

Rustam Ardeshir Gagrati

Rustam Ardeshir Gagrati

SooperKanoon Citation : sooperkanoon.com/328514

Court : Mumbai

Decided On : Sep-21-1989

Reported in : AIR1990Bom111; 1989(3)BomCR310; 1989MhLJ1034

Judge : G.H. Ghuttal, J.

Acts : [Succession Act, 1925](#) - Sections 302

Appeal No. : Misc. Petn. No. 17 of 1989 in Petn. No. 265 of 1968

Appellant : Rustam Ardeshir Gagrati

Judgement :

ORDER

1. This Petition by the sole surviving executor raises a question which is as interesting as it is difficult. The sole surviving executor appointed under the Will and the grantee of the Probate seeks from this Court in its testamentary jurisdiction, an order, appointing another person, not being an executor, to administer the estate jointly with him. Can such an order be made?

2. Framroze Dinshaw Bilimoria, the Petitioner herein, and Chinubhai Nagindas Mehta were the executors and trustees appointed under the Will and Codicil respectively, dt. 13/2/1957 and 25/11/1965, executed by Hirjeebhoy Dinshaw Bilimoria. In testamentary Petition No. 265 of 1968, the probate of the Will was granted to the Petitioner and Chinubhai Mehta --- Framroze Bilimoria, the third executor, having died during the pendency of the petition. The probate is dt. 10th

March, 1989. After the death of Chinubhai Mehta on 10th May, 1989, the Petitioner is the sole surviving executor of the estate of the deceased, Hirjeebhoy Bilimoria.

The Petitioner, 89 years of age, seeks a direction under S. 302 of the Succession Act that in the interest of the estate and the beneficiaries, some fit and proper person be 'appointed to act along with the Petitioner'.

3. The Petitioner seeks the appointment of a person not being an executor to 'act' jointly with him. Whether such an appointment could be made by the Court exercising testamentary jurisdiction may be considered in the light of the provisions of the Succession Act.

'Executor' of a Will is the person to whom the execution of the Will of a deceased is, by the testator's appointment, confided. He administers the estate by virtue of the grant made in his favour by the probate. There are only two ways of rightfully administering the estate of a deceased. It may be done by virtue of the Letters of Administration which are granted in cases of intestacy. The Letters of Administration may also be granted when a testator dies leaving a Will but without naming an executor or if there be an executor, such executor is legally incapable, or refuses to act or dies before the Will is proved. So also when a proving executor dies without fully administering the estate, the Letters of Administration with the Will annexed may be granted. The substance of the matter is that only a person who is granted the legal right to administration can administer the estate.

4. Consider the nature of the appointment sought in this petition. The petitioner who is administering the estate as an executor appointed by the Will wants the Court to 'appoint to act along with the Petitioner'. It is clear that the Petitioner due to his age wants someone to assist him. That is why he seeks the direction to appoint someone to 'act'. The capacity of the person sought to be appointed needs to be understood. Prayer (a) of the petition is revealing. The Petitioner wants such person to 'act along with' him, for the purposes set out therein. The prayer proceeds to state the purpose of such appointment. Such person shall have 'power to prosecute all pending proceedings and to give effectual discharge on behalf of the estate.'

After the grant of probate, the power to prosecute legal proceedings belongs only to the executor and no other person. The executor as the legal representative can give discharge on behalf of the estate. Therefore, the Petitioner seeks the appointment of another person to perform the duties and exercise the powers of an executor.

5. The deceased confided into the hands of the executor, the administration of his estate. I have carefully and anxiously endeavoured to discover whether the Court exercising testamentary jurisdiction can authorise by the stamp of its sanction the appointment of any other person to 'act along with' the executor for the purpose of administration of the estate. The executor, besides being the chosen confidante of the testator, has a unique position. He derives his title from the Will. He is the legal representative of the estate. After the probate is granted, as in this case, the powers of execution vest in the executor or the surviving executor. Even when all the executors die, the estate cannot be represented except by appointment of a new representative for administering the estate. No such representation can be granted as long as there is an executor who continues the chain of representation.

The rule applicable in the case of death of one or more executors has been stated in unmistakable terms. The powers of representation vest in the surviving executor except in the cases in which the Will contains 'any direction to the contrary'. There is no such 'direction to the contrary' in the Will of the deceased. Therefore, in this case, no one except the Petitioner can 'act' to administer the estate.

6. It is clear from the scheme of the relevant provisions of law that the acts of representation of the estate of the deceased can be done only by the executor. That is why the probate shall be granted only to an executor; the grantee of the probate alone can sue or prosecute a suit or otherwise act as representative of the deceased', and upon the death of one of several executors', the obligation to administer accrues to the surviving executors. The sanctity of the Will and therefore, of the appointment of executor is highlighted by the law which declares that the probate shall be granted 'only to an executor appointed by the Will'.

In the circumstances of this case, permitting anyone except the Petitioner to act even jointly with him to do the acts set out in the petition and summarised in

paragraph 4 of this judgment is to permit such appointee to represent the estate. I am afraid, the petition cannot be allowed without deviating from the law laid down in the Succession Act. Therefore, as long as one of the joint grantees of the probate is alive, no one can be appointed to 'act' with him for doing acts of administration of the estate.

7. This petition is for direction under S. 302 of the Succession Act. Such directions must necessarily be 'in regard to the estate or in regard to the administration thereof' These words limit the authority of the Court to question arising between executors or between executors and legatees, and which relate, to the administration of the estate. What the Petitioner seeks is beyond the scope of the administration of the estate. He seeks a direction that a person who is not appointed executor by the Will be permitted to do acts which are in the exclusive authority of the executor. Such a direction is clearly beyond the advisory scope of S. 302 of the Succession Act - for, it seeks to entrust the administration of the estate to a person not named by the testator and who is not in law entitled to administer the estate of the deceased.

8. Petition is dismissed.