

(2001) 03 BOM CK 0140

In the Bombay High Court

Case No : Petition No. 519 of 1990 in Suit No. 10 of 1991

John Francis Anthony Gonsalves and Another

APPELLANT

Vs

Mrs. Agnes Mary Conception Rebello

RESPONDENT

Date of Decision : 27-03-2001

Acts Referred:

Succession Act, 1925 — Section 141

Citation : AIR 2001 Bom 372 : (2001) 4 ALLMR 98 : (2001) 4 BomCR 577 : (2001) 3 BOMLR 310

Hon'ble Judges : D.G. Deshpande, J

Bench : Single Bench

Advocate : Mr. S.F. Rego and Mr. A.I. Shaikh, for the Appellant; Mr. K.C. Nichani, for the Respondent

Final Decision : Dismissed

Judgement

D.G. Deshpande, J.—This petition for probate is filed in respect of the said Will and Testament of John Frederick Gonsalves who died in Mumbai on 3.1.1983. The last Will and Testament is dated 1.4.1979. Petitioner No. 1 is the son so also petitioner No. 2 is the son of the deceased.

2. Caveat came to be lodged opposing petition for probate by the caveator/defendant/respondent Mrs. Agnes Mary Conception Rebello who as per the particulars of legal heirs given in the petition is daughter of the deceased. The ground of objections that were raised in the caveat is that the Will is null and void and inoperative in law because even though the alleged Will is dated 1.4.1979. Julia wife of the deceased was alive, thereafter neither she nor any of the heirs accepted the existence of the Will but to the contrary the said Julia acted in such a way as if no Will was in existence. Instances in that regard have been given in the caveat. Caveator further contended that all the legal heirs of the deceased had given a letter to the Bank of India in 1990 represented to the bank that the deceased John Frederick Gonsalves died without leaving a Will. Therefore in sum and substance the caveator contended that right from 1979 till

1991 none of the parties acted as if the Will was existing. To the contrary all of them had disregarded the Will and therefore now according to them the theory put forth by the petitioner that the Will of 1979 was found in 1990 is a bogus case, concocted and invented to deny to their heirs and legal representatives what is due to them if no Will was in existence or if the deceased John Frederick Gonsalves had died intestate. The petition and the Will were therefore strongly opposed.

3. On the basis of the aforesaid pleadings, my predecessor had framed following issues on 8.10.1997 :-

(1) Whether the plaintiffs prove that the Will dated 1.4.1979 is the last Will of deceased John Frederick Gonsalves?

(2) Whether the plaintiffs prove that the deceased John Frederick Gonsalves was of sound and disposing state of mind when he executed the Will dated 1.4.1979?

(3) Whether the Defendant proves that the said Will is not of the deceased John Frederick Gonsalves and that the said deceased died intestate?

(4) Whether the plaintiffs prove that they have manifested their intention to act as Executors and are entitled to the grant of probate?

(5) Are the plaintiffs entitled to the grant of probate of the said Will?

(6) What order?

My findings on the issues are as under :

Issue No. 1 : Affirmative

Issue No. 2 : Affirmative.

Issue No. 3 : In view of findings on issue Nos. 1 & 2 issue No.

3 does not survive

Issue No. 4 : Negative.

Issue No. 5 : Negative.

Issue No. 6 : As per the final order.

4. Thereafter evidence was recorded in this petition and the suit wherein petitioner No. 1 examined Owen John D'Souza attesting witness as P. W. 1, Petitioner John Francis Anthony Gonsalves as P.W. 2 and thereafter caveator examined herself as D.W. 1.

5. After the evidence was over I heard the arguments of the Advocate for the petitioner and the respondent. However, during arguments it became clear that the caveator is not seriously disputing and challenging execution and valid attestation of the Will and even in the written submissions given by Ms. Nichani it has been clarified by her that the Will may be considered as proved as per the

evidence given by Owen John D'Souza attesting witness. Therefore, so far as Issue Nos. 1 and 2 are concerned, discussion of evidence is not necessary and my findings on Issue Nos. 1 and 2 are in the affirmative. In view of this findings on Issue Nos. 1 and 2, Issue No. 3 does not survive. The only issue that remains serious consideration is Issue No. 4, and therefore the following discussion of the evidence and the circumstances and the legal provisions will be with reference to Issue No. 4 only.

6. It was strongly urged by Ms. Nichani Advocate for the caveator that the Will of the deceased is of 1.4.1979 and the petition for probate came to be filed in 1990 i.e. after more than 21 years. According to her there is an inordinate delay and gross delay in filing the probate petition for which no explanation at all whatsoever much less the satisfactory explanation and plausible explanation has been given by the petitioner. She pointed out that in the entire petition not a word is uttered by the petitioner as to why they did not apply for probate earlier and why they waited for 21 years before moving the Court for the probate of the Will. When questioned in this regard. Counsel for the petitioner contended that petition for probate has to be in the prescribed form and since the prescribed form did not provide for an explanation, no such explanation was given. Such an argument cannot be accepted and it has to be rejected. The prescribed form is provided for guidance and the petition has to be generally in conformity with the prescribed form but that did not and could not prevent a party from giving all the necessary particulars as in the instance case a cause for delay of 21 years. Non-explanation of delay in the petition itself is therefore strong circumstance that Will have to be held against the petitioner.

7. Ms. Nichani also submitted that the delay of 21 years in applying for probate was because none of the parties ever intended to act upon the Will. According to her all the circumstances leading to his conclusion have been given in detail by the caveator in her affidavit in support and explanation that is given by the petitioners in their evidence that they found Will in 1990 is an after thought, invented to overcome the delay and also to overcome other difficulties of meeting the case of the petitioner.

8. Since the question of delay is of vital importance in this petition because according to Ms. Nichani. Advocate for the caveator, petitioners or whoever applies for probate are required to satisfy "the manifest intention to act as an executor and since during 21 years executors never manifested their intention they were not entitled to probate even if there is no denial of the execution of the Will. Objection raised by Ms. Nichani is vitally important and goes to the root of the matter and therefore it requires consideration.

9. P.W. 2 is the petitioner. He has stated that the Will was found in April, 1990 by that time his mother has died i.e. on 21.12.1987 and when they were searching mother's cupboard they found Will among clothes, letters, gas and electricity bills. He has also stated that his mother did not disclose Will to him. It is pertinent to note in this regard that the Will is dated 1.4.1979 and the testator

John Frederick Gonsalves died on 3.1.1983.

10. In this background very heavy burden lies upon the petitioner to prove that they were not aware of the Will of 1979 till 1990. That they did not come to know of the Will even after the death of the father in 1983 and that their mother was also not aware of the Will till her death in 1987 and that they found Will three years after her death in April, 1990.

11. P.W. 2 in his evidence has further stated that they used to meet every Sunday after the death of their mother to get rid of old crockery etc. and this included his brother Charles, his sister caveator and another brother Damascene and step son of sister Collin. He has stated as they were going through the mother's cupboard which contained clothes, letters etc., they found the Will placed in an envelope. He took out a seal from the envelope, read it in presence of all, and his sister and her husband requested for a copy of the Will which was given to her on the following Sunday. He has further stated that only the sister - caveator raised dispute about the Will but his five brothers were in agreement and they wish to comply with the Will.

12. P.W. 2 has stated that the deceased at the time of his death was residing in Flat No. 501 and 502, that both the flats were on the same floor and they were adjoining plots. After his father's death mother continued to stay in the said flats. He has also stated that before finding the Will all of them were under the impression that the father had died intestate.

13. P.W. 2 was subjected to searching cross-examination by Ms. Nichani. At the time of his evidence recorded in 1999, his age was given as 71 years, which means that when his father died in 1983 he was of 55 years and when his mother died he was of 59 years. After his father's death there were no meetings to discuss about the property of the father and this continued till the death of the mother and there were no meetings nor discussions about the property of the father. He stated that he did not make any efforts to find out whether his father had left any Will and he is unaware whether his brother and sister had made any such attempt. He did not demand any share in the father's property and the entire estate of his father was handled by his mother. He has stated that as long as the mother was alive he did not discuss anything with her about the estate of the father.

14. He has further stated that he was in India at the time of his father's death and inventory was made by his mother after the death of his father in respect of share certificates of the father lying in the cupboard. This inventory was made by him, his brother-in-law and sister's husband. Further he has stated that he looked into his father's cupboard at the time when inventory of his shares, security deposit etc. was made. This inventory took about 2/3 days. It was spread over a week or about two weeks.

15. Regarding finding of the Will in the mother's cupboard, he has stated that it was found in her cupboard which contained clothes, letters etc. He has further

stated that after the mother's death there used to be meeting on every Sunday. He has admitted that inventory of the articles of the furniture was made but not of clothings, crockery and cutlery. He further admitted that even though such a list was made after inventory, no attempt was made to search mother's cupboard. However, he has stated that they also started distribution of father's clothes in charity and the mother's cupboard was searched after the mother's death but that was only in 1990.

16. All this cross-examination falsifies the case of the petitioner and their story of getting hold of the Will of the father in 1990. 21 years after the father's death and three years after the mother's death.

17. From what has come on record it is clear that deceased John Frederick Gonsalves had two flats i.e. which were used as one. Though it has not come on record in those two flats there could not be more than 4, 5, 6 cupboards because from what has appeared in evidence the deceased was not wealthy or rich person nor is there anything to show that he was fond of clothes, ornaments or valuables so as to require to keep in the house more than half a dozen of the cupboards. In ordinary middle class family there can be 2/3 cupboards and even if maximum latitude is given there could not be 6 cupboards in the house.

18. Therefore it is not only difficult but impossible to believe evidence of the petitioner that for 21 years no search of the cupboards either of the father or the mother was made to find out whether any Will is there or not. This is in spite of the fact that there used to be meetings of the family members and in spite of the fact that the mother was residing in the flat till her death. The whole story of finding the Will in 1990 is most unnatural, strange, suspicious, improper and unbelievable.

19. Apart from the above, there is a strong circumstance brought on record and that is letter given by the heirs of the deceased to the bank. This letter is Exhibit "F". It is dated 1.3.1990 signed by all the heirs and addressed to the bank with a request to close the amount of John Frederick Gonsalves and in this letter there is a statement that there is no Will of the deceased John Frederick Gonsalves. The exact words of P.W. 2 in this regard are :

"It is true that in ray letter dated 1.3.1990 addressed to the Bank of India about the closing the account of my father we have written that no Will of my father was found."

It is clear that till 1.3.1990 the parties i.e. all the heirs of the deceased were certain that there was no Will but suddenly in April, 1990 the Will is alleged to have been found in the cupboard of the mother. This is therefore a strong circumstance creating suspicion and doubt about the petitioners claim about finding of the Will in 1990.

20. It is unbelievable that 8 legal heirs of the deceased John Frederick Gonsalves could not and did not search of the cupboard in the house for 21 years to find

out the Will particularly when it has come in the evidence that search of the cupboard was made and undertaken, that it continued for about one week or even more than that, where list of all the shares, deposits etc. was made. If this is so it is impossible to believe that mother's cupboard was not searched or even after the search the Will could not and did not found by the petitioners and that it was a Will came out of the blues for the first time in April, 1990.

21. Since the petitioner P.W. 2 is the only witness for proving this vital and material fact regarding the delay/details of the circumstances in which the Will was found, and since his evidence or story put forth by the petitioners does not inspire the confidence, the same is required to be rejected. I therefore hold that the petitioners have failed to prove that the Will of the father was not found throughout the period from the date of the Will till his father's death or from father's death till mother's death or from mother's death till April, 1990. It is also impossible to believe the mother having survived her husband for about 4 years did not utter a single word about the existence of the Will. If the Will was in her cupboard then it is impossible to believe that lady frequently requiring to use her cupboard would not find the Will for four years and will not even know about the existence of the Will till she was alive. The entire theory and evidence of the petitioner in that regard is to be rejected as bogus and totally and completely invented false story.

22. Once the case and contention regarding finding of the Will in 1990 is rejected as bogus, the only thing that is required to be seen is whether there are circumstances on record to attract Section 141 of the Indian Succession Act on which heavy reliance was placed by Ms. Nichani. Section Powers of Criminal Courts Act, 1973 is as under :

"141. Legatee named as executor cannot take unless he shows intention to act as executor. If a legacy is bequeathed to a person who is named an executor of the Will, he shall not take the legacy, unless he proves the Will or otherwise manifests an intention to act as executor."

23. According to Ms. Nichani, the petitioners have miserably failed to prove the manifestation of their intention to act as an executors from 1979 to 1990 and therefore they are not entitled to probate.

24. To grasp the submissions of Ms. Nichani. It is necessary at this juncture to refer to the Will and the contents of the Will. It does not appear to have been exhibited though P.W. 1 attesting witness was examined. Further there is no dispute about the Will and therefore it can be safely relied upon. A copy of the Will is annexed with the petition as Exhibit "A". By this Will the deceased appointed the petitioners as executors. The Will is in respect of Flat Nos. 501 and 502 referred to above, money in the banks and shares and other investments. By this Will Flat No. 502 is given to Charles Willibrord Gonsalves absolutely. Flat No. 501 is given to wife Julia but she is only given a limited Interest in the flat and after the death her executors were to sell the flat and to distribute the net sale

proceeds equally amongst the children including the grandson Colin, who represented the share of his mother Anne. Further as per the Will all the monies in the banks, shares and other investments were bequeathed to wife Julia for life and after her death to all the children in equal shares Including Colin. Julia was given right to receive income from the bank or from the shares and other investments and she was also given right to withdraw from the capital or sale the shares and other investments in case of necessity and she was to be the sole Judge as to what is the necessity.

25. It is therefore clear from the aforesaid Will that so far as Flat No. 501 is concerned, Julia the wife of deceased John Frederick Gonsalves was given only life interest and after her death flat was to be sold and the sale proceeds were to be distributed. If the petitioners were appointed under the Will as executor then it was their bounden duty to act Immediately under the Will and fulfil the desire of deceased John Frederick Gonsalves and therefore when Julia died in 1987 they should have been taken Immediate steps to sale the flat. However, they did nothing, waited for three years and then filed this petition by concocting stories that the Will was found in April, 1990.

26. From the Will it is clear that Flat No. 502 was to go to Charles absolutely which means that Flat No. 502 should have been transferred in the name of Charles as owner fully and completely as soon as testator died in 1983. However, the facts are otherwise. The deceased Julia applied to the society for transfer of shares in respect of the aforesaid flats to her name on the basis of nomination and the society accordingly transferred those shares in her name in January, 1985.

27. The natural consequence of the rejection of the petitioners claim and contention as stated above will be to conclude that none of the heirs of the deceased wanted to act upon the Will, they agreed not to act upon the Will and this is an alternative conclusion and apart from the rejection of the petitioners case that the Will was found after 20 years, the objection raised by Ms. Nichani u/ s Powers of Criminal Courts Act, 1973 of the Indian Succession Act has to be upheld because the petitioners have miserably failed to prove the manifest intention to act as executors. The letter written to the bank by all the heirs as stated above removed any kind of doubt in this regard and therefore though the petitioners have succeeded in proving their valid intention and execution of the Will (since there is no challenge of this fact by the caveator-defendant) the finding on Issue Nos. 4 and 5 has to be against the plaintiffs-petitioners and those findings are negatived. Since the plaintiffs-petitioners have failed to prove that they had manifested their intention to act as executors it has to be held that they are not entitled to grant of probate. In view of these facts, I pass the following order :

ORDER

Petition No. 519 of 1990 for grant of probate is dismissed with costs of Rs.

5,000/- to be paid by the petitioners to the caveator. Certified copy expedited.