

(2017) 08 BOM CK 0086
In the Bombay High Court
Case No : 27 of 2001

Ruprao s/o. Vishwanathrao Fating, & Ors.	APPELLANT
Vs	
Vasant s/o. Vishwanath Fating, (dead), & Ors.	RESPONDENT

Date of Decision : 23-08-2017

Acts Referred:

Registration Act, 1908, Section 18 - Documents of which registration is optional
Succession Act, 1925, Section 63, Section 276 - Execution of unprivi

Citation : (2017) 08 BOM CK 0086

Hon'ble Judges : S.B. Shukre

Bench : SINGLE BENCH

Advocate : Nitin Vyawahare

Final Decision : Allowed

Judgement

1. Heard Shri Nitin Vyawahare, learned counsel for the appellant. Nobody appears on behalf of the legal heirs of the deceased respondents, although they are duly served on merits.

2. This is an appeal preferred against the judgment and order dated 14.11.2000, passed in Probate Case No.100/1995, by 4th Joint Civil Judge, Senior Division, Nagpur. The deceased respondent No.1 Vasant Vishwawanath Fating filed an application under Section 276 of the Indian Succession Act, 1925 for grant of Probate in respect of a Will dated 30.11.1972, claimed by him to be executed in his favour by the owner of the property mentioned in the Will, deceased Vishwanath Fating. Deceased Vishwanath Fating was the father of the original applicant i.e. deceased respondent No.1 Vasant as well as of the other children, namely, Yeshwant, Ruprao and Prabhakar and Vasatlabai. It was the contention of the deceased Vasant that under Will dated 30.11.1972, which was registered one, the property mentioned in the Will was bequeathed to him and Yeshwant (respondent No.2) equally. Vishwanath died on 20.12.1975 and thereafter an

attempt was made by the deceased Vasant to get the property which was the subject matter of the Will (hereinafter referred to as, "subject property"), mutated in his name in the record of the Nagpur Municipal Corporation. But, the application for mutation of the subject property in the name of deceased Vasant was rejected by the authorities of the Nagpur Municipal Corporation on 26.11.1976. Thereafter, about 19 years later, deceased Vasant filed an application for grant of Probate under Section 276 of the Indian Succession Act. The other children of the deceased Vishwanath were joined as respondents parties and all of them resisted the claim of the deceased Vasant. Evidence was also led by the rival parties. On merits of the case, the Probate Court found that the Will was validly executed and proved in accordance with law before it and, therefore, by the impugned order it granted Probate in favour of deceased Vasant in respect of the subject property. Not being satisfied with the same, the other children, who are the appellants in this appeal preferred the present appeal.

3. After having heard Shri Nitin Vyawahare, learned counsel for the appellant Ruprao s/o. Vishwanathrao Fating who has now been left as the sole appellant, after the original appellant No.2, Prabhakar sold his share in the property to the appellant No.1 Ruprao and name of appellant No.3 Smt. Vatsalabai was deleted from the array of appellants as per the order passed by this Court on 13.9.2002. I have gone through the record of the case including the impugned judgment and order.

4. The only point which arises for my determination :

Whether the Will dated 30.11.1972 was duly proved by deceased Vasant through his legal heirs in accordance with law ?

5. Shri Nitin Vyawahare, learned counsel for the appellant submits that the Will in question was not duly proved in accordance with law and, therefore, no Probate in respect of Will could have been granted by the Probate Court. He submits that the attesting witness examined in this case, PW 2 Dayaram, has clearly admitted the fact that he had not seen the testator Vishwanath sign the Will and that he also did not sign the Will in the presence of the testator Vishwanath. He submits that this admission clearly shows that the Will was not proved in accordance with Section 63 of the Indian Succession Act read with Section 68 of the Indian Evidence Act. He places his reliance in the case of Shobha Madhusudan Sheth vs. Sandeep Shyam Bhanushali, reported in 2013(2) Mh.L.J. 139.

6. Section 63 of the Indian Succession Act requires that a Will shall be attested by two or more witnesses and each of the attesting witnesses must have seen the testator sign the Will or at least some other person sign the Will in the presence and by the directions of the testator and that each of the attesting witnesses must also sign the Will in the presence of the testator. Section 68 of the Indian Evidence Act prescribes that when a document is required by law to be attested, it cannot be used as evidence until one of the attesting witnesses at

least has been called and the execution of the Will is proved through such attesting witness. The combined effect of these provisions of law would be that a document like Will is compulsorily attestable and so its execution must be proved by one of the attesting witnesses in the manner prescribed under the law. This would mean that there is no option for the attesting witness other than his deposing before the Court that he had seen the testator sign the Will or had seen some other person sign the Will on the instructions of the testator and in the presence of the testator and that he had also signed the Will as an attesting witness in the presence of the testator. If he does not depose before the Court in such a specific manner, the execution of the Will cannot be proved in evidence in terms of Section 63 of the Indian Succession Act and then it would follow that it can also not be admitted in evidence in terms of Section 68 of the Indian Evidence Act. In fact, this is also the view taken by the learned Single Judge of this Court in the case of Shobha (*supra*) relied upon by the learned counsel for the appellant and the view commends to me.

7. Now, if the evidence of PW 2 Dayaram is seen, one would at once come to the conclusion that the Will in question in the instant case has not been proved in accordance with law. PW 2 Dayaram clearly admits that as he was not present at the time when the Will was signed by deceased Vishwanath, he did not see deceased Vishwanath sign the Will. He also admits that at the time when he attested the Will by putting his signature thereon, deceased Vishwanath, the testator, was not present. He also states that he was not present at the time when the other attesting witness affixed his signature to the Will in question. These admissions are a clear pointer to the fact that the execution of the Will in question has not been proved as required by the provisions of Section 63 of the Indian Succession Act read with Section 68 of the Indian Evidence Act. So, the Will in question ought not to have been admitted in evidence. But, it has been admitted by the Probate Court, albeit erroneously and contrary to the mandatory provisions of law discussed earlier. The Probate Court has not at all considered the mandatory requirements of law governing the proof of execution of a Will and has only considered the effect of the cross-examination of one of the attesting witnesses PW 2 Dayaram, for recording a finding that his evidence has gone virtually unchallenged and therefore execution of Will was proved. The question of believing in the testimony of a witness would arise only after the mandatory requirements of law, which are firmly embedded in the provisions of Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act, are first met by such a witness. Since those requirements, which are the prerequisites of admission of a Will in evidence have not been fulfilled in the instant case, the question of further appreciation of the evidence of PW 2 Dayaram would never arise in the instant case. But, this was all ignored by the Probate Court.

8. It appears that there was other attesting witness, one Deokinandan Mishra, who could have been examined as witness. But, he was not examined in the present case by the original applicant. Therefore, there was also no question of

considering the possibility of admission of Will in evidence through the evidence of other attesting witness.

9. There is one more aspect which needs consideration at this stage. The Will in question was a registered document. But, the registration of Will itself was only optional, in view of the provision of Section 18 of the Registration Act. The attestation of the Will, however, was not optional, in view of the provision of Section 63 of the Indian Succession Act. This would mean that there is no question of drawing of any presumption of due execution of a document that usually goes with a registered document, which is compulsorily registrable.

10. In view of above, I find that Will in the instant case was not duly proved and so it could not have been admitted in evidence. It would then follow that no Probate of the Will could have been granted by the Probate Court. The impugned order is illegal, it being contrary to law.

11. In the result, I find merit in this appeal. The appeal deserves to be allowed and is allowed accordingly.

12. The impugned order is quashed and set aside.

13. The Probate application stands dismissed.

14. The parties to bear their own costs.