earlier order passed on the notice and, therefore, this order authorizing the production of a copy ought not to be taken in isolation to contend that it is not an order on merits.

7. The further argument that this order also flouts a claim founded on a breach of any law in force in India has no meaning, for, there is no law which is

breached here. There is no law even in India that a copy of the Will cannot be accepted by court for issuance of a letter of administration. I have extracted the Section 237 of the Indian Succession Act to show that it is possible for a court to issue a grant which will be limited as to the time when the production of the original is made. Till such time as the original is produced, the copy itself can be acted upon. The Indian Evidence Act does not abhor a secondary evidence at all times. It sets out 7 circumstances (a) to (g) under Section 65 of Evidence Act. Loss of original or the Will being mislaid are circumstances when the secondary evidence is permissible. I have already referred to the decision of the Supreme Court in *Ashok Layland Limited* (supra) that any order of foreign court of what the grant declares must be taken to be conclusive of what it states. If foreign judgment reads that the party has been served with notice and after the grant, it also says that it was being issued till the original was produced, then it will be begging the question to ask that the original has not been produced and that conflicts with some rule of procedure in India. The circumstances set out for issuing a grant on the basis of a copy itself are sufficient vindication of the fact that the court has found a justification for reception of secondary evidence for issuance of a grant.

VI. Rule of Private International Law stated

8. The rule of private international law enjoins that the law of domicile will govern the issue of grant. In England, the Wills Act, 1963 lays down nationality and habitual residence as governing consideration regarding the formalities of execution of a Will. It provides under Section 1 that, "a Will shall be treated as properly executed, if its execution conforms to the internal law in force in any one of the following territories:-

"(a) The territory where the Will was executed, even if the testator was on a temporary visit.

.....

(b) The territory where the testator was domiciled either at that time of making the Will or at death.

(c) The territory where the testator was habitually resident either at the time of making the Will or at death.

(d) The State of which the testator, either at the time of making the Will or at death, is a national."

In Canada, Section 129 of the Wills & Succession Act (infra) makes domicile as the relevant consideration for application for probate. In India also, under Section 57 of the Indian Succession Act makes domicile as the relevant consideration for testing the formal validity of the Will and Section 270 of the Act directs the Court of jurisdiction for the grant to a person who is ordinarily resident or where the Will was executed.

VII. Relevant provisions of Province of British Columbia reproduced for comparison

9. The foreign judgment relied on by the plaintiff in a Court of India is bound to be accepted as a measure of comity of nations and it can be assailed only if the court refers the finding that there were any of the circumstances mentioned under Section 13 under the exception delineated under the said provision. In *World Sport Group (Mauritius) Ltd. Versus MSM Satellite (Singapore) Pte. Ltd.*, (2014) 11 SCC 639, LNIND 2014 SC 43, the Supreme Court recounted Black's Law Dictionary meaning for the expression, "The principle in accordance with which the Courts of one State or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect. Thus, what is meant by the principle of comity is that courts of one State or jurisdiction will give effect to the laws and judicial decisions of another State or jurisdiction, not as a matter of obligation but out of deference and mutual respect." For our purpose, the learned counsel was referring to two circumstances both of which I have considered above.

10. The learned senior counsel for the respondents states that the decision of Bombay High Court in *Devika Damji Shah* (supra) itself refers to the fact that if any foreign judgment refuses to recognize the law in India, it would be taken as in breach of Section 63 of the Indian Succession Act. Section 63 of the Indian Succession Act requires the Will to be executed by a person in a sound disposing state of mind and attested by two persons. Unless the person who wants the foreign judgment to be discarded has an argument that the law of Canada is at variance with Indian law and there is no requirement of proof of attestation of a Will by two persons, I cannot infer a breach. The law of Canada as applicable to the Province of British Columbia reads as under:-

"WILLS, ESTATES AND SUCCESSION ACT (SBC 2009) CHAPTER 13 How to make a valid Part 4-Wills Division 1-Making a Will Will (Execution of Will)

Who can make a Will

36 (1) A person who is 16 years of age or older and who is mentally capable of doing so may make a Will.(2) A Will made by a person under 16 years of age is not valid.

37 (1) To be valid, a Will must be (ATTESTATION OF A WILL)

(a) in writing,

(b) signed at its end by the Will-maker, or the signature at the end must be acknowledged by the Will-maker as his or hers, in the presence of 2 or more witnesses present at the same time, and

(c) signed by 2 or more of the witnesses in the presence of the Will-maker.

(2) A Will that does not comply with subsection (1) is invalid unless

- (a) the court orders it to be effective as a Will under Section 58(court order curing deficiencies),
- (b) it is a Will recognized as valid under Section 80 (validity of Wills made in accordance with other laws), or
- (c) it is valid under another provision of this Act.

Witnesses to Wills

40 (1) Signing witnesses to a Will-maker's signature must be 19 years of age or older.

(2) A person may witness a Will even though he or she may receive a gift under it, but the gift may be void under Section 43 (gifts to witnesses).

(3) A Will is not invalid only because a witness was, at the time the Will was signed by the Will-maker, or afterwards became, legally incapable of proving the Will, unless the witness was not 19 years of age or older at the time the Will was signed by the Will-maker."

I have also seen the provisions for issue of probate in the Province of British Columbia. The relevant provisions are:-

Division 3- Application for Grant of Probate or Administration Notice of proposed application for grant of probate or administration.

121. (1) An applicant for a grant of probate or administration must give notice of the proposed application to the persons referred to in the Supreme Court Civil Rules.

(2) An applicant or personal representative who, in accordance with the Supreme Court Civil Rules, makes reasonable efforts to discover the existence, identity or whereabouts of persons to whom the notice under subsection (1) is required to be given, but is unsuccessful, is not liable for any loss or damage arising from not giving the required notice except for claims to recover property or enforce an order under Division 6 (Variation of Wills) of Part 4 (Wills)

Division 4- Grant of Probate or Administration Grant of probate or administration

129 (1) The court may grant probate of a Will or administration of an estate for general, special or limited purposes on proof

(a) of the validity of the deceased person's Will or that the deceased person died without a Will, and

(b) that the deceased person was ordinarily resident or domiciled

(i) in British Columbia at the time of his or her death,

(ii) outside British Columbia at the time of his or her death and left property in British Columbia, or

(iii) outside British Columbia at the time of his or her death and the personal representative will be a party to a proceeding commenced in British Columbia.

(2) The court may grant probate of a Will or administration of an estate even though the deceased person was not ordinarily resident or domiciled in British Columbia at his or her death and left no property in British Columbia.

(3) The Registrar of the court may grant probate of a Will or administration of an estate for general, special or limited purposes in the circumstances described in subsections (1) and (2) if the application for the grant of probate or administration is

(a) unopposed, and

(b) made in accordance with the applicable Supreme Court Civil Rules."

The extract of the above provisions will show that there is no major conflict with the provisions of British Columbia as regards execution, and attestation, except the age of the executant and as regards the procedure for obtaining grant.

VIII. Is ancillary grant necessary for a grant obtained in a foreign country for Punjab?

11. There is a contention that the letter of administration obtained as regards a will has not been made the basis for taking letters of administration in India as required under Section 228 of the Indian Succession Act. The said section reads thus:

"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 India and a properly authenticated copy of the will is produced, letters of administration may be granted with a copy of such copy annexed."

This provision sets out the scope and feasibility for a person who has secured the grant by producing in a foreign country to apply with the authenticated copy in India in a court of competent jurisdiction and obtain a grant of letters. The court in India may grant letters and the expression "may" admits of an interpretation that the court has a discretion to either grant or reject it. The issue of a letter of administration to a grant made of a will in a foreign country is mandatory or a facilitative provision shall be required to be examined in the context of other provisions under the Indian Succession Act.

12. The requirement of probate or letters of administration is mandatory in the following situations:-

"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.

(2) This section shall not apply in the case of wills made by Muhammadans or Indian Christians, and shall only apply-

(i) in the case of wills made by any Hindu, Buddhist, Sikh or Jaina where such wills are of classes specified in clauses (a) and (b) of Section 57, and

(ii) in the case of wills made by any Parsi dying, after the commencement of the Indian Succession (Amendment) Act, 1962, where such wills are made within the local limits of the ordinary original civil jurisdiction of the High Courts at Calcutta, Madras and Bombay, and where such wills are made outside those limits, in so far as they relate to immovable property situate within those limits."

In other words, in respect of Wills executed at places which fall within the original jurisdiction of High Courts of Calcutta, Madras and Bombay or when the properties covered under the Wills are situate within the jurisdiction of the above courts, there is a mandate to have the Will probated or letters of administration obtained.

13. The issue of probate or letters of administration is optional for the rest of India by the restrictive operation of Section 213 of the Indian Succession Act referred to above. The effect is twofold: For persons who are mandated to secure the grant under Section 213, a resort to grant under Section 228 of the Act for a foreign grant is mandatory. In *Alagammal and others Versus Rakkammal*-AIR 1992 Mad 354, the Madras High Court came to such a conclusion by a combined reading of the above two provisions for a person whose properties were situation within the original jurisdiction of Madras High Court. No probate or Letters is necessary in the case of Wills made by Hindus of Punjab and of properties situated in Punjab (*Sohan Singh Versus Bhag Singh* , AIR 1934 Lah 599; *Ram Chand Versus Sardar Singh* , AIR 1962 Punj 382) and consequently, the grant of probate issued by a foreign court to operate in India will be tested only through Section 13 of CPC and Section 41 of the Evidence Act, the exercise which we have undertaken. Before concluding this issue, I must record a view expressed by the High Court of Lahore, the principle of stare decisis of which court is applicable to the Punjab & Haryana High court as its successor court, in *Ramlal Versus Chanan Dass*-1938 (40) PLR 1064. The Court has held that the real object of Section 228 is to dispense with the production of the original owing to its having been deposited in some other court. The section is merely an enabling section and if the court considers that there is a question to be decided relating to the validity of the Will, such as the power of the testator to make a Will, etc, the court is bound to try that question before enabling the executor to act under the Will. To our purpose in this case, there is no issue that the father had no power of disposition under the will. Indeed, the issue of title is irrelevant to grants and I will not use the cautious rider that the earlier decision of the Lahore Court alludes to.

IX. Dispensation

14. It will be a travesty to put the party through a necessity of having to prove the Will again under Section 68 of the Evidence Act. If the defendants are aggrieved by the grant, they may resort to such action as it is possible to apply to the foreign court for revoking the grant in the manner similar to the procedure prescribed under Section 263 of the Indian Succession Act.

15. The order already passed is set aside and the revision petition is allowed. The grant of Probate with copy of Will is directed to be retained in evidence as proof of what it states. The grant will have other limitations as conventionally understood in India, viz., that a grant does not decide title of the testator to the property.