
(2014) 01 BOM CK 0025

In the Bombay High Court

Case No : Second Appeal No. 02 of 2008

Rupo Thanu Bhomkar

APPELLANT

Vs

Sazu Bondu Bhomkar

RESPONDENT

Date of Decision : 31-01-2014

Acts Referred:

Citation : (2014) 01 BOM CK 0025

Hon'ble Judges : F.M. Reis, J

Bench : Single Bench

**Advocate : Amey Kakodkar, Learned Counsel, Advocate for the Appellant;
Shivan Desai, Learned Counsel, Advocate for the Respondent**

Final Decision : Partly Allowed

Judgement

F.M. Reis, J.—Heard Shri Amey Kakodkar, learned Counsel appearing for the Appellants and Shri Shivan Desai, learned Counsel appearing for the Respondents.

2. The above Appeal came to be admitted by an Order dated 11.02.2009, on the following substantial questions of law :

(i) Whether the Courts below fell in error in holding the Will wholly void when it purported to dispose of more than what the testator could have by testamentary succession ?

(ii) Whether the final order passed by the First Appellate Court, needs to be corrected ?

(iii) Whether the injunction order could have been passed against the co-owners ?

3. Shri Amey Kakodkar, learned Counsel appearing for the Appellants, in support of the first substantial question of law, has pointed out that the learned Judge has come to the conclusion that the Will executed by the deceased Lingu dated 10.06.1994, is null and void as it had disposed more than what the deceased Lingu was entitled in a specific property and exceeded the disposable quota.

Learned Counsel further pointed out that the said deceased Lingu was a bachelor and, consequently, the question of there being any disposable quota is totally displaced. Learned Counsel further submits that even assuming that the testator has bequeathed more than what he is entitled, such Will will have to be restricted in terms of his property of Article 1804 of the Portuguese Civil Code. Learned Counsel thereafter pointed out that the Survey Records disclosed that the property stands in the name of the deceased Lingu and upon his death, in view of the said Will, the names of the Appellants have been substituted in the Survey Records in respect of property surveyed under No. 121/7 of Ella Village. Learned Counsel further pointed out that the Respondent No. 1 was the original plaintiff who was the original purchaser of the property along with the said Lingu and, as such, his claim, if at all, is only to the extent of half of the property. Learned Counsel further pointed out that the Respondent No. 1 filed the suit on the premise that he was the exclusive heir of the said Lingu without considering that he had already executed the Will in favour of the Appellants. Learned Counsel further pointed out that as the right of the Appellants is to the extent of half of the property, the declaration in favour of the Respondent No. 1 that the whole property belongs to the said Respondent, is totally misconceived. Learned Counsel further pointed out that the learned Judge has erroneously granted the injunction to restrain the Appellants from interfering with the property when it cannot be disputed that the Appellants are the co-owners along with the Respondent No. 1 of the said suit property. Learned Counsel has further taken me through the impugned Judgment as well as to the material on record and pointed out that the learned Judge has misconstrued the provision of law to come to the conclusion that the Will executed in favour of the Appellants is a nullity and, consequently, the substantial questions of law framed by this Court are to be answered in favour of the Appellants.

4. On the other hand, Shri Desai, learned Counsel appearing for the Respondents, has pointed out that the right of the Appellants, if at all, is restricted to one half of the property and by no stretch of imagination can the whole property belong to the Appellants. Learned Counsel further pointed out that the Respondents have disputed the authenticity of the Will and, as such, as the Will itself is a nullity, the question of claiming any such right on the basis of such Will does not arise. Learned Counsel further pointed out that the Respondents have a residential house in the property which is in their occupation and, as such, the question of the Appellants in any event dispossessing the Respondents of the residential house without recourse to law or seeking a partition, is not justified. Learned Counsel has thereafter taken me through the impugned Judgment and pointed out that the learned Judge has rightly appreciated the material on record and has come to the conclusion that the Will itself is a nullity and, as such, no interference is called for in the impugned Judgment.

5. I have carefully considered the submissions of the learned Counsel. I have also gone through the records. It cannot be disputed that a person/testator is

entitled to freely dispose of his property. The only embargo in such testamentary disposition is that in cases in which the testator is survived by descendants or ascendants, the disposition cannot affect his disposable quota. In the present case, it is not in dispute that the testator Lingu was not survived by either descendant or ascendant and, consequently, the question of protecting any disposable quota does not arise at all. Article 1739 of the Portuguese Civil Code provides that the act by which the person dispossesses the whole property or part of the property to take effect after his death is called a Will. Article 1784 of the Portuguese Civil Code provides that legitime means the portion of the property that tested cannot dispose of because it has been set apart by law in the descendants or ascendants. Article 1719 of the Portuguese Civil Code provides that one or more persons may be instituted as heir. Considering the said above provisions of Portuguese Civil Code as the testator had no descendant and was a bachelor, the question of there being any disposable quota as held in the impugned judgment cannot be sustained.

6. Considering that the testator was entitled in law to freely dispose of his rights in the property, the finding of the learned Judge that the Will is a nullity as it bequeathed a specific property beyond the disposable quota, cannot be sustained and deserves to be quashed and set aside. As rightly pointed out by Shri Amey Kakodkar, learned Counsel appearing for the Appellants the Will will have to be restricted in terms of his right under Article 1804 of Portuguese Civil Code. Taking note that the testator Lingu was entitled to only one half of the property, the disposition in favour of the Appellants will have to be restricted to one half of the suit property only. The remaining one half belongs to the Respondents herein. In such circumstances, the Lower Appellate Court was not justified to come to the conclusion that the Will is a nullity. To that extent, the impugned Judgment deserves to be quashed and set aside. Nevertheless, the rights of the Appellants are restricted to one half of the property whereas the remaining one half belongs to the Respondents. The first two substantial questions of law framed by this Court is answered accordingly.

7. Shri Desai, learned Counsel appearing for the Respondents, at this stage, has pointed out that there were other grounds on which the Will was challenged namely that the Appellants have resorted to undue influence and/or coercion on the testator to execute such Will. On perusal of the Judgment of the fact finding Court, these allegations have been held as not proved by the Respondents. These findings of fact cannot be re-appreciated by this Court in the present Second Appeal unless there is perversity in such findings and, consequently, the contention of Shri Desai, learned Counsel appearing for the Appellants, on that count, cannot be accepted.

8. Dealing with the third substantial question of law framed by this Court with regard to the injunction claimed as it is held that the Appellants and the Respondents are co-owners of the property, the question of granting any blanket injunction is not at all justified. As pointed out herein above, the rights of the

Appellants is restricted to one half of the property and the remaining one half belongs to the Respondents herein. Apart from that, it is not in dispute that a residential house is located in the suit property which is in occupation of the Respondents herein. The learned Judge has granted an injunction restraining the Appellants from interfering with the possession of the said residential house. Considering the findings rendered herein whilst disposing of the first substantial question of law, the occupation of the Respondents of the residential house is of a co-owner of the suit residential house. Nevertheless, as the occupation is admitted, I find it appropriate to modify the injunction granted by the Lower Appellate Court to the effect that the occupation of the Respondents of the residential house shall not be disturbed by the Appellants otherwise than in due process of law. This occupation shall be subject to the rights of both the parties in any partition proceedings which may be initiated by any of the parties. To that extent, the impugned Judgment passed by the Lower Appellate Court stands modified.

9. In view of the above, I pass the following :

O R D E R

- (i) The Appeal is partly allowed.
- (ii) The impugned Judgment passed by the Lower Appellate Court stands modified to the extent referred to herein above.
- (iii) It is further declared that the Appellants are entitled to one half of the property and the remaining one half of the property to the Respondents.
- (iv) Appeal stands disposed of accordingly.