

In Re : Harish Agarwal

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Court : Allahabad

Decided On : Aug-17-1999

Reported in : 1999(4)AWC3138

Judge : Sudhir Narain, J.

Acts : [Indian Succession Act, 1925](#) - Sections 119, 232, 234, 235 and 253

Appeal No. : Testamentary Case No. 4 of 1997

Appellant : In Re : Harish Agarwal

Advocate for Def. : A.D. Prabhaker, Adv.

Advocate for Pet/Ap. : Ajit Kumar, Adv.

Judgement :

Sudhir Narain, J.

1. The petitioner seeks grant of probate/letters of administration to him with the copy of the Will dated 31.1.1990 annexed with it to the extent of 1/3rd share in the property of the testator Shri Raghunath Prasad Agarwal.

2. The facts in brief are that Raghunath Prasad Agarwal executed his last Will on 31.1.1990 whereby he bequeathed his property C-15, Surya Nagar, Ghaziabad to his wife and three sons. He expired on 25.9.1995. The petitioner filed this petition

on 1st February, 1997 claiming 1/3rd share in the property. The notices were issued to his widow, two sons and two daughters. The petition has been opposed by his widow Smt. Sushila Agarwal and two sons, namely, Sri Satish Kumar Agarwal and Sri Rajesh Agarwal. They have admitted the execution of the Will but their objection is that the property was given exclusively to the widow of the testator and only after her death. the property in question was to be devolved on three sons in equal shares. On the contentions raised by the parties following issues were framed :

'1. Whether the Testator had by his Will dated 31.1.1990 given absolute life interest to his wife Smt. Sushila Agarwal for enjoyment of the tenancy rights over the constructions only as alleged in paragraph No. 7 of the plaint?

2. Whether Smt. Sushila Agarwal has absolute ownership rights on the property No. C-15, Surya Nagar, Ghaziabad to the exclusion of her 3 sons who had no such right during her life time?

3. Whether the three sons of the testator or anyone of them has a right to raise an immediate claim on the basis of the Will and the present petition is premature and not maintainable?

4. Whether the word 'my' appearing in paragraph No. 3 of the said Will was a typing error for the word 'her' as alleged in para 1A of the written statement?

5. As to what Relief, if any, is the petitioner entitled.'

3. Issue Nos. 1, 2 and 4 : These issues are related with each other and, therefore, are being decided together. The execution of the Will is not denied. The respondents have also admitted the execution of the Will by Raghunath Prasad Agarwal. The Will has also been proved by Niranjana Lal, the attesting witness who has filed affidavit stating therein that the Will was executed in his presence. It was read over to the testator and he signed the Will in his presence. The only question is whether the executant had given his wife life estate or absolute ownership in the property in question. In this context, the relevant part of the Will is produced below :

'1, Raghunath Prasad Agarwala, son of Late L. Surya Bhan aged 60 yrs. Resident of C-15 Surya Nagar, Ghaziabad (U. P.) do hereby make and declare this as my last Will and Testament without any pressure or influence and with my free mind whereby I bequeath and give to my wife Smt. Sushila Agarwala my property built on plot No. C-15 Surya Nagar, Ghaziabad (U. P.) along with the leasehold rights on the land Smt. Sushila Agarwala shall be the absolute owner of the said property after my death. And I hereby declare that I the sole owner of the above said property and it is free from all encumbrances, claims, charges, liens, demands, mortgages and I have constructed this property from my own funds except the portion wherein my eldest son Shri Satish Kumar Agarwal lives in. This portion has been constructed by him by his own earned funds. I hereby further declare that the said property will be enjoyed by my wife solely and absolutely in whatever manner she desires. No further construction shall be done by any of my heirs during her life time. My three sons (1) Shri Satish Kumar Agarwal (2) Shri Harish Kumar Agarwal and (3) Shri Rajesh Kumar Agarwal shall not have any right in the said property except the portion which has been constructed by my eldest son Shri Satish Kumar Agarwal as stated above and he will continue to have his rights to live therein. After my death however, there will be equitable distribution of the said property amongst my above mentioned three sons. However, my eldest son Shri Satish Kumar Agarwal will have first option to retain the portion constructed by himself through his own funds adjustable against his share of my said property.'

4. From the reading of the aforesaid Will, it is clear that the testator has given absolute rights of enjoyment of the property to his wife and only after her death, the property was to be distributed amongst his three sons. There is however, some ambiguity in this deed. It provides 'I bequeath and give my wife Smt. Sushila Agarwala my property built on plot No. C-15, Surya Nagar, Ghaziabad along with leasehold right on the land Smt. Sushila Agarwala shall be the absolute owner of the said property after her death'. At another place it reads 'I hereby further declare that the said property will be enjoyed by my wife solely and absolutely in whatever manner she desires. No further construction shall be done by any of my heirs during her lifetime'. At third relevant place, he states that 'after my death, however, there may be equitable distribution of the said property amongst my above mentioned three sons'. If the property had been given absolutely to his wife,

there was no occasion for the testator to indicate his intention that his property shall be taken by his sons after his death. The Will has to be construed as a whole. The property can be taken by his sons only when it is held that his wife was to enjoy the property during her life time. The first clause of the Will read with the other two clauses shows that the intention of the testator was that his wife was to enjoy the property absolutely during her life time and only after her death, the property in question was to be taken by his three sons. He had not given any share to his daughters and the reason for exclusion of his daughters are enumerated in the Will. It is not necessary to examine this aspect as the daughters have not filed any objection claiming their rights in the property in question.

5. The second issue is regarding the right of the wife of the testator in the property. She has been given absolute right to enjoy the property but the enjoyment does not confer any power to alienate the property to any person. In case such right is given the sons would be deprived of their right over the property in question after her death. The fact that the sons of the testator are to get the property under the Will after death of his wife implies that Smt. Sushila Agarwala was not given any right to alienate the property. The third issue is that word 'my' used in the Will should be read as 'her' wherein the testator has indicated that 'after my death, however, there will be equitable distribution of the said property amongst my above mentioned three sons'. The testator was conferring the power of absolute enjoyment of the property in favour of his wife and at the same time could not have stated that the same property was to be distributed equally amongst his three sons after his death. The word 'my' should be read as 'her' in the context of the entire contents of the Will. The three sons of the testator were to get the equal rights over the property in question after death of wife of the testator. Issue Nos. 1 and 4 are decided in affirmative. Issue No. 2 is decided in affirmative but with the clarification that Smt. Sushila Agarwala has only a life interest in the property.

6. Issue No. 3 : The petitioner is claiming the right on the basis that after death of his mother, he has a right to get a share in the property under the Will and, as such, he has vested interest. Section 119 of the [Indian Succession Act, 1925](#), provides that where by the terms of a bequest, the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper

time shall, unless a contrary intention appears by the Will, become vested in the legatee on the testator's death, and shall pass to the legatee's representative if he dies before that time and without having received the legacy, and in such cases the legacy is from the testator's death said to be vested In interest. Illustration No. 3 referred to in this section contemplates a situation where the property is bequeathed to one for life and thereafter to another person, such other person is said to have a vested interest on the death of the testator. The difference between the 'contingent' interest and the 'vested' interest was considered in Sree Chand Sowcar v. T. Kasi Chetty and others AIR 1933 Mad 885, wherein it was held that if the Interest created in favour of a person should take effect on the happening of a specified uncertain event which may or may not happen, the interest is a contingent one. The death of a man is an event of life of a person which is bound to happen. There is no uncertainty about it. The testator has conferred a life interest in a property under the Will to a person and thereafter to another person after the death of the first legatee, it is a vested interest on the subsequent legatee. The subsequent legatee has a vested interest immediately after the death of the testator because life interest has to cease on the death of the person who has life interest in the property. Similar situation arose in Smt. Kapuri Kuer v. Sham Narain Prasad : AIR1962 Pat149 , wherein the testator had given life interest in the property and absolute interest to his two daughters, it was held that the daughters had a vested Interest in the property on the death of the testator. Similarly in Chilamakuri Chinna Pullappa v. Gurkha Chinna Bayanna and others : AIR 1962 AP54 , where the testator bequeathed his property to his wife for life and thereafter his daughter was to enjoy the property under the Will, it was held that the daughter got a vested and not contingent interest in the property after the death of the testator. The Court relied upon the language of Section 119 of the Act. In P. Somasundaram v. K. Rajammal AIR 1976 Mad 295, it was held that if the life interest is followed by an absolute estate from the person to whom the absolute interest has been given has a vested right on the death of the testator.

The petitioner having an interest in the property after death of his father has vested right in the property and the petition filed by him is maintainable. The issue is decided accordingly.

7. Issue No. 5 : The petitioner has prayed that he may be granted probate/letters of administration with a copy of the Will dated 31.1.1990. Section 253 of the Act provides that in any case in which it appears necessary for preserving the property of a deceased person, the Court within whose jurisdiction any of the property is situate may grant to any person, whom such Court may think fit, letters of administration, limited to the collection and preservation of the property of the deceased and to the giving of discharges for debts due to his estate, subject to the directions of the Court. The petitioner is apprehensive that the property may be alienated by his mother because she is claiming absolute ownership in the property in question. He is a legatee under the Will.

8. Section 232 provides that the Court may grant letters of administration with the Will annexed to an universal or a residuary legatee, if the deceased has made a Will but has not appointed an executor or if the executor has been appointed, he is legally incapable or refuses to act. There is no definition of the 'universal legatee' contained in the Act but Wharton's 'Law Lexicon' defines as 'a testamentary disposition by which the testator gives to one or more person the whole of the property which he leaves at his decease'. 'Residuary legatee' on the other hand is defined as 'the person to whom the surplus of the personal estate, after the discharge of all debts and particular legacies, is left by the testator's Will'. In *Mst. Ram Rani v. Indrani*. AIR 1942 Oudh 510, the two Hon'ble Judges differed on the question as to who is the universal legatee. One view was that if the property has been given only to a legatee, he is a universal legatee but this view was not accepted by the another Hon'ble Judge. The Court, however, held that the letters of administration can be granted under Section 234 of the Act where one of the legatees can be granted letters of administration. In *Soundaraja Peter v. Florance Chellaih and others* : AIR 1975 Mad 194, it was held that the Probate cannot be granted but the letters of administration under the Will can be granted to any of the legatees under Section 234 where Section 235 is inapplicable. The petitioner having a vested interest in the property has to see that the property is preserved. In the facts and circumstances, he is entitled for letters of administration only to the extent that he can be permitted to supervise the property for its preservation.

ORDER

9. The petition is allowed. Letters of administration be granted in favour of Harish Agarwala son of Late Raghunath Prasad Agarwala in respect of the property under the Will on payment of ad valorem court fee on the estate of the deceased and after the Registrar gives a certificate under Chapter XXX, Rule 9 of the Rules of the Court regarding the sufficiency of the court fee.

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