
(2001) 04 BOM CK 0069

In the Bombay High Court

Case No : Misc. Petition No's. 18 and 65 of 2000 in Petition No. 105 of 1993

Everest Agencies

APPELLANT

Vs

Ishrat Rafique Sharif

RESPONDENT

Date of Decision : 12-04-2001

Acts Referred:

Succession Act, 1925 — Section 263

Citation : AIR 2001 Bom 377 : (2001) 4 ALLMR 387 : (2001) 3 CivCC 686 :
(2002) 1 RCR(Civil) 426

Hon'ble Judges : A.B. Palkar, J

Bench : Single Bench

Advocate : Mr. N.K. Mudnaney, for the Appellant; Mr. M.P.S. Rao and N.R. Mody,
instructed by Rustamji and Ginwala, for the Respondent

Final Decision : Dismissed

Judgement

A. B. Palkar, J.—These 2 separate petitions have been filed on behalf of the petitioners Everest Agencies, and Anand Sarup Mehta claiming principally the relief of revocation of Probate granted to the Respondent in Petition No. 105/93. However, in Misc. Petition No. 65/2000 an alternative relief is claimed for directing the Respondent to remove Item Nos. 4 and 5 of the Schedule of estate of deceased to the Probate. Since the petitions are in respect of the same Probate, they are heard together and are being disposed of by this order. In Petition No. 105/93 Probate of the Will of deceased was granted to the Respondent. One Sayyed Mohd. Akhtar had filed a Caveat. This Court (Coram : I. G. Shah, J.) passed an order. The Court after examining the attesting witness to the Will and after considering his evidence accepted that the thumb impression on the Will was of the deceased and granted Probate and also disposed of the suit. Thereafter in Misc. Petition No. 92/93 the grant of Probate was set aside. Thereafter again the petition was disposed of by consent order dated 29.10.99 and Probate was granted to the Petitioner in Petition No. 105/93.

2. One petition is filed by Everest Agency and the other by its partner Anand

Swarup Mehta claim to be owners of the office situated at Flat 103-C, 1st floor, Sukh Sagar Co-operative Society Ltd., Mumbai. The deceased died on 20.1.93. Probate was earlier granted on 3.1.93. According to the petitioners the circumstance that the Will was executed about 25 days prior to her death by the deceased is a circumstance which creates suspicion in the genuineness of the Will. The deceased was a Shia Muslim and was not entitled to bequeath more than 1/3rd of her share in the estate. The petitioners have purchased the aforesaid flat which is shown as Items 4 and 5 of Schedule 1 annexed to the Probate, These Items were added to the schedule by an amendment allowed by this Court on 8.12.99 in the aforesaid petition. According to the petitioners this flat was sold to them by the deceased by an agreement dated 20.4.82. In Petition No. 65/ 2000. It is specifically contended that the deceased had made an earlier Will on 24.12.83 under which one Chartered Accountant Dhirajlal M. Desai was appointed executor and trustee. At that time deceased's sister Sheeraz was alive. After the death of Sheeraz, the deceased executed another Will on 28.7.88. Petitioners have come in possession of copy of that Will from Rajesh Dhirajlal Shah.

3. According to the petitioners the Will which has been probated is suspicious inasmuch as it bears the thumb impression of the deceased whereas the deceased was a person who could read, write and sign. The witnesses to the Will Advocate Nazim H. Kazi and Dr. M. J. Moledina are residents of Mazgaon and Respondent is resident of Mazgaon whereas the deceased was never residing in Mazgaon. There is no specific reference to the two earlier Wills made by the deceased which stand evoked by the aforesaid Will. There is no provision made for certain relations of the deceased. The deceased was admitted to Ramkrishna Mission Hospital at Khar in Oct-November, 1992 and thereafter a Nurse was employed in January. 93 to attend to her at her residence and therefore, when the Will was made the deceased was not in a testamentary disposition of mind. She was never under treatment of Dr. Moledina and was residing at Khar and not at Mazgaon. The deceased used to consult petitioners and her Chartered Accountant for all her financial matters and therefore the Will produced by the Respondent is not a genuine document. It appears to be a forged and fabricated document and petitioners have taken thumb impression without making the deceased aware of the contents of the Will. Therefore, the Probate obtained should be revoked.

4. The petition is opposed on the ground that it is mala fide, frivolous and baseless. Petitioners have no interest in the estate of late Pratimadevi (deceased) or in her last Will and testament. Petitioners have no locus standi to file present petition seeking revocation of Probate. The issue regarding title to particular property cannot be decided in exercise of testamentary jurisdiction and remedy if any available to the petitioners is to approach the appropriate forum having Jurisdiction to decide the title to the property. Petitioners have already initiated proceedings in Cooperative Court as well as in Ordinary Original Civil Jurisdiction in respect of the title (Suit No. 4519/99) in which a status quo order

has been passed in respect of suit property.

5. Respondent is the granddaughter of deceased Pratimadevi who was a successful actress. She is executrix as well as beneficiary under the said Will. Deceased Pratimadevi owned several properties including office premises for which the present petition is filed. According to the Respondent she had long back applied to the Society for transfer of share. Even the present petitioners had approached the Society. The Society did not accept their claim. All the near relatives of the deceased were served with citation. Although earlier they objected to and filed Caveats, later on they realised the futility and consent orders are passed. The present petition is filed after lapse of six years from the earlier order. The present petitioners have no caveatable Interest in the property of the deceased.

6. Learned Counsel appearing for the parties stated that no oral evidence is to be led and hence arguments were heard. In view of the arguments advanced before me, the only point that arises for determination is whether the grant is liable to be revoked in view of the various assertions made in these two petitions by the petitioners. Before proceeding to consider the arguments, it is necessary to point out that in order to make out a case for revocation, the petitioners have to show that they have a caveatable interest in the property left by deceased and that grant is liable to be revoked on some of the grounds mentioned in Section 263 of the Indian Succession Act. The arguments regarding the circumstances which may have some effect on the validity of the Will can be considered only if a ground is made out for revocation of Will:

7. Admittedly, petitioners are not in any way related to the deceased. They do not have any claim in the property left by the deceased. It is necessary to understand as to what is the claim of the present petitioners. Petitioners are claiming to have purchased the property in dispute (flat) from the deceased during the life time. Therefore, the petitioners are not claiming the property left by the deceased. They have a rival claim to the title of the property as they are claiming that the property did not belong to the deceased at the time of her death but had been transferred by her in her life time.

8. This Court in its testamentary jurisdiction does not decide title to the property. While granting Probate what the Court considers is that the Will produced before it is genuine last Will of the testator. Whatever property is claimed by the executor to be the property left by the deceased is normally included in the schedule and by inclusion of the property in the schedule the Court does not decide title of that property. Therefore, any person having a rival claim to the title of the property, is always at liberty to approach the appropriate Court for decision of her title.

9. It was contended on behalf of the petitioners by learned Counsel Shri Mudnaney that a Judgment in Probate proceeding is Judgment in remand so long as that remains in force it is conclusive as to the due execution and validity of

the Will unless it is duly revoked as per law. It binds not only the parties but also upon all persons in all proceedings arising out of the Will or the claims under or connected therewith. There is no question of disputing the proportion. However, by stating that Judgment in the Probate proceeding is Judgment in rem, it does not mean that the Court exercising the testamentary jurisdiction can decide as to the title of the property and if at all it so decided, that also would be the Judgment in rem.

10. Relying on in the case of *Sima Rani Mohanti v. Puspa Rani Pal*, it was contended that any interest, however slight and even the bare possibility of an interest is sufficient to entitle a person to file application for revocation. Accepting the legal proposition, it is necessary to point out that the person must show to have interest in the property left by the deceased. If a person coming with a claim that the property did not belong to the deceased at the time of the death but it did belong to him then the person is not making a claim to the property of the deceased. He is therefore, cannot be said to be claiming property through the deceased. It is pertinent to point out that all the relatives of the deceased have ultimately accepted the Will and although objections were taken by the relatives to grant of Probate, the present petitioners were well aware of the fact that there is an earlier Will. In spite of that none applied for any Probate of that Will right from 1982. The respondent has produced letter dated 26.2.93 sent by Advocate P. Vas on behalf of the society informing the present petitioners to take steps and approach the appropriate Court for grant of letters of administration. In spite of this, the present petitioners did not take any steps and have now come forward to claim revocation.

11. The facts stated above clearly shows that the petitioners have no caveatable interest in the property left by the deceased and they are denying the title of the deceased to that property at the time of her death. In my view, it would serve their purpose if it is observed that petitioners are at liberty to take appropriate proceedings in Court having jurisdiction to decide the title of the property and the fact that Probate of the Will of deceased is granted to the present respondent will not come in the way of the present petitioners to establish their title to the property as against the deceased if it is otherwise permissible in law. In view of the above discussed legal position. I am not inclined to go into the arguments advanced in respect of the so-called suspicious circumstances as I am not satisfied that the petitioners are entitled to challenge the grant of Probate to the respondent who is granddaughter of the deceased.

12. Even from the conduct of the petitioners in moving these two petitions only after inclusion of the flat is in Sukh Sagar building in the schedule, it is clear that the interest of the petitioners is not infact in challenging the Will but in challenging the title of the deceased to the property which petitioners claim to have purchased from the deceased. As pointed out earlier, the petitioners have a remedy to approach appropriate Court having Jurisdiction to decide title and get the title decided there. The proceedings in Testamentary Court cannot be used to

get the issue of title decided. In this view of the matter, I find that there is absolutely no substance in these two petitions and both the petitions therefore, deserved to be dismissed.

13. Both the petitions are dismissed with costs.