HIGH COURT OF MADHYA PRADESH
BENCH AT INDORE
(SB: HON. SHRI JUSTICE PRAKASH SHRIVASTAVA)

Writ Petition No.339/2015

Rupinder Singh Anand. …. Petitioner

Vs.

Smt. Gajinder Pal Kaur Anand
& others. ….Respondents

Shri S.R. Saraf, learned senior counsel with Shri Vinay Saraf, learned counsel for the petitioner.

Shri B.L. Pavecha, learned senior counsel with Shri Nitin Phadke, learned counsel for the respondent No.1.

Shri M.L. Agrawal, learned senior counsel with Shri Ravi Shukla, learned counsel for respondents No.2 and 3.

Whether approved for reporting :

O R D E R

(Passed on 3/8/2015)

1/ This writ petition under Article 227 of the Constitution of India is at the instance of the plaintiff in the suit challenging the order of the trial Court dated 12.12.2014 whereby the petitioner's objection in respect of the admissibility of the will/codicil dated 28.6.2003 and 4.1.2008 has been rejected.

2/ In brief, the petitioner has filed the suit for declaration and partition raising the plea that the petitioner's father Late Shri Jagjit Singh Ji Anand had died on 23.4.2008. the respondents No.1 to 3 had filed the written statements contending that Shri Jagjit Singh Ji Anand had executed the will

dated 28.6.2003 and codicil dated 4.1.2008. At the stage of cross-examining the plaintiff, the will and codicil dated 28.6.2003 and 4.1.2008 respectively was sought to be produced by the respondents No.1 to 3. The objection was raised by the petitioner about admissibility of the will and codicil without obtaining the letter of administration/probate, and objection has been rejected by the trial Court by the impugned order.

3/ Learned counsel appearing for the petitioner submits that since some of the properties mentioned in the will and codicil are situated in Mumbai, therefore, in terms of Section 57(b) and 213(1) of the Indian Succession Act, the letter of probate is necessary without which, the will and codicil cannot be admitted in evidence.

4/ Learned counsel for the respondents have supported the impugned order and have submitted that except three, all other properties mentioned in the will/codicil are situated in Indore and Delhi and therefore, in respect of those properties no probate is required.

5/ I have heard the learned counsel for the parties and perused the record.

6/ It is undisputed that the will dated 28.6.2003 and codicil dated 4.1.2008 were executed by Late Shri Jagjit Singh

Anand at Indore. Some of the properties covered by the will/codicil are located at Mumbai whereas the other properties are located at Indore and Delhi. No probate or letter of administration has been obtained in respect of will/codicil by the parties. Section 57 of the Indian Succession Act, in the Part VI Testamentary Succession, provides for application of certain provisions of Part to a class of Wills made by Hindus and reads as under :-

> "**57. Application of certain provisions of Part to a class of Wills made by Hindus, etc**.- The provisions of this Part which 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 or Jaina on or after the first day of September, 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 Jain 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."

7/ Section 213 of the Act relates to the establishment

of the right as executor or legatee and provides as under :-

> "**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 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 [or Indian Christians], 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 (16 of 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 relate to immovable property situated within those limits.]"

8/ In terms of Section 213(2) the probate or letter of administration is required in case of wills made by Hindu, where such wills are covered by Section 57(a) and (b), meaning thereby probate is required if such a will is made at or property is situated within the territories subjected to lieutenant Governor of Bengal on the relevant date or within the local limits of original civil jurisdiction of Madras and Bombay High Court.

9/ In the present case, undisputedly the will and codicil have been signed at Indore outside the local limits of High

Court at Calcutta, Madras and Bombay. So far as the properties which are situated at Indore are concerned, in respect of those properties no probate or letter of administration is required. It is the settled position in law that if the will is not executed within the territory mentioned in clause (a) of Section 57 or will does not relate to the property situated within the territory mentioned in clause (a) of Section 57, the provision of sub-section 1 of Section 213 are not attracted and the probate or letter of administration is not required. [See: **Phool Singh and two others Vs. Smt. Kosa Bai and two others**, reported in **1999(I) MPJR 352**]. The Supreme Court in the matter of **Clarence Pais and others Vs. Union of India**, reported in **(2001) 4 SCC 325** has settled that a probate is not required to be obtained by a Hindu in respect of a will made outside the territories mentioned in Section 57 and 213 of the Act or regarding the immovable properties situated outside those territories. In this regard, the Supreme Court has held that :-

> "6. The scope of Section 213(1) of the Act is that it prohibits recognition of rights as an executor or legatee under a will without production of probate and sets down a rule of evidence and forms really a part of procedural requirement of the law of forum. Section 213(2) of the Act indicates that its applicability is limited to cases of persons mentioned therein. Certain aspects will have to be borne in mind to understand the exact scope of this section. The bar that is

imposed by this section is only in respect of the establishment of the right as an executor or legatee and not in respect of the establishment of the right in any other capacity. The section does not prohibit the will being looked into for purposes other than those mentioned in the section. The bar to the establishment of the right is only for its establishment in a court of justice and not its being referred to in other proceedings before administrative or other tribunals. The section is a bar to everyone claiming under a will, whether as a plaintiff or defendant, if no probate or letters of administration are granted. The effect of Section 213(2) of the Act is that the requirement of probate or other representation mentioned in sub-section (1) for the purpose of establishing the right as an executor or legatee in a court is made inapplicable in case of a will made by Muhammadans and in the case of wills coming under Section 57(c) of the Act. Section 57(c) of the Act applies to all wills and codicils made by any Hindu, Budhhist, Sikh or Jaina, on or after the first day of January, 1927 which does not relate to immovable property situate within the territory formerly subject to the Lieutenant Governor of Bengal or within the local limits of the ordinary civil jurisdiction of the High Courts of Judicature at Madras and Bombay, or in respect of property within those territories. No probate is necessary in the case of wills by Muhammadans. Now by the Indian Succession (Amendment) Act, 1962, the section has been made applicable to wills by Parsis dying after the commencement of the 1962 Act. A combined reading of Sections 213 and 57 of the Act would show that where the parties to the will are Hindus or the properties in dispute are not in territories falling under Section 57(a) and (b), sub-section (2) of Section 213 of the Act applies and sub-section (1) has no application. As a

> consequence, a probate will not be required to be obtained by a Hindu in respect of a will made outside those territories or regarding the immovable properties situate outside those territories. The result is that the contention put forth on behalf of the petitioners that Section 213(1) of the Act is applicable only to Christians and not to any other religion is not correct."

10/ The aforesaid judgment also makes it clear that not only in respect of the properties of Hindus for which a will is made outside the areas mentioned in Section 57 and 213 but also regarding the immovable properties situated outside those territories, no probate is required.

11/ In the present case counsel for the respondents No.1 to 3 have categorically stated before this Court that on the basis of the will/codicil in question, the respondents want to establish their claim only in respect of property situated at Indore and Delhi for which no probate is required and not in respect of the property situated at Mumbai therefore, in terms of the aforesaid judgments also since the properties at Indore and Delhi for which the respondents are raising their claim the objection relating to obtaining the probate of the will in respect of those properties cannot be accepted.

12/ Learned counsel for the petitioner has placed reliance upon the judgment of the Madras High Court dated 12.1.2011 passed in **O.S.A. Nos.397 & 398 of 2010 in the**

matter of G. Ganesan Vs. P. Sundari, Full Bench judgment of the Madras High Court in the matter of **Ganshamdoss Narayandoss Vs. Gulab Bi Bai reported in AIR 1927 Madras 1054** and the judgment of Kerala High Court in the matter of **Cherichi Vs. Ittianam and others reported in AIR 2001 KERALA 184** but these judgment are distinguishable on their own facts since in those matters the wills and the properties were covered by Section 57 and 213 of the Act.

13/ This very issue between the same parties in the present civil suit had come up before this Court at earlier occasion while deciding the appeal arising out out the order of temporary injunction passed by the court below and this Court in the matter of **Rupinder Singh Anand Vs. Gajinder Pal Kaur and others** reported in **2011(1) MPLJ 646** after examining the aforesaid issue, had held as under :-

> "19. So far as legal question which has been raised by the appellant to the effect that no right can be claimed by the respondent Nos. 1 to 3 in the properties left by deceased Jagjit Singh Anand on the basis of Will and codicil as no probate has been obtained which is mandatory requirement of law is concerned, in all the cases cited hereinabove either the properties under the Will are situated in the ordinarily civil jurisdiction of the High Courts of Judicature at Madras and Bombay or in the jurisdiction of M.P. In none of the cases properties were situated at both the places. While in the case in hand most of the

> properties are situated in M.P. and only some of the properties are situated at Delhi and within the local limits of the ordinary original civil jurisdiction of High Court of judicature at Mumbai. Thus on facts all the case laws submitted are distinguishable. However, suffice to say that both the parties has placed reliance on a decision of Hon'ble Apex Court in the matter of Clarence Pais (supra) wherein Hon'ble Apex Court observed that a combined reading of section 213 and 57 of the Act would show that where the parties to the Will are Hindus or the properties in dispute are not in territories falling under section 57(a) and (b), sub-section (2) of Section 213 of the Act applies and sub-section (1) has no application. As a consequence, a probate will not be required to be obtained by a Hindu in respect of a Will made outside those territories or covering the immovable properties situated outside those territories. In view of this, prima facie it can safely be said that while deciding the application under Order XXXIX, Rule 1 and 2 of Civil Procedure Code the registered Will and codicil cannot be ignored only because it is unprobated."

14/ At another occasion this very issue between the same parties in the same suit had come up before this Court in W.P. No.12474/2010 against the order of the trial Court rejecting the petitioner's application under Order 6 Rule 16 of the CPC in respect of the alleged will and codicil. This Court while dismissing the writ petition by order dated 20.5.2011 had held as under :-

> "18. The decisions cited by Shri A.K. Sethi, learned Senior Counsel are in relation

> to probate proceeding where either probate is to be granted or letter of administration are to be given to an applicant having an interest in the estate of the deceased. The circumstances in the present suit wherein a person dies intestate are, however, different. The learned trial Court has correctly indicated that the dispute between the parties relating to the title of the deceased in respect of his properties which are situated in M.P. and Delhi, can be gone into and that there is no bar to a Court determining the same and if in the later stage it is found that administrator has not been appointed in respect of the three properties which are situated at Bombay, then the question regarding striking out of the defence of the defendants can be considered is just and proper."

Therefore, at earlier occasion also this Court has held against the petitioner in regard to this issue.

15/ It is also the settled position in law that the doctrine of severability applies to the wills. Section 87 of the Act provides that the testator's intention to be effectuated as far as possible and it is not to be set aside because it cannot be given effect to the full extent. This proposition is also supported by the judgment of the Privi Council in the matter of **Raghunath Prasad Singh and another Vs. Deputy Commissioner, Partabgarh and others** reported in **1929 Privy Council 283** judgment of the Supreme Court in the matter of **Bajrang Factory Ltd. and Another Vs. University of Calcutta and**

others reported in **(2007) 7 SCC 183** and in the matter of **Anil Kak Vs. Kumari Sharada Raje and others** reported in **(2008) 7 SCC 695**.

16/ Thus, I am of the opinion that the trial Court is competent to consider the wills in question in respect of the properties which are situated at Indore and Delhi for which no probate or letter of administration is required. Hence the trial Court has not committed any patent illegality in rejecting the petitioner's objection in respect of the admissibility of the will.

17/ Even otherwise, the Supreme Court in the matter of **Jai Singh and others Vs. Municipal Corporation of Delhi and Another** reported in **2010(9) SCC 385** while considering the scope of interference under Article 227 of the Constitution, has held that the jurisdiction under Article 227 cannot be exercised to correct all errors of judgment of a court, or tribunal acting within the limits of its jurisdiction. Correctional jurisdiction can be exercised in cases where orders have been passed in grave dereliction of duty or in flagrant abuse of fundamental principles of law or justice.

18/ The writ petition is accordingly dismissed.

(PRAKASH SHRIVASTAVA)
J u d g e

Trilok.