

Smt. V. Prabha Vs. the State

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Court : Delhi

Decided On : Aug-11-1994

Reported in : 1994IIIAD(Delhi)1201; AIR1995Delhi128; 1994(31)DRJ385; (1995)110PLR72

Judge : Ms. Usha Mehra, J.

Acts : [Succession Act, 1925](#) - Sections 264, 266, 268 and 300; [Code of Civil Procedure \(CPC\), 1908](#) - Sections 151 - Order 9, Rule 7 - Order 39, Rules 1 and 2

Appeal No. : I.A. No. 7834 of 1987

Appellant : Smt. V. Prabha

Respondent : The State

Advocate for Def. : Atul Batra, Adv.

Advocate for Pet/Ap. : Mukul Rohtagi, Sr. Adv

Judgement :

ORDER

1. By this application the objector, legal heir of late Raja Pratap Bhan Prakash Singh, wants this Court to recall its order dated 13th October, 1987 passed in I. A. No. 4270. 87. It is the case of the applicant that the applicant had filed an application under Order 39 Rules 1 and 2 C.P.C. seeking restraint order against

the petitioner from dealing with properties mentioned in the schedule annexed to the probate petition. In the meantime, the petitioner filed an application for appointment of an Administrator. The application was allowed vide order dated 13th October, 1987. Tim order was passed in the absence of the applicant. The eldest son of the deceased Raja Pratap Rhan PrakashSingh arrived at Delhi on 10th October, 1987 in order to pursue this petit ion. His lawyer fell sick, however, keeping in view the interest of the applicant, his lawyer even during illness came to the Court on 13th October, 1987 but due to rush of work and on account of his illness he could not appear in the Court when the case was called. In the absence of the applicant/objector and his counsel, this Court passed the ex parte order appointing an Administrator for the properties mentioned in paras 4 & 5 of the Schedule. On account of the omission on the part of the lawyer, the ex parte order was passed. The applicant through his lawyer immediately on the same day moved an application for recalling of the order which was listed before Court on 15th October, 1987. The court on his application issued notice on 19th October, 1987 and in the meantime stayed the operation of the order passed by this Court dated 13th October, 1987. This application is supported by the affidavit of the objector sworn before Oath Commissioner on 13th October, 1987 itself.

2. This application, seeking recalling of the order dated 13-10-87, has been contested by the petitioner, inter alia, on the ground that this Court has no jurisdiction to recall its order passed on merits. It has become final. This Court has no inherent power to review its own order. Even otherwise no grounds have been made out for setting aside or recalling the said order as the said order was passed on merits. The remedy against the impugned order is by way of appeal.

3. I have heard the Id counsel for the parties and perused the record. Admittedly when the impugned order dated 13th October, 1987 was passed the applicant objector was not present. On all previous dates the objector was represented by. Mr. Mukul Rohtagi, Advocate. It has been explained in this application that the said counsel of the objector had fallen ill. Even though he attended the court on 13th October, 1987 but could not reach the connected when the case was called hence ex parte order was passed. Mr. Rohtagi immediately drafted the present application and filed the same inthe Court indicating that due to his illness and

rush of work he could not reach the Court when the case was called. So far as the bona fide of the objector is concerned that cannot be doubted. He came to Delhi on 10-10-87. This shows that there was no negligence or mala fide on his part. It was due to illness of his counsel and consequential rush of work that counsel did not attend to the case. For the act of omission and commission of the counsel, litigant cannot be made to suffer. The petitioner in her reply has admitted that the objector was present in the Court on 13-10-87. No mala fide can be inferred.-In para 6 of the reply it is stated that 'The junior and clerk of the counsel for respondents appeared and prayed before the court to get the matter passed over for some time at the second call Prabhakar along with the junior counsel of Mr. Mukul Rohtagi were present outside the Court room.' This fact lends support to the version given by the applicant when he stated that he was present in the Court on 13th October, 1987 but waited for his lawyer Mr. Rohtagi to come. This shows that the objector, respondent took interest in the case and, therefore, came all the way to Delhi to attend this case on the date fixed. Having come to Delhi and having attended the Court, one cannot imagine why he would earn ex parte order unless what he has stated is correct that his lawyer due to illness and rush of work could not attend the Court. No fault can be attributed to the objector. He cannot be made to suffer for the negligence of his counsel. The non-appearance of the objector on 13th October, 1987, when the case was called was neither intentional nor mala fide but due to the circumstances beyond his control, I think the applicant has made out a good case and shown sufficient cause for the recalling of the impugned order.

4,. Before parting, I may mention that a very important and interesting point has been raised by the petitioner regarding the power of this Court in recalling or reviewing the impugned order. At the outset, I must say the contentions raised by the petitioner are without force. A court which has the power to pass an order has the power to review the same if sufficient cause is shown. In order to deal with this objection scheme of the grant and revocation of the probate and the applicability of the C.P.C. has to be seen under the provisions of Indian Succession Act (In short the 'Act').

5. The power to grant and revoke the probate has been conferred on the District Judge under Section 264 of the Act. This Section provides that the District Judge shall have jurisdiction in granting and revoking probate in all cases within his districts. Section 266 of the Act which is reproduced as under provides that the District Judge shall have like powers and authority as are by law vested in him in relation to any civil suit or proceeding. Meaning thereby that while dealing with probate case pending in his Court he will deal with the same as if he was dealing with a civil suit pending in his court.

'266. District Judge's powers as to grant of probate and letters of administration - The District Judge shall have the like powers and authority in relation to granting of probate and letters of administration, and all matters connected therewith, as are by law vested in him in relation to any civil suit or proceeding pending in his Court.'

6. Section 268 of the Act, which is reproduced as under, provides that the District Judge in relation to the grant of probate shall regulate his proceedings so far as the circumstances of the case permit in accordance with the provisions of the Code of Civil Procedure (in short 'CPC').

'268. Proceedings of District Judge's Court in relation to probate and administration The proceedings of the Court of the District Judge in relation to the granting of probate and letters of administration shall, save as hereinafter otherwise provide, be regulated, so far as the circumstances of the case permit, by the Code of Civil Procedure, 1908'.

7. Section 300 of the Act, which is reproduced as under, provides that the High Court shall have the concurrent jurisdiction with the District Judge in the exercise of all the powers hereby conferred upon the District Judge.

'300. Concurrent jurisdiction of High Court -- (1) The High Court shall have concurrent jurisdiction with the District Judge in the exercise of all the powers hereby conferred upon the District Judge.

(2) Except in cases to which Section 57 applies, no High Court, in exercise of the concurrent jurisdiction hereby conferred over any local area beyond the limits of

the towns of Calcutta, Madras and Bombay shall, where the deceased is a Hindu, Muhani-madan, Buddhist, Sikh or Jaina or an exempted person, receive applications for probate or letters of administration until the State Government has, by a notification in the Official Gazelle, authorised it so to do.'

8. From the scheme of the Act as discussed above it is clear that this Court exercises the same power as are vested with the District Judge. Since the Court proceedings are to be regulated by the provisions of the CPC, so far as possible, therefore, it is clear that the legislature empowered the Court to invoke the provisions of the CPC and regulate its proceedings accordingly. If that be so, then the provisions of Order 9 as well as of Section 151 CPC would be attracted and can be invoked by the Court while disposing this application. Order 9 Rule 7 CPC provides that if the defendant on the adjourned hearing shows good cause for his previous non-appearance, Court may set aside ex parte order. Even under Section 151 CPC this court would have inherent power to recall its order if the circumstances permit. So far as the objection of the petitioner that it was an order on merits, hence cannot be recalled is also without force. Admittedly, it was an ex parte order and not after the contest, hence the provision of Order 9 Rule 7 CPC would apply. That being so this Court will have the power to review its order. As already discussed above, since the applicant/objector has been able to furnish good cause for non appearance, I see no reason why this Court cannot in exercise of its power review or recall the impugned order. This Court has the power under the Act itself to review or recall the order in the interest of justice. The provisions of CPC are also applicable and such proceedings have to be regulated as far as possible under the provisions of CPC. Once it is held that the provisions of CPC are applicable, then this court besides invoking the provisions of Order 9 Rule 7 CPC would also have inherent power to do justice by reviewing or recalling the impugned order if the circumstances so warrants. The only thing which has to be seen is that the applicant could not appear and that his non appearance was bona fide or for sufficient cause. Hence this Court in exercise of its powers vested in it recall the impugned order dated 13th October, 1987 passed in I.A. 4270/87. With these observations the application stands disposed.

9. 1. A. No.4270/87 be listed for arguments on merits on 23rd November, 1994.

10. Since the judgment was reserved and the petitioner is appearing in person, therefore, she may be informed by Court notice the next date.

11. Order accordingly.

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