

SUPREME COURT OF INDIA

Samir Chandra Das

Vs.

Bibhas Chandra Das

C.A.No.4345 of 2010

(V.S.Sirpurkar and Dr.Mukundakam Sharma JJ.)

07.05.2010

JUDGEMENT

V.S.Sirpurkar, J.

1. Leave granted.
2. Challenge in this appeal is to the Division Bench Judgment of the Calcutta High Court wherein the appeal filed by respondent herein, namely, Bibhas Chandra Das was allowed holding that no probate could be granted in favour of the present appellant, namely, Samir Chandra Das.
3. Following factual panorama would clarify the controversy herein:

“One Jogesh Chandra Das was the testator. He expired on 13.01.1984 leaving his widow Parul Bala Das and four sons Samir Chandra Das, Subhash Chandra Das, Bibhas Chandra Das and Anjan Das. He had three daughters also, namely, Dipti, Jayanti and Sashwati. In his Will dated 14.08.1983, he named his widow Parul Bala Das and Samir Chandra Das as the executors. By this Will, however, Bibhas Chandra Das was not given any share. The house property at Harish Mukherjee Road was to go to his wife Parul Bala Das with life interest without any right to sell, mortgage etc., and after her death, to his three sons, namely, Samir Chandra Das, Subhash Chandra Das and Anjan Das. He had also desired that the right of residence would be available to his two unmarried daughters, namely, Jayanti and Sashwati. It was also mentioned in the Will that the testator had purchased a piece of land in the name of his wife and second daughter who was polio affected. This property was given to the widow for life and thereafter to the three sons of the testator excluding Bibhas Chandra Das on the condition that the three sons would bear the maintenance and marriage expenses of the two unmarried daughters for which the wife Parul Bala Das had specific authority to sell the land even during her life time to meet the expenses of

maintenance and marriage of the two daughters, if the three sons did not bear the same.”

4. Two sale deeds were executed by Parul Bala Das and Jayanti whereby 5 cottahs of land out of 7 cottahs purchased earlier by the testator in the `benami' of Parul Bala Das and Jayanti was sold on 10.10.1983. It is to be mentioned that these sale deeds were countersigned by Jogesh Chandra Das as also Samir Chandra Das.

“The remaining two cottahs of land was sold by Parul and Jayanti by sale deed dated 12.02.1988. The sale proceeds are alleged to have been used for running the Indian Oil Corporation Gas Dealership for Jayanti and Sashwati. On 17.07.1984 an application came to be made for probate by Samir Chandra Das and Parul Bala Das.

However, during the pendency of the probate proceedings, Parul Bala Das expired on 18.01.1990. This probate application was supported by all excepting Bibhas Chandra Das, the respondent herein. Since the probate became contentious, the application for probate was refiled on 22.01.1986 and the proceedings were renumbered as Original Suit No. 6 of 1986.”

5. As has been stated earlier, all the legatees supported the probate application. However, Bibhas Chandra Das opposed the same. During the pendency, as has already been stated, on 12.02.1988, Parul Bala Das along with her second daughter Jayanti had sold the remaining two cottahs approximately of the earlier mentioned land. On this, the appellant Samir Chandra Das had signed as a witness. Smt. Parul Bala Das died on 18.01.1990. The respondent herein opposed the grant of probate by filing a written statement dated 05.04.1990. The evidence was led and the Will was got proved.

6. In the written statement, respondent Bibhas Chandra Das mainly opposed the probate application on the grounds that the suit was not maintainable, Will was not genuine, Will was not legally executed and attested, Jogesh Chandra Das did not execute the Will out of his free will, it was brought about by undue influence and lastly that Bibhas Chandra Das had good relations with his father Jogesh Chandra Das and, therefore, it was unthinkable that he would be disinherited by Jogesh Chandra Das in his Will. It was also alleged that since the executer Samir Chandra Das was on inimical terms with Bibhas Chandra Das, he had exercised undue influence on his father. By amendment it was further alleged that the Will was not out of the free will of Jogesh Chandra Das who was very affectionate with defendant Bibhas Chandra Das and he was not the prodigal son. In short, the defendant never raised the plea regarding any acquired disability by renunciation as executer on the part of Samir Chandra Das to apply for probate. After the evidence was led, the trial Court framed the following six issues:

“1. Is the application for probate maintainable in law and proper form?

2. Had the testator sound disposing state of mind to execute the Will i.e. whether the testator was physically fit and mentally sound and alert to execute the will.

3. Whether the will in question was validly executed and attested in accordance with law?
4. Whether the petitioner Samir Kumar Das obtained the alleged Will by exercising undue influence over the testator?
5. Whether the petitioner/plaintiff is entitled to an order of probate over the Will in question?
6. What other reliefs, if any is the petitioner entitled to?"

7. After the evidence, the trial Court came to the conclusion that the Will was genuine and the testator had the sound disposing state of mind to execute the same since he was physically fit and mentally sound and alert. It was also held that the Will in question was validly executed and attested. It was found that the Will was free from any undue influence much less from Samir Chandra Das. In that view, the Court ordered grant of probate.

8. An appeal was filed on various grounds. We scanned the grounds in appeal very carefully which mainly pertained to the grounds raised in the written statement. In the grounds raised in the appeal, we do not find a single ground to the effect that the executor Samir Chandra Das had, in any manner, acquired any disability or had, in any manner, renounced the executorship.

9. The appellate Court, however, did not consider the matter on merits as is clear in the penultimate paragraph of the judgment. The Court, however, wrote a finding that the appellant herein having put his signatures as a witness along with his mother on the sale deed dated 12.2.1988 in effect renounced his position as an executor.

“The appellate Court also wrote a finding that both the executors having espoused an interest over the subject matter of the Will which was adverse to the interest of the testator, no probate could be granted in their favour since by their conduct they had renounced the executorship. The appellate Court also made a reference to Sections 222, 223 and 230 of the Indian Succession Act and came to the conclusion that though Samir Chandra Das had not expressly renounced the executorship, yet he had asserted title which is hostile to that of the testator and/or acted contrary to the directions contained in the Will and/or had supported such claim or act or has even orally asserted before the Court any right adverse to that of the testator and supported such claim and such conduct of the executor amounted to "implied renunciation" of the executorship. It went on to further allege that if any such document signed by the executor as is proved before the probate Court having been knowingly signed by the executor, the probate Court will presume renunciation of the executorship and will refuse to grant probate to such executor. The appeal was thus allowed and the suit was dismissed.”

10. It is this judgment which has fallen for our consideration in this appeal. Shri Jaydeep Gupta, Learned Senior Advocate questions the correctness of this judgment on various grounds. He firstly pointed out that this was not at all a case of renunciation. Learned Counsel pointed out that the renunciation can be only under Section 230 of the Act and such renunciation if made orally in the presence of a Judge, it may amount to a renunciation. As such the Learned Counsel pointed out that such renunciation has to be in writing duly signed by the person renouncing. Under these two conditions, the person renouncing is precluded from applying for probate of the Will in which he is appointed as an executor. He argued that the concept of "implied renunciation" is not known to the law or is not to be found anywhere in the Indian Succession Act. Learned counsel, therefore, argued that when the statute mandates through a specific provision the manner and the conditions for the renunciation, the Court could not have found out a different way of renunciation. Learned counsel argued that when the statute provides for the manner and the conditions for renunciation then the renunciation could be ordered only on the fulfillment of the conditions and not in any other manner.

“Learned counsel further argued that even on the facts the Court erred in holding that in putting the signatures as a witness to the sale deed of the property covered by the Will it can be said that the executor had acted hostile to the testator or had acted contrary to the directions contained in the Will. According to him, ultimately that property which was sold was to go under the Will to the daughters and the wife of the legatee Parul Bala, with rights to sell the property for the welfare of the two unmarried daughters. It was pointed out by learned counsel that in the two sale deeds dated 10.10.1983 even the testator had put his signatures along with the present executor Samir Chandra Das, though the Will had already come into existence on that date. According to the learned counsel, those two sale deeds, therefore, were absolutely innocuous. In so far as the third sale is concerned, the property was to go to Parul Bala and her daughters and further, Parul Bala had the authority under the Will to dispose of the property for the welfare and maintenance of the two daughters.

Learned counsel was at pains to point out that the gas dealership of the IOC was arranged from the consideration in the name of the two unmarried daughters. He pointed out that, therefore, there was no question of the executor having acted hostile to the interests of the testator or even for that matter the other legatees who had no concern with such property. Learned counsel, therefore, argued that even on merits there was no question of such a finding.”

11. As against this, Shri Pradip Kumar Ghosh, learned Senior Advocate and Shri Rauf Rahim, learned advocate argued that the judgment was correct. Three decisions were relied upon by *Shri (Dead) through L.Rs. & Ors.*¹ Krishna Kumar Shri Ghosh also argued that we must give purposive interpretation to Section 230 of the Indian Succession Act. He also argued that though Section 223 specifically provides for the disqualification of the persons to whom the probate could be granted, we must read that Section along with Section 230 to

hold that there could be a deemed renunciation and the Court could under the circumstances deny the probate to such an executor who had in fact impliedly renounced his character as an executor.

12. On these rival contentions, it has to be seen whether the judgment is correct.

13. In the first place, we must observe that the appellate Court should not have allowed this question to be argued as there was no plea raised in the written statement in support of the theory of renunciation by widow Parul Bala and the present executor Samir Chandra Das. This question was not argued before the Trial Court nor was it raised by way of a written statement nor was it raised even in the memo of appeal before the High Court. In our opinion, therefore, the High Court should not have entertained such a question.

14. On merits, it was the case of respondent herein that in the three sale deeds, two of which were executed before the death of the testator and one after his demise during the pendency of the probate proceedings the properties were claimed to be the self acquired properties of the widow and the second daughter. It was argued that, therefore, the widow who was an executor was claiming that this property never belonged to the testator. The further case was that since the surviving executor Samir Chandra Das had put his signatures as a witness to the sale deeds, he also must be deemed to have accepted the recitals in the sale deeds to the effect that it was a self acquired property of the widow and the second daughter thereby disputing the title of the testator.

15. The argument is absolutely incorrect, firstly, for the simple reason that at the time of first two sale deeds, even the testator had put his signatures as a witness and as he was alive on that day, the Will was irrelevant. Therefore, those two sale deeds will naturally go out of consideration. Probably realizing this, the High Court made a stray remark in the judgment to the effect that "one of it was executed during the pendency of the probate application". Now, if the earlier two sale deeds which were dated 10.10.1983 and were executed during the lifetime of the testator and he himself had acted as a witness, there was no question of any rival or hostile title being set up by Parul Bala and further by the present appellant who put his signatures as a witness along with his father, the testator on the sale deeds dated 10.10.1983. It cannot be presumed that there was any idea of setting up a hostile title. The remaining property which was sold on 12.02.1988 i.e. during the pendency of the probate application was admittedly a part of the aforementioned property, part of which was sold on 10.10.1983 by two sale deeds. Basically, on 10.10.1983, the Will had never become effective as the testator was alive. Therefore, the deduction of the High Court that Parul Bala Das and Samir Chandra Das had taken a stance against the testator is clearly faulty. On that day, this position was absolutely not available.

“This is apart from the fact that on that day, on those two sale deeds dated 10.10.1983, even the testator had signed as a witness. Insofar as the subsequent sale deed dated 12.02.1988 is concerned, also there will be no question of taking any hostile stance against the testator because the property which was sold was clearly

given away in the Will in favour of Parul Bala Das and her daughters, and Parul Bala Das also was given the right to sell the property for the maintenance and marriage expenses of her two unmarried daughters. Therefore, at least on that day, when the sale deed was executed, Parul Bala Das and her two daughters had inherited the property under the Will, which they sold and they were undoubtedly the owners of the properties. We must, therefore, hold that the High Court erred in taking the stand that the executor had taken a hostile stance against the testator. Once this position on facts is obtained, there is no question of further considering the correctness of the probate holding that there was an "implied renunciation" by the appellant herein."

16. However, since there is no authoritative pronouncement, we are proceeding to test the judgment.

17. Our attention was invited by Shri Jaideep Gupta, Learned Senior Counsel appearing on behalf of the appellant, firstly to a *A Govindarayalier*². In that case, the District Judge had refused to grant the probate to the appellant. The appellant was one of the two executors. The Will was found to be genuine and it was found that prior to the probate proceedings, the appellant had indulged in wild statements that the Will was a forgery and he was never appointed as executor and that testator had never signed the Will. The appellant had also stated that his (appellant's) attestation on the Will itself was obtained by fraud. Relying on a decision in *In the goods of Manick Lal Seal*³ the Madras High Court observed that it was open to the executor to openly assert outside the Court that he was renouncing his executorship, but it was by his statement in the Court that he will stand or fall. It was further observed that the appellant's statement in the Court that he did not admit the execution and validation of the Will or that it was a spurious document or that he never put his signatures to the Will and his attestation thereto was obtained by fraud, would be of no consequence in view of his end statement that if the Court considered the Will genuine and was prepared to grant probate, he was willing to act as the executor. The Court did not consider whether such a statement would amount to renunciation. The Court further observed that it was quite open to the executor to take a position taken by the appellant. Further relying on a reported the statements of the appellant were held not to be the renunciation.

"The other decision relied upon by the Learned Senior Counsel was where the Calcutta High Court specifically held that:- "disputing the Will by an executor is no ground for which the Court is authorized to refuse grant of probate to such executor when, later, he asks for it."

In this decision also, the appellant was joined as the opposite party as she, though was a named executor, did not apply for probate. She also filed a petition, but she did not admit the Will or the proper execution and attestation thereof. However, she had stated that if the Will was proved to have been properly executed and attested, she was willing and claimed to get the probate as executrix.

The question regarding due execution of the Will was fought out.

Even in her evidence, the appellant had disputed the genuineness of the Will. However, the Will was held to be a valid, duly executed and attested Will. On this ground, she was refused the probate. Even the appellate Court had taken a view that she had renounced her executorship. It was held by the appellate Court that after repudiating the Will, the person could not turn around and say that he was entitled to probate. Referring to Section 230 of the Indian Succession Act, it was held that even under these circumstances, Section 230 was not applicable and the said Section was bound to be read alongwith Section 229 and reading the two together, unless the executor has renounced his executorship, the probate cannot be refused to him/her. It was clarified that Section 230 refers to the manner of renunciation in such a case. It was held that even under the circumstances of the case, the appellant was entitled for probate.

When we consider the position obtained in the present case, one thing is clear that the situation here was nowhere comparable to the one obtained in the above two decisions. In fact, there was not even a trace of renunciation on the part of the appellant herein, not even remotely.”

18. We have already explained the factual situation and in our opinion, the High Court completely misguided itself in stretching the theory of renunciation to its illogical end. The provision of Section 230 lays down specifically as to how the executor renounces his character as an executor. That is certainly not to be found here and when the law requires a thing to be done in a particular manner, it cannot be done in any other manner. The concept of deemed renunciation, as found by the High Court, does not appeal to us, much less on the factual background of the present case. There cannot be a deemed renunciation. However, we must hasten to add that we do not even for a moment say that the concerned Court has no power to deny the probate for good and valid reasons. However, in this case, we cannot subscribe to the opinion expressed by the High Court that there was a renunciation on the part of the appellant.

“In a proper case, the Court considering the probate application may, for good reasons, find it not possible to grant the probate to executor, but in this case that has not happened. Instead, the High Court wrote a finding that the executor had renounced himself and he is deemed to have renounced on account of the so-called hostile stand taken by him. We do not agree that there was any hostile stand. We do not further agree that there was any such renunciation or deemed renunciation. We further do not agree that there can be any concept of deemed renunciation.”

19. Shri Pradip Kumar Ghosh, learned Senior Advocate and Shri Rauf Rahim, learned advocate urged that we must give a purposive interpretation to Section 230, so as to find that there can be a deemed renunciation in terms of that Section. We do not agree. The language of the Section is too clear to be tinkered with. There has to be a scrupulous adherence to the

Section before an executor is refused the probate under Section 230. The Learned Advocates then *Ghosh (Smt.) (Dead) through L.Rs. & Ors.*⁴.

“This case was entirely different on facts. It pertains to the subject of revocation of probate. The second decision in *Krishna Kumar Birla* consequence. It is basically regarding the subject of caveatable interest and mainly turns on the fact as to why the appellant could not be said to have a caveatable interest. It does not help the appellant in the present controversy in any manner. The third decision relied *Raje & Ors.*⁵ to which one of us (Hon'ble Sirpurkar, J.) was a party. That was again the decision rejecting the two applications for grant of probate and letter of administration. We do not think that the controversy involved in the present appeal is even distantly touched by this case.”

20. In the result, the appeal succeeds. The order of the appellate Court is set aside and the matter is remanded back to the appellate Court for decision on merits regarding the valid execution or attestation of the Will. The appeal succeeds with the costs of Rs.25,000/-.

¹2005 (9) SCC 375

²AIR 1926 Mad. 605

³(1908) 35 Cal. 156

⁴2005 (9) SCC 375

⁵2008 (7) SCC 695