

(2019) 08 DEL CK 0282

In the Delhi High Court

Case No : Regular Second Appeal No. 134 Of 2016, Civil Miscellaneous
Application No. 18557 Of 2016

Bhim Sain (Since Deceased) Thr Lrs & Ors

APPELLANT

Vs

Mohinder Kumar (Since Deceased) Thr Lrs & Ors

RESPONDENT

Date of Decision : 08-08-2019

Acts Referred:

Limitation Act, 1963 — Article 58

Citation : (2019) 08 DEL CK 0282

Hon'ble Judges : Yogesh Khanna, J

Bench : Single Bench

Advocate : Rohan Dewan, K.Venkatraman, D.K.Chawla

Final Decision : Dismissed

Judgement

Yogesh Khanna, J

1. This is an appeal against the judgment passed in RCA No.8/2013 dated 19.12.2015. The appeal was dismissed while upholding the judgment dated 22.05.2013 passed in Civil Suit No.1412/2011.

2. The dispute is qua house property bearing No.4-E/164, Amar Colony, Lajpat Nagar, New Delhi. This property was in the name of Late Roop Chand s/o Shri Roop Lal, resident of Multan District in Pakistan.

2. It was alleged by the appellants that Roop Chand migrated to India and had married twice during his lifetime. From his first wife, he has one son Bhim Sain (since deceased - the appellant herein) and from his second wife he had four sons (including the respondent herein) and three daughters.

3. It was alleged Roop Chand had migrated to Delhi and in lieu of the his ancestral property left by him in Pakistan, he was given a claim by Rehabilitation Department, Government of India, which was adjusted against the price for purchase of various properties, including the subject property.

4. On 02.02.1982, Roop Chand had executed a Will bequeathing the above house to Shri Mohinder Kumar describing it to be self-acquired property. It was noted in the WILL that Mohinder Kumar had helped him and had contributed money to purchase the vacant plot bearing No. 4-E/164, Amar Colony, Lajpat Nagar, New Delhi. On 23.03.1982, Roop Chand had executed yet another Will. In July, 1986, the probate was granted in respect of the Will dated 28.03.1982 and then in the year 1987, a suit for declaration was filed stating inter alia the Will dated 28.03.1982 be declared as null and void as Late Roop Chand had no authority to execute any Will in respect of ancestral property viz property bearing No. 4-E/164, Amar Colony, Lajpat Nagar, New Delhi.

5. In the suit, the appellant had alleged the cause of action arose on 30.07.1986 when the District Judge, Delhi had granted probate of Will dated 23.03.1982 without going into its legality. Admittedly, the appellant had come to know of the Will dated 26.03.1983 on receipt of the summons of probate case, served upon him. However, he filed this suit on 01.09.1987 on the premise the limitation would start from 30.07.1986 when the probate was granted in the present case.

6. The trial court held Suit No.1412/2011 was time barred. It observed:-

"40. In the present case it is the contention of the plaintiff that the suit was not filed as the defendants had filed a probate petition which was pending and was granted only on 30.07.1986. I am not convinced with the arguments and contentions raised on behalf of the plaintiffs for the reason that Civil Court only possess the jurisdiction with respect to the question as involved in the present suit that whether the late father of the parties had the right to execute a will in respect of the ancestral property i.e. the testamentary capacity. The plaintiffs have relied upon Talat Parveen Naqvi Vs DDA 163 (2009) DLT 622, Ravi Khanna Vs. Pankaj Khanna & Ors 152 (2008), DLT 484 and Anita Khosia Vs. State & Ors. 173 (2010) DLT 290. In these rulings it has been held that Probate Court only determines genuineness of Will and grant of probate does not confer any title. Thus these citations in fact goes against the plaintiffs as he could not keep on waiting after knowing about the Will and speculating the result of the probate petition. The probate Court only determines the genuineness of a Will and a grant of probate does not confer any title on the person in whosoever favour probate is granted. It is therefore that the title of the property in favour of the legator has to be established independent of the will, before legatee can claim any right under a Will. Further, it is also noted that the judgment dt. 17.04.1986 rendered in the probate case no. 70/83 nowhere decides the issue as to the testamentary capacity of the testator i.e. Sh. Roop Chand. Thus, the issue involved in the present suit could have been decided only by the Civil Court and therefore the only remedy available to the plaintiffs was to file the present suit within the period of limitation as prescribed under Article 58 from the date of knowledge of the Wills in question and they cannot derive any benefit by raising contention that since probate case was filed by the legatees i.e. the defendants and therefore the plaintiffs awaited for the result of the same and thereafter filed

the present suit. This contention is also absurd in itself for the reason that even the plaintiffs are not accepting the probate granted in favour of the defendants and have challenged the Will by way of the present suit for declaration seeking to declare the Wills in question as invalid, illegal and void and also for injunction restraining defendant no. 1 from taking any benefit on the basis of the probate granted.

42. Even the plaintiff/ PW-1 in his cross-examination dt. 16.09.2002 at page 1 admitted of having received the summons of the probate case In the year 1983 I.e. on 26.03.1983. It Is thus clear from the above testimony that the plaintiff came to know about the WIII In the year 1983, while the present suit has been filed on 01.09.1987 which Is beyond the period of three years as per Article 58 of the Limitation Act as computed from the year 1983. Thus, the relief of declaration "that the Will dated 02.02.1982 and 28.03.1982 executed by late Sh. Roop Chand are invalid, illegal, void having no sanctity and he had no authority to dispose off the ancestral properties consisting of H. No.4-E/164, Amar Colony, Lajpat Nagar, New Delhi is barred by time.

43. Along with the above declaration, the prayer clause of the plaint, in continuity, also seeks the declaration that "the money in his almirah and in his account in Canara Bank, New Delhi, which is the sale proceeds of property no. E/185, Lajpat Nagar, New Delhi, and other assets, ornaments, house hold goods by Will....". Thus, this declaration is with regard to the property no. E/185 that the money in the almirah of late Sh. Roop Chand and in his account in Canara Bank are the sale proceeds of the said property. In this regard, it is seen that the said property no. E/185 was sold by late Sh. Roop Chand to Sh. Sant Ram Malik in the year 1976. The plaintiff/ PW-1 in his cross-examination dt. 13.09.2001 at page 1 has admitted to the suggestion that he did not take any action when his father sold the property no. E-185, Lajpat Nagar. His suggestion shows that the plaintiff had knowledge about the sale of property when it took place in 1976. From the above it is clear that the present suit is barred by time in respect of the above relief also. This issue no. 9 is accordingly decided against the plaintiff and in favour of the defendants."

7. The appellant went in appeal in RCA No.8/2013 and the learned ADJ also had the same view and observed in his judgment dated 19.12.2015 as follows:-

"9. It is not in dispute that Sh.Roop Chand had executed the Wills dated 02.02.1982 and 28.03.1982. It was also not disputed by the Ld. Counsel for appellant that a probate petition was filed by defendant no.1 which was granted by Ld. District Judge on 30.07.1986 in respect of Will dated 28.03.1982. On the basis of evidence of parties, Ld. Trial Court had held that cause of action first arose in the year 1983 as PW1 admitted during his cross examination that he came to know about the Will in the year 1983. Further, PW1 also admitted during his cross examination that the summons of the probate case were received on 26.03.1983. It is an undisputed case that plaintiffs/appellants came to know about the execution of the Will by Late Sh.Roop Chand in the year 1983.

10. The stand of the appellants/plaintiffs counsel is that cause of action arose when the probate was granted by Ld. District Judge on 30. 07.1986 whereas as per the defendants/ respondents, the cause of action arose when the appellants/ plaintiffs came to know about the Will i.e. in the year 1983 and more particularly 26.03.1983 when they received the summons in the probate case. The trial court record shows that the present suit was filed on 01.09.1987.

11. As far as the relief of declaration is concerned, Article 58 of The Limitation Act specifically provides limitation of three years and 'time from which period begins to run, has been specifically mentioned in column three of Article 58 as "when the right to sue first accrues". Ld. Trial Court rightly held that Article 58 nowhere uses the word The court can not give a different meaning to the statute when the statute is unambiguous and clear on a certain point. Giving any other interpretation will not only go against the statutory provisions but will also make the word ' first' in Article 58 of The Act as redundant. Applying Article 58 to the facts of the present case, it is clear that right to sue first accrued to the appellants/plaintiffs on 26.03.1983 when they received the summons of the probate case and came to know about the Will dated 28.03.1982. The suit having been filed on 01.09.1987 is beyond the period of three years. Reliance in this regard can be placed on Board of Trustees of Port of Kandia vs Hargovind Jasraj and Ann 2013 SAR (Civil) 225 wherein the well settled principle of limitation of three years in filing suits for declaration has been reiterated.

12. Ld. Counsel for appellants have relied upon Talat Parveen Naqvi vs DDA 163(2009)DLT 622; Ravi Khanna Vs Pankaj Khanna & Ors 152(2008) DLT 484 and Anita Khosla Vs State & Ors. 173 (2010) DLT 290. I have perused these judgments.

13. In Talat Parveen (supra), it was held that the probate court only determines the genuineness of a will and a grant of a probate, does not confer any title on the person in whosoever favor probate is granted and title of the property in favor of the legator has to be established independent of the will, before the legator can claim any right under the will. In Ravi Khanna(supra), it was held that there is no clash between the probate proceedings and the proceedings before the Civil Court, neither the probate proceedings are required to be stopped because of pendency of the proceedings before the Civil Court. The subject matter of the two proceedings are altogether different. That case pertained to stay of the proceedings which is not the case here. Therefore, this judgment is not of any help to the appellant. The judgment of Anita Khosla (supra) does not refer to the point of limitation.

14. The contention of the appellants that they waited for the outcome of the probate petition and probate was granted on 30.07.1986 and therefore the suit filed on 01.09.1987 is within limitation is without any merit and goes against the letter and spirit of Article 58 of The Limitation Act. Therefore, the suit for declaration and consequential relief of injunction having been filed on 01.09.1987 is clearly barred by limitation."

8. Learned counsel for the appellant has now relied upon two authorities to bring home his point the limitation would start on the day when the probate was granted and had relied upon (i) Daya Singh and Ors. V. Gurdev Singh (Dead) by LRs and Ors., AIR 2010 SC 3240. The facts of this case were - a compromise was entered into between the parties on 26.10.1972 in respect of possession of certain agricultural land. However, a week before filing of suit, the plaintiff came to know of the wrong entries in revenue record, which the defendants had refused to admit. In such circumstances, it was held the cause of action would arise not on the date the compromise dated 26.10.1972 was entered into but would arise in 1990 when the plaintiffs for the first time came to know of such wrong entries in the revenue records as also the denial of claim of the plaintiffs by the defendants. The court, in such circumstances held there can be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendants against whom suit is instituted. It was thus held that when such wrong entries came to the knowledge of the plaintiffs and the defendants having refused to admit the claim of the plaintiff viz a week before the filing of the suit, the limitation would start from such day and not from the year 1972; as it was only a week before there existed an unequivocal threat of infringement of the rights of the plaintiffs.

9. The learned counsel for the appellants also referred to (ii) National Sports Club of India and Ors. v. Nandlal Dwarkadas Chhabria and Ors., 1997 (3) Bom CR 565, wherein the issue was in the year 1986, a resolution was passed by the Club asking the members (including lifetime members) to pay certain fee. The members refused to increase fee vide their replies. In 1995, the arrears were demanded and a letter was issued by the club that an action would be taken if the amount is not paid within 30 days. This was challenged in a civil suit. The question was if the limitation would start from 1986 when the members were asked to pay the fee or in 1995 when the real threat was given by the Club to take action. It was held it would start from the later date when the threat was given.

10. Now, coming to the case in hand, it would be appropriate to say the moment the Will dated 28.03.1982 came to the knowledge of the appellant, it was an eminent threat to his rights in the property as he always believed the suit property was an ancestral property. Even otherwise, no probate is required to be obtained in Delhi and if for arguments sake the respondents have not filed any probate petition, would such fact have extended the limitation for filing suit for declaration to an unknown future date? The answer is 'No'. The infringement of the alleged right of appellant in the said property accrued on the day the appellant came to know of the Will dated 28.03.1982, as the said document had taken away his right to have share in subject property, for whatever reasons. The appellant thus ought to have filed this suit for declaration within three years from 26.03.1983, per Article 58 of the Limitation Act. Both the Courts below have concurrently held the suit being barred by limitation. I also hold the same

opinion.

11. Considering the facts and circumstances of the case, no substantial question of law arises in this appeal and, accordingly, the second appeal stands dismissed. The pending application(s), if any, also stands dismissed. No order as to costs.