
(1920) 03 BOM CK 0010
In the Bombay High Court
Case No : O.C.J. Suit No. 3639 of 1919

Abdul Karim

APPELLANT

Vs

Karmali Rahimtulla

RESPONDENT

Date of Decision : 12-03-1920

Acts Referred:

Specific Relief Act, 1877 — Section 27
Succession Act, 1925 — Section 187

Citation : (1920) 22 BOMLR 708 : 58 Ind. Cas. 270

Hon'ble Judges : Crump, J

Bench : Single Bench

Judgement

Crump, J.—This is a suit for specific performance of an agreement to sell executed on August 19, 1919 by one Bai Mariambai deceased in favour of the plaintiffs. It is only necessary to consider one of the issues originally raised as the others have been abandoned. The only point on which the parties are now at variance is contained in issue No. 4, viz., whether defendant is bound to take out representation to the estate of Mariambai.

2. The deceased lady was a Khoja and defendant is her son. He is prima facie her heir as the property was admittedly her "Stridhan," if indeed that term is strictly applicable. , Further there is a document purporting to be the last will and testament of Mariambai whereby defendant is sole legatee. The question is whether plaintiffs can call upon him to take oat probate of this will.

3. Plaintiffs say that there is a grand-daughter who might in certain circumstances be entitled to succeed if there was an intestacy. Whether those circumstances exist or not they do not know, but upon the existence or non-existence of those circumstances depends the answer to the question whether the property is Yautaka or Ayautaka Stridhan. Therefore their title is not safe unless the will is admitted to probate.

4. The defendant's answer put shortly is two-fold. First, that defendant as representative of Mariambai cannot be called upon to make good any title but

that of Mariambai. Secondly, that as there is no statutory obligation on him to take out probate he cannot be compelled to do so, and that plaintiffs ought to be satisfied with proof of the will which he is willing to offer.

5. The first objection cannot prevail. Defendant ex hypothesi represents the estate. He is bound by the agreement to sell, and he is also bound by the condition in the agreement to deduce a marketable title. His position is that he is the legal representative of Mariambai, and he is bound to make that position good. The point is practically covered by Section 27 of the Specific Relief Act.

6. As to the second question it is necessary to decide whether Section 187 of the Indian Succession Act is applicable. If so then the right of the defendant to convey the property cannot be established without probate. The point is covered by authority (*Haji Mahomed Mitha v. Musaji Esaji* I. L. R. (1891) 15 Bom. 657. If on the other hand Section 187 of the Indian Succession Act is not applicable title under the will can be established without probate and the will therefore stands on the same footing as any other document of title. Generally speaking the section is not applicable to the wills of Mahomedans (*Shaik Moosa v. Shaik Essa* I.L.R (1884) Bom. 241; *Sakina Bibee v. Mahomed Ishak* I.L.R (1910) Cal. 839. Nor indeed as explained in the former of these cases to any wills to which the Hindu Wills Act, 1870, is not applicable (see p. 254 of the Report). The question really narrows itself to this: "Whether the Hindu Wills Act, 1870 is applicable to the will of a Khoja Mohammedan". The general question whether the wills of Khojas are governed by Hindu or Mahomedan law mooted in *Hassonally v. Popatlal* I.L.R (1912) 37 Bom. 211 : 14 Bom. L. R. 782 does not arise for the purposes of the present case. Whatever may be the law applicable to Khojas in testamentary matters, it cannot be contended that they are Hindus. Therefore they are not within the scope of the Hindu Wills Act, 1870.

7. It follows, therefore, that probate not being essential to the validity of the will it stands on no other footing than a deed of gift, and if it is on the face of it a valid document plaintiffs must in my opinion be satisfied with proof, such as is offered, shewing that it was executed by Mariambai under such circumstances as to make it a valid testamentary instrument. On that proof being recorded further orders will be passed.

8. His Lordship delivered the following judgment on 13th March.-

Satisfactory proof of the will has now been adduced: two points remain (1) costs; (2) the time to be fixed for performance.

9. As to costs the suit was in substance necessitated by defendant's conduct, and prima facie he must bear the costs. But the continuance of the suit after March 1st was due to plaintiffs' insistence on the necessity for probate. Had plaintiffs not insisted on the necessity of this formality the suit would in all probability have ended then and there. Therefore plaintiffs must bear costs of that and the following hearings. It is urged that plaintiffs should recover from defendant 1 the costs incurred by them against defendant 2 as against whom the

suit has been dismissed. I am not prepared to accede to this suggestion as I hold that defendant 2 was unnecessarily joined.

10. As to time it is to be remarked that there are certain requisitions still unanswered. I consider that seven days will suffice from the date of the answer to the requisitions considering what the nature of those requisitions is.

11. I therefore make the following decree.

(1) Defendant within seven days of the answer to the requisitions shall specifically perform the agreement in suit and on payment of the stipulated price shall deliver the property to plaintiffs" possession and execute a proper conveyance.

(2) Plaintiffs to recover their costs from defendant up to March 1st 1920 and to pay defendants" costs on and after that date.

12. Parties to be at liberty to apply.