

(2019) 12 DEL CK 0003

In the Delhi High Court

Case No : Civil Miscellaneous (Main) No. 1307 Of 2018

Rohinton Edalji

APPELLANT

Vs

Arvind Rai & Ors

RESPONDENT

Date of Decision : 03-12-2019

Acts Referred:

Indian Succession Act, 1925 — Section 192, 193, 194, 195, 208, 209
Code Of Criminal Procedure, 1973 — Section 145
Hindu Succession Act, 1956 — Section 15(2)(a)

Citation : (2020) 1 AD(Delhi) 124

Hon'ble Judges : Prathiba M. Singh, J

Bench : Single Bench

Advocate : Tanmaya Mehta, Raveesh Thukral, Shubham Mahajan, Anil Sharma, Arun Baali, Siddharth Yadav

Final Decision : Disposed Of

Judgement

Prathiba M. Singh, J

1. The present petition challenges the impugned order dated 13th August, 2018, by which the Petitioner's application under Section 195 of the Indian Succession Act, 1925, for appointment of a Curator, was rejected by the Id. Trial Court.

2. The background of the present proceedings is that one Ms. Piroja Edalji and Mr. Hoshang Edalji were 50% owners of property bearing No.213 (lower ground floor), Kailash Hills, New Delhi - 110065 (hereinafter, "suit property"). Ms. Piroja Edalji passed away on 19th December, 2012, leaving behind two daughters and two sons. The Petitioner is one of the sons of Ms. Piroja Edalji and the brother of Mr. Hoshang Edalji. Mr. Hoshang Edalji passed away on 29th March, 2018, in Delhi. He used to reside in the suit property.

3. After the death of Mr. Hoshang Edalji, disputes arose between the Petitioner and his family and Respondent No.2 - Mr. Babulal, who was working as the domestic help of Mr. Hoshang Edalji. It is not disputed that Respondent No.2 was

working as the domestic help of Mr. Hoshang Edalji since 1994. Respondent No.1 - Mr. Arvind Rai is the son of Respondent No. 2 - Mr. Babu Lal and Respondent No.3 - Ms. Phoolwati is the wife of Mr. Babu Lal.

4. The two sisters of the Petitioner and Mr. Hoshang Edalji have relinquished their shares in the suit property in favour of the Petitioner. Mr. Hoshang Edalji did not have any children. Thus, it is the claim of the Petitioner that he is the absolute owner of the suit property, being the real brother of Mr. Hoshang Edalji.

5. The case of the Petitioner is that upon the death of his brother, when he went back to the suit property, the Respondents did not permit him to enter the suit property. He was, therefore, forced to file a complaint with the police and an FIR was registered on 9th May, 2018. Post the said FIR being registered, the Respondents set up an alleged Will dated 15th September, 2017, which they claim has been executed by Mr. Hoshang Edalji, in favour of Respondent No.1. They have filed a probate petition seeking probate of the said Will and the said petition is stated to be pending. During the pendency of the probate petition, the Petitioner moved an application under Section 192 of the Indian Succession Act, 1925, which was dismissed by the Id. Trial Court, and is challenged in the present petition.

6. The submission of Mr. Mehta, Id. counsel appearing for the Petitioner, is that the Id. Trial Court has committed a grave error in holding that since the probate is pending, there is no dispute between two persons claiming under the Indian Succession Act, 1925. He submits that Respondent No.2 is only a domestic help of the deceased and in any case, the Petitioner owns 37.5% share in the suit property and could therefore not have been excluded. He submits that the Id. Trial Court has erred in holding that the judgment in *Uma Devi Nambiar v. TC Sidhan*, (2004) 2 SCC 321 does not apply to the facts and circumstances of the present case. It is his further submission that a perusal of the documents of the National Heart Institute shows that the Petitioner was present at the time his brother was admitted into the hospital and even at the time of his death. He, in fact, made the payments for the deceased's treatment and also conducted the last rites in the Parsi Crematorium. He further submits that the Respondents have illegally grabbed the suit property.

7. On the other hand, Id. counsel for the Respondents submits that the Petitioner, in fact, tried to illegally evict the Respondents, even though he has given a statement in the probate petition that he will not try to dispossess the Respondents, except in accordance with law. He further submits that the genuineness of a Will cannot be gone into in a petition under Section 192 of the Indian Succession Act, 1925, which is settled in the judgment of *Uma Devi Nambiar* (supra) itself. Thus, given the fact that the probate petition was pending and the Respondents being in illegal possession of the suit property was not the settled position, the petition was rightly dismissed by the Id. Trial Court. He further relies upon the order dated 28th May, 2018, passed in the probate petition, wherein certain observations have been made in respect of the wrong

contents of an envelope being dispatched to the Respondents. It is finally submitted that subsequent to the impugned order dated 13th August, 2018, on 8th May, 2019, the main petition itself has been disposed of and, thus, there is no challenge to the said order.

8. The Court has heard the Id. counsels for the parties. The admitted facts are that Respondent No.2 - Mr. Babulal worked as the domestic help of the deceased - Mr. Hoshang Edalji. The suit property was jointly owned by Ms. Piroja Edalji and Mr. Hoshang Edalji. Ms. Piroja Edalji passed away on 19th December, 2012, and her 50% share in the suit property equally devolved upon her four children, as by the time of her death, Mr. Phiroz Edalji - her husband, had pre-deceased her on 14th November, 1993. Upon the death of Ms. Piroja Edalji, the share of the various heirs to the suit property was as under:

S. No.

Name

Relationship

Share

1.

Amy Edalji Komer

Daughter

1/8th

2.

Hoshang Edalji

Son (1/8th + 1/2)

5/8th

3.

Roshni Edalji Hertslet

Daughter

1/8th

4.

Rohinton Edalji

Son

1/8th

9. The two sisters, namely Ms. Amy Edalji Komer and Ms. Piroja Edalji, had

settled in different parts of the world, but were still regularly visiting the family in the suit property. Since Mr. Hoshang Edalji lived alone, he had hired Respondent No.2 - Mr. Babulal as a domestic help, and Respondent No.2's family was residing in the servant's quarter on the terrace of the suit property.

Around 2001-2002, Mr. Hoshang Edalji was diagnosed with Chronic Obstructive Pulmonary Disease (COPD). In February, 2017, his health severely deteriorated and he had to be taken to the hospital by his neighbor. On 29th March, 2018, he passed away.

10. The Petitioner - Mr. Rohinton Edalji, has placed on record his passport and his call-details, to show that he was present in India prior to the death of his brother and was with him at the time of his death as well. It is further submitted that Mr. Hoshang Edalji died single, and thus, his share in the suit property devolves upon his two sisters and the Petitioner in the following manner:

S. No.

Name

Relationship

Share

1.

Amy Edalji Komer

Sister

1/3rd

2.

Roshni Edalji Hertslet

Sister

1/3rd

3.

Rohinton Edalji

Brother

1/3rd

11. Both the sisters executed registered relinquishment deeds in favour of the Petitioner on 23rd May, 2018 and on 25th May, 2018. When the Petitioner returned after performing the last rites of his brother on 1st April, 2018, he was prevented from entering the suit property by the Respondents.

12. The Respondents relied upon an alleged Will dated 15th September, 2017,

and filed a probate petition. In the probate petition filed by Respondents, the pleaded case is that the brother and sisters of the deceased did not show any love and affection to him and hence, since the Respondents were taking care of the deceased, he bequeathed his share in the suit property i.e., 62.5%, in favour of the son of his domestic help - Respondent No.1 - Mr. Arvind Rai. The relevant plea in the probate petition is as under:

"5. It is submitted that the Petitioner had served the Deceased as his son even the family members of the Petitioner were also actively taking care of the deceased throughout his lifetime and the deceased used to treat them as a part of the extended family as the Petitioner used to manage the day to day affairs of the deceased such as bank withdrawals and other misc., as a result of which the Deceased had left behind his entire estate (undivided to the extent of 62.5%) in favour of the Petitioner while being possessed of sound state of mind without any force and any undue influence in favour of the Petitioner."

13. Notice has been issued in the said petition on 2nd June, 2018. The Petitioner, thereafter, filed a petition under Section 192 of the Indian Succession Act, 1925, seeking the following reliefs:

"In the circumstances, it is most respectfully prayed that this Hon'ble Court may be pleased to:

a. Pass an order thereby allowing the present Petition thereby removing the Respondents from the possession of the demised property and allowing the Petitioner and other legal heirs to have possession/access to the demised property.

b. Appoint a curator in terms of Section 195 of the Indian Succession Act, 1925 to take over the possession of the demised property and moveable assets pending disposal of the present petition.

c. Pass such other and further orders as this Hon'ble Court may deem fit in the facts and circumstances of the case."

14. The application under Section 195 of the Indian Succession Act, 1925, was dismissed by the Id. ADJ on 13th August, 2018. The finding of the Id. ADJ is as under:

"9. Ld counsel for petitioner has relied upon judgment Uma Devi Nambiar & Ors Vs T.C. Sidhan (dead) AIR 2004 SC 1772. The ratio of this judgment is that question of genuineness of the will cannot be decided conclusively in the proceedings under Section 192 to 195 Indian Succession Act. Even on facts in that case, there was a dispute between one sister and husband of another deceased sister. The two sisters had inherited equal shares in the property on the death of their father. The husband of the deceased sister took the possession of the property on the ground that his wife had executed a will in his favour. The other sister challenged the genuineness of the Will and also claimed herself to be the heir of her sister (being issue less) u/s 15 (2) (a) of Hindu Succession Act,

however, in the case in hand the dispute is not between two persons claiming under succession. Therefore, this judgment is not applicable to the case in hand.

10. The respondent cannot be said to be in a wrongful possession of the property and this application does not lie within the ambit of Section 192 to 195 Indian Succession Act. Application is therefore, dismissed"

15. A perusal of the above shows that the reason given by the Id. ADJ is that in the case in hand, the dispute is not between two persons claiming under succession. The Id. ADJ also holds that the Respondents are not in wrongful possession and hence, the relief prayed for in the application cannot be granted. The said order is under challenge in this petition.

16. Before analyzing the legal position under Section 192 of the Indian Succession Act, 1925, some provisions under Part VII of the Act are set-out herein-below:

"192. Person claiming right by succession to property of deceased may apply for relief against wrongful possession. - (1) If any person dies leaving property, moveable or immovable, any person claiming a right by succession thereto, or to any portion thereof, may make application to the District Judge of the district where any part of the property is found or situate for relief, either after actual possession has been taken by another person, or when forcible means of seizing possession are apprehended.

(2) Any agent, relative or near friend, or the Court of Wards in cases within their cognizance, may, in the event of any minor, or any disqualified or absent person being entitled by succession to such property as aforesaid, make the like application for relief.

193. Inquiry made by Judge. - The District Judge to whom such application is made shall, in the first place, examine the applicant on oath, and may make such further inquiry, if any, as he thinks necessary as to whether there is sufficient ground for believing that the party in possession or taking forcible means for seizing possession has no lawful title, and that the applicant, or the person on whose behalf he applies is really entitled and is likely to be materially prejudiced if left to the ordinary remedy of a suit, and that the application is made bona fide.

194. Procedure. - If the District Judge is satisfied that there is sufficient ground for believing as aforesaid but not otherwise, he shall summon the party complained of, and give notice of vacant or disturbed possession by publication, and, after the expiration of a reasonable time, shall determine summarily the right to possession (subject to a suit as hereinafter provided) and shall deliver possession accordingly.

Provided that the Judge shall have the power to appoint an officer who shall take an inventory of effects, and seal or otherwise secure the same, upon being applied to for the purpose, without delay, whether he shall have concluded the inquiry necessary for summoning the party complained of or not.

195. Appointment of curator pending determination of proceeding.- If it further appears upon such inquiry as aforesaid that danger is to be apprehended of the misappropriation or waste of the property before the summary proceeding can be determined, and that the delay in obtaining security from the party in possession or the insufficiency thereof is likely to expose the party out of possession to considerable risk, provided he is the lawful owner, the District Judge may appoint one or more curators whose authority shall continue according to the terms of his or their respective appointment, and in no case beyond the determination of the summary proceeding and the confirmation or delivery of possession in consequence thereof:

Provided that, in the case of land, the Judge may delegate to the Collector, or to any officer subordinate to the Collector, the powers of a curator:

Provided, further, that every appointment of a curator in respect of any property shall be duly published."

17. A perusal of the above provisions shows that, for grant of relief under Section 192, a person must claim a right under succession in the property, or in any portion of the property. An inquiry would have to be conducted, which is summary in nature, to arrive at a conclusion as to whether the party in possession has lawful title or not. The inquiry would also extend to the question as to whether the application is bona fide and whether the applicant would be materially prejudiced, if relegated to the ordinary remedy of a suit. After conducting the inquiry, the Court would summarily determine the right to possession and, accordingly, deliver possession.

18. Under Section 195, the Court can also appoint a curator, if the Court is of the opinion that there is considerable risk to the applicant, who is the lawful owner. Such a curator can even be directed to take possession of the property and prepare an inventory of the property. The above scheme has been laid down in the case of Uma Devi Nambiar (supra), wherein the Hon'ble Supreme Court has observed as under:

"19. Coming to the scope and ambit of Sections 192, 193, 194 and 195 it is to be noted that they form a part of Chapter XIII dealing with the modalities to be adopted, for protection of properties of the deceased being covered by Part VII. These proceedings are essentially interlocutory in character and necessarily summary depending upon the filing of an application for relief seeking the Court to determine who has a right to possession pending the final determination of the rights of the parties in a regular suit.

20. Section 192, inter alia, provides that a person who claims right by succession can make an application in respect of a property, movable or immovable, left behind a person who has died. Section 193 provides for an enquiry by the District Judge to whom such an application is made and Section 194 deals with the procedure to be adopted when an application is made under Section 192.

21. The Court before taking any steps in the matter under Section 194 is required to be satisfied of the existence of such strong ground of belief on both points i.e. the person in possession has no lawful title and that the person applying is likely to be materially prejudiced if left to the ordinary remedy of a regular suit. An order under Section 194 is in nature of summary decision and can only be passed if the conditions embodied in Section 193 are fulfilled. The expression "subject to a suit" means subject to a suit contemplated under Section 208 i.e. a regular suit to establish title and obtain possession.

22. The effect of a summary decision even in an extreme case is not a bar to a regular suit. The underlying object of Section 208 and Part VII is particularly to protect the property appertaining to large estates in case of a dispute as to succession. As noted above, it has a great similarity to a proceeding under Section 145 of the Code with respect to certain specified properties where its scope is large in as much as it embraces all properties movable and immovable and once for all it settles the right to hold possession of the property summarily directing the other disputants to seek their remedy in proper Court by appropriate proceedings. A person aggrieved by an order passed by a summary proceeding under Part VII is required to seek remedy by a suit and not by an application for revision. This remedy is preserved by Section 208. Section 209 makes the position further clear. It provides that the decision of a District Judge in a summary proceeding under Part VII shall have no other effect than that of settling the actual possession, but for this purpose it shall be final and shall not be subject to any appeal or review. But where instead of a summary disposal, there is in depth analysis of the evidence and conclusive conclusions/decisions arrived at it cannot be said that there has been a proper exercise of the power conferred while dealing with an application under Section 192 of the Act.

23. In the case at hand by several orders/judgments on earlier occasions/stages, it has been specifically held that the genuineness of the Will has to be established in a regular suit. While dealing with an application under Section 192 of the Act, obviously there has to be some consideration of the genuineness of the Will. But it cannot be in a conclusive and detailed manner as has been done in this case. Further, when admittedly half of the share in the property indisputably belonged to Appellant 1, the District Judge while dealing with an application under Section 192 could not have either ventured to undertake even a summary decision of a disputed title of the respondent or even delivered possession of the whole property to original Respondent 1 in preference to the person whose title and claims are beyond controversy at least in respect of her half share. This itself shows that the consideration was not proper and the entire exercise wholly impermissible. The High Court dismissing the revision petition holding that the jurisdiction was discretionary, is to put it even in mild terms, a serious error and misdirection virtually placing a premium on grave illegality committed resulting in miscarriage of justice."

19. In the present case, the Will put up by the Respondents would also have to

be looked at before arriving at a final decision in the petition under Section 192. This is clear from a reading of the ratio in *Uma Devi Nambiar* (supra). A prima facie view has to be taken by the Court as to the genuinity and validity of the Will, though the same may be pending in the probate petition. While examining the Will, the Court can obviously look at any suspicious circumstances surrounding the execution of the Will. A perusal of the Will set up by the Respondents shows that the recitals in the same clearly admit that the Petitioner is the real brother of the deceased and has inherited rights in the suit property from his mother. The recitals, to the effect that the brother and sisters of the deceased did not visit him, is prima facie proved to be incorrect, from a perusal of copies of passport documents, migration stamps and call records of the siblings of the deceased.

20. The alleged Will is dated 15th September, 2017 i.e., a few months prior to the demise of Mr. Hoshang Edalji - the testator. In the months prior to the testator's demise, the testator had been hospitalized several times. There is also no averment to the effect that the Will is registered. Bequeathing valuable property located in a posh South-Delhi colony in favour of the son of a domestic help would prima facie be a suspicious circumstance.

21. In the probate petition, the Respondents are merely claiming 62.5% share in the suit property and not 100% share, this itself proves that they do not have complete rights in the suit property and the remaining 37.5% share belongs to the Petitioner. Registered relinquishment deeds, which have been placed on record, are sufficient for this Court to conclude, at this stage, that the Petitioner undisputedly owns 37.5% of the suit property.

22. Moreover, considering the suspicious circumstances surrounding the execution of the Will, as also documentary evidence which shows that the Petitioner had, in fact, paid for the medical treatment of his brother and the fact that suit property was originally bought by the mother of the Petitioner, the Petitioner cannot be deprived of the enjoyment and occupation of a property which belonged to his family. It would be completely inequitable and unjust to exclude the Petitioner from a house in which he prima facie owns 37.5% share. Moreover, a reading of the Will does not inspire any confidence. Details of the two attesting witnesses are not given. It is also not clear as to whether they are genuine witnesses or not. There is no reason which has been shown that would explain why the deceased would bequeath his entire share in the suit property in favour of the son of his domestic help, when, clearly, his family was in touch with him, especially his brother, who, as is borne out from the record, interacted with him almost on a daily basis. The plea of the Respondents, that the Petitioner and his family were not in constant touch with the deceased, does not appear to be true.

23. Proceedings under Section 192 are summary in nature. However, even in summary proceedings, the Court has to take a view, on the basis of the evidence on record, as to whether possession ought to be given. This Court, is of the clear

opinion that the Petitioner i.e., the brother of the deceased and the son of the original owner, cannot be deprived of entering and occupying the suit property. The Respondents were the domestic help of the deceased and cannot convert themselves into owners of the suit property, especially since their rights are yet to be established in the probate petition. It is unfortunate that such a circumstance has even arisen, due to the fact that no member of the family was continuously residing with the deceased. The siblings of the deceased, having settled abroad, the deceased may have given some control of the suit property to the Respondents, who were residing in the servant quarter in the property, however, that cannot convert them into owners of the suit property.

24. Under these circumstances, this Court passes the following directions:

a) It is directed that the suit property ought to remain with the Edalji family, until the decision in the probate petition.

b) The Petitioner is permitted to enter the suit property and occupy the same. Considering that during the lifetime of the deceased, the Respondents were in occupation of the servant's quarter on the terrace of the suit property, they are permitted to only occupy the servant's quarter, during the pendency of the probate petition.

25. Accordingly, the impugned order is set-aside and the matter is remanded back to the Id. ADJ, in order to conduct an inquiry as per Section 193 and to pass final orders in the petition under Section 192.

26. In order to hand over peaceful possession of the suit property to the Petitioner, Mr. H.S. Sharma, DJ (Retd.) (M: 9910384647, E-mail: hss21252@gmail.com) is appointed as a Local Commissioner to visit the suit property on 10th December, 2019 at 11am. The respondents shall hand over the peaceful possession of the property to the Local Commissioner who shall then hand over the same to the Petitioner. The Local Commissioner shall also prepare a complete inventory of the movable property belonging to the deceased - Mr. Hoshang Edalji in the suit property. The said belongings shall be handed over to the Petitioner. Possession of the servant's quarter shall, however, be given to the Respondents, for their living, until the decision in the probate petition. One set of keys of the servant quarter shall be given to the Respondents and the second set of keys shall be deposited with this Court. The commission shall be executed in the presence of the police. The SHO of the area concerned is directed to render all assistance to the Local Commissioner. One representative and two counsels on behalf of the parties are permitted to accompany the Local Commissioner. The Local Commissioner shall be entitled to take photographs as well. The Respondents shall ensure that they cooperate in the execution of the Commission. One key of the property shall remain with the Petitioner and another key shall be deposited in this Court. The fee of the Local Commissioner is fixed at Rs.50,000/- to be paid by the Petitioner. Report of the Local Commissioner be submitted within two weeks. If there is non-cooperation, the

Local Commissioner is permitted to break open locks.

27. With these observations, the petition and all pending applications are disposed of.