
(2001) 09 BOM CK 0016

In the Bombay High Court

Case No : Civil Revision Application No. 1102 of 1999

Parwatibai (Died. Her L.R.) and Anna Chavan

APPELLANT

Vs

Ramrao Barikrao Lahane

RESPONDENT

Date of Decision : 21-09-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 10, Order 43 Rule 1(1), 115
Evidence Act, 1872 — Section 68

Citation : (2002) 2 ALLMR 788 : (2002) 3 BomCR 318

Hon'ble Judges : B.B. Vagyan, J

Bench : Single Bench

Advocate : M.D. Joshi, for the Appellant; D.L. Agrawal, for the Respondent

Final Decision : Allowed

Judgement

B.B. Vagyan, J.—Heard.

2. This civil revision application filed by the petitioner (original applicant) is directed against the order dated 24-12-1998 passed by the District Judge, Aurangabad in Misc. Civil Appeal No. 130 of 1994. In brief the facts giving rise to this civil revision application are as under :

Namdeo Patilba owned and possessed immovable properties. He had two wives (1) Drupadabai and (2) Parwatibai. Namdeo died issueless. After the death of Namdeo, both the widows could not pull on well. Parwatibai started residing with her brother Sheku. Drupadabai resided with Ramrao, nephew of Namdeo. Parwatibai filed Regular Civil Suit No. 94 of 1975 against Ramrao and Drupadabai for partition and separate possession of the property of her 1/2 share. The trial Court decreed the suit.

3. Feeling aggrieved by the judgment and decree passed by the trial Court, Ramrao and Drupadabai filed regular civil appeal. The appeal was dismissed by the District Judge, Aurangabad. Without there being second appeal, the decree for partition and separate possession achieved finality. Parwatibai filed execution

proceeding bearing No. 27 of 1979.

4. Parwatibai, during her life time, bequeathed her 1/2 share in the immovable properties left by her husband to her brother's son Anna s/o Sheku under registered Will deed dated 12-7-1977 Exh. 77. During pendency of the execution proceeding, Parwatibai died on 12-2-1988. After death of Parwatibai, Anna s/o Sheku, the legatee under the registered Will Exh. 77 moved the Executing Court for substitution of his name in place of Parwatibai.

5. Drupadabai died during pendency of the execution proceeding. During her life time, she bequeathed her share to Ramrao under registered Will dated 8-8-1980 Exh. 95. Ramrao resisted the application of Anna s/o Sheku for bringing his name on record in place of original decree holder, on the ground that he is the legal representative of deceased Parwatibai. He claimed that he is the nephew of Namdeo, the husband of Parwatibai and Drupadabai. He also claimed substitution of his name in place of Parwatibai.

6. Anna s/o Sheku, besides himself, examined Jinesh, writer of the Will Exh. 77, his father Sheku and Dattatraya Kulkarni the nephew of attesting witness Narsingh to prove execution of Will Exh. 77. Narsingh and Shamrao are the attesting witnesses of Will Exh. 77. Ramrao himself deposed at Exh. 92 and examined Vinayak Chavan attesting witness of Will Exh. 95.

7. After having heard the submissions made at the Bar and after having considered the oral as well as documentary evidence placed on record, the trial Court allowed the application filed by Anna s/o Sheku and substituted his name in place of Parwatibai, as a decree holder. Impliedly, the learned trial Court rejected the application filed by Ramrao.

8. Feeling dissatisfied by the order passed by the Executing Court, Ramrao original judgment debtor preferred Misc. Civil Appeal No. 130 of 1994. The learned District Judge held that the execution of Will Exh. 77 is not properly proved. According to him, the propounder of the Will should have examined one of the attesting witnesses. Relying on the mandate of section 68 of the Indian Evidence Act, the learned District Judge allowed the Misc. Civil Appeal filed by Ramrao and consequently, quashed and set aside the order passed by the Executing Court. Feeling aggrieved by the order passed by the District Judge, Anna s/o Sheku the legatee under the Will Exh. 77 has filed this Civil Revision Application.

9. The learned Advocate Shri Joshi for the petitioner submitted that writer Jinesh is an attesting witness of Will Exh. 77 and in the light of his evidence, the learned District Judge ought to have held that the execution of Will Exh. 77 is properly proved. According to him, though witness Jinesh is a writer of Will, he had witnessed execution of the Will and, therefore, he should be treated as an attesting witness. In support of his submissions, he relied upon following rulings :

1. Ruprao v. Ramrao, AIR 1952 Nag 88.

2. Makhan Mal L. Ram Ditta Mal and Others Vs. Mst. Pritam Devi and Others, .
3. K.M. Varghese and Others Vs. K.M. Oommen and Others, .
4. P.P.K. Gopalan Nambiar Vs. P.P.K. Balakrishnan Nambiar and others, and
5. Palanivelayutham Pillai and Others Vs. Ramachandran and Others, .

10. On the other hand, the learned Advocate Shri Agrawal vehemently urged that the mandate of section 68 of the Indian Evidence Act, 1872 has not at all been complied with and, therefore, the decision of the learned District Judge is perfectly legal and correct. According to him, the attesting witness Shamrao, though summoned with witness summons, has not been examined by the propounder of the Will and, therefore, by any stretch of imagination, it cannot be said that the execution of Will Exh. 77 is proved. He points out that the witness Jinesh is a mere writer of Will and has not signed the Will as an attesting witness and, therefore, his evidence cannot be considered in the matter of execution of Will Exh. 77. The learned Advocate Shri Agrawal placed his reliance on the case of H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, .

11. I gave anxious consideration to the rival submissions made at the Bar. It is seen from the judgment of learned District Judge that Jinesh is a mere writer of the Will and has not signed the Will as an attesting witness. Technically speaking, the mandate of section 68 of the Indian Evidence Act, 1872 is flouted. As per section 63 of the Indian Succession Act, a Will is required to be attested by two or more witnesses. As far as this requirement is concerned, there is no defect in the Will Exh. 77. Admittedly, two attesting witnesses i.e. Narsing and Shamrao appear to have attested the Will Exh. 77 as attesting witnesses. Narsing is not alive. Shamrao was alive at the material time. Shamrao had been summoned as a witness to tender his evidence. However, Anna s/o Sheku the beneficiary under the Will Exh. 77 did not examine him. Instead, he examined the writer Jinesh and Dattatraya Kulkarni in order to prove the execution of Will Exh. 77. In the strict sense, therefore, execution of Will Exh. 77 is not proved in the light of mandate of section 68 of the Indian Evidence Act. However, genuineness of the Will is proved beyond any shadow of doubt. None of the authorities, therefore, relied upon by the learned Advocate Shri Joshi is applicable to the facts of the case in hand.

12. Even though the evidence brought by propounder of Will is lacking on the point of execution of Will Exh. 77 the learned District Judge should not have interfered with the order passed by the Executing Court. The learned District Judge has magnified the issue of execution of Will disproportionately and also unnecessarily. The learned District Judge, while entertaining the Misc. Civil Appeal, has come to the conclusion that the order passed by the Executing Court relates to devolution of interest of Parwatibai on Anna s/o Sheku and, therefore, substitution of name of Anna s/o Sheku is sought under Order 22, Rule 10 of Civil Procedure Code. He, therefore, concluded that the order passed by the Executing Court is appealable under Order 43, Rule 1(I) of the Civil Procedure

Code. Accordingly, he entertained and disposed of the appeal.

13. It is to be noted that the learned District Judge has completely lost sight of the fact that the enquiry contemplated under Order 22, Rule 10 CPC is a summary enquiry. The learned District Judge has not taken into consideration this aspect of the matter. Moreover, the learned District Judge has not taken into account the limited question with regard to substitution of the name of Anna s/o Sheku in place of Parwatibai. Anna s/o Sheku has claimed substitution of his name in place of Parwatibai on the basis of Will. He claims that he is a legatee under Will Exh. 77 and, therefore, he claims that he may be permitted to represent the estate of deceased Parwatibai. In fact, the question which was raised before the trial Court should have been restricted with regard to right to represent the estate of deceased Parwatibai. It is absolutely not necessary to consider the right of Anna s/o Sheku on the basis of registered Will Exh. 77 with relation to the property left by Parwatibai. His representative capacity as a legatee under the Will should have been focused. The learned District Judge has not at all considered this aspect of the matter and has unnecessarily examined the issue of execution of Will in the light of mandate of section 68 of the Indian Evidence Act. Even otherwise, the nature of enquiry does not change.

14. A reference with profit can be made to the case of Jawasharlas Vs. Saraswatibai Babulal Joshi and Others, . The scope of nature of enquiry contemplated under Order 22, Rule 10 CPC was raised before Single Judge of this Court. This Court held that no detail enquiry at the stage of granting leave under Order 22, Rule 10 CPC is contemplated. This Court further observed that the Court has only to be prima facie satisfied for exercising its discretion in granting leave for continuing the suit by or against the person on whom the interest has devolved by assignment or devolution and the question about existence and validity of assignment or devolution can be considered at the trial of the suit on merits. The Single Judge of this Court further held that a full-scale enquiry about existence of validity of the assignment or devolution would not be necessary at the stage of granting leave. It is not expected that the existence or otherwise of the rights or attacks or defences, which may be open to other parties on merits, should be gone into at the stage of granting leave. These have to be dealt with at a latter stage when the suit comes for trial.

15. After having examined the scope of enquiry contemplated under Order 22, Rule 10 Civil Procedure Code, it is not necessary at all to have a full scale enquiry about existence and validity of devolution. In this case, devolution is by Will Exh. 77. There is no challenge to the Will Exh. 77 on the ground of suspicious circumstances. A party who wants to challenge validity of the Will has got a separate remedy. He may challenge validity of the Will by filing separate suit. The finding arrived at in an enquiry under Order 22, Rule 10 CPC does not operate as a res judicata in a subsequent proceeding. After having examined the true scope of enquiry contemplated under Order 22, Rule 10 Civil Procedure Code, the Court has only to be prima facie satisfied for exercising its discretion in

granting leave for continuing the execution proceeding and the question about validity of devolution can be considered in a separate suit on merits. This being the legal position, the order passed by learned District Judge does not appeal to be correct and, therefore, interference is justified.

16. In my view, the question which was raised before the Execution Court on account of presentation of application by legatee under the Will Exh. 77, squarely falls within the mischief of Order 22, Rule 5 Civil Procedure Code. Where a question arises as to whether any person is or is not the legal representative of the deceased, such question is required to be determined by the Court. The enquiry contemplated under Order 22, Rule 5 CPC is also summary nature. In a summary enquiry contemplated under Order 22, Rule 5 Civil Procedure Code, the Court should refrain from going into the question of genuineness of the Will in such type of enquiry. Because the question of validity of Will is not in issue in such type of summary enquiry. The issue is who is the legal representative of the deceased for the purpose of proceeding with the pending matter. In this behalf, I would like to refer a decision of Single Judge of this Court in the case of Shivraj Vs. Prayagbai Shete died - through L.Rs., .

17. The scope of enquiry under Order 22, Rule 5 CPC was examined by the Single Judge of this Court in case of Shivraj Ramaji Paul Shete (referred supra). In the said case, more than two persons put forth their claims as the sole heir of deceased plaintiff and, therefore, scope of enquiry under Order 22, Rule 5 CPC was raised for determination. While dealing with this issue, the Single Judge of this Court has held that when wills making claims contrary to each other are produced before the Court to form the basis of right of claimant as a legal representative of the deceased plaintiff, the Court in a summary enquiry under Order 22, Rule 5 CPC should, as far as possible, refrain from going into the question of genuineness of the Will in such an enquiry. This Court further held that after summary enquiry, the party having the better right to be the legal representative of the deceased, should be substituted in the place of deceased plaintiff and the other claimants should be directed to be added as defendants and leave the final adjudication of rival claims for the trial. This Court has also incidentally held that the order passed by the Court under Order 22, Rule 5 of CPC will not operate as a res judicata in a subsequent proceedings.

18. A reference can also be made to another recent decision of this Court in the case of Bhaskar Baraku Tahsildar & others v. Gangaram Supadu Tahsildar & others, 2001(2) M.L.J. 263. The scope of enquiry under Order 22, Rule 5 CPC is incidentally discussed elaborately along with the principal question as to whether the finding under Order 22, Rule 5 of CPC amounts to res judicata. In para No. 6 of the judgment, Single Judge of this Court observed :

"On plain reading of the various provisions contained in said Order XXII of the Civil Procedure Code, it is clear that the issue which arises for determination in a proceedings under Order XXII, Rule 5 of the CPC is whether the person stated to be or claiming to be the legal representative of the deceased party to the suit is

entitled to prosecute or defend the cause in the suit in place of the deceased party to the suit. The enquiry, therefore, is necessarily restricted to the said limited point under Order XXII, Rule 5 of the CPC . It cannot be forgotten that it is not full fledged trial on the disputed questions regarding the right to the property but it is restricted for the purpose of considering whether the person claiming or claimed to have right to represent the estate of the deceased for the purpose of lis has sufficient interest in carrying on the litigation in place of the deceased and in case of rival claims, it may also decide as to who is really the person entitled to represent the estate of the deceased for the purpose of prosecuting or defending the proceedings. Certainly, it does not deal with the enquiry into the right to succeed, to the property of the deceased and such rights are to be decided by an independent proceedings in accordance with the law."

19. On the question of application of doctrine of res judicata, Single Judge of this Court has also held that the substitution of deceased by his legal representatives being limited for the purpose of carrying on the proceedings, any decision in that regard cannot be construed as a bar for maintainability of separate suit by applying the principle of res judicata.

20. The learned District Judge, while highlighting the issue with regard to due execution of Will Exh. 77 in the light of mandate of section 68 of the Indian Evidence Act, has sidetracked the issue with regard to rights of rival party to prosecute the proceedings in place of Parwatibai. In my view, the learned District Judge has committed impropriety in holding full-fledged enquiry with regard to genuineness of the Will and its due execution in the light of mandate of section 68 of the Indian Evidence Act. In fact, the learned District Judge has not taken into consideration as to whether Anna s/o Sheku is legal representative of deceased Parwatibai on the basis of registered Will Exh. 77. Under the circumstance, the order of the learned District Judge is liable to be interfered with.

21. The learned Advocate Shri Agrawal submitted that Anna s/o Sheku is not the legal representative of deceased Parwatibai. I do not agree with learned Advocate Shri Agrawal. "Legal Representative" is defined in section 2(11) of the Civil Procedure Code. The legal representative means a person who, in law, represents the estate of a deceased person and includes any person, who intermeddles with the estate of the deceased and where a party sues or sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued. In this behalf, I would like to refer to the decision of Supreme Court in the case of The Andhra Bank Ltd. Vs. R. Srinivasan and Others, wherein it is held that a legatee who represents only part of the estate of the deceased under a will, can be said to be representing the estate and is, therefore, a legal representative u/s 2(11) of the Civil Procedure Code.

22. Before parting with the judgment, I would like to record displeasure with regard to inordinate delay that has been committed in keeping the execution petition alive. Parwatibai filed suit in the year 1975 for partition and separate

possession of the properties of her 1/2 share. The suit was decreed in favour of Parwatibai. After dismissal of the civil appeal filed by Ramrao and co-widow Drupadabai, the decision of the trial Court achieved finality. Parwatibai filed execution petition in the year 1979 and tried to execute the decree obtained by her. In spite of filing of execution petition, she could not recover properties of her share. The execution petition moved at snail's speed. The Executing Court completely lost sight of the fact that the execution is the end and the fruit of law. Even after having decree in her favour. Parwatibai died on 12-2-1988 without testing the fruits of law. If the decree could have been executed within a reasonable time, poor widow could have obtained possession of the properties of her 1/2 share during her life time and could have lived the remaining life with dignity. The poor widow, in spite of having interest in the agricultural land left by her husband, she lived at the mercy of her brother. The suit and the first appeal were disposed of within the span of five years but in spite of consumption of 10 years, the execution could not come to an end. We only chant a proposition that the law dislikes delay. It is said that quick justice is the step-mother or misfortune but delayed justice is a demon of misfortune. The poor widow Parwatibai was victim of delayed justice. The time has now come to renovate our tools so as to curtail the life of litigation. It is the duty of every Judge to accelerate at least the speed of disposal of execution petitions.

23. In the result, civil revision application is allowed. The impugned order passed by the District Judge is hereby quashed and set aside. The order of Executing Court substituting the name of the petitioner in place of Parwatibai, is restored. The Executing Court is hereby directed to dispose of the Executive Petition as early as possible. Rule is made absolute accordingly.