

In Re: Madhav Prasad Birla (D)

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Court : Kolkata

Decided On : Sep-02-2004

Reported in : AIR2005Cal1

Judge : Kalyan Jyoti Sengupta, J.

Acts : [Succession Act, 1925](#) - Section 276

Appeal No. : G.A. Nos. 3156 and 3157 of 2004 and PLA Nos. 241 and 242 of 2004

Appellant : In Re: Madhav Prasad Birla (D)

Judgement :
ORDER

Kalyan Jyoti Sengupta, J.

1. Two separate Notices of Motions have been taken out in connection with two separate matters as mentioned herein-above. Both the matters are disposed by this common judgment and order, as the question involved therein are identical and similar. Both the deceased left behind two wills of the same date dated 13th July 1982, said to have been executed by them. The applicants in both the matters have filed the aforesaid two applications for grant of probate to the aforesaid two Wills admittedly without annexing the respective original Wills, As such the present Notices of Motions have been taken out for granting leave to the Department to

treat and accept the applications made by the petitioners for grant of probate with notarized true photocopy of the Wills, as regular and made in due compliance with the requirement of law on the petitioners undertaking to produce the original Will as and when required by the Hon'ble Court; alternatively to treat and accept the application for grant of probate made by the petitioners as regular and made on the compliance of law upon the petitioners depositing the original Will with the Registrar Original Side, High Court, Calcutta in a safe custody. The grounds for the aforesaid relief taken out in the petition, made in support of the Notice of Motion are as follows :

(a) Having regard to the facts that the proceeding relates to a famous industrial family matter and having received enormous publicity and making news everyday both in the print and electronic media.

(b) The petitioners have noted serious apprehension that immediately upon filing of the caveats, but before copies of this, can be furnished to Sri Rajendra Singh Lodha the propounder of the said purported Will dated 18th April 1999, a substantial part of the defence had been published in various newspapers widely.

(c) Therefore, the petitioners have every reason to believe that despite all usual precautions undertaken by the Department of this Court, total outsiders have been able to find access to the Department and obtained copies, till then confidential, in an unauthorized fashion.

(d) Thus in order to eliminate all possible risks and danger of the original Will being lost, tampered with, defaced or damaged the aforesaid relief are required to be granted by this Court.

2. Mr. S.B. Mukherjee the learned Senior Counsel appearing in support of the application being G.A. No. 3156 of 2004 submits that having regard to the facts and circumstances as stated in the petition the Court in exercise of its discretion should allow his clients to maintain the present application with the copy of the Will annexed. He fairly submits that his client has not insinuated any aspersion against the integrity and functioning of the Department of this Court and its Officer. It is not uncommon and unusual, despite all possible measure being taken by the Court

vital information is leaked and the same cannot be checked. In fact in various newspapers immediately after filing of the affidavit in support of his client's caveat a substantial portion of the defence had been published widely even before supply of the copies thereof is made. The defence taken in any proceeding is meant for the Court and for Court's decision and not for understanding and knowledge of the member of the public at large and third party before hearing takes place. This basic confidentiality and secrecy cannot possibly be maintained. His client having experienced these events, apprehends that if the original Will is annexed with the petition, then there is every chance of the document being misplaced or lost. It is his client honest apprehension and to prevent the future danger the present application has been made.

3. He further submits that pointing out to the various Sections namely Sections 276, 237, 238, 239 and 240 of the Indian [Succession Act, 1925](#) (hereinafter referred to as the said Act) and Rules of the Original Side of this Court submits, that there is no compulsion on part of the applicant to annex the original Will with the application for grant of probate, the same can be produced later on. He submits in particular reference to Sections 237, 238, 239 and 240 of the said Act that it is not the intention of the Legislature that filing of the original Will with the application is mandatory, had it been so, the provision for granting probate with a copy of the Will as mentioned in Sections 237, 238, 239 and 240 of the said Act would not have been there. Since his client acted under the advice of the learned lawyer who thought upon his bona fide and reasonable interpretation of the law, filing of application for the probate with the copy of the Will is permissible, if this Court is of the view that filing of the original Will along with application is mandatory then his client is prepared to produce the same before this Court and the same may be kept in the safe custody of the Registrar Original Side of this Court. That is why the present application has been made immediately after filing of the instant application.

4. Mr. P.K. Ray learned Senior Counsel appearing in support of the application being numbered G.A. No. 3157 of 2004 has basically adopted the argument of Mr. Mukherjee and in addition thereto he contends that because of wide publicity of this proceeding in the print and electronic media it has assumed different

significance and effect with extraordinary curiosity amongst the member of the public at large as well as media men. So, possibility of vital, information being divulged and confidentiality of the matter being leaked to the outsiders and causing disappearance of the original, cannot be ruled out totally. It is merely apprehension of this client and the same appears to be reasonable because of the fact that more after the Court passes order for reconstruction of the records and documents on account of original being lost and misplaced. The present application is not for expressing petitioner's lack of confidence in Department's functional confidentiality and integrity, but to merely vent their application.

5. Instant applications have been made at the threshold and the contentions raised by the respective petitioners are really the subject matter between the applicants and the Court. Whether prayer can be granted or not is not the concern of anybody else except the petitioner at this stage, it may be considered later. Since it is a question of law and the Court is to examine the legal position of the importance on a given facts. It thought it fit that it should get assistance in independent way. Therefore, I asked Mr. Bachawat and A.K. Mitra learned Senior Advocates to address on the point raised in the two applications. Such assistance of any of the learned Advocate of the Court is permissible under the provisions of Order 1, Rule 10(A) of the Civil Procedure Code, which I appropriately quote hereunder :

'R. 10A. Power of Court to request any pleader to address it.- The Court may, in its discretion, request any pleader to address it as to any interest which is likely to be affected by its decision on any matter in issue in any suit or proceeding, if the party having the interest which is likely to be so affected is not represented by any pleader.'

6. It is true Mr. Bachawat and Mr. A.K. Mitra have been instructed in this matter to appear by their client Mr. R.S. Lodha who is the propounder of the later Will of Priyangbada Devi, since deceased but I have made it clear on 30th August 2004 that their appearance and argument in the Court on this issue will not be construed to have created any interest or right in favour of their client.

7. Mr. Bachawat submits, drawing my attention to the provision of Section 276 of the said Act that it is mandatory to annex original Will with the application and the word 'shall' employed in the said Section is a clear indication, and that is why exception has been made Under Sections 237, 238, 239 and 240 of the said Act where copy, draft or statement of the contents may be allowed to be filed. He submits that non filing of the original Will along with application for grant of probate is fatal under the eye of law and the application is rendered because of non-filing, non-maintainable.

8. Mr. Bachawat submits all the grounds mentioned in the affidavit in support of the summons for dispensation of filing of the original Will is absolutely unfounded, defamatory and scandalous so to say, as far as this Court is concerned. The applicants cannot be privileged litigant or for that matter there is no scope Under Section 276 of the said Act for dispensation of filing of the original Will under any circumstances. He submits that no relief should be granted either on this application based on defamatory and scandalous statement.

9. Mr. A.K. Mitra learned Senior Advocate has supported the argument of Mr. Bachawat and in addition thereto he submits when original Will is admittedly available the same must be annexed to the petition for grant of probate or Letters of Administration Under Section 276 of the said Act, he adds, however in other cases grant of Letters of Administration enclosing of original may not some time be necessary. This differentiation will clearly be appearing from careful reading of the provisions of Section 276 and 278 of the said Act. The language used in Section 276 is mandatory in nature. The grounds mentioned in the petition are wholly unfounded and baseless, as such prayers made in the petition are not entertainable under the law. According to him this petition is defective incurably.

10. Having heard respective contention of the learned Counsels and having gone through the petition I am of the view, before I consider the prayer the basic question as to whether enclosing of original instrument in case of this nature is mandatory or not under the provisions of the aforesaid Act and the Original Side Rules, is to be answered. I have gone through the Chapter XXXV of the Original Side Rules being the relevant provision and I have not found any provision as to

requirement of enclosing the original instrument with the petition for grant of probate. Therefore, the provisions of the aforesaid Act will be the only governing factor. Chapter IV of the said Act exhaustively prescribes procedure and practice in granting and revoking Probates and Letters of Administration. Section 276 of the said Act is part of the aforesaid Chapter and it has provided how the application for probate or for Letters of Administration with the Will annexed shall be made. It is therefore, apposite to set out the aforesaid provisions of Section 276 of the said Act :

'276. Petition for probate .- (1) Application for probate for Letters of Administration with the Will annexed, shall be made by a petition distinctly written in English or in the language in ordinary use in proceeding before the Court in which the application is made, with the Will or, in the cases mentioned in Section 237, 238 and 239, a copy, draft, or statement of the contents thereof, annexed, and stating -

(a) the time of the testator's death,

(b) that the writing annexed is his last Will and testament.

(c) that it was duly executed,

(d) the amount of assets which are likely to come to the petitioner's hands, and

(e) when the application is for probate, that the petitioner is the executor named in the Will.

(2) In addition to these particulars, the petition shall further state,-

(a) When the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge, and

(b) When the application is to a District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.

(3) Where the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another State, the petitioner

shall further state the amount of such assets in each State and the District Judges within whose jurisdiction such assets are situate.'

11. Upon careful reading of the said Section it will appear as rightly pointed out by Mr. Bachawat and Mr. Mitra that excepting in cases Under Sections 237, 238 and 239 of the said Act, the application for probate or for Letters of Administration with the Will annexed has to be filed with the original Will annexed, the legislature in its wisdom has consciously carved out exception where enclosing of original Will with the petition is not required as the same would be beyond control of anybody. Sections 237, 238, 239 and 240 visualize the situation where enclosing of the copy of the instrument will be the sufficient requirement. Those sections are for cases of lost and destroyed Will or where the Will is not readily available. The requirement of enclosing of the original where available is mandatory. What is required to be stated in the Petition for grant of Probate as well as the Letters of Administration with the Will annexed as mentioned in Clause (b) of Sub-section (1) of the said section is also suggestive factor of the above conclusion. Furthermore if Section 278 of the said Act is considered, it is clear, application for Letters of Administration is permissible to be filed without the original Will being enclosed, whereas for the administration with Will annexed, enclosing of the original is compulsory. This distinction in this context, between the provision of Section 276 and 278 of the said Act is clearly discernable. The intention of the legislature for enclosing the original Will is also clear if provision of Section 281 regarding verification of the petition for probate by one of the attesting witnesses is read. The said section is reproduced hereunder.

'281. Verification of petition for probate, by one witness to Will.- Where the application is for probate, the petition shall also be verified by at least one of the witnesses to the Will (when procurable) in the manner or to the effect following, namely :-'I(C.D.), one of the witnesses to the last Will and testament of the testator mentioned in the above petition, declare that I was present and saw the said testator affix his signature (or mark) thereto (or that the said testator acknowledged the writing annexed to the above petition to be his last Will and testament in my presence).'

12. It will appear therefrom that mode of verification by one of the attesting witnesses has been provided for cases of both the situations namely when original Will is not required to be enclosed as mentioned in the excepted circumstances Under Sections 237, 238 and 239 and situations and in case where original Will is available.

13. I am of the view that when original Will is available the verification has to be made admittedly with language 'that the said testator acknowledged the writing annexed to the above petition to be his last Will and testament in my presence' reading the word 'or' as 'and' conjunctively. Legislature thus has used the language carefully keeping in view of both the situations, upon reading the provisions as aforesaid in totality, it admits of no doubt that the enclosing of the original Will when available is mandatory and there cannot be any dispensation under any circumstance. It is settled position of the law by this time when the law requires the things to be done in one particular manner, this has to be done in that manner alone or not at all.

14. I am unable to accept the contention of Mr. Mukherjee and Mr. Roy that the annexing notarized photocopy of the original Will is sufficient requirement and compliance of the Section 276 of the said Act. Besides I think when grant of probate is sought to be asked in relation to a testamentary instrument the competent Court of law cannot entertain any application primarily without having received original thereof.

15. While coming to the grounds mentioned in the petition I am of the view that the same are wholly unfounded, defamatory, without any basis and further this has been made aiming at to damage the reputation integrity of the officers of the concerned Department. These allegations are vague. Mr. Mukherjee, however fairly submits that these allegations should not be looked into by the Court, as it was never intended to malign or defame the Department and the officers of this Court. Accordingly the same are expunged. In future the petitioners shall not make any statement without having detailed particulars and evidence and material. Here no material was produced. It is made clear before the Court of law the position of all the citizens is equal irrespective of their status and financial position.

16. Thus I hold that the prayer made by the petitioners on this application cannot be granted under any circumstances.

17. Now question is whether the application for grant of probate should be dismissed on refusal to grant prayer made or not. When the application was allowed to be tiled rightly or wrongly by the department: and the legal position until this judgment is rendered, was not very clear beyond debate to act upon, it would be unfair to dismiss the application without affording a chance to cure the defect. Besides the Court has got ample power Under Section 153 read with Section 151 of the CPC (under the provision of the said Act the provision of CPC has since been adopted), to pass appropriate Under Section so that the litigants are not harassed and multiplicity of judicial proceeding is avoided. The litigant here approached the learned Lawyers who are responsible for drafting, preparation and filing of the application in the Court. It is their primary duty to see the petition having been prepared and filed in accordance with the provision of the law. It is also the duty of the officers and the Department to examine whether the application sought to be filed is in accordance with the requirement of the law or not. The Department at the first instance should have refused to accept this application instead the same is allowed to be filed. It may be bona fide mistake on part of the officials and the department and that is why legal provision of removing the curable defect has been provided. I am sure the concerned Department undoubtedly would have detected such defect after scrutiny and would have dealt with this matter appropriately. However, before that stage could reach the present application has been made by the petition and immediately after filing of the Probate petition. I am of the view the defect of non-filing of the original Will before hearing takes place is not an incurable one. Therefore, instead of dismissing this application at this stage for reason above for which the innocent litigant is not at fault. I direct the petitioner to file a supplementary affidavit enclosing the original instrument. Moreover, I find from the verification of the original petition that the same has not been done in accordance with the provision of Sections 280 and 281 of the said Act. The legislature has prescribed a special and particular mode of verification and it has to be followed without any demur and departure. So the respective petitioners and the attesting witnesses shall re-verify the same. All these shall be done within seven days from the date of receipt of the signed copy

of the minutes of this order. Failing which both the petitions will stand dismissed.

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