
(1997) 05 MP CK 0040
In the Madhya Pradesh High Court
Case No : L.P.A. No. 9 of 1991

Om Prakash Sharma

APPELLANT

Vs

Smt. Saraswatibai and Others

RESPONDENT

Date of Decision : 23-05-1997

Acts Referred:

Succession Act, 1925 — Section 276(1)

Citation : AIR 1998 MP 226 : (1998) 1 MPLJ 183

Hon'ble Judges : Shacheendra Dwivedi, J; Fakhruddin, J

Bench : Division Bench

Advocate : K.N. Mangal, for the Appellant; H.D. Gupta, for the Respondent

Final Decision : Dismissed

Judgement

Shacheendra Dwivedi, J.

This Letters Patent Appeal, which is an intra Court appeal, has been preferred by the appellant, who was an applicant before the probate Court and had applied for the grant of probate of the will dated 25-12-1996 Ex. P/I, which was refused by probate Court, dismissing his application.

The appeal preferred by the appellant was also dismissed by the learned single Bench of this Court.

It was stated by the appellant in his application, for probating the Will, that the Will annexed (although it was not annexed) with the application is the last Will and testament of Smt. Mannu Bai Kelkar, which was duly executed by her in favour of the appellant in the presence of witnesses. One Ganpal Rao, the husband of respondent No. 1 and father of respondents 2 to 7, had objected to the grant.

The application for the grant of probate was ultimately dismissed by the probate Court, i.e. IVth Additional Judge to the Court of District Judge, Gwalior, on the consideration of the oral and documentary evidence led by both the parties, by

order dated 21-12-1988. Thereafter, an appeal was preferred against the order of the probate Court. The same was heard and dismissed by the learned single Bench. This Letters Patent Appeal has been preferred thereafter challenging the order of the learned single Bench.

The case has a chequered history. Deceased Mannu Bai, the stated testator of the will, was in Government service as teacher. She had owned a house . A portion of which was occupied by the appellant's father named Omkar Lal as tenant and the other portion was occupied by the other tenant Ram Swaroop. The remaining portion of the house was in the use and occupation of Smt. Mannu Bai.

It was the case of the appellant that Mannu Bai gave the love and affection to the appellant as if he was her son, and he was also stated to have been brought up by her. She was stated to have remained unmarried. On 25-12-1966 , she is stated to have executed a will in his favour of a part of the house and had appointed the appellant's father Omkar Lal as an executor of the said Will.

Objector Ganpat Rao Vaidyabad raised the objections on the above stated application, submitting that he was the husband of Smt. Mannu Bai and had interest in the bequeathed property. He had challenged the execution of the will and had submitted that Smt. Mannu Bai had not executed any Will, but the stated Will was forged and the very statement made in the Will was utterly wrong that Manna Bai had no near relations. It was also stated by the objector that Mannu Bai had married the objector Ganpat Rao Vaidya in the year 1952 and had thereafter changed her surname to "Vaidya" as her original surname was Kelkar. After marriage she was addressing herself as Mannu Bai Vaidya and had also applied for such a change of her name in the School records. Her service record and also the School record, as was evident from Ex. NA/4 to NA 78, showed that her name became Mannu Bai Vaidya from the year 1952 onwards.

Respondent Ganpat Rao Vaidya after the death of his stated wife Mannu Bai, had applied for the grant of succession certificate in relation to her debts and securities, including Provident Fund, Pension and Gratuity. In the succession case, the appellant as a conscious citizen only had objected to its grant to Ganpat Rao Vaidya, on the ground that deceased Smt. Mannu, Bai had left no successor and, therefore, the property was to vest in the Government. Curiously, he had not stated at that stage that any Will was executed by the deceased lady in his favour. However, after the Succession Case No. 34/67 was decided, he had preferred a revision petition before this Court bearing No. 54/68, wherein he had challenged the fact that Ganpat Rao Vaidya was not the husband of the deceased.

The single Bench of this Court had observed in that case that from the service record, which was of unimpeachable nature, the deceased was described as the wife of Ganpat Rao Vaidya, and as such being husband, he was found to be entitled to the grant of succession certificate. The order passed by this Court

became final, as the same was not challenged by the appellant either by way of a Civil Suit or by way of appeal before the Hon"ble Supreme Court.

The other objections regarding Will were that the Will was typed on a plain paper and the material part thereof relating to property, was scored out, but it was not signed by the testator nor by any of the attesting witnesses. The date was left over and was not typed, which was written later by hand, the typist of the will was not examined, the Will had used some chaste Urdu words, only known to the legal brain and language was professional, the will was not filed with the probate application and despite orders of probate Court, it was filed after 3 years and with such objections inter alia, the application filed by the appellant for the grant of probate was prayed to be dismissed.

The learned two Courts, on the appreciation of the evidence of both the parties, dismissed the application filed by the appellant for the grant of letters of administration/probate of the stated Will.

However, in the appeal, before the single Bench, it was contended by the appellant that the evidence was misread by the lower Court, whereas the appellant had succeeded in proving the Will by examining the attesting witness Ramnarayan (A.W. 1), Suraj Singh (A.W. 2) and the executor of the will Om Prakash as A.W. 3 and there was no reason to doubt its genuineness. It was also contended that the appellant was brought up by the deceased as her son and she had all the love and affection for him. It was out of love and affection that she had executed the Will in his favour, but the learned lower Court had proceeded on wrong premise in dismissing his application.

The learned Single Bench considered the contentions of both the parties at length and found that as there were suspicious circumstances surrounding the Will, those were required to be cleared by the propounder, besides the proof of Will for proving its genuineness. Only proof of testators' signatures, would not by itself establish the validity of the Will unless the suspicious circumstances were cleared .

On evidence, it was found by the learned Judge of Single Bench that the material suspicious circumstances were not explained by the propounder. No evidence was led to clear the suspicion. On the question of marriage of deceased Mannu Bai with Ganpat Rao Vaidya, the learned single Bench found that it was amply proved by evidence, documentary and oral, that Mannu Bai was married to Ganpat Rao Vaidya, and her name was thereafter accordingly changed in the School records and also in her service records, from Mannu Bai Kelkar to Mannu Bai Vaidya.

Before us, the learned counsel for the appellant Shri K.L. Mangal, although made strenuous effort by taking us through all the relevant, oral and documentary evidence, but could not point out any perversity of the findings arrived at by the two Courts concurrently. The appellant has failed to prove by any evidence that the testator, after the year 1952, i.e., after her marriage, had ever signed as

Mannu Bai Kelkar. In the year 1952, her marriage with Ganpat Rao Vaidya was solemnised at Kanpur. Although, it is true that at that time, the first wife of Ganpat Rao was alive, but under the prevailing legal position, there was no prohibition for the second marriage, nor any such circumstance has been brought out by the appellant that the marriage of Ganpat Rao and Mannu Bai was not valid.

The two Courts on facts have concurrently found that after the marriage in the year 1952, deceased Mannu Bai had changed her name from Mannu Bai "Kelkar" to Mannu Bai "Vaidya". The School record and the service record of deceased Mannu Bai has proved the change of her name. It is also clear from column No. 1 of Ex. NA/9 that name of Mannu Bai Kelkar was recorded as Sau. Mannu Bai Vaidya, after her marriage. The old records cannot be doubted. From the evidence led, the appellant could not dispel the doubts, appearing about the genuineness of the Will. It may be seen that the Will Ex. P/I is conspicuously silent as to the clear description of the property, the cut portion in the Will is not signed by testator. The document is stated to be executed in the presence of witnesses, but those were not particularised in the typed statement of the Will nor the date was typed. The portion for the above particulars were left blank, in the "Will".

The Hon'ble Supreme Court observed in Kalyan Singh Vs. Smt. Chhoti and Others, as under at page 402 :--

"It has. been said almost too frequently to require repetition that a Will is one of the most solemn documents known to law. The executant of the Will cannot be called to deny the execution or to explain the circumstances in which it was executed. It is, therefore, essential that trustworthy and unimpeachable evidence should be produced before the Court to establish genuineness and authenticity of the Will. It must be stated that the factum of execution and validity of the Will cannot be determined merely by considering the evidence produced by the propounder. In order to judge the credibility of witnesses and disengage the truth from falsehood the Court is not confined only to their testimony and demeanour. It would be open to Court to consider circumstances brought out in the evidence or which appear from the nature and contents of the documents itself. It would be also open to the Court to look into surrounding circumstances as well as inherent improbabilities of the case to reach a proper conclusion on the nature of the evidence adduced by the party."

It may be seen that application for the grant of probate was filed in violation to the requirements of Section 276(1) and Sub-Section (1) Clause (b) of Section 276 of Indian Succession Act, as the stated "Will" was not annexed with the application.

There is yet another important and material aspect of the case. The appellant himself in his application, filed before the probate Court for the grant of probate of the will, had left the blanks of material particulars and had described the

testator as Smt. Mannu Bai Kelkar, but still her husband's name was not described. She was only described as daughter of Natthu Bhaiya Kelkar. This admitted position itself supports the contention of respondent and showed that testator Mannu Bai was not unmarried. But still her husband's name was suppressed by the appellant. However unwillingly and unwittingly, the truth has come on record, that testator Mannu Bai was a married lady, and once the lady was admitted to be married, much heavy burden lay on the propounder to show as to who was her husband, and also as to how and why her husband was being deprived of the property. This fact by itself demolishes the very theory set up by the appellant.

The Will is a document which is brought to light after the testator's death who does not remain available either to admit or deny the document or the statement made therein, and therefore, where the document of will is shrouded with suspicion, the propounder is required to clear the suspicious circumstances, to the satisfaction of the Court's conscience not only about its execution, but more particularly about its authenticity also.

It is well settled that the burden lies only on the person, who sets up the theory of will to prove the due execution of will and to remove the suspicious circumstances surrounding the document. In the circumstances, the possibility expressed by the learned single Judge Bench in paragraph 12 of the judgment, is borne out from record. The learned Single Bench has assessed the credibility of the applicant's witnesses and the active interest taken for gain by the executor and has held that the will was shrouded with suspicion, which could not be cleared by propounder, as such, the will was found to be not genuine and authentic. The appellant by setting up a case of "Will" did not pay or deposit any rent, when he was admittedly tenant of Smt. Mannu Bai and has occupied the house since 1967 without rent.

On evidence, in the circumstance, we have not found the " Will" to be proved as required u/s 63 of the Indian Succession Act, 1925 and the provisions of Section 68 of the Evidence Act. The discussion of the authorities cited by the parties would only be burdening the decision, in the facts and circumstances of the case.

For the foregoing discussion, we have found no merit in this appeal. Consequently, the appeal is dismissed, leaving the parties to bear their own costs of this appeal.