
(2002) 03 BOM CK 0065
In the Bombay High Court
Case No : First Appeal No. 775 of 1990

Daniel Premacey Ramball

APPELLANT

Vs

Joseph Charlas Salvi and Others

RESPONDENT

Date of Decision : 11-03-2002

Acts Referred:

Succession Act, 1925 — Section 213, 63

Citation : (2002) 6 BomCR 223 : (2002) 4 MhLj 133 : (2003) 1 RCR(Civil) 179

Hon'ble Judges : R.M.S. Khandeparkar, J

Bench : Single Bench

Advocate : R.A. Thorat, Vaibhav A. Sugdare and Jagruti Mujumdar, for the Appellant; A.L. Patki, For respondents Nos. 1A to 1C and V.Z. Kankaria, for the Respondent

Final Decision : Dismissed

Judgement

R.M.S. Khandeparkar, J.—This Appeal arises from the Judgment and Order dated 19th March 1990 passed by the II Additional District Judge, Nasik in Civil Misc. Application No. 176 of 1984. By the impugned Judgment and Order the lower Court has rejected the Application for grant of probate to the Appellant in relation to Exh. 45 which was stated to be the last Will allegedly executed by one Maltibai Kennith Ramball on 19th July 1969. Heard the Advocates for the parties. Perused the records.

2. The undisputed facts in the matter are that one Kennith Ramball expired on 19th July 1947 leaving behind him his third wife Maltibai. Prior to that he had married two other ladies, one of them being Nanibai, who expired leaving behind her husband Kennith and two sons, namely, William and Premise. In fact, the marriage of Nanibai with Kennith was her second marriage and at the time of their marriage, Nanibai had one son by name, William out of her first marriage. William is survived by Vijay, who is the Respondent No. 2 herein. Premise is survived by Danial, who is the Appellant herein. The third wife of Kennith Ramball, namely, Maltibai expired on 31st July 1984. Maltibai had three brothers,

namely, David Salvi, Lamvel Salvi, and Charles Salvi. Third brother Charles Salvi expired in the year 1967, leaving behind him son Joseph. Joseph is the original opponent in the proceedings before the lower Court. The said Joseph, expired on 24th February, 1987 leaving behind him the respondent No. 1A as his widow and the Respondent No. 1B and 1C as the son and the daughter, respectively. It is also to be noted that Maltibai had executed a Will on 16th September, 1961 where under the original opponent Joseph was the sole legatee thereunder.

3. It is the case of the Appellant that Maltibai executed her last Will on 19th July, 1969 and the same was registered before the Sub-Registrar at Nasik. Said Maltibai expired 15 years thereafter i.e. on 31st July, 1984. Under the said Will the Appellant was appointed as the sole legatee and the property described therein has been bequeathed in favour of the appellant and, therefore, the Appellant is entitled to own and possess the said property as the exclusive owner thereof and, therefore, is entitled for the grant of Probate in his favour in relation to the said Will, dated 19th July, 1969.

4. The original Opponent Joseph objected to grant of Probate in favour of the Appellant in relation to the said Will, denying the execution of the said Will by Maltibai as well as contending that the said Will was obtained by practicing fraud and that Maltibai had already executed a Will dated 16th September, 1961 under which he was the sole legatee to inherit the property left behind by Maltibai. It was also further sought to be contended that Maltibai was driven out by all the family members and she used to reside at Nasik and she was being maintained by the opponent Joseph. The claim for grant of Probate was also objected to by the other opponent Vijay.

5. The Appellant examined himself and one Philip Mathew Ohal in support of the claim for grant of probate, whereas the opponents examined Bela Joseph Salvi w/o of Joseph Salvi and Daniel Charles Salvi in support of the case of the opponents. The lower Court after considering the evidence on record rejected the application for grant of Probate holding that the document dated 19th July 1969 was not duly executed Will of Maltibai. Hence, the present Appeal.

6. Assailing the impugned Judgment and Order, the learned Advocate for the Appellant submitted that the evidence on record clearly discloses admission on the part of the Opponent regarding execution of the said Will by Maltibai, and for want of any material regarding the doubt about the soundness of the health or the evidence regarding ill-health of Maltibai, there was no justification for the lower Court to hold that the Will was not duly executed by Maltibai. Lapse of the period of 15 years without any adverse action by Maltibai prior to her death, coupled with the fact of registration of Will establish genuineness of the Will and benefit thereunder ought to be given to the Appellant, and having denied the same the lower Court has acted illegally while refusing to grant the probate. The specific objection was raised in relation to the signature of the Maltibai as the same being bogus, and yet no evidence was adduced by the Opponent in that regard. The signature on the Will having been established as that of Maltibai as

the testator and the Will having been registered, the lower Court ought to have held that the Will was duly executed by Maltibai. The materials on record apparently disclose that the findings arrived at by the lower Court are not borne out from the record. Reliance is sought to be placed in the decision of Privy Council in the matter of AIR 1949 272 (Privy Council) in support of the contention that in the absence of any evidence regarding undue influence having been exercised by the Petitioners, the genuineness of the Will could not have been doubted and in the decision of the Apex Court in the matter of Surendra Pal and Others Vs. Dr. (Mrs.) Saraswati Arora and Another, in support of the contention that the burden upon the opponent having not been discharged pertaining to the objection raised by them, the Probate ought to have been necessarily granted in favour of the Appellant. Reliance is also placed in the decision of the Apex Court in Vrindavanibai Sambhaji Mane Vs. Ramachandra Vithal Ganeshkar and others, in support of the contention that in the absence of any unnatural things about contents of Will being disclosed the same ought to have been construed as duly executed by Maltibai. Reliance is also placed in the decision of the Apex Court in P.P.K. Gopalan Nambiar Vs. P.P.K. Balakrishnan Nambiar and others, in support of contention that in view of Registrar's endorsement about due execution of the Will, minor discrepancies in evidence cannot come in the way of the Appellant in getting probate in relation to the Will in question.

7. On the other hand making grievance about non-disclosure of the first Will dated 16th September 1961, in the application seeking the relief of grant of probate by the Applicant and placing reliance in the decision of the Apex Court in the matter of Bhagwati Prasad Vs. Shri Chandramaul, the learned Advocate for the Respondent submitted that irrespective of the fact whether any specific plea was raised or not and irrespective of the fact whether the details in support of the objection for grant of probate had been disclosed in the reply or not, the propounder has to primarily establish that the Will in question was duly executed and only thereupon the onus shifts upon the Opponent to disprove the same. According to the learned Advocate for the Respondent, the materials placed on record are sufficient to raise suspicion about due execution of the Will by Maltibai. That apart, the language of the Will apparently disclosed that the same has not been written by any layman but a person having acknowledge about the law relating to the disposal of the properties. According to the learned Advocate the presence of the Appellant at the time of alleged execution of the Will and the records disclosing enthusiasm on the part of the Appellant in getting the said Will executed by Maltibai apparently discloses that the same was not duly executed by Maltibai. Reference is also made to the letter Exh-33/6A contending that the said letter was admittedly written by Maltibai to the Appellant and the same was in Hindi language whereas the Will is in Marathi language.

8. Before considering the rival contention, it would be worthwhile to take stock of law laid down by the Apex Court in relation to the proof of Will.

9. In H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, after taking

into consideration various decisions of various High Courts as well as the Privy Council, the Apex Court has held that the party propounding a Will or otherwise making a claim under a Will is no doubt seeking to prove the document and for deciding as to how it is to be proved, reference can be favourably made to statutory provisions relating to the proof of documents and in that connection sections 67 and 68 of the Evidence Act as well as sections 59 and 63 of the Indian Succession Act are relevant. It has been held that even while dealing with the proof of Will, the Court will start with same enquiry as in case of proof of documents. The propounder has to be called upon to produce satisfactory evidence about the Will having been signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, and that he had understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the Will, is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, the Court would be justified in making a finding in favour of the propounder. After taking into consideration some of the instances which can be called as a suspicious circumstance, creating doubt about the genuineness of the Will, the Apex Court has observed that the propounders who have taken a prominent part in the execution of the Will which confer upon them substantial benefits, the same can be one of the suspicious circumstance, sufficient to raise doubt about the genuineness of the Will. It has been held that if it is found that the propounder had taken prominent part in the execution of the Will and has received substantial benefit under it, that itself could be treated as a suspicious circumstance in relation to the execution of the Will and propounder could be required to remove the said suspicion by clear and satisfactory evidence. The test merely emphasis that in admitting the question as to whether the instrument produced before the Court, is the last Will of the testator, the Court is deciding solemn question and it must be fully satisfied that it has been voluntarily and validly executed by testator, who is no longer alive. It is obvious that for deciding material question of fact which arise in Application for probate, no hard and fast rule can be laid down for the appreciation of evidence. It may, however, be stated generally that a propounder has to prove the due and valid execution of the Will and that if there are any suspicious circumstances surrounding the execution of the Will, the propounder must remove the said suspicions from the mind of the Court, by cogent and satisfactory evidence.

10. Similarly in *Shashi Kumar Banerjee and Others Vs. Subodh Kumar Banerjee* since deceased and after him his legal representatives and Others, it was observed that the mode of proving a Will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a Will in terms of Section 63, Indian Succession Act. The onus of proving the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, the proof of testamentary capacity and the signature of the testator as required by law is

sufficient to discharge the onus. Where, however, there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before court accepts the Will as genuine.

11. In *Rajinder Nath Sharma and Others Vs. Rani Chander Kanta and Others*, the Division Bench of the Delhi High Court has held that it is necessary for the propounder to dispel all suspicions which may surround the Will such as genuineness of signatures of the testator, condition of the testator's mind, disposition made in the Will being unnatural, improbable or unfair in the light of the relevant circumstances or any other indications in the Will showing that the testator's mind was not free. It has been also observed that if a Will is registered one there is a presumption of genuineness but it will not by itself be sufficient to dispel all suspicions without submitting the evidence of the Registrar to close examination as the registration may take place without executants really knowing what he was registering. Speaking on behalf of the Division Bench of Calcutta High Court in *Anath Nath Das and Others Vs. Sm. Bijali Bala Mondal, Shri Chittatosh Mookerjee, J.* as he was then, after taking the note of the decision of the Apex Court in *Venkateachala Iyengar v. B. N. Thimmajamma's* case as well as in *Purnima Debi v. Khangendra Narayan Deb* and *Ramchandra Rambux v. Champanbai* cases observed, "the judicial decisions have also laid down that all the circumstances which would be regarded as suspicion cannot be precisely defined or exhaustively enumerated" and further held that "if the evidence as to the registration shows that it was done in a perfunctory manner, that the officer registering the Will did not read it over to the testator or did not bring home to him that he was admitting the execution of a Will or did not satisfy himself in some other way (as for example, by seeing testator read in the Will) that the testator knew that it was a Will the execution of which he was admitting, the fact that the Will was registered would not be of much value. Registration may take place without executants really knowing what he was registering".

12. The Apex Court in *Bhagwan Kaur v. Kartar Kaur*, (1994) 5 SCC 135 reiterated the necessity of ascertaining as to whether the requirement of Section 63 of Indian Succession Act and Section 68 of the Indian Evidence Act had been satisfied or not while analysing the evidence produced by propounder in support of his claim for grant of probate. In the said case, Apex Court considered the depositions of the witnesses placed on record and taking note of the fact that the statement of both the witness being not consistent, it was held that due execution of the Will could not be expected to have been proved. It was further observed that the endorsement made by the Sub-Registrar to the effect that it was made in his presence and in the presence of witness and that the witness signed the said endorsement in presence of Bachan Singh was held to be not satisfying the requirement of Section 63 of the Indian Succession Act and does not reach upto the level of proof as required u/s 68 of the Indian Evidence Act and, therefore, it was ruled that "the mere registration of Will said to have been executed by Bachan Singh is of no consequence".

13. The Division Bench of Calcutta High Court in the matter of Woomesh Chunder Biswas v. Rashmohini reported in ILR XXI Calcutta 279 has held that, "due execution" of a Will implies not only that the testator was in such a state of mind as to be able to authorise, and to know he was authorizing, the execution of a document as his Will, but also that he knew and approved of the contents of the instrument; and in such cases of disputed execution the Judge should consider and express an opinion upon both these questions.

14. Even the decision of the Apex Court sought to be relied upon by the learned Advocate for the Appellant in the matter of Surendra Pal's case clearly lays down that it is for the propounder to show that the Will was signed by the testator, that he was at the relevant time in a sound disposing state of mind, that he understood the nature and effect of the dispositions, that he put his signature to the testament of his own free will and that he signed it in the presence of the two witnesses who signed it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder stands discharged. But where there are suspicious circumstances, it will be for the propounder to explain them to the satisfaction of the Court before the Will could be accepted as genuine; and where the caveator alleges undue influence, fraud or coercion, the onus is on him to prove the same.

15. Bearing in mind the law laid down by the Apex Court and considering the point involved in the matter relates to the satisfaction of the court regarding due execution of the alleged Will, if one peruses the evidence on record, there is no doubt that the appellant as well as his witness Phillip have categorically stated that the said document was signed by Maltibai and had affixed her signature to the said document in the presence of the witnesses. The Appellant Danial has also stated that the document after having been typed, the same was read over to Maltibai and thereafter she had put her signature on the said document. Considering the said statement by the appellant and there being no challenge to the said testimony in the cross-examination on behalf of the respondent, it was sought to be submitted by the learned advocate for the appellant that the fact that the contents of the Will were read over to Maltibai has been duly established by the said evidence of the appellant and that discloses that Maltibai had full knowledge about the contents of the Will. This evidence undoubtedly discloses that the signature of Maltibai on the Will was sufficiently established by the appellant. However, it has to be noted that it is not more proof of signature that will entitle that party to obtain Probate, but it is also necessary to clear every other suspicious circumstance. It is, therefore, necessary to ascertain in the case in hand, whether there was any such suspicious circumstance, which was required to be clarified and cleared by the appellant.

16. Undisputedly, it is the case of the appellant that the Will was typed by one Mr. Joshi. It is not in dispute that Joshi was not living at the time when the application for Probate was filed and, therefore, he was not available before the Court below. It is the case of the appellant that the said Will was typed by Joshi

on the same being dictated by Maltibai to the said typist. The Will is in Marathi Language.

17. The Will, on the face of it, nowhere refers to having been dictated to the typist by Maltibai or it having been in the words as those were communicated to the typist by Maltibai. The evidence on record does not disclose as to whether the narration of the Will by Maltibai to the typist Mr. Joshi was either in Marathi or in Hindi. The evidence on record discloses that Maltibai was in habit of writing letters in Hindi as well in Marathi.

18. The Will, on the face of it, nowhere discloses having been read by Maltibai before affixing her signature to the same. It also does not disclose as to whether the same was read over to Maltibai and if so, by whom. Undisputedly, the statement of the appellant to the effect that the Will was read over to Maltibai has not been corroborated by the witness. Even the appellant himself has not come out with any information in his testimony as to who had read over the Will to Maltibai. In absence of complete information in that regard having not been disclosed in examination-in-chief, no benefit of absence of cross-examination in that regard can be given to the appellant. It was primarily for the appellant to establish the fact that prior to the execution of the Will the same was read by Maltibai or it was read over to her and if so, by whom. Incomplete information sought to be disclosed regarding this material aspect of the case, cannot enure to the benefit of the appellant, merely because, there was no cross-examination in that regard by the respondent as it is, a matter of satisfaction of judicial conscience and, therefore, would depend upon the facts and circumstances of each case and the nature and quality of evidence adduced by the parties.

19. Once on the face of it, the Will does not disclose to have been read by the person who has stated to have signed the same, nor it discloses to have been read over to him, neither the Will nor the evidence discloses the identity of the person, who might have read over the Will to the testator, nor any such person who could have read over the Will have been examined before the Court, in such circumstance, it cannot be said that the suspicions relating to the due execution of the Will have been removed to the satisfaction of the Court by the propounder of the Will. Besides, the witness Philip has not stated in his testimony anything regarding the fact of reading of the Will or the same having been read over to Maltibai before it was signed by Maltibai.

20. The testimony of witness Philip rather than lending support to the case put forth by the appellant, gives rise to various doubts about the genuineness of the Will. It also lends support to the contention, that the contents of the Will were not to the knowledge of Maltibai at the time she had affixed her signature to the Will. The witness Philip has stated in his deposition, that after the Will was typed by Mr. Joshi all the person went to the office of the Sub-Registrar and in their presence, Maltibai affixed her signature below the document of Will. Apparently the possibility of the incidence of reading by or reading over of the Will to Maltibai was totally ruled out by the testimony of Philip. The endorsement

regarding the execution of the Will by the sub Registrar also nowhere discloses the testator having confirmed about the knowledge of the contents of the Will. It nowhere discloses that the Will was read by or read over to the testator or Testator having confirmed the contents of the said Will to be to the knowledge of the testator.

21. The first page of the Will discloses the same having been recorded on 19th July, 1969. The endorsement by Sub-Registrar also discloses that it was presented for registration on 19th July, 1969. However, the date at the end of the Will but prior to the signature of the testator, is mentioned to be 18-7-69. Undisputedly, there is no evidence led by the appellant as regards the said discrepancy about the dates.

22. Referring to the decision of the Apex Court in Vrindavanibai Sambhaji Mane Vs. Ramachandra Vithal Ganeshkar and others, it was sought to be contended that lapse of 15 years period after execution of the Will and before the death of Maltibai without any revocation thereof or execution of any other Will by Maltibai, it was sought to be argued, that the same discloses that there was no grievance on the part of Maltibai about the due execution of the said Will, and, therefore, it clearly establishes the genuineness of the Will. Once it is apparent that the evidence on record does not disclose that Maltibai has full knowledge about the contents of the Will before execution thereof and in the absence of any evidence on record to show that from the date of execution of the Will till her death, she was made aware of the contents of the Will, it cannot be presumed that Maltibai had any occasion to react against the said Will, at any point of time during the said period of 15 years. Had it been the case of the appellant that after the execution of the said Will Maltibai had occasion to know the contents thereof, subsequent thereto certainly, there could have been some sort of confirmation of the contents of Will by Maltibai on account of such evidence being brought on record by the appellant. In the absence of any such evidence, mere lapse of the period of 15 years, from the date of execution of the Will till her death, cannot enure to the benefit of the appellant to claim justification for the grant of probate in relation to the said Will in view of suspicious circumstances, referred to above which have not been cleared by producing cogent evidence by the appellant.

23. There is no doubt that objection which was sought to be raised by the opponent was mainly in relation to the signature of Maltibai having been forged. However, as already observed above, considering the law on the point, which primarily requires the propounder to clear all the suspicious circumstances in order to be entitled to get the probate in relation to the Will and analysis of the materials on record, clearly disclose that the appellant had failed to discharge his burden in that regard. Being so, even though, the reason for arriving at the final decision by the trial Court may not be correct, nevertheless, the materials on record clearly justify ultimate finding arrived at for the reasons disclosed hereinabove.

24. It is to be noted that while rejecting the application filed by the appellant for

the Probate in relation to the Will, dated 19th July, 1969, the relief in the nature of Probate to the respondent, in relation to its first Will dated 16th September, 1969, has also been rejected on the ground of failure on the part of the Respondent to adduce any evidence to prove the execution of the said Will or to prove its attestation. Undoubtedly, the lower Court has not at all analysed the evidence on record in that regard. The respondent has examined Bela Joseph Salvi as well as Danial Charles Salvi, while opposing the claim of opponent and in support of their case. It was, therefore, necessary for the Lower Court to analyse their evidence and to ascertain whether there was due execution of the Will by Maltibai on 16th September, 1961 in respect of which the Respondent had applied for probate being issued. The lower Court having totally ignored the evidence and having merely observed about the failure to adduce evidence by totally ignoring the deposition of both of the Respondents and her witness, the Lower Court has acted arbitrarily and respondents" are justified in filing the cross objection, the same are to be allowed to that extent and the said finding is to be set aside and the matter is to be remanded to consider whether the Respondents have established that the said Will, dated 16th September, 1961, was duly executed by Maltibai or not.

25. Needless to say that in view of the disposal of the appeal, the stay granted in relation to the proceedings before the District Court Nasik, in Miscellaneous Petition No. 129 or 1990 also stands vacated. However, this does not mean that this Court has expressed any opinion as regards the merits of the contention of the parties in the said proceeding. The Lower Court will have to dispose of the same in accordance with law.

26. In the circumstances, the appeal fails, and is dismissed. The Cross-objections filed by the Respondent are allowed. The finding regarding failure on the part of the Respondent to adduce evidence is hereby set aside. The matter is remanded to the Lower Court to analyse the evidence on record to ascertain and to decide whether the Respondents have established that the Will dated 16th September, 1961 was duly executed by Maltibai or not. There shall be no order as to costs.

27. At this state the learned Advocate for the appellant, prays for stay of the order passed today and for continuation of the interim relief granted for a period of eight weeks. The same is objected by the learned Advocate for the respondent. However, the interim relief to continue for a period of eight weeks.

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