APPELLATE CIVIL

Before Jindra Lal, J.

CHANAN DEVI *alias* DROPADI DEVI,—*Appellant.*

versus

DES RAJ AND ANOTHER,—*Respondents.*

F.A.O. No. 51 of 1962.

1964

Sep., 30th

Succession Act (XXXIX of 1925)—Ss. 276, 289 and Schedule VI—Schedule of properties likely to come to the hands of the executor—Whether necessary to be annexed to the probate—Code of Civil Procedure (Act V of 1908)— S. 151—Court—Whether can delete the schedule from the probate under inherent powers.

Held, that section 276 of the Indian Succession Act, 1925, provides for a petition for probate and enjoins the petitioner to annex with his petition a statement of the amount of assets which are likely to come to the petitioner's hands. A probate is then, after complying with the procedure, granted under section 289 of the Act. The form in which the probate is to be granted is contained in schedule VI appended to the Act. A perusal of schedule VI shows clearly that the form of probate does not contain any provision for the mention of schedule of properties or the assets, which are likely to come to the hands of the petitioner. The probate is granted to enable an executor to collect all the assets of a testator and to administer them according to the tenor of the will and the executor is liable to the Court for any default in this behalf.

Held, that the Court has not to annex the schedule of properties likely to come to the hands of the executor with the probate. If annexed, the Court has inherent power to delete it, as no litigant can be allowed to suffer an account of a mistake made by a Court.

First appeal from the order of Shri Ram Lal Aggarwal, District Judge, Jullundur, dated the 9th April, 1962, dismissing the application for probate.

H. L. SARIN AND H. S. SAWHNEY, ADVOCATES, for the Appellant.

B. D. MEHRA, ADVOCATE, for the Respondents.

JUDGMENT

Jindra Lal, J.

JINDRA LAL, J.—This case has an unfortunate history. Pandit Ram Chand, husband of the present appellant, executed a will on the 21st of June, 1955, appointing Shrimati Chanan Devi, appellant herein, as the executrix of the will as well as the sole legatee. He died on the 18th of September, 1955. The appellant made an application under section 276 of the Indian Succession Act, hereinafter referred to as the Act, for a probate of the will. With this application, she annexed a schedule indicating the amount of assets, which were likely to come to her hands, as well as a schedule of liabilities which, according to her, had to be met by the estate of the deceased. A probate was granted by the District Judge, Jullundur, on the 4th of February, 1957. It appears that with the probate were annexed the copies of schedules, mentioned above.

Armed with a copy of the probate, the appellant applied to the State Bank of India to deliver to her the ornaments mentioned in the schedule which were in a locker in the State Bank of India, in the name of the testator. When the locker was opened, it contained many more ornaments and much more gold than was mentioned in the schedule attached to the probate and consequently the Bank refused to deliver any ornaments to the appellant.

On the 19th of March, 1958, an application was moved on behalf of the appellant before the District Judge, Jullundur, praying that the State Bank of India be directed to hand over to her all the gold and jewellery contained in the locker. The learned District Judge dismissed this application on the 28th of April, 1958, with the following observations—

> "In the present case what I think proper for the petitioner to do is that she should apply for the probate of the will concerning the present assets which will be dealt within the ordinary manner".

The appellant did not accept this order and preferred a first appeal to the High Court, which, however, was dismissed *in limine*.

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On the 3rd of January, 1959, the appellant made another application to the District Judge, Jullundur, praying that she should be given the rest of the ornaments on which she was willing to pay the Court-fee. This application was also dismissed on the 12th of January, 1959. On the 16th of November, 1959, another application was moved praying that the State Bank of India be ordered to give the ornaments in the locker to the present appellant. This application was also rejected on the 11th of December, 1959. Yet another application made apparently containing a similar prayer was rejected on the 22nd of March, 1961. Ultimately, on the 31st of October, 1961, the appellant made an application to the District Judge and it is out of an order passed on this last application that the present appeal has arisen.

To the application, dated the 31st of October, 1961, a reply was made by Des Raj, respondent No. 1, who is a stepson of the appellant, stating that when the probate had been originally granted an objection had been raised by him to the effect that his wife had kept about 100 *tolas* of gold with his father, the testator, and that this gold was the property of his wife, but since the appellant was claiming only 7 *tolas* of gold he did not press his objection and allowed the appellant to get the probate. He asserted that had the appellant at that stage made a claim to the rest of the ornaments in the locker, he would have resisted the granting of the probate even at that time.

In the impugned order before me, the learned District Judge, Jullundur, after reciting all the above facts, has mentioned that it is not disputed before him that a second application for the grant of a probate to the will is not, in fact, maintainable and that a probate is granted to a person merely to administer the estate of the deceased. The administrator may not be aware of the extent of the assets of the testator at the time of the granting of the probate and if subsequently he finds out other assets, he is certainly entitled to collect those assets of the deceased. The reason why the learned District Judge dismissed the application was that the previous applications made by the present appellant had also been dismissed and at least one appeal from the order of the District Judge,

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dated the 28th of April, 1958, had been dismissed by this Court *in limine* and, according to him, to allow the present application would be to over-rule the orders of this Court.

It was urged before the learned District Judge that in the previous applications the relief sought for was somewhat different from the relief claimed now and, in fact, the reliefs prayed for in the previous applications could not be granted. In the present application, a prayer was made that the probate be amended by deleting the schedules from it. According to the learned District Judge, this was merely another way of seeking the same relief as had been sought before. Since he felt bound by the orders of his learned predecessors, who had dismissed her previous applications, the learned District Judge also dismissed the present application with considerable reluctance.

Mr. H. L. Sarin, learned counsel for the appellant, was asked by me under what provision of law he had filed the application, out of which the present appeal has arisen. He stated that the appellant had invoked the inherent jurisdiction of the Court under section 151 of the Code of Civil Procedure or otherwise because due to a default of the Court in the circumstances, mentioned hereinafter, the appellant had been made to suffer.

Section 276 of the Act provides for a petition for probate and enjoins the petitioner to annex with his petition a statement of the amount of essets which are likely to come to the hands of the petitioner. What is then, after complying with the procedure, granted under section 289 of the Act? The form in which the probate is to be granted is contained in schedule VI appended to the Act. A perusal of schedule VI shows clearly that the form of probate does not contain any provision for the mention of schedule of properties or the assets, which are likely to come to the hands of the petitioner. What is provided in the form contained in schedule VI is for a copy of the will to be annexed to the probate and that the administration of the property and a statement of credits of the deceased had been granted to the named executor in the will and that he having undertaken to administer

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the same, the executor is to make a full and true inventory of the said property and credits and exhibit the same in the probate Court within six months from the date of the grant or within such further time as the probate Court may grant from time to time. It is obvious, therefore, that the probate is granted to enable an executor to collect all the assets of a testator and to administer them according to the tenor of the will and the executor is liable to the Court for any default in this behalf.

A reference may now be made to some provisions of the Court-Fees Act, 1870. Chapter III-A relates to Court-fees for probates, letters of administration and certificates of administration. Section 19-A provides for relief where too high a Court-fee has been paid on a probate on account of over-estimate of the value of the property of the deceased at the time of the granting of the probate, etc. Section 19-E provides for cases where too low a Court-fee has been paid on probates, etc., on account of the fact that later on it had been found that the value of the property was more. Section 19-I(1) is in the following terms—

> "19-I(1). No order entitling the petitioner to the grant of probate or letters of administration shall be made upon an application for such grant until the petitioner has filed in the Court a valuation of the property in the form set forth in the third schedule, and the court is satisfied that the fee mentioned in No. 11 of the first schedule has been paid on such valuation".

It is urged, therefore, on behalf of the appellant that the schedule of property to be annexed is for a different purpose and it cannot form part of a probate granted by a Court and, therefore, the Court did, in fact, make a mistake in appending the schedule to the probate. This appears to be correct. If that is so, then it is further urged on behalf of the appellant that no litigant should be allowed to suffer on account of a mistake made by a Court. This is an old principle, which has been reaffirmed by their Lordship of the Supreme Court in *Jagat Dhish Bhargava* v. *Jawahar Lal Bhargava and others* (1). This proposition is not contested by the learned counsel for the respondents.

(1) A.I.R. 1961 S.C. 832.

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Learned counsel for the respondents has urged very strenuously that it was as far back as 4th of February, 1957, that the probate was granted to the appellant and it was soon after that she discovered that a schedule has been annexed to the probate. If she felt aggrieved by that, then she should have taken proper steps; and if she had been following a wrong remedy in a Court of Law then she is not entitled to be helped by this Court. According to him, if a relief was available to the appellant which she did not avail of and kept on making applications, which, in fact, did not lie, then she has herself to blame and this appeal should be dismissed.

It is well-settled that a probate Court does not decide rival claims to the property left by a deceased, nor does it decide questions of title and if the contention is as to the ownership of the property in the locker, which is not contained in the schedule, then of course the matter has to be decided by a civil Court and the short matter for consideration is which is the party which should go to the Civil Court. According to the respondents, it is the appellant, who should go to the Civil Court and establish her title. According to the appellant, it is for the respondents to establish their title. The learned lower Court felt bound by the orders of its learned predecessors and, therefore, it dismissed the application.

Mr. Mehra for the respondents has urged that principles of *res judicata* apply to the probate proceedings and, relying upon *Kalipada De and others* v. *Dwijapada Dass and others* (2), he has urged that the matter has been decided finally between the parties earlier before the District Judge that the relief sought by the appellant in the previous applications was not available to her.

An obvious injustice, to my mind, has been done by the Court in inserting the schedule of the property and I am, therefore, of the view that the appellant is entitled to the relief sought. It was no function of the District Judge to have annexed copies of the schedules of the properties, annexed to the application for probate, to the probate granted and their annexation was, to my mind,

(2) A.I.R. 1930 P.C. 22.

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not in accordance with law. I, therefore, accept this appeal, set aside the order of the Court below and hold that the schedules attached to the probate granted to the appellant on the will of her husband, dated the 21st of June, 1955, do not form part of the probate and shall stand deleted.

B.R.T.

FULL BENCH