

(1997) 01 BOM CK 0035
In the Bombay High Court
Case No : First Appeal No. 17 of 1995

Cedric X. Pinheiro

APPELLANT

Vs

Smt. Josefina Remedios and another

RESPONDENT

Date of Decision : 22-01-1997

Acts Referred:

Citation : (1998) 91 CompCas 99

Hon'ble Judges : R.K. Batta, J

Bench : Single Bench

Advocate : S.S. Kantak, for the Appellant; M.M. Rao, for the Respondent

Judgement

R.K. Batta, J.—The entire dispute in this appeal centres round fixed deposit receipt No. 208 of 1975, for Rs. 20,000, which was subsequently renewed as Fixed Deposit Receipt No. 244 of 1986, and a sum of Rs. 20,616.07 lying in Savings Bank Account No. 2245 (later on changed to 12164 in the name of respondent No. 1). Fixed Deposit Receipt No. 208 of 1975 (now 244 of 1986, in the name of respondent No. 1) was payable to either or survivor, namely, Fr. Damaso D'Lima, and the original plaintiff, Claire Victoria Pinheiro. The savings bank account was also in their names and was also payable to either or survivor. The original Savings Bank Account No. 2245 was opened somewhere on February 2, 1972, and the Fixed Deposit Receipt No. 208 of 1975, is of the year 1975. On October 16, 1974, Fr. Damaso D'Lima executed a will in favour of respondent No. 1 and the material portion of the will which is relevant for the purpose of the decision of this appeal is as under :

"And in the presence of the said witnesses, the said testator stated that he has no ascendants nor descendants and as such he is free to dispose of his assets, freely. And, therefore, he institutes, as his sole and universal heir, Mrs. Josefina Remedios, widow, residing with the said testator and who is looking after him for many years especially in his old age and sickness, with all the care and affection, to succeed the said testator, in all his assets, immovable and movable, rights and shares as well as any sums of money deposited in any banks and also the right

to collect all that is due on account of the "shares" which belong to him or are possessed by him ..."

2. Fr. Damaso D"Lima died on December 1, 1976.

3. The dispute in this case is to whom in law the amounts of Fixed Deposit Receipt No. 208 of 1975 (now 244 of 1986) and Savings Bank Account No. 2245 (now 12164) is payable. The original plaintiff and defendant No. 1 lay claim to the same to the exclusion of each other.

4. The trial court, vide the impugned judgment dated October 14, 1994, which is challenged in this appeal, rejected the claim put forward by the original plaintiff and held that the amount standing in the said fixed deposit and savings bank account is payable to respondent No. 1.

5. The learned advocate, Shri S. S. Kantak, appearing on behalf of the appellant, submitted before me that in so far as Fixed Deposit Receipt No. 208 of 1975 (No. 244 of 1986), is concerned, the amount standing therein in law belongs to the appellant since the money in the said receipt was invested by Fr. Damaso D"Lima after the execution of the will in favour of respondent No. 1 which is a clear indication of the intention of the said Fr. Damaso D"Lima that the amount in the said fixed deposit was meant for her. In respect of the savings bank account, it was contended by the learned advocate for the appellant that the Fixed Deposit Receipt No. 208 of 1975 (No. 244 of 1986) was obtained by the said Fr. Damaso D"Lima after the execution of the will in his name and that of the original plaintiff, which further indicates that even the savings bank account which was in their names as either or survivor was intended for the benefit of the original plaintiff since no contrary intention was expressed in respect of the same in the will. The learned advocate, Shri Kantak, relied upon a Division Bench ruling of this court in *Krushanadas Nagindas Bhate Vs. Bhagwandas Ranchhoddas and Others*, .

6. On the other hand, the learned advocate, Shri M. M. Rao, after placing reliance on *Dalavayi Nagarajamma Vs. State Bank of India and Others*, , *Dalavayi Nagarajamma Vs. State Bank of India, Cuttupah and Others*, , *Indranarayan Vs. Roop Narayan and Another*, , *Upleta Municipality, Upleta Vs. Yunus Haji Adam Fulara and Others*, and *P. Narayana Menon Vs. P. Bhageerathi Amma*, , urged before me that when a fixed deposit or a savings bank account is in the name of either or survivor, it does not on the death of one constitute a gift to the survivor and in such cases there is a resulting trust that the money becomes the absolute property of the deceased and is payable to his heirs in the absence of a contrary intention. In other words, there is a resulting trust in favour of the survivor in the absence of proof of contrary intention, there being no presumption of intended advancement in favour of the survivor. According to the learned advocate for respondent No. 1 in so far as the savings bank account is concerned, the position is crystal clear on account of the will dated October 16, 1974, in favour of respondent No. 1 that the money in the savings bank account would revert to

respondent No. 1. Since the said account was opened in the name of Fr. Damaso D''Lima and the original plaintiff is either or survivor much prior to the execution of the said will and the will is a clear indication of the intention in favour of respondent No. 1 that the said amount was left by will by Fr. Damaso D''Lima for respondent No. 1.

7. Coming to the fixed deposit receipt where the money was invested after the said will, it has been contended by the learned advocate for respondent No. 1 that the will itself is otherwise clear and the will actually operates on the death of the testator, namely, Fr. Damaso D''Lima, which took place on December 1, 1976, and in view of the said position even the amount in the fixed deposit receipt would be part of the estate of Fr. D''Lima to which respondent No. 1 is entitled under the law and no contrary intention that the said amount was intended to be left for the survivor can be made out from the facts and circumstances. He further submitted that the fixed deposit receipt was in the custody of Fr. Damaso D''Lima which was encashed by respondent No. 1 who further made a fixed deposit of the same and if the intention of Fr.D. D''Lima was that the said receipt was meant for the original plaintiff, he would have certainly given the said receipt to her. The second factor which has been pointed out by him is that the original plaintiff did not lay any claim in respect of the said fixed deposit for a long period of ten years from the death of Fr.D. D''Lima on December 1, 1976, till 1986.

8. There is no dispute that Fixed Deposit Receipt No. 208 of 1975 (No. 244 of 1986) was taken somewhere in the year 1975 that is after the execution of the will and that the savings account had been opened on February 2, 1972, i.e., prior to the execution of the said will. There is also no dispute that the amounts laying in the fixed deposit and in the savings bank account belonged to Fr. Damaso D''Lima. Likewise, there is no dispute relating to the proposition of law which is applicable and which has been enumerated in a number of authorities quoted by learned advocates for the parties including the Division Bench ruling of this court in *Krushanadas Nagindas Bhate Vs. Bhagwandas Ranchhoddas and Others*, .

9. The question to be decided is as to what was the intention of the deceased, Fr. Damaso D''Lima, namely, whether the intention was to make the survivor the owner of the amount or that the said amount should go to the heirs and the same has to be gathered from the facts and circumstances on record. Under the will dated October 16, 1974, Fr. Damaso D''Lima had constituted respondent No. 1 as his sole and universal heir. In so far as Savings Bank Account No. 2245 (No. 12164) is concerned, the said account was opened on February 2, 1972, payable to either or survivor, namely, original plaintiff or Fr. D''Lima. However, by will dated October 16, 1974, it was clearly expressed by Fr. D''Lima that any sums of money deposited in any banks would go to respondent No. 1 under the said will. Therefore, in so far as Savings Bank Account No. 2245 (No. 12164) is concerned, the will is a clear expression of the intention of Fr. Damaso D''Lima that all sums

of money deposited by him in banks prior to October 16, 1974, should go to respondent No. 1. The subsequent deposit of amount in Fixed Deposit No. 208 of 1975 (No. 244 of 1986) in the year 1975, which was payable to the original plaintiff and/or Fr. D'Lima on the principle of either or survivor, does not in any manner help the contention advanced by the learned advocate, Shri Kantak, that a contrary intention to the one expressed in the will can be attributed to Fr. D'Lima in so far as Savings Bank Account No. 2245 (No. 12164) is concerned. In my opinion, the will dated October 16, 1974, clearly sets at rest the controversy relating to Savings Bank Account No. 2245 (No. 12164) in favour of respondent No. 1.

10. The position is however, different in so far as Fixed Deposit Receipt No. 208 of 1975 (No. 244 of 1986), is concerned. Admittedly, this deposit was made after the execution of the said will. There is no dispute that prior to the making of this will, Fr. Damaso D'Lima was staying with respondent No. 1. In spite of the fact that Fr. Damaso D'Lima was staying with respondent No. 1, and had also made a will in favour of respondent No. 1, he still deposited a sum of Rs. 20,000 in fixed deposit which was payable either to him or to the original plaintiff or survivor. There was no impediment whatsoever for Fr. Damaso D'Lima to have deposited the said amount of Rs. 20,000 in fixed deposit payable to him or to respondent No. 1 or survivor, but he chose to deposit the said amount as payable to him or the original plaintiff or survivor. These circumstances give a clear indication of the intention of Fr. Damaso D'Lima, who in spite of having willed all sums deposited by him in the banks in favour of respondent No. 1, still took Fixed Deposit Receipt No. 208 of 1975 (No. 244 of 1986) in his name and that of the original plaintiff payable to either or survivor. The fact that the fixed deposit receipt remained with Fr. D'Lima and was encashed and reinvested by respondent No. 1 and the original plaintiff did not claim the said fixed deposit for a period of ten years is not sufficient to negate the intention of Fr. D'Lima in taking the fixed deposit receipt payable to him or original plaintiff or survivor. It is no doubt true that the will operates on the death of the testator, but that by itself, cannot override the intention which can be gathered from the making of Fixed Deposit Receipt No. 208 of 1975 (No. 244 of 1986) even after respondent No. 1 was nominated as the sole and universal heir. The original plaintiff had, in my opinion, discharged the burden cast on her that the amount in Fixed Deposit Receipt No. 208 of 1975 (No. 244 of 1986) was intended for her. The trial court has not looked into the circumstances referred to above while coming to a contrary conclusion and the conclusion of the trial court on this aspect cannot be sustained.

11. For the reasons mentioned above, the appeal is partly allowed. It is held that respondent No. 1 is entitled to the amount lying in Savings Bank Account No. 2245 (No. 12164) and the amount lying in Fixed Deposit Receipt No. 245 of 1986 (sic). The plaintiff is held entitled to the amount lying in Fixed Deposit Receipt No. 208 of 1975 reinvested in Fixed Deposit Receipt No. 244 of 1986. In the facts and circumstances, I would leave the parties to bear the costs. Interim order

dated March 31, 1995, of this court stands vacated.