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**(1987) 07 DEL CK 0024**

**In the Delhi High Court**

**Case No :** I. A. S. No's. 4554, 4657, 4933 and etc of 1986 in Probate Case No. 54 of 1986

Dr. Mrs. Pari Hingorani

APPELLANT

Vs

Mrs. Shakuntala and others

RESPONDENT

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**Date of Decision :** 10-07-1987

**Acts Referred:**

Specific Relief Act, 1963 — Section 41, 41(b)

Succession Act, 1925 — Section 151, 222, 232, 234, 270

**Citation :** AIR 1987 Delhi 307

**Hon'ble Judges :** A.B. Saharya, J

**Bench :** Single Bench

**Advocate :** Ram Panjwani and Raj Panjwani, for the Appellant; T.K. Ganju for No. 6 and Mohinder Goel for No. 5, for the Respondent

**Final Decision :** Dismissed

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## Judgement

Arun B. Saharya, J.—The basic question raised by Pari Hingorani and her husband, who are beneficial legatees under the will which is subject matter of the probate proceedings, is whether Shakuntala, a residuary legatee, ought to be restrained from proceeding with action in a London Court for grant of probate of the will to her.

2. Dr. Rochiram Udhavdas Hingorani, hereinafter referred to as Dr. Hingorani, a Hindu, executed a will dated 14-2-1979 at Delhi, but did not appoint an executor. The testator bequeathed property No. 42, Anandlok in Delhi to his son Ram, his wife Pari and their daughter Angela. Except this property, he left unspecified residue of the estate to his daughter Shakuntala and her legal heirs. Relevant clauses 2 and 4 of the will read as follows :

On my death I bequeath to my son Ram, his wife Pari and their daughter Angela, the house and property on plot No. 42, Anandlok Colony, New Delhi.

4. I leave to my daughter Shakuntala and her legal heirs all that might remain of

my assets and personal papers and effects of any description at the time of my death, except the house and property on plot No. 42. Anandlok Colony, New Delhi.

3. Dr. Hingorani died on 28-4-1986 at London. Pari filed the main petition under Ss. 276 and 300 of the Indian Succession Act 1925, hereinafter referred to as the Act, for grant of probate or letters of administration to her. She named her husband Ram, daughter Angela and Shakuntala, among others, as near relatives of the deceased.

4. Ram and Pari Hingorani are happily married and are living in the same house at Anand Lok which has been bequeathed to them. This fact was stated by Pari's counsel at the Bar. While Ram is challenging title of his father to the property and the validity of the will, his wife wants to enforce it.

5. Pari filed IA 4554 of 1986. It was alleged that she apprehended that Shakuntala will initiate proceedings in London for grant of probate of the will and prayed that Shakuntala be restrained from filing or proceeding with action at London. Soon thereafter, she filed the second application IA 4657 of 1986 stating that Shakuntala has started the proceedings and prayed that she be restrained from proceeding with the case in London. Both these applications were opposed by Shakuntala. She also filed IA 4933 of 1986 seeking dismissal of Pari's applications and also the main petition on the grounds, inter alia, that she was not the executor appointed by the will, that a residuary legatee alone is entitled to the grant of letters of administration, and that the main petition is not verified by any of the witnesses to the will. During the hearing of the first three applications, Learned Counsel for Shakuntala contended, inter alia, that Pari would suffer no prejudice by London proceedings as she was herself supporting the will, Ram promptly came forward with IA 5997 of 1986 to restrain Shakuntala from proceeding with her case at London. Meanwhile proceedings continued in London and some order was made on 22-10-1986. Pari filed IA 6068 of 1986 praying that Shakuntala be directed to disclose the order passed by the London Court. Learned Counsel for Pari and also for Shakuntala referred to books to show the scope of law regarding probate proceedings in England. Shakuntala filed an affidavit of a solicitor dated 18-9-1986 regarding probate proceedings in England. Pari objected to this affidavit. She filed IA 6069 of 1986 praying that the affidavit filed on behalf of Shakuntala to prove English law be rejected.

6. None of the near relatives of deceased Dr. Hingorani has contested the will except his son Ram. According to him, Dr. Hingorani had Indian domicile, he was a citizen of India, he was governed by Mitakshara Hindu Law, and that he had no right to bequeath the property as it was coparcenary property. According to him, the will dated 14-2-1979 is not the last will of Dr. Hingorani. He has also challenged validity of the will on the ground that it was made by Dr. Hingorani under undue influence of Shakuntala.

7. Pari invoked jurisdiction of this Court for grant of probate or letters of administration in respect of the will on the plea that the deceased had immovable property within the jurisdiction of this Court. Section 270 of the Act empowers a District Judge to grant probate of a will or letters of administration of a deceased person, if it appears by a petition of the person applying for the same that the testator at the time of his decease had a fixed place of abode or any property, movable or immovable, within the jurisdiction of the Judge. Section 300 confers on the High Court concurrent jurisdiction with the District Judge for grant of probate and letters of administration. The testator, at the time of his decease, did not have a fixed place of abode within the jurisdiction of this Court. In such a case. S. 271 of the Act confers a discretion on the Judge to refuse the application, if in his judgment it could be disposed of more justly or conveniently in another district, or, where the application is for letters of administration, to grant them absolutely, or limited to the property within his own jurisdiction. Section 273 declares that probate or letters of administration shall have effect over all the property and estate, movable or immovable, throughout the State in which the same is or are granted, and shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belongs to him and shall afford full indemnity to all debtors, paying their debts and all persons delivering up such property to the person to whom such probate or letters of administration have been granted. By virtue of proviso to that section, probates and letters of administration granted by a High Court shall, unless otherwise provided by the Act, have like effect throughout the other State. Dealing with this provision in *Smt. Rukmani Devi and Others Vs. Narendra Lal Gupta*, , the Supreme Court observed :

a decision of the probate Court Would be a judgment in rem not only binding on the parties to the probate proceedings but it will be binding on the whole world.

8. According to Mr. Panjwani, the Learned Counsel for Pari, this Court has jurisdiction to grant letters of administration in respect of the entire estate of Dr. Hingorani. That being so, he contended that, (1) this Court has power to restrain Shakuntala from prosecuting proceedings in England, and (2) that in the circumstances of the present case, it is necessary to do so as the will was made in Delhi, the witnesses and all concerned parties reside here, it is very expensive to participate in proceedings in a foreign Court, Pari and Ram are unable to bear that expense, Shakuntala has initiated proceedings in London to harass them, proceedings in Delhi were initiated prior to commencement of proceedings at London and that Delhi is a more convenient and proper forum for deciding all matters relating to will of Dr. Hingorani.

9. Shakuntala contested the pleas raised on behalf of Pari and Ram. According to her counsel, this Court has no power to restrain her from proceeding with the case in London, unspecified residue of substantial value of the estate of Dr. Hingorani bequeathed to her is in England, proceedings there are unavoidable for enjoyment of the estate bequeathed to her, grant of letters of administration by

this Court or any other Court in India will be ineffective for the enjoyment of the property in England, proceedings were initiated by Shakuntala prior to Pari's proceedings in Delhi, Ram had full knowledge of those proceedings, he lodged a Caveat there, Pari and Ram are admittedly in possession of and are enjoying the property bequeathed to them but they are maliciously obstructing Shakuntala from enjoyment of the remaining estate bequeathed to her, and that Pari and Ram have taken contradictory stands with regard to title of Dr. Hingorani to the properties and also regarding validity of his will maliciously to harass Shakuntala. Further, it was argued that Pari could suffer no prejudice whatsoever by the proceedings in London inasmuch as she is herself setting up the same will of Dr. Hingorani. Therefore, it was contended on behalf of Shakuntala that even if it is found that this Court has the power to issue an injunction sought by Pari and Ram, this Court should exercise discretion against the grant of equitable relief of injunction to them.

10. In support of the first proposition regarding power of this Court to restrain Shakuntala from prosecuting proceedings in England, Mr. Panjwani relied upon Halsbury's Laws of England (Fourth Edition) Volume 24, para 103. It reads :

With regard to foreign proceedings, the Court will restrain a person within its jurisdiction from instituting or prosecuting proceedings in a foreign court whenever the circumstances of the case make such an interposition necessary or expedient.

11. He also relied upon an extract from Drury on Injunctions which reads as under :

It seems immaterial where or what the Court is in which the proceedings are sought to be restrained, provided the party sought to be restrained is amenable to the jurisdiction and is capable of being acted on by the process of contempt of Court, and the extension of the jurisdiction of equity to stay proceedings in other Courts besides Courts of common law and in foreign Courts as well as in Courts within the jurisdiction of the Court of Chancery, becomes when considered in reference to the principle stated, as rational and intelligible as it is firmly established in practice.

(Quoted in Subba Rao on Law of Specific Relief, First Edition, page 5.36).

12. In India the law is different. Section 41(b) of the Specific Relief Act, 1963 expressly precludes Court from granting an injunction "to restrain any person from instituting or prohibiting any person in a Court not subordinate to that from which an injunction is sought."

13. In view of this statutory provision, Courts in India have no jurisdiction to grant a perpetual injunction restraining a person from instituting or prosecuting a proceeding in a Court not subordinate to it or from granting temporary relief in the same terms. Inherent power of Court under S. 151, C.P.C. also cannot be invoked to nullify or stultify this provision made by the legislature in the Specific

Relief Act. The nature, scope and effect of the powers of the Court to grant both interim and perpetual injunction and exercise of inherent powers, in the context of S. 41(b) of the Specific Relief Act were considered by the Supreme Court in *Cotton Corporation of India Limited Vs. United Industrial Bank Limited and Others*, . At page 1276, it was pointed out the change made by the legislature in S. 56(b) of the old Specific Relief Act which was repealed by the new Act in 1963. It was recalled that by judicial interpretation on S. 56(b) of the old Act a consensus was reached that an injunction acts in personam, while the Court cannot stay the proceedings of a superior jurisdiction, it could certainly by an injunction restrain a party from further prosecuting proceedings in other Courts, may be superior or inferior in the hierarchy of Courts. The legislature was conscious of this judicial interpretation and made material alteration in the language of S. 41(b) while replacing S. 56(b) of the repealed Act by enacting new Act of 1963. The Supreme Court held:

The Legislature manifestly expressed its mind by enacting S. 41(b) in such clear and unambiguous language that an injunction cannot be granted to restrain any person, the language takes care of injunction acting in personam, from instituting or prosecuting any proceeding in a Court not subordinate to that from which injunction is sought. Section 41(b) denies to the Court the jurisdiction to grant an injunction restraining any person from instituting or prosecuting any proceeding in a Court which is not subordinate to the Court from which the injunction is sought. In other words, the Court can still grant an injunction restraining a person from instituting or prosecuting any proceeding in a Court which is subordinate to the Court from which the injunction is sought. As a necessary corollary, it would follow that the Court is precluded from granting an injunction restraining any person from instituting or prosecuting any proceeding in a Court of coordinate or superior jurisdiction. This change in language deliberately adopted by the Legislature after taking note of judicial vacillation has to be given full effect.

14. In that case, the Supreme Court also considered and rejected the argument that S. 41(b) deals with perpetual injunction and that it is not attracted to temporary or interim injunction which is regulated by the Code of Civil Procedure. The Court observed :

Expression "injunction" in S. 41(b) is not qualified by an adjective and, therefore, it would comprehend both interim and perpetual injunction. It is, however, true that S. 37 specifically provides that temporary injunctions which have to continue until a specified time or until further order of the Court are regulated by the Code of Civil Procedure. But if dichotomy is introduced by confining S. 41 to perpetual injunction only and S. 37 read with O. 39 of the CPC being confined to temporary injunction, an unnecessary grey area will develop. It is indisputable that temporary injunction is granted during the pendency of the proceedings so that while granting final relief the Court is not faced with a situation that the relief becomes infructuous or that during the pendency of the

proceedings an unfair advantage is not taken by the party in default or against whom temporary injunction is sought. But power to grant temporary injunction was conferred in aid or as auxiliary to the final relief that may be granted. If the final relief cannot be granted in terms as prayed for, temporary relief in the same terms can hardly if ever be granted.

The Court has no jurisdiction to grant a perpetual injunction restraining a person from instituting a proceeding in a Court not subordinate to it, as a relief, ipso facto temporary relief cannot be granted in the same terms. The interim relief can obviously be not granted also because the object behind granting interim relief is to maintain status quo so that the final relief can be appropriately molded without the party's position being altered during the pendency of the proceedings."

15. Further, the Supreme Court also considered and rejected the argument that even if temporary or perpetual injunction under S. 41(b) of the Specific Relief Act or under O. XXXIX of C.P.C. cannot be granted, yet the Court had inherent power to grant injunction. After noticing earlier decisions in *Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal*, and in *Padam Sen and Another Vs. The State of Uttar Pradesh*, , it was clarified in para 21 at page (of AIR 1983 SC 1281) as follows :

It must be conceded that the Court can in appropriate cases grant temporary injunction in exercise of its inherent power in cases not covered by O. 39, C.P.C. But while exercising this inherent power, the Court should not overlook the statutory provision which clearly indicates that injunction to restrain initiation of proceeding cannot be granted. Section 41(b) is one such provision and it must be remembered that inherent power of the Court cannot be invoked to nullify or stultify a statutory provision.

16. The concept of inherent power of the Court to restrain a person within its jurisdiction from instituting or prosecuting proceedings in a foreign Court as also the concept of an injunction operating in personam against a party within the jurisdiction of the Court stated in Halsbury's Laws of England and by Drury on Injunctions, cannot operate in India in view of the provision of S. 41(b) of the Specific Relief Act, 1963 and the authoritative pronouncement of the Supreme Court in the case of *Cotton Corporation of India Limited Vs. United Industrial Bank Limited and Others*, .

17. Since this Court has no power to restrain Shakuntala from prosecuting the proceedings in Courts at London, it is unnecessary to go into the circumstances canvassed by rival parties in the present case for exercise of discretion either way, or to refer to the interesting propositions of law and the numerous books and authorities cited by the parties at the time of hearing. In any event, no final opinion can be expressed at this stage on rival contentions of parties regarding effect of letters of administration that may be granted by this Court on substantial part of the estate of the deceased outside India.

18. In these circumstances, IAS 4554/86, 4657 of 1986, and IA 5997 of 1986 are dismissed. Consequentially, IAs 6068 of 1986 and 6069 of 1986 need no orders and are dismissed as infructuous.

19. Lastly, Shakuntala's IA 4933 of 1986 may also be considered. Probate can be granted only to an executor appointed by the will (Sec. 222 of the Act). No one has been appointed executor by the will in the present case. Only letters of administration of the will can be granted, if the will is proved to be valid. When the deceased has made a will, but has not appointed an executor, as in the present case, S. 232 provides that an universal or a residuary legatee may be admitted to prove the will, and letters of administration annexed with the will may be granted to him of the whole estate. In the present case, Shakuntala and her legal heirs are the residuary legatees. According to Shakuntala, the main petition by Pari is not maintainable as she is neither an executor appointed by the will nor is she an universal legatee. On the contrary Shakuntala is the residuary legatee and she alone can be granted the letters of administration.

20. Mr. Panjwani, Learned Counsel for Pari, contended that any legatee having a beneficial interest is entitled to institute proceedings for grant of letters of administration. He conceded that a residuary legatee has a prior right to it and that the other legatees having a beneficial interest can be admitted to prove the will and that letters of administration can be granted to Pari if the residuary legatee declines to act as such. For this purpose he referred to S. 234 of the Act :

When there is no executor and no residuary legatee or representative of a residuary legatee, or he declines or is incapable to act, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate, or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the will, and letters of administration may be granted to him or them accordingly.

21. Mr. Panjwani was right in contending that S. 234 is not a test of locus standi of the petitioner nor is it a test of qualification of the petitioner to be applied at the stage of institution of proceedings. Indeed, the scheme of Ss. 229 to 234 of the Act indicates inquiry into right of the petitioner to be admitted to prove the will or to the grant of letters of administration only after institution of proceedings for that purpose.

22. It is unnecessary to go further into this controversy as Learned Counsel for Shakuntala stated that she is willing to act as a residuary legatee and is also seeking grant of letters of administration of the will in question. Being a residuary legatee, Shakuntala undoubtedly has a prior right to the grant of letters of administration.

23. So far as the objection of Shakuntala to defect in Pari's petition for want of verification by one of the attesting witnesses is concerned, according to Mr. Panjwani, none of the attesting witnesses was available when Pari filed the petition. Since Shakuntala has agreed to act as residuary legatee, it will be for

her to take all suitable steps to effectively maintain and prosecute the present proceedings.

24. In these circumstances, IA 4933 of 1986 filed by Shakuntala is dismissed.

25. Accordingly, all the applications are dismissed. No costs.