



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

% **Date of Decision: 1<sup>st</sup> February, 2022.**

+ **TEST.CAS. 45/2001**

**MADAN MEHTA & ANR**

**..... Petitioners**

Through: Mr. Ritesh Khatri and Mr. H.S. Sharma, Advocates for petitioner no.2 with petitioner no.2-in-person

Versus

**STATE AND ORS**

**..... Respondents**

Through: Mr. Avneesh Garg, Advocate for applicant/objector.

**CORAM:**

**HON'BLE MS. JUSTICE ASHA MENON**

## **ORDER**

### **[VIA VIDEO CONFERENCING]**

**I.A. 16790/2021 (u/O XXII Rule 3 CPC filed by proposed LR's of Sh. Gobind Ishardass Shahani applicant in I.A. No.978/2004 for their impleadment)**

1. This order will dispose of the application filed by the legal representatives/heirs of the applicant Sh. Gobind Ishardas Shahani who had filed I.A No.978/2004 under Section 263 of the Indian Succession Act, 1925 (hereinafter referred to as the 'Act') for revocation of the Probate granted on 2<sup>nd</sup> August, 2002 to the petitioners in respect of the estate of late Smt. D.A. Shahani alias Lalri Shahani.

2. It is submitted that Sh. Gobind Ishardas Shahani had expired on 14<sup>th</sup> September 2021, leaving behind Mr. Jai Kishan Shahani and Mr.



Chandrakant Shahani as his legal heirs and that they be allowed to pursue the application being I.A. No.978/2004 by bringing them on record. It is also prayed that the Amended Memo of Parties be also taken on the record.

3. Reply has been filed on behalf of the petitioner No.2 to this application submitting that the application for substitution was not maintainable, as no right to sue survives in favour of the applicants. It is submitted that the allegations raised by Late Sh. Gobind Ishardass Shahani in I.A. No.978/2004 were personal in nature, as there were allegations of fraud. These grounds that were personal in nature did not survive his demise. It is also submitted that the applicants have not disclosed the status of the wife of late Sh. Gobind Ishardass Shahani and any other legal heirs, if any. Moreover, a large number of unnecessary parties who were not parties to the original application or the Probate Petition have been sought to be impleaded by means of an Amended Memo of Parties. It is, therefore, prayed that the application be dismissed.

4. Mr. Avneesh Garg, learned counsel for the applicants submitted that as regards the Memo of Parties, since late Sh. Gobind Ishardass Shahani had moved I.A. No.14639/2012 with proposed respondents who were transferees of the property in question and the said application was kept in abeyance vide order dated 30<sup>th</sup> January, 2013 of this court and the proposed respondents discharged from appearing till further orders, he would be filing the correct Memo of Parties excluding these names.

5. It was submitted by Mr. Ritesh Khatri, learned counsel for the petitioner No.2 that the applicants could not be substituted, as late Sh. Gobind Ishardass Shahani had not been accepted as an objector to the



Probate, as what was pending consideration was his application for revocation of the Probate. It was only after the grant of Probate was revoked that late Sh. Gobind Ishardass Shahani could have joined the proceedings as an objector. Thus, his position was akin to the executor of the Will on whose death no legal heirs could be substituted. Relying on the judgment of the Calcutta High Court in ***Hari Bhusan Datta Vs. Manmatha Nath Datta and Others*** AIR 1919 Cal 197, the learned counsel submitted that late Sh. Gobind Ishardass Shahani was only a residuary legatee, upon whose death, no legal heirs could be substituted.

6. On the other hand, Mr. Avneesh Garg, learned counsel for the applicants submitted that the substitution was available in view of the provisions of Section 141 of the Code of Civil Procedure, 1908 ('CPC' in short). The learned counsel for the applicants has explained that in the rejoinder it has been stated that the wife of late Sh. Gobind Ishardass Shahani had pre-deceased him and the sons were the only legal heirs. This clarification is noted.

7. Written submissions have been filed by both sides along with the cited case laws that they rely upon. The judgments relied upon by Mr. Ritesh Khatri, learned counsel for the petitioner No.2 are considered before proceeding to the case laws filed on behalf of the applicants.

8. In ***Hari Bhusan Datta*** (supra), since there was no executor to the Will stated to be the last Will and testament of Smt. Nrityamoni Dasee, her son Sh. Hem Bhusan Datta, the residuary legatee had applied to the High Court for grant of Letters of Administration with a copy of the Will annexed. Before the Probate could be granted, the residuary legatee died. An



application was moved by his son Sh. Hem Bhusan Datta praying that he be substituted and the Letters of Administration be granted to him. While disposing of this application, it was held that the residuary legatee's right was as that of an executor's and therefore the right did not survive to his legal heirs. The application was therefore dismissed.

9. This judgment cannot be considered as an authority on the status of an applicant under Section 263 of the Act, to conclude that a person who has applied for revocation of the Probate would be in the position of either a residuary legatee or an executor of the Will. In fact, in that case, since there was no executor, the residuary legatee took on the duty of an executor and had moved the court for grant of Letters of Administration. It is in that context that the court held that the rights of the residuary legatee were merely that of an executor of the Will and therefore on his demise his legal heirs could not be substituted.

10. The other two judgments, relied upon by the learned counsel for the petitioners, are the decision of the High Court of Calcutta in ***Fatemanesha Begum and Ors. Vs. S.K. Mahidin and Ors.*** 1944 SCC OnLine Cal 37 and the judgment of the High Court of Bombay in ***Anita Anant Patil Vs. Malini Anant Patil***, 2019 SCC OnLine Bom 8833. The second case related to substitution in appeal proceedings in a case in which the deceased had applied for a certificate of succession and while the Civil Judge (Senior Division) granted the Succession Certificate to her, this was reversed by the District Judge against which the appeal had been filed before the High Court. The High Court took the view that the deceased appellant being in a status similar to that of an executor of the Will, on her demise no legal heirs



could be substituted.

11. In the case of ***Fatemanesha Begum*** (supra), once again the deceased had applied for a Succession Certificate and had been granted the same. The Revision was filed by the petitioner against the grant of the Succession Certificate and it was held that on the death of the applicant for a Succession Certificate, the proceeding lapsed and it would be open to any other party entitled to a certificate to submit an application in this regard. It is clear that neither fact situation exists in this case. None of these authorities also support the contention of the learned counsel for the petitioner No.2 that the applicant under Section 263 of the Act, would be in the position of an executor seeking the Probate of a Will and therefore the substitution was not possible.

12. Before proceeding further, the citations filed on behalf of the applicants may also be considered. The first case is ***Basanti Devi Vs. Ravi Prakash Ram Prasad Jaiswal*** (2008) 1 SCC 267. This case was under the Hindu Succession Act, 1956. In that case, it was observed that grant of Probate being a judgment *in rem*, a person who is aggrieved thereby but had no knowledge about the proceedings and in the absence of proper citations being made, could file an application for revocation of Probate on such grounds as may be available to him. However, this judgment has no direct bearing on the issue at hand. This court had already permitted the deceased applicant Sh. Gobind Ishardass Shahani on 22<sup>nd</sup> July, 2010 to lead evidence in support of his contentions that fraud had been played by the petitioners while obtaining the Probate of the Will dated 5<sup>th</sup> January, 1991 of deceased Smt. D.A. Shahani alias Lalri Shahani.



13. The next case is of ***Thrity Sam Shroff Vs. Shiraz Byramji Anklesaria*** AIR 2007 Bom 103. The learned counsel for the applicants has relied on para no.30 of this judgment to submit that once the proceedings had become contentious, it took on the contours of a suit and thus under Section 141 of CPC, Order XXII Rule 3 CPC was applicable and thus the substitution should be allowed. Para No.30 of ***Thrity Sam Shroff*** (supra) is reproduced below for ready reference:

*“30. Considering all the above decisions, it is abundantly clear that the probate proceeding, though on being contested, becomes contentious proceeding, and therefore, it is to be proceeded in the form of a suit, but that by itself does not transform the proceeding into a suit under the Code of Civil Procedure. The provisions of Code of Civil Procedure would apply to such proceedings to the extent they are not inconsistent with the provisions of law comprised under the said Act. Section 226 of the said Act specifically provides that in case of death of an executor, representation would survive to the surviving executor or executors, as the case may be. At the same time, Section 222 clearly specifies that the probate can be granted only to an executor. In other words, the probate proceedings are essentially at the instance of the executors so named in the Will, and can survive till the executors survive. Moment the sole executor dies or all the executors die, the question of proceeding being kept alive does not arise at all, as there would be no occasion in such a case to grant any probate. Such a proceeding would die a natural death as a consequence of non survival of any executor. In such circumstances, the question of applicability of Order XXII of the Code of Civil Procedure does not arise at all.”*

But it is to be noticed that in the said case substitution was not permitted, as it was the executor who had expired and it was held that the proceedings could be continued only at the instance of other executors



named in a Will and the proceedings would survive only till the executors survived. The moment the sole executor died or all executors died, the proceedings would come to an end and thus Order XXII of the CPC would not be applicable at all. Relying on the judgment of the Apex Court in ***Diwan Brothers Vs. Central Bank of India*** AIR 1976 SC 1503, it was held that merely because the provisions of the CPC are made applicable to a proceeding, that by itself will not transform such proceedings into a suit within the meaning of the said expression under the Code. No help can be derived by the applicants from this decision of the Bombay High Court.

14. The next judgment relied upon by the learned counsel for the applicants is ***Binod Kumar Gupta and Ors. Vs. Vikramaditya Bhartee and Ors.*** 2015 SCC OnLine Pat 4585. That case was a First Appeal arising out of the judgment and order of the Third Additional District Judge, Siwan in a revocation case filed under Section 263 of the Act for revocation of a Probate granted in favour of the original appellant. The revocation was filed alleging that some part of the bequeathed property belonged to another person and in respect of which other independent proceedings had been initiated under Sections 144 and 145 of the Criminal Procedure Code, 1973. It was contended in that application for revocation that the applicant had no knowledge about the Probate proceedings, as no notice had been served on him or his vendor and it was alleged that the Will was forged and was a fabricated document. After three issues were framed and evidence recorded, the court concluded that no notice had been issued to the agnates of the deceased and the Probate granted in favour of the appellant was revoked. This was challenged on the ground that the court while dealing with an



application under Section 263 of the Act, had actually proceeded to decide the matter on merits under Section 276 of the Act, which was improper. It was submitted before the court that the right to revoke the Probate was with Ramji Bharti and on his death his widow could not be substituted, as the right to get the Probate revoked was a personal right. The opposing argument was that since the deceased was the owner of the property having purchased it from the original applicant, on his death, the property was inherited by his legal representatives/heirs and it could not be said that the right to seek revocation of the Probate was only a personal right. It was also submitted that there was no bar to the court deciding the merits and validity of the Will, even if the application had been moved under Section 263 of the Act. The court rejected the contention that the right to seek revocation of the Probate was only a personal right and that the legal heirs could not prosecute the proceedings initiated by Ramji Bharti. It was also held that while dealing with an application under Section 263 of the Act, the merits of the matter could not have been decided as if the court was dealing with the application under Section 276 of the Act. This judgment no doubt underlines the fact that proceedings under Sections 263 and 276 of the Act are distinct proceedings and if parties who had an interest through the right of inheritance and ought to have been notified when the Probate was filed were not so notified, they had the right to seek revocation on any of the grounds mentioned in Section 263 of the Act and on the demise of the original applicant his/her legal heirs could pursue the same.

15. The last case on which reliance has been placed by the learned counsel for the applicants is ***M.A. Sreenivasan Vs. H.V. Gowthama and***





*Another* ILR 2005 KAR 1138. It was held in that case that generally speaking who ever had a right to contest the grant of Probate, had the *locus standi* to seek revocation of the grant of Probate. So long as such a person has some interest in the estate of the deceased whose Will was sought to be probated, but had not been notified of the filing of the Probate Petition, he could seek to revoke the grant of the Probate or Letters of Administration.

16. Relying on this judgment the learned counsel for the applicants submitted that the deceased Sh. Gobind Ishardass Shahani was the nephew of the deceased Smt. D.A. Shahani alias Lalri Shahani and if the Probate had not been granted to the petitioner, he would have inherited the property as he was the son of her husband's brother. When Sh. Gobind Ishardass Shahani died, his sons would have then inherited the said property under the general laws of succession and as such they had a continued interest in the property and they had the right to seek the revocation of the Will. Therefore, the right to sue survived in their favour and they ought to be substituted.

17. Having heard both the counsels and considered the cited judgments, it is apparent that an applicant seeking revocation of a Probate under Section 263 of the Act cannot be equated with an executor of a Will or a person who seeks Letters of Administration or Probate of the Will in the capacity of an executor in case no such executor is named in the Will. This is because the proceedings under Section 276/278 of the Act are different in their very nature from proceedings under Section 263 of the Act. The former is founded on the Will whereas the latter is founded on the grounds mentioned in the provision, to be moved by any one who had some interest in the estate of the deceased but was unaware of the proceedings for grant of Probate or



Letters of Administration. An executor draws his right to seek Letters of Administration or Probate of the Will only from the Will. Therefore, it is personal to him. Section 222 of the Act also limits the grant of Probate only to an executor appointed by the Will. That is also the reason why on the demise of an executor, there can be no substitution of his legal heirs in his stead. Under Section 226 of the Act, when the Probate has been granted to several executors and one of them dies, the entire representation of the testator will accrue to the surviving executor or executors. On the other hand, the objectors are those who are claiming rights independent of the Will. The provisions relating to the executors cannot therefore apply to the objectors. Even when the Probate is granted or Letters of Administration issued, it becomes the obligation of the executor/petitioner to execute the Will and he cannot delegate it to someone else, as the Succession Certificate is issued to the executor alone. If there are others named in the Will as executors, anyone of them can be substituted.

18. When a Probate Petition is filed or Letters of Administration is sought under Sections 276 and 278 of the Act, the usual course is to issue citations, so that there is wide publicity to the filing of the petition for Probate/grant of Letters of Administration. It is proper that the legal heirs of the deceased testator are impleaded to the Probate Petition. Such respondents would either support the executor or oppose the grant of Probate, either on the ground that there was some other Will or questioning the execution of the Will and claiming right to inherit under the general law of succession. If pursuant to the objections, probate is refused, the estate would devolve in accordance with the law of succession. Once it is



established that a person has an interest in the estate, he would have the *locus* to file objections. The material question to be considered would be then, whether the right to sue survives. In the present case, the stage precedes the filing of objections. It is an application under Section 263 of the Act that is pending at the time of the demise of the applicant/Sh. Gobind Ishardass Shahani. It is to be then considered, whether any right to sue survives in favour of the present applicants seeking substitution.

19. In the present case, the application under Section 263 of the Act was pending disposal at the time of the death of Sh. Gobind Ishardass Shahani. When his application was taken up for consideration, this court, vide order dated 22<sup>nd</sup> July, 2010 declined to dispose of the application by summary procedure. It was observed that the petitioner had challenged the *locus standi* of the applicant that is Sh. Gobind Ishardass Shahani who sought to rely on certain documents including extract of the Birth and Death Register issued by the Sindhi Resettlement Corporation Ltd. and other documents certified by other agencies to establish his *locus standi* to move the application. This court observed that this *locus* was premised on unproved materials, and as the documents were denied, the case was not fit for adoption of a summary procedure and permitted the parties to lead evidence “to establish such of the disputed contentions as the Court will have to consider in the present proceeding”.

20. This conclusion was arrived at, after considering the decision of the Supreme Court cited by the applicant, namely ***Mrs. Nalini Navin Bhagwati and Others Vs. Chandravadan M. Mehta*** 1997 (9) SCC 689. In that case, the Supreme Court had held that an application under Section 263 of the Act



would be treated as a miscellaneous application. It would be open to the court to dispose of the application, either summarily or after allowing the parties to adduce evidence. But it went on to observe that it was not necessary that the application for revocation of the Probate or Letter of Administration would be treated as a suit, as contemplated under Section 295 of the Act. It also held that the procedure required under Section 295 of the Act need not be adopted for disposal of the application filed under Section 263 of the Act for revocation of the grant of Probate or the Letters of Administration.

21. It is thus apparent that an application under Section 263 of the Act is not to be treated as a suit. If that be so, would treating the application as a miscellaneous application preclude the substitution of legal heirs to pursue such an application under Section 263 of the Act?

22. Section 306 of the Act provides as under:

***“306. Demands and rights of action of or against deceased survive to and against executor or administrator.—All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault, as defined in the Indian Penal Code (45 of 1860), or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory.”***

While dealing with this provision, the Supreme Court in ***Melepurath Sankunni Ezhuthassan Vs. Thekittil Geopalankutty Nair*** (1986) 1 SCC 118 underlined that Section 306 of the Act speaks of an ‘*action*’. Therefore,  
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it is clear that its application cannot be restricted to suits, but would be available also in respect of miscellaneous applications where the right to sue survives to the legal heirs of the deceased applicant. The Supreme Court further held that though Section 306 speaks only of executors and administrators, “*but on principle*”, the same position must prevail necessarily in case of other legal representatives, as they could not be placed in a position “*better or worse than such executors or administrators*”. Thus, Section 306 was found applicable to other legal representatives also.

23. In other words, so long as the action is not in the nature of a defamation suit or personal assault or other personal injuries, the right to prosecute would survive to and against the executors or the administrators, and equally to other legal representatives. The natural corollary of this provision is that when an application under Section 263 of the Act has been filed for revocation of the Will, when the applicant dies, this right to prosecute the application will survive to his legal representatives being the present applicants. In ***State of Punjab Vs. Gurdev Singh*** (1991) 4 SCC 1, no doubt while dealing with Article 113 of the Limitation Act, 1963, the Supreme Court explained what right to sue connotes and it was held that the words “right to sue” ordinarily mean the right to seek relief by means of legal proceedings. The right to sue would accrue only when the cause of action arose i.e. the right to prosecute to obtain relief by legal means.

24. In the present case, late Sh. Gobind Ishardass Shahani claimed an interest in the property as being a Class II heir of the deceased, Smt. D.A. Shahani alias Lalri Shahani. It is that right of succession that would continue to be available to the present applicants, being his legal heirs, under Section 306 of the Act. In other words, the right to sue survives. They are entitled to



be substituted in place of late Sh. Gobind Ishardass Shahani. However, since the grounds taken in the application for revocation under Section 263 of the Act is founded on lack of notice of the probate proceedings and on fraud, and particularly since the recording of evidence stands concluded, such a substitution would not have the effect of permitting the legal heirs to set up independent claims and rights. The right of the legal heirs would only be to prosecute the application, in this case, to establish *locus* of the deceased applicant and to establish such other disputed contentions that would be requiring consideration of the court. As rightly pointed out by Mr. Ritesh Khatri, learned counsel for the petitioner No.2, it is only if the application under Section 263 of the Act is allowed, that the question of objections to the Probate would arise and be considered.

25. The application is accordingly allowed.

**TEST.CAS. 45/2001, I.As. 978/2004 (of Sh. Gobind Ishardass Shahani under Section 263 of the Indian Succession Act, 1925 for revocation of Probate granted on 2<sup>nd</sup> August, 2002) & 9527/2020 (of Sh. Gobind Ishardass Shahani under Section 151 CPC for urgent hearing)**

26. In the circumstances, I.A. No.9527/2020 has become infructuous and is accordingly disposed of.

27. Amended Memorandum of Parties be filed within a week.

28. Since the evidence stands concluded in I.A. No.978/2004 in the year 2018, list on 2<sup>nd</sup> March, 2022 for hearing arguments on I.A. No.978/2004.

29. The date of 2<sup>nd</sup> February, 2022 is cancelled.

30. The order be uploaded on the website forthwith.

**(ASHA MENON)  
JUDGE**

**FEBRUARY 01, 2022/‘bs’**