

(2012) 07 BOM CK 0184

In the Bombay High Court

Case No : Notice of Motion No. 72 of 2012 IN Suit No. 843 of 2003 and
Miscellaneous Petition no. 58 of 2012 IN Testamentary Petition No.
917 of 2009

Dr. Devika Damji Shah

APPELLANT

Vs

Rashmi Mukesh Shah and Another

RESPONDENT

Date of Decision : 27-07-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 13, 44A
Constitution of India, 1950 — Article 20
Evidence Act, 1872 — Section 41, 68, 69
Hindu Succession Act, 1956 — Section 30
Succession Act, 1925 — Section 2(f), 228, 263, 63, 68

Citation : (2012) 5 ALLMR 547 : (2012) 6 BomCR 456 : (2012) 114 BOMLR 2757

Hon'ble Judges : Roshan Dalvi, J

Bench : Single Bench

Advocate : Mahek Bookwala assisted with Ms. Smita Sawant assisted with Mr. Bilawala instructed by Bilawala and Co, for the Appellant; Rajesh Shah a/w. Mr. Vipul Shukla for Defendant No. 1/Applicant. Ms. Mili Thakkar a/w. Mr. Rajan V. Thakkar for Defendant No. 2, for the Respondent

Judgement

Mrs. Roshan Dalvi, J.—This Notice of Motion is taken out by defendant No.1 for dismissal of the suit and release of the assets of the deceased whose estate is being administered. The deceased was one Dr. Mukesh Ramji Shah. The plaintiff is the mother of the deceased (mother). Defendant No.1 is the wife of the deceased (wife). Defendant No.2 is the son of the deceased (son). All these parties are the heirs and legal representatives of the deceased u/s 8 of the Indian Succession Act. The mother has sued for claiming her 1/3rd share in the estate of the deceased and for that purpose prayed for declaration that the will of the deceased dated 19th February, 202 and two joint declarations dated 16th August, 2001 are illegal and void and accordingly for administration of the estate of the deceased as on intestacy, making accounts, and giving her share. The will of the deceased was sought to be probated by his wife as the guardian of his son

who was the sole legatee under the will. The will was executed in Mumbai. However the deceased as well as his wife and son were resident in Dubai, UAE. The will was sought to be probated there. After initial rejections on the ground that such a will could not have made under a Sharia law, the Court of Cassation in Dubai, which is the Apex Court in that country, has passed an order which has granted the administration of the movable and immovable assets of the deceased to his minor son. The wife claims that that is the probate of the will granted by the Court of Cassation in Dubai

2. The wife has thereafter filed a petition u/s 228 of the Indian Succession Act for an ancillary probate in respect of the estate of the deceased in Mumbai, India. Since the will of the deceased was proved and deposited in the Court in Dubai and an authenticated copy of the will was produced for the grant of Letters of Administration with the authenticated copy of the will proved abroad, this is separately obtained and may be separately challenged by the mother

3. The son has attained majority. However the wife has applied for dismissal of this suit upon the ground that the will of the deceased is probated by the Competent Court in Dubai, UAE. A petition for obtaining ancillary grant also for the administration of the properties of the deceased in India has also been filed

4. It is contended on behalf of the petitioner that the probate of the Court in Dubai is conclusive proof of the probate u/s 41 of the Indian Evidence Act, 1872 which runs thus: 41. Relevancy of certain judgments in probate, etc., jurisdiction .A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant. Such judgment, order or decree is conclusive proof that any legal character, which it confers accrued at the time when such judgment, order or decree came into operation; that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, [order or decree] declares it to have accrued to that person; that any legal character which it takes away from any such person ceased at the time from which such judgment, [order or decree] declared that it had ceased or should cease; and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, [order or decree] declares that it had been or should be his property.

5. It may at once be mentioned that the contention that the probate becomes so conclusive as a judgment in rem as would not come up for challenge at any time is only partly correct. Indeed a probate is a judgment in rem and would be presumed to have been obtained in accordance with the procedure prescribed by law and would be good against the whole world and accordingly conclusive on its validity so that it would be operative even against outsiders and third parties who

would be bound by the probate and would not be entitled to challenge or to go behind the grant. This however is provided the grant is made by a Court competent to pronounce such a judgment in rem and has not been revoked u/s 263 of the Indian Succession Act.

6. A judgment u/s 41 of a Court in its testamentary and intestate jurisdiction granting probate of a will in India would certainly be conclusive proof of the legal character that it confers or the entitlement of the person that it declares or the legal character which it takes away or the entitlement of the property of any person that it declares.

7. However a judgment stated to be a probate granted by a foreign Court would come within the purview of section 13 of the CPC as any other foreign judgment. Section 13 applies to judgments in rem as well as personam. Section 13 reads thus :

13. When foreign judgment not conclusive. A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except.

(a) where it has not been pronounced by a Court of competent jurisdiction;

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

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of [India] in cases in which such law is applicable;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) where it has been obtained by fraud;

(f) where it sustains a claim founded on a breach of any law in force in [India]. Hence a foreign judgment would not be conclusive if it refuses to recognise the applicable law of India or is in breach of any law in force in India and is consequently hit by clause 13(c) or (f).

8. It would have to be seen whether the judgment in this case based upon which the claim of dismissal of the suit is made in this Notice of Motion falls within the aforesaid mischief. The will was executed in Mumbai. Almost the entire property of the deceased, movable as well as immovable, that is sought to be bequeathed under the will except certain bank accounts in 2 banks in Dubai, are in India. Hence it could have been probated in Mumbai. It was sought to be probated in Dubai as the parties resided in Dubai. Of course, the mother submitted to the jurisdiction in Dubai and has defended the claim of the wife on behalf of her minor son for the grant of probate in Dubai.

9. It would have to be seen from the judgment itself whether it has refused to

recognize the law of India applicable to the case. The translation of the judgment from Arabic language shows that Indian Hindu Law was sought to be applied. The judgment declares that the petitioner had requested the transfer of ownership of the wealth to one of the heirs and the law required to be in force for that purpose was "Indian Hindu Inheritance Law of the year 1956". The judgment shows that in that law there is nothing to prevent an adult sane individual from giving of his wealth to one of his heirs and to transfer all movable and immovable assets to such heirs, who in that case was minor son Preet. The reasoning in the judgment by which the Court came to pronounce the judgment was because the will was signed by the will writer and his signature was verified by official entities in India as well as UAE and the papers were devoid of any serious dispute regarding its genuineness and accordingly, therefore, the Court had decided to uphold the validity and enforcement of the will. Accordingly the Court passed an order of "validating the will dated 19.02.2002 issued by Mukesh Shah" and permitted to the petitioner therein "to administer the transfer of the movable and immovable assets to his minor son Preet to be executed as stated in the will

10. The grant is not like the grants issued by the Indian Court. The format of the grant is the procedural requirement. However a grant of the probate is issued essentially upon the proof of the will. A will is required to be proved specifically as mentioned in Section 63 of the Indian Succession Act, 1925 which is a part of Chapter III which relates to execution of unprivileged wills, the relevant part of which runs thus:

CHAPTER III OF THE EXECUTION OF UNPRIVILEGED WILLS

63. Execution of unprivileged Wills. Every testator shall execute his Will according to the following rules:

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

11. This is a substantive provision of law. The language of section makes the execution of the will in accordance with the rules under the Section absolutely mandatory. Any deviation from the mandatory provision would invalidate a will.

Such a will would not be entitled to the grant of probate.

12. The judgment of the Court in Dubai has not considered or even referred to the aforesaid mandatory, statutory requirement of execution of Wills. The judgment only refers to "the Indian Hindu Inheritance Law of 1956" i.e. the Hindu Succession Act, 1956. The Act essentially applies to intestate succession except u/s 30 which allows a Hindu to dispose of by will the property capable of being so disposed of but which also would be in accordance with the provisions of Indian Succession Act. The relevant part of Section 30 which is in Chapter III relating to testamentary succession runs thus :

CHAPTER III TESTAMENTARY SUCCESSION 30.

Testamentary succession. Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so [disposed of by him or by her], in accordance with the provisions of the Indian Succession Act, 1925, or any other law for the time being in force and applicable to Hindus.

Hence even the liability referred to in the Judgment makes a reference to the will being executed in accordance with the Indian Succession Act and the aforesaid provision is relevant in showing the mandatory requirement for its execution under Indian Succession Act.

13. Having seen the aforesaid provision and the judgment, it is easy to read that even if the judgment does not refuse to recognise the Law of India, it would be in breach of the law laid down in Section 63 of the Indian Succession Act which would be required to be followed even u/s 30 of the Hindu Succession Act.

14. Such a foreign judgment would, therefore, not be conclusive as to the matters thereby directly adjudicated thereupon and would be excluded from the purview of Section 41 of the Indian Evidence Act making the judgment conclusive proof of the 4 aspects enumerated therein.

15. The reasoning behind this is material to consider. A writing which is termed as the last will and Testament of any person is not per se proved or even taken to be admissible in evidence unless the mandatory requirement u/s 63 of the Indian Succession Act is followed.

16. Mr. Shah on behalf of the wife drew my attention to the judgment of the Supreme Court in the case of Surinder Kumar and Others Vs. Gian Chand and Others, showing the presumption that the judgment in a probate Court granting probate was a judgment in rem and must be presumed to have been obtained in accordance with the procedure prescribed by law. This essentially applies to Indian judgments. It would also apply to foreign judgments which are not in breach of the law relating to execution of the wills in force in India - Section 63 of the Indian Succession Act with regard to execution of the will. If a foreign judgment has seen that the requirement of Section 63 of Indian Succession Act is followed, it would certainly be conclusive and also binding upon the parties who claim their rights thereunder. This exception is specifically set out in the

judgment in the case of AIR 1950 Mysore 57 DB which has held that such a judgment in rem, including judgment of a foreign Court is binding upon the parties upon the operation of Section 41 of the Indian Evidence Act but only provided those Courts are competent to pronounce the judgment as contemplated in that section. The Court would be competent and its judgment would be conclusive if they followed the law applicable in India. Such a judgment would hold good until the probate granted under such judgment is revoked also under the law in force in India being Section 263 of the Indian Succession Act.

17. In this case the grant has been made not because and after it was proved that the testator signed in the presence of the attesting witnesses or that his signature was put in their presence or that the will was at all attested by the 2 persons whose signatures are shown at the foot of the will or was signed by them in the presence of the deceased. The will has been probated because it was signed by the deceased and his signature was verified by the certain official entities in India and UAE. These would be the officials of the Consulate office of the 2 countries or their immigration officials. The observation that the papers are devoid of serious disputes also renders itself to error because the parties seriously agitated their dispute in 5 Courts before finally contesting in the Court of Cassation. The genuineness of the will referred cannot be accepted per se upon seeing a signature of a person stated to be the deceased and of the officials of the 2 countries. This reason wholly derogates from the law in force in India. It would constitute breach of the law in force in India. The claim founded upon such a will would be a claim founded on a breach of the law in India until, of course, the will was proved to have been validly executed and attested as mandatorily required. The judgment also exhibits itself to have refused to recognise the law in India relating to execution of wills since a mere reference is made to the inheritance of the law wholly ignoring the mandate u/s 30 of that same law.

18. It is argued by Ms. Mahek Bookwala on behalf of the mother that the judgment of the Court of Cassation in Dubai is not a grant of the probate at all. She argued that the actual grant of the probate is not made under the judgment. The judgment has only permitted to administer the transfer of the property of the deceased to his son which is to be executed as per his will. We may take it that the phraseology of the judgment should not matter and the order permitting administration of the estate of the deceased which would result in a transfer of properties of the deceased to his son as per his will would be construed to be the grant of the probate of the will. But the fact remains that the will of which the probate is granted has not been proved as per law.

19. Mr. Shah contended that the requirement of the Evidence Act is a part of procedural law of the country. He drew my attention to Chapter 35 Rule 209 in the conflicts of laws by Dicey and Morris. Rule 209 indeed lays down that all matters of procedure are governed by the domestic law of the country to which the court, wherein any legal proceedings are taken, belongs (lex fori) and the term "procedure " is included (inter alia) therein.

20. The commentary of Dicey and Morris which is an authority of Private International Law indeed shows that procedure is governed by the *lex fori* and universally so admitted. Matters of substance would however be governed by the law to which the Court is directed by its choice of law rule (*lex causae*), that being the proper law applicable to parties. Mr. Shah drew my attention to the further commentary under the same rule relating to admissibility of evidence which is also held to be governed by the *lex fori*. Mr. Shah argued that how a will is executed would be a matter of evidence. It is not. How a will is to be executed is a matter of substantive law set out in Section 63 of the Indian Succession Act and statutorily accepted in Section 30 of the Hindu Succession Act. What would be covered under the rules of procedure as also the rules of admissibility and what forms the part of procedure is the proof of document under part IV of the Indian Evidence Act contained in Sections 68 & 69 which lay down the procedural aspect of leading evidence for proof of execution of a will being a document required by law to be attested and what would be the procedure for the proof of the will where no attesting witness was found amongst other such sections in the said part. Hence the requirement that at least one attesting witness is called for proving the execution of a will u/s 68 of the Indian Evidence Act or if no such attesting witness is found, the proof that the attestation of one attesting witness is in his handwriting as required by Section 69 of the Indian Evidence Act may be a matter of procedure. However the factum of execution of the will and its attestation which by the same would have to be proved is not a matter of procedure but of substance. Whereas the proof by one attesting witness or any other witness may be guided *lex fori*, the fact that the execution of the will by the proof of the testator affixing his signature in the presence of the attesting witnesses and the attesting witnesses attesting the will in the presence of the testator, being the matter of substance, would be as per *lex causae*. That aspect would, therefore, be governed by Section 63 of the Indian Succession Act and no other provision. How the validity of the will is proved may be governed by the law of the country where the will is sought to be probated.

21. The mandate is seen from the Judgment of Justice Bhagwati since the case of *Girja Datt Singh Vs. Gayatri Datt Singh* AIR 1955 SC 346 in which it was held that it cannot be presumed from mere signatures of 2 persons appearing at the foot of the endorsement of registration of a will that they had appended their signatures to the document as attesting witnesses nor can be construed to have done so in their capacity as attesting witnesses. It is held that the provision of Section 68 should be complied with in order that the 2 persons be treated as attesting witnesses.

22. The aspect of valid execution of the will as per Indian law is not seen by the Court of Cassation in Dubai. Consequently the Judgment of the Court of Cassation in Dubai is not conclusive as to the validity of the will and the validity of the grant thereunder. Consequently the ancillary probate also cannot be applied for and granted as not sustainable. The very basis on which the application is made for dismissal of the suit cannot be sustained and accordingly

the suit cannot be dismissed.

23. Ms. Bookwala also argued that the dismissal of this suit is itself upon the premise that the estate of the deceased would be administered as per the order of the Court of Dubai as a probate granted of the will of the deceased. That would tantamount to execution of the foreign judgment. She argued that u/s 44A of the CPC the execution of decrees of foreign Courts would be only allowed if the foreign Courts are declare "Reciprocating Territory". The relevant part of Section 44A runs thus:

44A. Execution of decrees passed by Courts in reciprocating territory.(1) Where a certified copy of a decree of any of the superior Courts of any reciprocating territory has been filed in a District Court, the decree may be executed in [India] as if it had been passed by the District Court.

24. She argued that the judgment of the Court of Dubai cannot be executed since Dubai is not a reciprocating territory. Mr. Shah drew my attention to the Gazette Notification under which the agreement between the Republic of India and the United Arab Emirates came to be gazetted on 16th December, 2000. That agreement deals with "Juridical and judicial cooperation in civil and commercial matters for the service of execution of judgments and arbitral awards." The agreement relates to mutual legal assistance in civil and commercial matters in accordance with their national laws and execution of decrees, settlement and arbitration awards. It deals with service of summons, taking of evidence and recognition of execution of decrees and arbitral awards. Article 20 of the agreement, however, sets out specifically only such of the decrees and awards that would be recognized and accepted as are specified in Section 13 of the CPC. It excludes of the exceptions set out in the said Section. Ultimately, therefore, the executability of the grant of probate under the judgment of the Court of Dubai is also circumscribed by the same provision. In this case it is circumscribed by the exceptions (c) & (f) in Section 13 as also in the aforesaid agreement between 2 countries. The agreement itself relates to legal assistance in accordance with "the national laws". The national law in India applicable in this case is Section 63 of the Indian Succession Act; the national law of Dubai is the Sharia law which does not recognize any such testamentary disposition.

25. Ms. Bookwala argued that the agreement does not even constitute a notification showing Dubai as reciprocating territory since the notification is required to show that the country so notified is a reciprocating territory u/s 44A and cannot be taken to be or deemed to be such a territory by virtue of a bilateral treaty or agreement. Even if Section 44A is not read and construed strictly, the judgment in this case even if otherwise falling within the aforesaid agreement, would not be conclusive and binding and hence incapable of execution and enforcement.

26. The argument of Mr. Shah that the probate cannot now be revoked since the

judgment was passed with the knowledge of the mother since as far back as 16th January, 2007 is also of no importance because the Judgment is not conclusive between the parties even if left unchallenged and the probate, if any, granted therein is left unrevoked.

27. Ms. Bookwala further argued that the application for grant of ancillary probate, which has come up for acceptance before this Court, is as irregular and of no effect in law as the grant of the probate based upon the order of the Dubai Court. She argued that once it is seen that the order is not sustainable, the ancillary probate u/s 228 of the Indian Succession Act also cannot sustain. She drew my attention to the objections raised by the office of the Prothonotary and Senior Master of this Court in the petition for grant of ancillary probate filed by the wife on behalf of the son being Testamentary Petition No. 917 of 2009 in which the office itself raised objections that the order of the Dubai Court does not appear to be an order granting probate to the petitioner with the same reasoning as mentioned above. The objection was also raised that the will was not certified by the Court under its seal and signature and though the application u/s 228 of the Indian Succession Act is for a will which is proved and deposited in the foreign Court and for which a properly authenticated copy of the will is produced for grant of Letters of Administration, the wife in that petition deposited the original will in this Court itself which also rules out the applicability of Section 228. Ms. Bookwala contended that, therefore, the grant of ancillary probate is also not valid in law.

28. u/s 2(f) of the Indian Succession Act a probate means a copy of the will certified under the seal of the Court of competent jurisdiction with a grant of administration to the estate of the testator. In this case the will of the deceased is not certified under the seal of Dubai Court as a Court of competent jurisdiction granting the probate. It is not accompanied by a grant of administration to the estate of the deceased. It is only an order granting and allowing transfer of the estate of the deceased to be executed as per the will of the deceased. The original will is not under the seal. The original will is not deposited in that Court by the wife or the son to be entitled to obtain a valid ancillary grant u/s 228 of the Indian Succession Act upon a properly authenticated will of the deceased under the seal of the Court of Dubai produced in this Court for the grant of the ancillary probate.

29. Mr. Shah contended that it is held in the judgment of Ramesh Nivrutti Bhagwat Vs. Dr. Surendra Manohar Parakhe, that an ancillary grant cannot be revoked until the original grant is revoked and the grant made by the Court of Cassation in Dubai has been in force since 16.01.2007 and not sought to be revoked. This argument would have held good if the grant of probate by the Court in Dubai had become conclusive and had not suffered from the aforesaid 2 infirmities. However that having been seen, the grant of probate, as a foreign judgment, is not conclusive between the parties and is not even required to be challenged.

30. The parties cannot be taken to be bound by the foreign judgment of the Court of Cassation in Dubai. Consequently the ancillary grant obtained in India cannot be sustained.

31. For all the aforesaid reasons the grant, if any, of the Court of Cassation in Dubai is not valid in law and cannot be acted upon. Hence the Notice of Motion in the suit for administration is dismissed. Consequently the petition for ancillary probate filed by the wife/son is not accepted.

32. The right of the mother as the plaintiff in this suit for the 1/3rd share in the estate of the deceased and the administration of such estate is, therefore, yet subsisting. It shall be decided in this suit.

33. The mother admittedly has a 1/3rd share in the estate of her deceased son. Counsel on her behalf fairly stated that she would be entitled to only a 1/3rd share.

34. Court Receiver has been appointed inter alia of certain movable properties, being certain investments of the deceased in certain FDRs, banks etc. in Indian rupees as well as USD. One such amount is Rs.79,68,965/under FDRs of Canara Bank. The Court Receiver shall forthwith pay the wife being the defendant herein, 2/3rd of the said amount for herself and as also for the son.

35. The Court Receiver shall also similarly pay an equivalent of USD 85000/and USD 30,000/to the wife, being the defendant herein 2/3rd of the said amounts for herself and also for the son. The suit has been filed since about a decade. The written statements are filed. Suit is adjourned to 24th August, 2012 for framing issues and further directions as required.