

(2008) 10 BOM CK 0105

In the Bombay High Court

Case No : Miscellaneous Petition No. 45 of 2008 in Testamentary Petition No. 707 of 2007

Mr. Bomi Pirojshaw Sachinwala

APPELLANT

Vs

Dr. Cyrus S. Badshah and Others

RESPONDENT

Date of Decision : 08-10-2008

Acts Referred:

Succession Act, 1925 — Section 229, 230, 231, 247, 263

Citation : (2009) 1 BomCR 804 : (2008) 110 BOMLR 3656 : (2009) 1 MhLj 674

Hon'ble Judges : Roshan Dalvi, J

Bench : Single Bench

Advocate : H.N. Thakore and Agnes, instructed by, Thakore Zariwala and Associates, for the Appellant; B. Colabawala, F.Z.B. Kamdin and V. Deshpande, instructed by y, F.Z.B. and Associates, for the Respondent

Judgement

Roshan Dalvi, J.—This Petition is for revocation of the Letters of Administration granted to the Respondents. The Petitioner claims to be the executor of the last Will and Testament of the deceased one Dr. Shahapoor Behram Badshah who died in Bayreuth, Germany on 26 th March 2007. It is his case that the Will, though known to the Respondents, was suppressed and the Letters of Administration have been fraudulently obtained. Hence, he has applied for revocation.

2. The Will is dated 19.1.2000. It is registered on that date itself before the Sub Registrar of Assurances. Under the said Will, a Trust called Dr. Shapoor Behram Badshah Charitable Trust is created. Certain properties are bequeathed to the Respondents herein who are the two sons of the deceased. A large part of an immovable property is settled upon Trust. There is no separate Deed of Trust prepared. There are certain other small properties movable and immovable which are also to vest in the Trust.

3. The Petitioner is a contractor. He was given a contract to build a building for the purposes of a hospital for the Charitable Trust proposed by the deceased. It

was to be an Ashram to be used as a Rehabilitation Centre for street children. The Petitioner had to construct a hospital, prayer hall and an Ashram. The Respondents were to administer the affairs of the hospital, Ashram and prayer hall. If they declined, the administration would vest in the Petitioner as the executor for managing the affairs of the Trust by the Petitioner on behalf of the Trust.

4. The Petitioner has sought to contend that the Respondents had knowledge of the Will executed by their father in view of certain statements made in the Affidavit-in-rejoinder by one of the Respondents on behalf of himself as well as other Respondents in a Complaint filed in the Consumer Disputes Redressal Commission by the deceased against the Limited Company of the Petitioner being Complaint No. 140 of 2005.

5. It is contended that the deceased gave the work of constructing the hospital premises to the Petitioner. The premises were not constructed satisfactorily. There was a delay in construction. The deceased, who lived in Germany, visited India on a number of occasions. In his absence the construction did not proceed. The deceased filed the Complaint. After his death, the Respondents sought to prosecute the Complaint as the cause of action survived to them.

6. A portion of paragraph 7 of the Affidavit-in-rejoinder is shown to the Court by the Petitioner to contend that the Respondents had knowledge of the Will. The said paragraph contains denials of the statements made by the Petitioner in his Written Statement in the aforesaid Complaint. After making denials about the construction work and the service of the Petitioner, reference is made to a certain Power of Attorney executed by the deceased which has not been disputed. In that sentence reference is also made to the Petitioner being the executor of the Will. Thereafter lack of knowledge of any Will is shown. Further lack of knowledge of the fact that the Petitioner was the executor is also made. For both these aspects, the Petitioner herein has been put to strict proof. Thereafter the fact that though the Petitioner claimed to be the executor he had not obtained probate of the Will and the fact that as per the knowledge of the Respondents, their father, the original complainant, had died intestate is mentioned. Thereafter the fact of the Respondents having obtained Succession Certificate is mentioned. The relevant part of the said paragraph runs thus:

Although it is not disputed that the original Complainant had executed the Power of Attorney and he was executor of his will, I state that the said Power of Attorney was General Power of Attorney and the same has come to an end on demise of the original Complainant. am not aware of and do not admit whether the original Complainant had executed any Will and appointed the Opposite Party No. 2 herein as the executor of his Will and put the Opposite Party No. 2 herein to the strict proof thereof. Assuming without admitting that the original Complainant had executed any Will, admittedly the Opposite Party No. 2 has not produced the probate of the said Will in his alleged capacity as executor and is not entitled to rely upon the said will. I state that as per our knowledge, the

original Complainant had died intestate and has not left behind any Will in respect of properties in India and as such, being the only heirs and legal representatives of the original Complainant, the present Complainants are entitled to prosecute the present complaint. I state that the present Complainants have already approached the Hon''ble High Court for obtaining Succession Certificate. I crave leave to refer to and rely upon the said proceedings, when produced .

7. It can be seen that the underlined expression mentioned in the first sentence is completely out of context. This appears to be a secretarial error whilst correcting the draft of the Affidavit. The 'cut and paste' work appears not to have been properly done. The first sentence refers only to the Power of Attorney. It can be seen that the sentence without the aforesaid clause would be the correct sentence thus :

Although it is not disputed that the original Complainant had executed the Power of Attorney and he was executor of his will, I state that the said Power of Attorney was General Power of Attorney and the same has come to an end on demise of the original Complainant .

It is only the aforesaid phrase that is sought to be used against the Respondents to imply suppression of material facts. A further reading of the paragraph shows no knowledge of the execution of the Will. It shows that the Petitioner has been put to strict proof of what he has alleged in paragraph 5 of his Written Statement. It also shows that the deceased died intestate and that the Respondents have already sought to administer his estate.

8. It would not be proper to rely upon the phrase used completely out of context. It is not in consonance with the reading of the entire paragraph as a whole to impute such malafides as would tantamount to suppression of material facts in executing the estate by a fraudulent representation of a fact. The Petitioner's contention in that regard must, therefore, be rejected.

9. However, a registered Will has been produced. Even if that was not brought to the notice of the Respondents, once it is shown to Court it cannot be disregarded by the Court. It may be mentioned that revocation of grant of probate or Letters of Administration u/s 263 of the Indian Succession Act can be as much upon a false suggestion or concealment of facts under Clause (b) of the said section as also upon the grant being made upon an allegation made in ignorance of the facts. Under Clause-(c) of the aforesaid section, consequently even if the Respondents were ignorant of the fact that their father has left a Will, when the registered Will is produced, the Letters of Administration must be revoked.

10. The Respondents' Advocate has drawn my attention to several aspects to show and suggest that the Will could never have been executed by the deceased. It is strongly contended that the Respondents were the two sons of the deceased. They had cordial relationship with the deceased. They were to perform the funeral of the deceased. They were to administer the hospital to be

constructed by the deceased and yet none of them is made an executor under the Will and they have been bequeathed only a small part of the estate of the deceased. Hence the Will is unconscionable.

11. This Petition for revocation of the Letters of Administration. These aspects cannot be considered for justifying that it not be revoked.

12. It may be mentioned that the very complaint of the deceased in the Consumer Forum makes reference to the intention and desire of the deceased to utilize his monies for charitable purposes for the downtrodden. It is averred in the complaint that it is for that purpose that the deceased used to come from Germany, where he was settled, to India, which was his motherland to construct a hospital building. This very averment lends credence to the execution of the Will. Of course, strict execution would have to be proved before probate of the Will is granted and the estate is administered as per the directions contained therein.

13. Consequently, the case for revocation of the Letters of 3rd Administration granted on November 2007 by this Court for just cause is made out.

14. The Petitioner has also prayed for being permitted to file a fresh Petition for probate.

15. The Petitioner seeks to act as the executor under the Will. He had knowledge of the Will since the life time of the deceased. The deceased expired on 26.3.2007. The Petitioner did nothing to administer the estate as per the directions in the Will. The Respondents, without knowledge of the Will, applied for and obtained Letters of Administration on 3.11.2007 without contest. Of course, none could have contested as they are the only two heirs of the deceased and they claim that the deceased died intestate.

16. It is contended on behalf of the Respondents that the Petitioner never applied for probate and never performed any duty as executor because he had sought to renounce his executorship. There is intrinsic evidence in this regard. The Respondents have drawn my attention to a letter dated 3.9.2002 of the Petitioner annexed as Exhibit-D to the Petition itself, which is in reply to the letter of the deceased dated 27.6.2002. The correspondence was exchanged between the deceased and the Petitioner during the life time of the deceased whilst the construction work entrusted to the Petitioner was going on. It is clear that the construction was not progressing as directed and anticipated by the deceased. The Petitioner was given the contract. The deceased has admittedly filed a Complaint in the Consumer Court against the Petitioner. The correspondence between the parties with regard to the construction work on the property of the deceased had ensued. The letter dated 3.9.2002 shows, inter alia, as paragraph (k) the following:

(k) Please remove my name in your WILL as I am not willing to work as your ? EXECUTOR?, for which a separate letter shall be issued to you officially.

17. It is contended by the Petitioner that this does not constitute a renunciation of executorship. It is contended by the Respondents that it tantamounts to renunciation. Section 230 of the Indian Succession Act requires the form and effect of renunciation of executorship thus :

230. Form and effect of renunciation of executorship .-The renunciation may be made orally in the presence of Judge, or by a writing signed by the person renouncing and when made shall preclude him from ever thereafter applying for probate of will appointing him executor .

18. The only requirement is that the renunciation is in writing and signed by the person. It can be made at any time. No form is prescribed. No limits are laid down. In this case, the renunciation is made even before the Will took effect. It is during the life-time of the deceased. He was himself informed of the renunciation. The Petitioner has produced this letter to show the fact of the existence of the Will. He has contended that if the deceased had not made any Will, he would have definitely replied showing his surprise at such a statement. However, the Petitioner has not produced any reply to this letter. The lack of surprise, if any, therefore, cannot be seen. Of course, the Respondents have also not produced any copy letter in reply to this letter from the effects of the deceased to show surprise, if any, at this statement.

19. This letter, therefore, cannot conclusively show by itself the execution of the Will or lack of it. It has to be appreciated only to consider whether it constitutes the Petitioner's renunciation of his executorship.

20. The Petitioner is not a beneficiary. His name in the Will is only as an executor to manage the affairs of the Trust. He is not even appointed as a trustee. He is only appointed Manager of the Trust. The aforesaid letter shows that the Petitioner's name be removed from the Will. Hence the Petitioner would not be the executor or the Manager of the Trust. The line specifically shows that the Petitioner is not willing to work as the executor. The letter is signed by the Petitioner. The intention is clear. The renunciation is complete as it is in writing and signed by the Petitioner. In fact, it is made known to the deceased himself. The deceased could have executed another Will or a Codicil. He was put to notice that the only executor appointed by him was not willing to work as such. No further Will or Codicil is produced by any party.

21. The Petitioner has contended that he is willing to work as the executor and that the aforesaid statement is not a renunciation because for the renunciation a separate letter was to be issued to the deceased officially which was not done. Nevertheless, the parties had not reconciled thereafter. Their relations had deteriorated. The consumer complaint had progressed. It was not withdrawn or settled. It continued till the death of the deceased. It was thereafter continued and persecuted by the Respondents herein. In such scenario, the renunciation is required to be considered. The aforesaid section is clear and unambiguous. It requires nothing further to be done for an act of renunciation made outside Court

then to have the renunciation in writing and signed by the person making it.

22. Renunciation is usually made after the Will comes into effect because it is only then that the executor is called upon to perform his obligation under the will. However, the intent of a person to act or not to act as an executor may be in presenti or in futuro. There is nothing in law to suggest that an executor cannot in good faith or in fairness, inform the deceased himself that he was unable or unwilling to take up the onerous task of executorship. Consequently, the renunciation made in the life-time of the deceased cannot, in the absence of a specific legal provision, be rejected only as premature. The law relating to the renunciation u/s 230 of the Indian Succession Act has been settled since the earlier decades of the century. It may be set out as follows:

23. In the case of *In the Goods of Manick Lal Seal* of the Calcutta High Court, ILR 35 Cal 156 where the Official Trustee expressed his intention of renouncing probate but subsequently retracted, no formal renunciation having been made, he was not precluded from applying for probate. In that case the intention was expressed by the Official Trustee to the Solicitors for the estate that he desired to withdraw when the matter came up before the Court. The Official Trustee instead put in a Petition that he be granted probate. What was considered was whether he had renounced in such a manner as precluded him from applying for probate. The Official Trustee had written a letter to the Solicitors in which the intention was expressed. But before the matter came to the Court he never made a representation intimating Court that the renunciation was filed. Since that letter was not filed in Court it was held that it did not amount to renunciation of executorship and probate was directed to be issued to him.

24. Thereafter in the case of *(Thoppai) Venkataramier Vs. A. Govindarayalier*, , the judgment in the case of *Manick Lal Seal* (supra) was followed. It was held that an executor could assert outside the Court that he is renouncing his executorship, but it is by his statement in the Court that he will stand or fall. In that case the executor contended that the Will was executed by deceit practised upon the testator and that the testator had never put his signature on his own volition. But if the Court considered the Will genuinely and was prepared to grant the probate, he was willing to act as an executor. It was held that such a statement is not an assertion. That the Will is a pure concoction. The Court construed the statement of the executor as stating that he had doubts about whether the Will was a voluntary act of the testator. But before he accepted or renounced the Will, he would wait for the Court to determine the genuineness. In such a case it was held that there was no renunciation of executorship.

25. It may be mentioned that this case is quite the reverse. The Will is not disputed or doubted by the Petitioner. The Petitioner knew about execution of the Will. He knew that he was to act upon it as an executor. He unequivocally stated to none other than the deceased himself that he was not willing to act as his executor. Hence, the test of how the Court construed the renunciation in that case, if applied in this case, would bring about a different result. The very words

of the Petitioner unequivocally show that he had nothing to do with the Will which was definitely executed. Hence, whereas the Will stood, his executorship was renounced.

26. In a Division Bench judgment in the case of Gnanamani Nadathi Vs. Esunadian Nadar, , it is held that the written renunciation proved to the satisfaction of the Court is sufficient. It is observed thus :

There is nothing in the section to show that the writing also must be in Court; it is sufficient if there is a written renunciation and it is proved to the satisfaction of the Court.

In that case the executor administered the estate for four years and then renounced his office. It was held that the renunciation was valid.

27. In the case of In Re: Manchershah Pestonji Danania, , it was held that renunciation by an executor, when made, becomes final. He cannot retract it except with the permission of the Court. The Court cannot permit the retraction except ?in a case fit for it.? It is held that it would only be allowed to be retracted if the retraction is for the benefit of the estate or of those who are interested under the deceased's Will. It is held that only the Court is the sole Judge to decide the retraction. Citing the case of Craddock v. Western which is relied upon in Tristram & Coote at page 275 , it was held that renunciation could not be retracted. That was a case in which the deceased died intestate and left four children. Three of them renounced. Administration was granted to a creditor. The fourth child got the grant revoked. Then the heirs sought to retract their renunciation and asked for administration to one of themselves. The Court observed thus:

The person renouncing had not been deceived or imposed upon in their renunciation, and if any inconvenience followed they must thank themselves for it.

This judgment, therefore, shows when retraction of the renunciation can be allowed. Consequently, relying upon Halsbury's Laws of England, Vol. 14, Para-261 , it is observed thus:

...a renunciation cannot subsequently be withdrawn, nor will the withdrawal be allowed merely on the ground that the executor has changed his mind. A renunciation cannot be withdrawn without the leave of the Court, and the renouncing executor must show that his retraction is for the benefit of the estate or of those interested under the will.

It is held in that judgment that when the executor has renounced, a renunciation cannot subsequently be withdrawn nor will the withdrawal be allowed ?merely on the ground that executor has changed his mind?. The renunciation can be withdrawn with the leave of the Court upon the executor showing that the retraction is for the benefit of the estate and those interested under the Will.

28. It is, therefore, held that retraction can be permitted only in a fit and proper case and not because the executor has changed his mind. In that case a writing was passed in favour of the Petitioner even before the letter of renunciation based upon which the Petitioner administered a part of his estate. Hence even a letter written out of Court renouncing the executorship was held enough to constitute renunciation u/s 230 of the Indian Succession Act.

29. In a Division Bench judgment in the case of *L.N. Gadodia v. Raghubar Diyal* AIR 1931 Lah 746 , also it has been held that renunciation by a writing signed by the executor is enough. In that case the executor declared an unequivocal language that he did not desire to act as executor. It was held that whatever may be the motive that prompted that refusal, the statement was an express declaration of his refusal to assume the responsibility of an executor. The argument that it had to be made in the form prescribed u/s 230 or that it can be made only when an executor is called upon by the Court to accept or renounce the executorship was negatived. Relying upon Section 229, it was held that even before proceedings were instituted in a Court of law or before the citation was issued to him, he could express his renunciation. It was held that there was no need to address it to the Court or to make it in some undefined manner as that would be reading into Section 230 a condition which is not mentioned therein. Consequently, a mere writing signed by the renouncing person is final and precludes him from thereafter applying for probate of the Will. It was further held that the English practice allowing retraction could not be followed in India.

30. Consequently, the Petitioner's letter mentioning, inter alia, about his refusal and unwillingness to work as executor would suffice and the Petitioner cannot now change his mind to act as executor. It may be mentioned that in this case the Petitioner has not applied to Court for retraction of his renunciation. He has not shown how it is a fit case for the benefit of the estate or those interested under the Will to grant probate to him as executor despite his renunciation. He has contended that he has not renounced the executorship. Following the case of *Manchersha* (supra), it is clear that the letter unequivocally expressing unwillingness to act as an executor is enough to constitute renunciation. In fact the Petitioner has acted upon his own renunciation. He has not acted upon the Will. He has not even applied to obtain probate of the Will. He has not served citation upon the Respondents. He allowed the Respondents to administer the estate of the deceased on intestacy. He allowed much time to pass until he filed this Petition on 28th April 2008, more than a year after the death of the testator.

31. Though, therefore, the production of a registered Will by the Petitioner is enough to revoke the Letters of Administration granted to the Respondents, facts of this case would not permit the Petitioner to be allowed to apply for probate by filing a fresh Petition for probate of the Will in which he has renounced his executorship.

32. Under Section 231 of the Indian Succession Act, when executor renounces his executorship, the Will is required to be proved and Letters of Administration with

copy of the Will annexed is required to be granted to the person who would be entitled to administration in the case of intestacy. Consequently, the Petitioner having renounced the Will and having failed to accept the executorship or act upon the Will for a period of more than one year from the date of the death of the deceased, the Letters of Administration with the Will annexed would be required to be granted to the Respondents upon the Will being proved.

33. However, it is seen that the Respondents are not interested in administering the estate of the deceased as per the Will. If, therefore, the Respondents fail to apply for and obtain the Letters of Administration with the Will annexed within a reasonable time, Administrator of the estate of the deceased would be required to be appointed u/s 247 of the Indian Succession Act to exercise rights and powers of a general Administrator subject to the immediate control and directions of the Court.

34. Since the Will produced by the Petitioner shows a large part of the estate of the deceased having been bequeathed in favour of the Charitable Trust for the benefit of street children, an Organisation (NGO) working for street children would best be appointed Administrator.

35. The two aforesaid prayers for revocation of the Letters of Administration and for permitting the Petitioner to apply for probate shall have to be considered accordingly. The other prayers in the Petition follow as a matter of corollary. Hence the following order:

ORDER

(i)The Letters of Administration granted on 3.11.2007 to the Respondents herein is revoked.

(ii)The Respondents shall not take any further steps under the Letters of Administration dated 3.11.2007. The Respondents shall render accounts of the estate administered by them.

(iii)The registered Will of the deceased shall have to be considered for the grant of probate of the estate of the deceased.

(iv)However, the Petitioner cannot be granted permission to file a Petition for probate as an executor thereunder.

(v)The Respondents, as the persons entitled to administration in case of intestacy, shall take steps to obtain Letters of Administration with the Will annexed.

(vi)The Respondents shall apply for and obtain Letters of Administration with the Will annexed within 4 months from today, failing which, the President/Chairperson of ?Akansha?, an Organization (NGO) which works for the benefit of street children or and if that is not accepted by Akansha, the President/Chairperson of World Vision, which is a charitable Organization working for the benefit of street children is appointed Administrator of the estate of the deceased

having the rights and powers of the general Administrator other than the rights of distributing such assets u/s 247 of the Indian Succession Act.

(vii) The Prothonotary and Senior Master shall inform the aforesaid persons of this order by a letter annexing a copy of this order within 4 weeks from today.

The aforesaid Administrator shall be entitled to file a Petition for probate and obtain the required orders and directions upon the failure of the Respondents to act as per Clauses (v) and (vi) above. This order is stayed for 8 weeks.