

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CM(M) NO.265/2009

% **Date of decision: 12th January, 2010**

SARDAR KHUSHWANT SINGH & ANR.Petitioners

Through: Mr. P.S. Bindra, Advocate

Versus

KIRPAL SINGH ... Respondent

Through: Mr. J.K. Jain, Advocate

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

RAJIV SAHAI ENDLAW, J.

1. This petition under Article 227 of the Constitution of India has been preferred by the objector in a probate case pending before the Additional District Judge and aggrieved from the order dated 31st January, 2009 of the Additional District Judge dismissing the application of the petitioner/objector under Order 7 Rule 11 of the CPC.

2. The respondent herein in/or about January, 2008 applied for grant of probate of a Will dated 20th November, 1974 of Sir Sobha Singh who died on 18th April, 1978. The petition for grant of probate was thus filed after nearly 30 years of the death of the executant of the alleged Will.

3. The Will of which probate was sought is titled “Deed of Daan”. The said document purports to make a gift in presenti, of a plot of land measuring 165’x111’ situated in Sujan Singh Park, at Maharishi Raman Marg, New Delhi, to the respondent, Sant Kirpal Singh for Deara purposes. The document records the executant having handed over possession of the aforesaid plot to the respondent Sant Kirpal Singh with rights to raise construction thereon. The document also declares that after the death of the executant, nobody, or anyone in individual capacity will be entitled to claim or concern with the aforesaid plot of land. The document declares the Deed of Daan to be irrevocable. The document purports to be signed by two witnesses and is unregistered.

4. The aforesaid document was the subject matter of a suit instituted by the respondent on 4th December, 1993. The said suit was instituted against Sir Sobha Singh & Sons Pvt. Ltd. besides against NDMC, L&DO & M/s Singh Sabha (Regd.), Sujan Singh Park, New Delhi. The respondent by the said suit sought a decree for permanent and mandatory injunction with respect to the construction commenced by the defendants in the suit on the aforesaid land and also sought mandatory injunction for removal of the construction already commenced by the defendants. The respondent who was the plaintiff in that suit claimed title to the land on the basis of the Deed of Daan aforesaid.

5. Sir Sobha Singh & Sons Pvt. Ltd., the defendant in that suit, denied the execution of the Deed of Daan by Sir Sonbha Singh and also denied the respondent being in possession of the land. It was stated that the respondent was

a trespasser in a room/Kothari at the back of the Gurdwara in Sujan Singh Park and suit for possession of the said room / Kothari had been instituted; it was further pleaded that the respondent had forcibly and illegally also constructed a kachcha room on the roof of the Gurdwara and with respect whereunto another suit had been instituted. Sir Sobha Singh & Sons Pvt. Ltd. claimed to be the owner of the aforesaid land which was part and parcel of much larger land, by virtue of the perpetual deed of lease executed by the President of India in its favour.

6. The aforesaid suit instituted by the respondent was dismissed vide judgment dated 15th July, 2002 of the Civil Judge, Delhi. While dismissing the suit, it was held that the witness from the L&DO had confirmed the perpetual lease of the land aforesaid in favour of Sir Sobha Singh & Sons Ltd.; that the respondent/plaintiff in that suit, in his cross examination had admitted that the suit against him for possession of the Kothari / room in the Gurdwara had been decreed; that though the suit was filed by the respondent claiming gift of the plot of land aforesaid by Sir Sobha Singh to him vide Deed of Daan aforesaid and which gift was not valid in law being not by a registered document, the respondent appearing as the witness termed the document as a Will. The Civil Judge negated the claim of the respondent of the Deed of Daan being a Will for the reason of probate granted of the validly executed last Will dated 22nd February, 1953 of the deceased Sir Sobha Singh and the respondent having not preferred any objections to the grant of probate of that will.

7. The records reveal that the respondent preferred an appeal against the judgment/decreed dismissing the suit. The said appeal was also dismissed by judgment dated 14th May, 2003 of the court of the Additional Senior Civil Judge, Delhi. While dismissing the appeal, the court considered the true nature and import of the Deed of Daan aforesaid i.e. whether it was gift as originally

pleaded by the respondent or a Will as deposited by the respondent in his evidence. The appellate court on a construction of the said document held the same to be structured as a gift and further held the gift to be invalid, being not registered. It was further held that the plea of the respondent in evidence of the document being a Will could also not been accepted for the reason of the respondent having failed to prove the document as a Will and as required by Section 67 and 68 of the Indian Evidence Act. The appellate court also held the document to be not authentic. The appellate court further held that the deceased Sir Sobha Singh could not have conveyed any rights in the plot of land by the document aforesaid, having no right therein himself and it having been established that the perpetual lease of the land was in favour of Sir Sobha Singh & Sons Ltd; the judgment of the appellate court also records that the respondent herein had not challenged the said fact. The appellate court further held that the respondent had failed to prove that he was at any time to be in possession or was in possession of the aforesaid plot of land. Both the trial court as well as the appellate court also held the respondent to have failed to identify the land in which the right was claimed.

8. The respondent preferred Regular Second Appeal No.134/2003 to this Court against the dismissal of his appeal aforesaid. The said second appeal was dismissed in limine vide order dated 6th August, 2003 of this court. This court inter alia held that the courts below had scrutinized the document and concurrently held the same to be a gift deed and not a Will and the said finding was not open for interference in a second appeal.

9. The respondent preferred Special Leave Petition No.20876/2003 against the order of dismissal of his second appeal. The said Special Leave Petition was also dismissed in limine on 9th February, 2004. A review petition (C)

no.674/2004 also came to be dismissed on 31st March, 2004. After awaiting for another approximately four years, the probate petition from which this petition arises was filed as aforesaid in January, 2008.

10. Even though in the first round of litigation aforesaid, it had been clearly held that Sir Soba Singh & Sons Ltd. was the owner of the land and it is also recorded in the judgment of the first appellate court that the respondent had not disputed the said fact but the respondent in the probate petition did not implead Sir Sobha Singh & Sons Ltd. as a party to the probate case. The natural heirs of the deceased Sir Sobha Singh were impleaded as respondents and who preferred objections as well as the application under Order 7 Rule 11 of the CPC. The rejection of the probate petition was sought inter alia on the ground of (i) the same being in abuse of the process of the court (ii) in an attempt to re-litigate (iii) being an attempt to prove the document after having failed to prove the same in the first round of litigation by way of civil suit as aforesaid (iv) it having been held in the first round of litigation that the document was not a Will, the petition for probate thereof being not maintainable (v) the petition for probate being barred by time (vi) the proceedings being worthless for the reason of the property claimed to have been bequeathed under the alleged Will admittedly not belonging to the deceased and being in the ownership of Sir Sobha Singh & Sons Pvt. Ltd.

11. Though the plea of the petition for probate being barred by time was also taken for rejection of the probate petition and which is a valid ground in view of the law now laid down by the Supreme Court in **Kunvarjeet Singh Khandpur Vs. Kirandeep Kaur** AIR 2008 SC 2058 but the petitioners at the time of arguing the application under Order 7 Rule 11 of the CPC before the trial court, in view of the judgment of the Division Bench of this Court in **S.S. Lal Vs. Shri Vishnu**

Mitter Govil 2004 V AD Delhi 509 did not press for rejection on the said ground. Even though the law as laid down by the Division Bench of this Court is no longer a good law in view of the subsequent judgment to the contrary of the Supreme Court in **Kunvarjeet Singh Khandpur** (supra), the petitioners having not pressed the said plea before the trial court, this petition under Article 227 of the Constitution of India is considered de-hors the said plea.

12. The counsel for the respondent at the outset relied on **Ranjeet Singh Vs. Ravi Prakash** AIR 2004 SC 3892 to contend that the jurisdiction under Article 227 of the Constitution of India was a jurisdiction of certiorari and a supervisory jurisdiction and could not be used to correct the errors of judgment of the subordinate court, as is possible while exercising the appellate jurisdiction. He also relies on **Mayar (H.K). Ltd. Vs. Owners & Parties, Vessel M.V. Fortune** 2006 SAR (Civil) 209 (SC), **C. Natarajan Vs. Ashim Bai** 2007 SAR (Civil) 952 (SC), **Ram Prakash Gupta Vs. Rajiv Kumar Gupta** 2007 AIAR (Civil) 828 (SC), **Sopan Sukhdeo Sable Vs. Assistant Charity Commissioner** 2004 SAR (Civil) 228 (SC), **Abdul Gafur Vs. State of Uttarkhand** 2008 SAR (Civil) 843 (SC), **Popat and Kotecha Property Vs. State Bank of India Staff Association** 2005 SAR (Civil) 744 (SC) & **Pearey Lal Workshop Pvt. Ltd. Vs. R.S.A. Saran** 2009 RLR 216, all on the general principles of Order 7 Rule 11 of the CPC and the disputed questions being not capable of adjudication at this stage.

13. Per contra, the counsel for the petitioners relied upon **Sanjay Kaushish Vs. D.C. Kaushish** 48 (1992) DLT 414 (paragraph 14) laying down that where, from a bare reading of the plaint and the admitted documents and facts coming out in the statement recorded under Order 10 of the CPC, the court could come to the conclusion that the plaint does not disclose a cause of action or the suit is

barred by limitation or otherwise not maintainable, the court can decide the said point even without recording any evidence.

14. The counsel for the respondent contends that for the purpose of rejection under Order 7 Rule 11 of the CPC only probate petition and nothing else is to be seen and if the petition seeking probate in the present case is to be seen, it discloses a cause of action and cannot be rejected, the point of limitation having been given by the petitioners before the trial court. It is contended that the proof of a Will has to be before a probate court only and not before the civil court and thus the findings of the civil court in the first round of litigation as to the document aforesaid, claimed to be a Will, having not been proved are of no avail. It is further contended that the orders of the various courts in the first round of litigation qua the proof of document are conflicting. It is urged that the bar of the probate having been granted of the Will dated 22nd February, 1953 of the deceased Sir Sobha Singh also does not come in the way of the respondent herein because the said Will was only qua the property of the deceased in Sir Sobha Singh block in Connaught Place and not qua the property subject matter of the Will of which probate is now sought.

15. It cannot be lost sight of that rejection of the petition for probate was sought by the petitioners herein also on the ground of the petition being in abuse of the process of the court. The same has been held to be a ground entitling the courts to dismiss a proceedings brought before it in limine if the court is satisfied of the same being in abuse of the process of the court. No person can be permitted to reap the inherent advantages from the pendency of a legal proceedings and to the prejudice of the others. Re-litigation is admittedly an abuse of the process of the court. It has been held in **K.K. Modi Vs. K.N. Modi** AIR 1998 SC 1297 that relitigation is contrary to justice and public policy and it

is not permissible for a party to relitigate the same issue which has already been tried and decided earlier against him. The Supreme Court in ***T. Arindam Vs. T.V. Satyapal*** AIR 1977 SC 2421 and ***Liverpool & London S.P. & I Association Ltd. Vs. M.V. Sea Success*** I (2004) 9 SCC 512 has held that proceedings of which there is no possibility of success and/or which are dead wood and are doomed should be shot down at the earliest stage and ought not to be permitted to clog the resources of the court and at the cost of other deserving matters requiring the attention of the court and should not be allowed to be used as a device to harass.

16. Seen in the aforesaid light, I am satisfied that the present case falls in the category of the petition for probate being not only an abuse of the process of the court but also of there being no chance of the respondent deriving any benefit even by succeeding in proving the document.

17. Taking up of the second aspect first, it is abundantly clear from the judgments of the various courts in the first round of litigation that it stands established that the property subject matter of the document titled Deed of Daan belonged, even in the lifetime of deceased Sir Sobha Singh, as well as now to Sir Sobha Singh & Sons Ltd. and which apparently was subsequently known as Sir Sobha Singh & Sons Pvt. Ltd. The judgment of the first appellate court in the first round of litigation as noticed above expressly records that the respondent herein had not disputed the said fact. The said finding of the first appellate court has not been disturbed in the order in second appeal or by the Supreme Court and is now conclusive and binding on the respondent. Once it is established and binding on the respondent that the property is of Sir Sobha Singh & Sons Ltd., even if the respondent succeeds in establishing that the document is a Will and not an invalid gift and/or in proving the same, the respondent still cannot derive any benefit therefrom for the reason of Sir Sobha Singh who has purported to

transfer /bequeath the property there under himself having no right with respect thereto.

18. In this regard it is also significant that the respondent also, in the first round of litigation chose to litigate with Sir Sobha Singh & Sons Pvt. Ltd. and not with the natural heirs of Sir Sobha Singh. If Sir Sobha Singh was the owner of the property, the same upon his demise and in the absence of any Will would have fallen to the share of his natural heirs and the respondent would have in the first round of litigation while seeking to establish his rights with respect thereto would have made the natural heirs of Sir Sobha Singh as parties to the suit. The respondent did not choose to do so and choose to litigate with the limited company. The respondent now cannot be permitted a second round with the natural heirs of Sir Sobha Singh. Thus, I find the petition to be doomed for the said reason and which ought not to be permitted to drag in the courts at the cost of other deserving cases. The petition seeking probate deserves summary dismissal on this ground alone.

19. The present case is clearly a case of re-litigation. The contention of the counsel for the respondent that the genuineness and authenticity of a Will is to be established in a probate proceedings only does not find favour with me. It is now settled proposition as held in ***Bihari Lal Ramcharan Vs. Karam Chand Sahni*** AIR 1968 P&H (at Delhi) 108 (DB) and ***Rajan Suri Vs. The State*** AIR 2006 Delhi 148 and reiterated in the recent dicta of ***Banwari Lal Charitable Trust Vs. Union of India*** MANU/DE/2515/2009 that as far as the city of Delhi is concerned, probate is not necessary to claim/assert rights under a Will. Even in the absence of a probate, such rights under a Will can be established in a collateral proceedings in which the Will may be in question. See ***Prithipal Singh Sabharwal Vs. Jagjit Singh Sabharwal*** MANU/DE/0851/1996.

20. From a reading of the judgments of the courts in the first round of litigation, it is clear that the validity, authenticity, genuineness of the document was very much in question. The respondent as plaintiff in those proceedings relied upon the said document in assertion of his rights qua the property and the defendants in that suit denied the same. Though the trial court in the first round of litigation did not pronounce on whether the document had been proved in accordance with law or not and merely held the same to be invalid as a gift and invalid as a Will in view of the probate of the Will dated 22nd February, 1953 but the first appellate court unequivocally held the respondent to have failed to prove the document and for this reason being not entitled to claim any rights there under as a Will also. The said finding of the first appellate court has not been disturbed in the second appeal or in the Special Leave Petition. The respondent was entitled in the first round of litigation also though emanating from a civil suit to establish that the document was a Will and was the validly executed Will qua the property in suit of the deceased. The respondent failed to do so. Having taken his chance to establish the Will in the civil court, the respondent is not entitled to thereafter seek probate. The probate court is concerned with the genuineness and validity of the Will; but the said genuineness and validity was also the subject matter of the earlier civil proceedings. A party which fails to prove a Will in the civil proceedings inspite of having opportunity to do so is not entitled to a second round before the probate court. As aforesaid, as far as the city of Delhi is concerned, the probate court is not the court of exclusive jurisdiction where a Will can be proved. The respondent in the present case chose to prove the Will in the civil court. Though he filed the suit claiming the document to be a gift but in his deposition he claimed it to be a Will. He also sought to prove the same through the deposition of one of the attesting witness in another proceedings. The civil court did not find the document to have been

proved as a Will. The said finding of the civil court is now res-judicata before the probate court at least against the respondent. The respondent having not impleaded the natural heirs of the deceased Sir Sobha Singh as parties to the civil suit, the finding if had been returned in the first round of litigation of the Will having been proved would not have been binding upon the said legal heirs of the deceased but is nevertheless binding upon the respondent.

21. Probate can be sought only of a Will. If it is disputed before the probate court where the document of which probate is sought is a Will or not, the probate court would adjudicate on the same. As aforesaid, in the city of Delhi the said jurisdiction also extends to the civil courts in which the Will may be established. The civil courts in the first round of litigation have categorically held the document not to be a Will. It is so expressly set out in the order in second appeal to this court. The respondent cannot now be permitted a second round before the probate court by contending the document to be a Will. Once the finding of the civil court of the document not being a Will is held to be binding on the respondent, the respondent is not entitled to a second round in the probate court to contend the document to be a Will. Thus, on both these counts the petition for probate is found to suffer from the malady of re-litigation.

22. The probate court was thus in error in holding that all the aforesaid aspects which are borne out from the judgments, have to be shut out and the probate petition to be put to trial. The probate petition was liable for summary dismissal not only under Order 7 Rule 11 of the CPC but as held in the judgment cited above also in the exercise of inherent powers of the court to weed out such frivolous litigation. The Supreme Court in ***Sardar Estates Vs. Atma Ram Properties Pvt. Ltd.*** (2009) 6 SCC 609 has held that starting a second round of litigation on frivolous grounds is a flagrant abuse of the process of the court and

this process has become widespread and which the court cannot approve of, otherwise no judgment would ever attain finality.

23. As far as the contention of the counsel for the respondent of this Court in exercise of jurisdiction under Article 227 of the Constitution of India being not entitled to interfere with the orders of the trial court, the present is in fact found to be a classic case where such powers ought to be exercised by this Court. The respondent is clearly made out to be abusing the process of the court and indulging in re-litigation. I may mention that not only the first round of litigation mentioned herein above but similar issues were also for adjudication in the suit filed against the respondent by Sir Sobha Singh & Sons Pvt. Ltd. for possession of room/ Kothari and which were decreed. The defence of the respondent to the said suit was of the ownership on the basis of the document aforesaid. It was held that the respondent has failed to prove the aforesaid document.

24. This petition succeeds and the petition for probate of the alleged Will dated 17th April, 1954 of Sir Sobha Singh is rejected/dismissed summarily. The respondent in the circumstances is also burdened with costs of Rs.25,000/- payable to the petitioners.

**RAJIV SAHAI ENDLAW
(JUDGE)**

January 12, 2010
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