
(2021) 12 CAL CK 0072

In the Calcutta High Court

Case No : IA No.GA/1/2021 in PLA/327/2021

In The Goods Of: Shri Om Prakash Maniyar (Deceased) Vs

Date of Decision : 24-12-2021

Acts Referred:

Code Of Civil Procedure, 1908 — Order 6 Rule 4
Indian Succession Act, 1925 — Section 2(h), 247
Evidence Act, 1872 — Section 68

Citation : (2021) 12 CAL CK 0072

Hon'ble Judges : Sabyasachi Bhattacharyya, J

Bench : Single Bench

Judgement

Learned counsel for the petitioner/executrix of the last Will and testament dated August 3, 2020 of Om Prakash Maniyar, since deceased, seeks further ad interim order of injunction in respect of the assets and properties of the deceased, with regard to which probate has been sought and a prayer for appointment of administrative pendente lite has been made.

Learned counsel contends that the objector Subhas Maniyar, who is one of the sons of the deceased as well as a legatee under the Will dated August 3, 2020, is attempting to change the entire shareholding of the trust, to which the other legatee (another son) of Dheeraj Maniyar is also entitled.

Learned counsel submits Subhas is altering the shareholding, and thereby control, in respect of at least three companies, the shares of which were part of the assets of the testator and to the profits of which both Subhas and Dheeraj, are entitled at the rate of 45 per cent each, as per the Will dated August 3, 2020.

In view of such alteration of shareholding, it is contended, the entire subject-matter of the Will is being attempted to be changed in favour of Subhas, thereby frustrating the final decree (deemed) that would be passed in the probate proceeding.

Learned counsel places particular reliance on the judgment of *Atula Bala Dasi Vs. Nandita Devi*, reported at AIR 1951 Cal 561, where a Division Bench of this Court had held, inter alia, that the powers of the probate court are wide enough to

issue temporary orders restricting other persons from interfering with the properties which are the subject-matter of testamentary disposition, for safeguarding the interest of all concerned and particularly to protect the properties which are the subject-matter of such disposition. It was further held by the Division Bench that although the testamentary court could not decide a question of title, it is not thereby wholly incompetent to grant a temporary injunction even in extreme cases, in aid of and in furtherance of the purpose for which a grant is made by a probate court.

Learned counsel next places reliance on the judgment of Union of India Vs. N. Murugesan, reported at MANU/SC/0809/2021 for the proposition tht one cannot approbate and reprobate in the same breath.

The learned Senior Advocate appearing for the respondent, Subhas Maniyar, by placing reliance on Section 68 of the Evidence Act, argues that in the absence of any affidavit/verification having been filed in respect of the execution of the Will dated August 3, 2020 by any of the attesting witnesses, the Will has no evidentiary value and, thus, cannot be looked into by the probate court at all.

That apart, it is contended that a trust cannot be the subject-matter of adjudication before a probate court.

It is further contended that the testator was a minority in all the companies excepting one, regarding the shareholdings of which alterations took place. Moreover, the shareholders are, at best, entitled to a right to the profit and cannot claim the entire assets of the company as their own property.

That apart, the learned Senior Advocate places reliance on the definition of "Will" as given under Section 2(h) of the Indian Succession Act, as well as Section 247 of the said Act to argue that the indefinite profits which can be earned prospectively by the companies could not have been the subject-matter of a testamentary disposition at all; as such, the testamentary court's hands are tied insofar as directions regarding such shareholdings are concerned.

The learned Senior Advocate for the respondent places reliance on the following judgments in support of the proposition that, in the absence of evidence of any attesting witness, the Will cannot be said to have been proved:

- (i) AIR 1939 Cal 688 (Hare Krishna Panigrahi Vs. Jogneswar Panda and others.);
- (ii) AIR 1922 Cal 160/27CWN134 (Sahib Chandra Singh Vs. Gour Chandra Paul);
- (iii) AIR 1945 Cal 350/49 CWN 377 (Amal Shankar Sen Vs. The

For the proposition that the probate court does not decide title but is to see only if the Will is genuine or not, the learned Senior Advocate places reliance on the following judgments:

- (i) (2018) 18 SCC 547 (PasupatiNath Das Vs. ChanchalKumaar Das);
- (ii) 2008 (4) SCC 300 (Krishna Kumar Birla Vs. Rajendra Singh Lodha).

The learned Senior Advocate next contends that the probate court does not have jurisdiction to pass orders in respect of companies, in support of which he cites:

- (i) (2020) SCC Online Cal 900 (Priyambada Debi Birla and Birla Corporation Vs. Ajoy Kumar Newar Birla);
- (ii) (2020) SCC Online Cal 1671 (Ajay Kumar Newar Vs. Harsh Vardhan Lodha);
- (iii) 2012 SCC Online Cal 8684 (harsh Vardhan Lodha Vs. Devendra Kumar Mantri);
- (iv) (2007) ILR 2 CAL 377 [Rajendra Singh Lodha Vs. Ajoy Kumar Newar];
- (v) AIR 2006 Cal 259 (Priyambada Debi Birla Vs. Ajoy Kumar Newar);
- (vi) AIR 2011 Bom 136 (Ramchandra Ganpatrao Hande vs. Vithalrao Hande and others);
- (vii) 2016 SCC Online Cal 1541 (In the goods of Priyambada Birla (deceased)).

Apart from the above propositions, the learned Senior Advocate further argues that no temporary injunction order can be passed against a non-party to a probate proceeding, by placing reliance on 2016 (1) SCC 734 [West Bengal Housing Board Vs. Pramila Sanfui And others) and that the heirs of the deceased are all necessary parties to a probate proceedings; reliance in such regard is placed on (2005) 12 SCC 154 [Manibhai Amidas Patel and another vs. Dayabhai Amidas].

Upon hearing learned counsel and going through the materials-on-record, it is evident that the matter was taken up by a co-ordinate Bench on October 8, 2021, when the learned Single Judge was pleased to grant relief in terms of the prayer (i) of the notice of motion, directing that the petitioner be given a subsistence allowance of Rs.10 lakhs per month until further orders are made on the petition. Liberty was given to the respondent to seek further orders by way of an appropriate application or otherwise before the matter was taken up for consideration. Subsequently, the said order was challenged before a Division Bench and the Division Bench vide Order dated December 1, 2021, passed in APOT 161 of 2021 with PLA 327 of 2021, modified the order of the learned Single Judge to the tune that the amount of subsistence allowance payable to the executrix was reduced to Rs.7 lakhs per month on the express undertaking given by way of an affidavit by Dheeraj Maniyarin terms of the said order.

As such, the limited scope for consideration at the present stage, before affidavits are directed to be exchanged, is restricted to the observation made in the order dated October 8, 2021, to the effect that the direction of payment of substance allowance was to continue until further orders are made on the petition.

However, the liberty for seeking further orders, by way of appropriate application or otherwise before the matter was taken up for consideration, was only given to

the respondent and not the petitioner.

In such view of the matter, since the said order has merged into the order of the Division Bench and has attained finality, the same cannot be vacated at the ad interim stage itself by this Court, which would tantamount to sitting in judgment over a co-ordinate Bench order, that too prior to the affidavits being exchanged in connection with the main injunction application.

That apart, the petitioner has failed to establish any change of circumstance in the interregnum, between October 8, 2021, when the Single Bench order was passed, and the present. Hence, there is virtually no scope of further altering/modifying the order dated October 8, 2021, as modified by the order of the Appellate Court dated December 3, 2021 at this stage, particularly at the behest of the petitioner.

The alterations in the shareholding of the three companies, namely Campbell's Mining Company Private Limited, Digboi Carbon Private Limited, and Bihar Carbons Private Limited, as alleged, even as per the annexures to the injunction application, were effected mostly during the lifetime of the testator and, in a few cases, carry the joint signatures of Subhas and Chandni Maniyar, the respondent and the petitioner respectively.

Despite a challenge having been thrown to the authenticity of the signature of the petitioner in certain documents annexed to the application, the necessary particulars of fraud and/or forgery, as contemplated in Order VI Rule 4 of the Code of Civil Procedure, have not been established at this stage to hold ex facie that fraud was perpetrated by the respondent.

It is true that the probate court is not debarred absolutely from adjudicating prima facie on the right, title and interest of the contesting parties for the limited purpose of deciding an application for appointment of administrator pendente lite and/or passing orders of injunction in aid of the final grant in the probate proceeding. However, in the instant case, there is no scope of reconsidering the previous order of a co-ordinate Bench, as modified by the appellate court, at the ad interim stage itself before affidavits are exchanged and the injunction application / application for administrator pendente lite is heard finally on merits, since no change of circumstance in the interregnum has been established by the petitioner. The liberty to pray for further orders, on an appropriate application or otherwise, as given by the co-ordinate Bench on October 8, 2021, is restricted to the respondent and does not enure to the benefit of the petitioner, in any event.

In such view of the matter, the petitioner's prayer for further reliefs in terms of the prayers other than relief (i) of the injunction application has to be turned down at this stage.

It is made clear that the above observations are tentative in nature, made for the limited purpose of considering the petitioner's prayer for further ad interim orders. It will be open to the parties to argue all points at the final hearing of the

injunction application.

The respondents shall file their affidavit(s)-in-opposition to the injunction application, bearing G.A. No. 1 of 2021, within January 7, 2022. Reply/replies, if any, thereto shall be filed by January 14, 2022. The matter shall next be enlisted for final hearing of G.A.1 of 2021 on January 17, 2022.