
(2001) 10 GAU CK 0021
In the Gauhati High Court
Case No : Second Appeal No. 174 of 1996

Narayan Prasad Lohia and Others	Vs	APPELLANT
Debi Prasad Morr and Others		RESPONDENT

Date of Decision : 06-10-2001

Acts Referred:

Succession Act, 1925 — Section 213, 57

Citation : (2001) 3 GLT 424

Hon'ble Judges : D. Biswas, J

Bench : Single Bench

Advocate : K. Agarwal and D.K. Chomal, for the Appellant; G.N. Sahewalla, A.K. Goswami and P. Bora, for the Respondent

Judgement

D. Biswas, J.—The Title Suit No. 31 of 1986 was filed by the Respondents herein for declaration that the deed of release No. 1237/94 is void and inoperative in law and for specific performance of the contract for sale of the suit land by the Appellants on receipt of consideration of Rs. 40,000/-. The learned Assistant District Judge, Tinsukia by an order dated 2.5.1992 decided the issue regarding maintainability of the suit against the Respondents and dismissed the suit. The Respondents challenged the order of the learned Assistant District Judge in Title appeal No. 7 of 1994 which was allowed by the learned District Judge, Tinsukia by an order passed on 8.8.1976. The learned District Judge remanded the suit for disposal afresh after hearing all the issues. The judgment and decree passed by the learned District Judge has been challenged in this appeal which was admitted by this Court on 3.1.1997 for hearing of the following substantial questions of law:

(1) Whether in the absence of a probate being granted of the Will under which the right is claimed by a Court of competent jurisdiction, a right as Executor or Legatee can be established in any Court of justice?

(2) Whether the suit for specific performance is maintainable in law in absence of a Probate of the Will, under which the right is claimed granted by a Court of

competent jurisdiction in view of the mandatory provisions of Section 213 of the Indian Succession Act, 1925?

(3) Whether the suit for specific performance of a contract is maintainable in law in respect of sale of land against the persons in favour of whom there was a Will without a Probate granted by a Court of competent jurisdiction?

2. I have learned Mr K. Agarwal, learned Counsel for the Appellants and Mr G.N. Sahewalla, learned senior counsel for the Respondents.

3. The above questions formulated at the time of admission of the second appeal appear to be more or less identical and, hence, answer to the question whether the executor or the legatee of a Will is competent to alienate the property without obtaining a Probate Will be determinative of the fate of the appeal.

4. For consideration of the above question, it is necessary to refer to the provisions of Section 57 and 213 of the Indian Succession Act which are quoted below:

57. Application of certain provisions of part to the class of Wills made by Hindu etc. The provisions of this part are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply:

(a) to all Wills and Codicils made by any Hindu, Buddhist, Sikh and Jaina, or on after the first day of 1870, within the territories which at the said date were subject to the Lieutenant - Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(b) to all such Wills and Codicils made outside those territories and limits so far as relates to immovable property situate within those territories or limits; and

(c) to all Wills and Codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of January, 1927, to which those provisions are not applied by Clauses (a) and (b):

Provided that marriage shall not revoke any such Will or Codicil 213. Right as executor or legatee when established (1) No right as executor or legatee can be established in any Court of justice, unless a court of competent jurisdiction in India has granted probate of the Will under which the right is claimed, or has granted letters of administration with the Will or with a copy of an authenticated copy of the Will annexed. (2) This section shall not apply in the case of Wills made by Muhammadans, and shall only apply:

(i) in the case of Wills made by any Hindu, Buddhist, Sikh or Jaina where such Wills are of the classes specified in Clause (a) and (b) of Section 57; and

(ii) in the case of Wills made by any Parsi dying, after the commencement of the Indian Succession (Amendment) Act, 1962, where such Wills are made within the local limits of the ordinary original civil jurisdiction of the High Courts at Calcutta,

Madras and Bombay and where such Wills are made outside those limits, in so far as they related to immovable property situate within those limits.

5. The provisions above Act clearly show that Section 213 bars an executor legate to have his right in such capacity established in any Court of law unless the Will from which the right is derived has been probated. This is precisely the answer to the question of law recast in paragraph 3 of the judgment.

6. However, the above answer is not the panacea for all cases. It has its" application depending upon the facts and circumstances of each case. The factual background of this case make out a case for exception. A bare reading of the judgment of the First Appellate Court would show that in the instant case the Appellants have been in unholy alliance with the Defendant No. 1, wife of the testator Ramdeo Lohia, designed to frustrate the legitimate claim of the Plaintiff Respondents. Recapitulation of the facts in brief is, therefore, necessary to clarify the position.

7. Ramdeo Lohia, since deceased, during his life time executed a Will in favour of his wife, Smti Laxmi Devi Lohia, bequeathing the disputed land including the suit land. The Will was registered on 8.10.1975. The testator died on 2.7.1980. Thereafter, the Defendant wife executed an agreement for sale of the suit land for a consideration of Rs. 48,000/-to the original Plaintiff, since deceased, now represented by the Respondents. The said agreement was also registered on 18.4.1983. A sum of Rs. 8,000/was also paid in advance against the consideration amount. The Defendant-wife applied for issue of probate which was registered as Miscellaneous Case No. 83 of 1983 in the Court of District Judge at Dibrugarh. During the pendency of the said probate proceedings, the Defendant-wife entered into an agreement with other Defendants, the step sons of the testator, in terms of which she did not proceed with the probate proceedings and executed a deed of release in respect of the suit land in favour of the co-Defendants. This act on the part of the Defendants is undoubtedly a matter which requires intensive scrutiny to ensure that justice is done. Besides the Defendants wife, although her status as a wife has been challenged, according to the learned First Appellate Court was entitled to her share as successor in interest to the estate of the testator. At any rate, the factual background do not permit dismissal of the suit filed for specific performance of contract only upon hearing the preliminary issue regarding maintainability. That part, Section 213 prohibits establishment of a right of an executor or legatee on the basis of Will yet to be probated. It does not prohibit a suit filed by a party for execution of a contract executed by a successor-in-interest whose right is further fortified by a Will. Therefore, this is a case which ought to have been dismissed upon hearing the preliminary issues only and, that too, on wrong interpretation of Section 213.

8. Cause of justice not be defeated unless stringent and absolute legal provisions clog its course. No Court would deny access to the Court of law to a person "wronged" in order to allow the "wrong doer" to enrich himself by recourse to a plea of illegality. The paramount duty of a Court is to ensure justice without

offending the provisions of law to the extent possible. Since Section 213 is not a bar to the case at hand, it, would be appropriate to refer the matter back to the learned Trial Judge for disposal of the case after hearing all the issues. The decisions cited by Shri Agarwal, learned Counsel for the Appellants in Mrs. Hem Nolini Judah (since deceased) and after her Legal Representative Mr. Marlean Wilkinson Vs. Isolyne Sarojbashini Bose and Others, cannot salvage the situation. I, therefore, decide to refrain from interfering with the judgment passed by the learned first Appellate Court. The learned trial judge is directed to dispose of the suit without being influenced by any observation made in this judgment.

9. In the result, this second appeal is dismissed.