

(2018) 12 BOM CK 0086

In the Bombay High Court

Case No : Appeal No. 358 Of 2017 In Chamber Summons (Testamentary) No. 86
Of 2017 With Notice Of Motion (Appeals) (L) No. 2019 Of 2017

Jaya Talakshi Chheda

APPELLANT

Vs

Tanuja Jayantilal Bhagat And 2 Ors

RESPONDENT

Date of Decision : 17-12-2018

Acts Referred:

Indian Penal Code, 1860 — 304
Hindu Succession Act, 1956 Sec 25

Citation : (2018) 12 BOM CK 0086

Hon'ble Judges : B. R. Gavai, J;Riyaz I Chagla, J

Bench : Division Bench

Advocate : Virendra Tulzapurkar, K T Kukreja, Bhumika Gada, Nilkanth Gharkar,
Ram Pawde, Devang Hasmukhlal Shah, Atul Damle, Sachin R Pawar, M A Amjith,
Amit Seth

Final Decision : Disposed Off

Judgement

Riyaz I. Chagla J

1. This Appeal challenges an order of the learned Single Judge of this Court dated 21st August, 2017 ("the impugned order") by which the Chamber Summons was dismissed on the ground that the Appellant incurred disqualification under Section 25 of the Hindu Succession Act, 1956 ("the Act"). The said Chamber Summons sought the following directions:-

(a) to amend the Petition by deleting the name of Hitesh Suresh Bhagat, since deceased, and in its place, substitute the name of the applicant (Caveatrix) being the mother of the deceased Hitesh Suresh Bhagat as the only heir and legal representative;

(b) to get the citation issued through this Court against the applicant;

(c) to serve duplicate citation and true copy of the amended Petition upon the applicant or through her Advocate who agrees to waive service on her behalf.

2. A brief background of facts is necessary. The Appellant got married to one Suresh Kalyanji Bhagat on 18th February, 1979. Thereafter, the Appellant and Suresh K. Bhagat were divorced on 5th July, 2006. The said Suresh K. Bhagat was alleged to have been murdered by the Appellant and their son Hitesh Suresh Bhagat along with others on 13th June, 2008. The Appellant and the said Hitesh Suresh Bhagat were arrested in July, 2008. On 31st July, 2013, the learned Additional Sessions Judge, Greater Bombay convicted Hitesh S. Bhagat and the Appellant along with other co-accused in Sessions Case No. 294 of 2009 for committing murder of Suresh K. Bhagat and sentenced them to suffer life imprisonment. On 5th September, 2013, Criminal Appeal No. 968 of 2013 filed by Hitesh Bhagat against the order of conviction was admitted by this Court. Although the Appeal was admitted, the conviction was neither stayed nor the sentence suspended. On 23rd March, 2014, Hitesh S. Bhagat died in jail while undergoing sentence of life imprisonment.

3. It was during the arrest and the trial of the Appellant and Hitesh Bhagat in the Sessions Court that Maniben Kalyanji Bhagat mother of the deceased Suresh Bhagat instituted Suit No. 3197 of 2008 for administration of the estate of the deceased Suresh K. Bhagat. Maniben Bhagat was further alleged to have executed a Will dated 14th October, 2008 and a codicil appointing Respondent No.1 as executrix on 3rd March, 2010. The said Maniben Bhagat died on 19th September, 2010. The Respondent No.1 filed a probate Petition No. 588 of 2011 which was later converted into Testamentary Suit No. 100 of 2011. Respondent No.1 applied to be substituted as Plaintiff and to continue to prosecute the administrative suit for administration of the estate of the deceased Suresh Bhagat. The Appellant has been allowed by this Court to represent the deceased Hitesh Bhagat in Notice of Motion No. 1062 of 2013 which had been taken out by Hitesh Bhagat during his life time in the administration Suit. The Notice of Motion came to be disposed of by this Court on 29th September, 2014 and by which order the 50% share of the deceased Hitesh Bhagat in the estate of the Suresh Bhagat was protected. The Appellant has also been permitted to continue the Criminal Appeal as Appellant on behalf of the deceased Hitesh Bhagat by the order of Division Bench of this Court passed in Criminal Application No. 971 of 2014 and which Criminal Appeal challenged the order of conviction passed by the learned Sessions Judge, Greater Bombay.

4. Dr. Virendra Tulzapurkar, the learned Senior Counsel appearing for the Appellant has submitted that the learned Judge by the impugned order disqualified the Appellant under Section 25 of the Act from defending the Testamentary Suit in substitution of her son the deceased Hitesh Bhagat as the only heir and only legal representative of Hitesh Bhagat. He has submitted that the learned Judge has in passing the impugned order merely relied upon the decision of the learned Additional Sessions Judge, which convicted Hitesh Bhagat and the Appellant for committing murder of Suresh Bhagat and sentenced them to suffer life imprisonment. He has submitted that a Criminal Appeal had been filed by Hitesh Bhagat which was later upon his demise allowed by this Court's

order dated 7th April, 2017 to be prosecuted by the Appellant against the order of conviction and which has been admitted by this Court. He has submitted that the Appellant has also been allowed by this Court to represent the deceased Hitesh Bhagat in a Notice of Motion No. 1062 of 2013 taken out by Hitesh Bhagat during his life time in the administrative Suit and which came to be disposed of by an order dated 29th September, 2014 passed by this Court protecting the 50% share of Hitesh Bhagat in the estate of Suresh Bhagat. These orders have merely been mentioned by the learned Judge in the impugned order without giving due weightage to the said orders. He has submitted that the Civil Court has neither tried nor come to an independent finding on the issue as to whether the Appellant had committed murder of her husband Suresh Bhagat. He has relied upon the judgment of the Supreme Court in the case of Anil Behari Ghosh Vs. Smt. Latika Bala Dassi and Ors. AIR 1955 S.C. 566. The Supreme Court had observed in that case that the Courts below assumed on the basis of the judgment of conviction and sentence passed by the High Court in the Sessions Trial that one Mr. Charu was the murderer. It has been held that the judgment is relevant only to show that there was a trial resulting in conviction and sentence of Mr. Charu to imprisonment for life but it is not evidence of the fact that Mr. Charu was the murderer and that question has to be decided on evidence. This judgment has been followed in Mst. Biro and Anr. Vs. Banta Singh AIR 1980 Punjab and Haryana 164 by the Punjab and Haryana Court where it has been expressly held that the judgment of the Criminal Court is not binding on the Civil Court and it can only be relied upon to show that there was a trial resulting in conviction. It is for Civil Court to determine on evidence adduced before it as to whether the case falls within Section 304 of the IPC. The decision of the Supreme Court has also been relied upon by the Calcutta High Court in the case of Ram Chatterjee and Anr. Vs. Smt. Taapati Mukherjee and Anr. C.O. No. 3431 of 1991 decided on 6th February, 2002 which has maintained the position that the judgment of the Criminal Court has no independent impact upon the Civil Court and it is for the Civil Court which has jurisdiction to decide the matter independently. The above High Court decisions were considering the issue of disqualification under Section 25 of the Act. Dr. Tulzapurkar has accordingly submitted that the learned Judge should have similarly followed the Supreme Court decision. The Appellant could not have been disqualified by merely relying upon the decision of the Sessions Court and it was for the Civil Court to independently determine whether the Appellant had committed murder after adducing evidence before it.

5. He has submitted that the learned Judge in the impugned order has relied upon the judgment of this Court in Minoti Vs. Sushil Mohansingh Malik & Anr AIR 1982 Bombay 68. which had not considered the judgment of the Supreme Court in Anil Behari (Supra) and in fact the learned Judge had observed that he was not called upon at this stage to decide the question as to what will be the scope of inquiry before the Civil Court in case of acquittal and is deciding the question of disqualification under Section 25 of the Act on the basis of the position as it

stood on the date of the judgment. He has submitted that the learned Judge ought to have considered that the disqualification of the Appellant would result in the Testamentary Suit being undefended and the Will and Testament along with codicil of the deceased Maniben Bhagat being probated which would affect the rights of the Appellant in the administrative suit where 50% share of the deceased Hitesh Bhagat has been protected. He has accordingly submitted that the learned Judge should have allowed the Appellant to defend the Testamentary Suit pending the decision of this Court in the administrative Suit where an issue has been raised that the Appellant had not committed murder of the deceased Suresh Bhagat to incur disqualification under Section 25 of the Act.

6. Shri Atul Damle, learned Senior Counsel for the Respondent has submitted that the Appellant stands convicted as of today and that the Criminal Appeal filed against the order of conviction although admitted by this Court has neither been stayed nor the sentence of conviction suspended. He has submitted that till the conviction is set aside, the Appellant cannot be allowed to challenge the Will and codicil of the deceased Maniben. He has relied upon the judgment of this Court in Minoti (Supra) where this Court relied upon the conviction of the Defendant under Section 304 of the IPC by the Sessions Court and held that this attracted disqualification under Section 25 of the Act. He has further relied upon the judgment of the Supreme Court in the case of Vellikannu Vs. R. Singaperumal & Anr. (2005) 6 SCC 622 wherein it has been held that the Defendant having been convicted under Section 304 of the IPC which conviction has been continued by this Court, disqualification under Section 25 would be attracted. It has been held that that a person guilty of committing murder, cannot be treated to have any relationship whatsoever with the deceased. It has been held that where the son of the deceased is totally disqualified under Section 25 of the Act, the wife cannot have a better claim in the property of the deceased father. He has submitted that this judgment applies to the present case and that the Appellant in the present case cannot have a better claim than her deceased son. He has submitted that the Testamentary Court is not a forum to decide whether the Appellant has committed murder. He has further submitted that the Appellant has taken out the Chamber Summons in 2017 for substitution of the deceased Hitesh Bhagat who died in 2014 and hence the Chamber Summons should not be allowed by this Court, particularly when the Testamentary Suit itself has sufficiently progressed in the absence of the deceased Hitesh Bhagat. He accordingly submitted that there is no merit in the present Appeal and should be set aside by this Court.

7. We have considered the submissions. It appears that the learned Single Judge in the impugned order has relied upon the order of conviction passed by the learned Sessions Judge thereby convicting the Appellant and her deceased son Hitesh Bhagat for the murder of Suresh Bhagat and sentenced them to life imprisonment. The learned Judge has also placed reliance upon the judgment of this Court in Minoti (Supra), where this Court had placed reliance upon the judgment of the Sessions Judge which had convicted the Defendant therein for

committing culpable homicide or unlawful manslaughter under Section 304 of the IPC. This Court expressly held in that decision that the learned Judge was not called upon at the stage of passing of the order to decide the question as to what will be the scope of the inquiry before the Civil Court in case of acquittal. The learned Judge in Minoti (Supra) had decided the question of disqualification under Section 25 of the Act on the basis of the position as it stood on the date of the order and granted liberty to the parties to raise all permissible contentions in case of subsequent development or change in circumstances. The learned Judge in the present case has followed the decision of this Court in the case of Minoti (Supra) and held that the Appellant incurred disqualification under Section 25 of the Act and granted liberty to the Appellant to raise all permissible contentions in case of subsequent development or change in circumstances.

8. Section 25 of the Act which falls for consideration read as under:-

25. Murderer disqualified. - A person who commits murder or abets the commission of murder shall be disqualified from inhering the property of the person murdered, or any other property in furtherance of the succession to which he or she committed or abetted the commission of the murder.

9. It has been well settled that the issue of a person having committed murder or abets in the commission of murder to attract Section 25 of the Act is to be decided independently by a Civil Court and that mere reliance on the finding of the Sessions Court is considered insufficient. The decision of the Sessions Court can only be relevant to show that there was a trial resulting in conviction and sentence. We find that the learned Judge has although referring to judgment of the Supreme Court in Anil Behari (Supra) not appreciated the ratio of that decision and has merely held that the said decision was not applicable to the present case as Section 25 of the Act did not fall for consideration. The decision of the Supreme Court was dated 15th April, 1955 i.e. prior to the Act coming into force on 17th June, 1956. Hence, the Supreme Court could not have considered Section 25 of the Act when the said decision was passed. The ratio of the Supreme Court is to be found in paragraph 15 of the said decision which reads as under:-

15. It was

The learned counsel for the contesting respondent suggested that it had not been found by the lower Appellate Court as a fact upon the evidence adduced in this case that Girish Charu had murdered his adoptive father though these matters had been assumed as facts. The Courts below have referred to good and reliable evidence in support of the finding that Girish was the nearest reversioner to the estate of the testator. If the will is a valid and genuine will, there is intestacy in respect of the interest created in favour of Charu, if he was the murderer of the testator. On this question the Courts below have assumed on the basis of the judgment of conviction and sentence passed by the High Court in the sessions trial that Charu was the murderer. Though that judgment is relevant only to show

that there was such a trial resulting in the conviction and sentence of Charu to transportation for life, it is not evidence of the fact that Charu was the murderer. That question has to be decided on evidence.

10. It is thus clear from the decision of the Supreme Court that the judgment of conviction and sentence passed by the Sessions Court convicting the person of murder can only be relevant to show that there was a trial resulting in conviction and sentence of that person and it is not evidence of the fact that the person had committed murder. That question has to be decided independently by the concerned Civil Court on evidence. In the present case, the Civil Court has not independently decided the issue and / or arrived at an independent finding that the Appellant had committed murder. In fact this is an express issue raised by the Appellant in the written statement filed in the Suit for administration of estate and hence an issue which requires to be determined by this Court hearing the Suit.

11. The decision of the Supreme Court in Anil Behari (Supra) has been followed in the decision of the Punjab and Haryana High Court in Mst. Biro (Supra) and the decision of the Calcutta High Court in Ram Chatterjee (Supra). The Punjab and Haryana High Court has held that the judgment of the criminal court convicting a person of murder is not binding upon the Civil Court and that this will have to be independently determined by that Court. The Calcutta High Court in Ram Chatterjee (Supra) in paragraph 18 and 19 held thus:-

18. Hence, considering the judgments as referred to and the points as emerged, it is now crystal clear that the Civil Court has the jurisdiction to decide the question whether a person is a murderer or not and / or whether he abetted the commission of offence murder, on taking into account of the facts as would be placed before him by way of evidence independently and without being influenced by any finding of the Criminal Court while adjudicating the charge of murder. Hence, the question as raised by learned senior advocate Mr. Roy Chowdhury that unless and until there is an adjudication by a competent Criminal Court holding the husband as murderer of wife, the suit was prematured, has no legal basis to stand and accordingly such contention is rejected. It is ex facie clear from the judgment as analysed before, that Civil Court is required to adjudicate the issue on evidence as to be adduced before him, even if there was a finding by a Criminal Court that a person is a murderer vide the Apex Court judgment in Anil Behari Ghosh (Supra) wherein it is held that there was necessity of adjudicating the matter by the Civil Court upon taking the facts and evidence on records. Further it is clear from the judgments of Andhra Pradesh High Court and Bombay High Court as referred to above that irrespective of findings of the Criminal Court in a full-fledged criminal trial by acquitting the accused from the charge of murder in terms of Section 302 of Indian Penal Code, the Civil Court had the competency to adjudicate the matter against the said accused while dealing the question of murderer in terms of Section 25 of Hindu Succession Act, 1956. Hence, in a proceeding before Civil

Court praying disqualification to inherit the property in terms of Section 25 of the said Act pre-trial and / or post trial of charge of murder by a competent Criminal Court regarding the issue in question is irrelevant and since under Section 43 of the Evidence Act, the judgment of the Criminal Court has no independent impact upon the Civil Court, has the jurisdiction to decide the matter independently. In that view of the matter, the argument of learned senior advocate Mr. Roy Chowdhury fails.

19. In the present case in hand, accordingly, the Civil Court has the power and jurisdiction to decide the question upon taking appropriate evidence as would be required for passing a declaration in terms of Section 25 of the Hindu Succession Act, 1956 to disqualify the husband defendant to inherit the property of the wife who as allegedly murdered by the husband. The judgment as relied upon by Mr. Roy Chowdhury, learned senior advocate in that case Chaman Lal V. Mohan Lal and Ors., reported in MANU/DE/0028/1977 : AIR 1977 Delhi 97 wherein the single judge of Delhi High Court held that after acquittal of a person in the charge of murder under Section 302 of Indian Penal Code, there was no scope to reopen the matter by a Civil Court in adjudicating the proceeding to disqualify such acquitted person to inherit the property in terms of Section 25 of Hindu Succession Act, 1956, is distinguishable on its special facts of that case. With due respect to the learned Judge, who

decided the matter, it appears that in the said judgment there was no argument advanced regarding impact of Section 43 of the Evidence Act with reference to a judgment and / or decision of a Criminal Court qua its binding effect of it to a Civil Court and further the judgment of Apex Court passed in Anil Behari Ghosh (Supra) also was not placed before the said Court for its decision. In that view of the matter the judgment passed in the case Chaman Lal (Supra) with due respect to the judgment is attracted by doctrine of *subsilncio* since the decision of the Apex Court passed in Anil Behari Ghosh (Supra) was not at all placed and considered.

12. It is thus clear from these decisions that the judgment of the Criminal Court has no independent impact upon the Civil Court which has the jurisdiction to decide the matter independently. The learned Judge has in fact accepted the position that in civil cases the evidence adduced in criminal cases would be impermissible to be treated as evidence in the civil case unless the parties agree that the evidence in one case may be treated as evidence in the other. However, the learned Judge has not considered the well settled position that the Civil Court has to independently decide the issue as to whether the Appellant had committed murder of Suresh Bhagat.

13. We find that the learned Judge although referring to the orders passed by this Court in the Suit for administration of estate and in the criminal appeal challenging the conviction of the Appellant and her deceased son Hitesh Bhagat, which allowed the Appellant to substitute the deceased Hitesh Bhagat, has not given due weightage to these orders. In fact this Court had in the Suit for

administration of estate by allowing the Appellant to represent the deceased Hitesh Bhagat, in the Notice of Motion taken out during his life time had disposed of the Notice of Motion by protecting the 50% share of the deceased Hitesh Bhagat in the estate of his deceased father Suresh Bhagat. It is in this Suit that a written statement has been filed and the issue of whether the deceased Hitesh Bhagat had committed murder of his father Suresh Bhagat is expressly raised. Hence, this issue remains to be decided by this Court in the administrative suit.

14. We are of the view that the judgment of the Supreme Court in Vellikannu (Supra) is not applicable to the facts of the present case as in the present case the issue is still open to be decided by this Court as to whether the deceased son Hitesh Bhagat had committed murder of Suresh Bhagat. Hence, unless there is such determination, it cannot be said that the deceased son of the Appellant was disqualified under Section 25 of the Act from inheriting the property of his deceased father and hence the finding in that decision that the wife (mother in the present case) can have no better claim in the property of the deceased is inapplicable.

15. We are of the view that the learned Judge by not allowing the Appellant to defend the Testamentary Suit would result in an unfair prejudice being caused to the Appellant as any decision of this Court in the Testamentary Suit would impact the Suit for administration of estate which the Appellant has been allowed to defend and where an issue has been raised as to whether the Appellant and the deceased Hitesh Bhagat had committed murder of Suresh Bhagat so as to disqualify them from claiming inheritance in this estate. In the Testamentary Suit the deceased Maniben Bhagat, who is the mother of deceased Suresh Bhagat claims to have left a Will and codicil, the probate of which has been sought in the Testamentary Petition, which thereafter has been converted into the Testamentary Suit. The deceased Maniben Bhagat has bequeathed all her assets by codicil to the Will i.e. 50% of her assets amongst her grand children, being children of her son, Jayantilal Bhagat and the other 50% amongst her grand children, being children of her son Vinod Bhagat. Thus any decision taken in the Testamentary Suit would negatively impact the inheritance of the deceased Hitesh Bhagat, the grandson of the deceased Maniben Bhagat, as well as have a bearing on the Suit for administration of estate of the deceased Suresh Bhagat where the deceased Maniben Bhagat had sought a declaration that she alone is entitled to succeed to all the estate of the deceased Suresh Bhagat. It would accordingly be necessary to allow the Appellant to defend the Testamentary Suit by substituting the deceased Hitesh Bhagat particularly since the Appellant is the mother of the deceased Hitesh Bhagat and his only heir and legal representative.

16. Accordingly, we allow this Appeal by setting aside the impugned order and pass the following order:-

(a) The Plaintiff in the Testamentary Suit is directed to amend the Testamentary Suit / Petition by deleting the name of Hitesh Suresh Bhagat, since deceased, and in his place substitute the name of the Appellant as the only heir and legal

representative. The amendment shall be carried out within a period of four weeks from the date on which this order is uploaded;

(b) The Plaintiff in the Suit is further directed to get the citation issued through this Court against the Appellant within a period of four weeks from the date of uploading of this order;

(c) The Plaintiff is directed to serve the duplicate citation and true copy of the amended Testamentary Suit / Petition upon the Appellant or through her Advocate who agrees to waive service on her behalf within a further period of two weeks from carrying out the amendment and issuance of citation through this Court as directed in (a) and (b) above;

(d) The Appeal is accordingly disposed of in the above terms with no order as to costs.

(e) In view of the disposal of the Appeal, nothing survives in the Notice of Motion filed therein and is accordingly disposed of.