
(2009) 09 BOM CK 0177

In the Bombay High Court

Case No : Testamentary Suit No. 57 of 2002 in Testamentary Petition No. 273 of 2002

Rusi Hormusji Pavri and Another

APPELLANT

Vs

Roxana M. Buhariwala

RESPONDENT

Date of Decision : 15-09-2009

Acts Referred:

Succession Act, 1925 — Section 63, 68

Citation : (2010) 1 CivCC 79 : (2010) 7 RCR(Civil) 592

Hon'ble Judges : Anoop V. Mohta, J

Bench : Single Bench

Advocate : Gaurav Joshi, Mr. Simil Purohit and Mr. Manish Doshi instructed by M/s. Vimadalal and Company, for the Appellant; E.H. Kotwal instructed by M/s. Harish Shroff and Company, for the Respondent

Judgement

Anoop V. Mohta, J.—The present probate petition is of the last Will and Testament of Eddie Hormusji Pavri, filed by Petitioner No. 1 who is the brother of the deceased. Petitioner No. 2 is the niece of the deceased and the daughter of Petitioner No. 1. Petitioner Nos. 1 and 2 are appointed Executors under the Will dated 15th October, 1998 of the deceased. Petitioner No. 1's son Rushad Rusi Pavri was also appointed an Executor but has renounced his rights.

2. The Caveatrix-defendant is also niece of the deceased as her sister who resides in Australia. Both, the caveator and Caveatrix-Roxana, are daughters of Pavri, the deceased brother and only other siblings of the deceased.

3. As the objection was raised through an affidavit dated 16.02.2002, the Petition, therefore, converted into the suit in question.

4. A Commissioner was appointed. The Petitioner examined himself PW1 and an attesting witness Mr. M.T. Tijoriwala, PW2, a Solicitor who prepared the Will of the deceased. The Caveatrix examined herself DW1.

5. this Court has framed the following issues-

1. Whether the Petitioners prove that the deceased Eddiee Hormusji Pavri duly executed his last Will and testament dated 15th October, 1998?
2. Whether the Defendant proves that the deceased executed the said Will through exercise of undue influence by Petitioner No. 1 as alleged in para 2 of the Affidavit in support of the Caveat?
3. Whether the defendant proves that the deceased did not possess the requisite testamentary capacity to make his Will as alleged in para 8 of her affidavit?
4. Whether the petitioners are entitled to grant of probate of the said Will of the deceased as claimed?

6. Issue No. 1: The Petitioner in support of his case led evidence of attesting witness Mr. Tijoriwala who was eminent solicitor and an advocate. Even prior to execution of this Will an earlier Will followed by the Codiciles of the deceased testator and his wife, had specifically bequeathed in identical pattern in favour of the Petitioners. The aforesaid Wills and Codiciles are produced as PW21 and PW25. The defendant and her sister were not the beneficiaries under the said Wills and Codiciles. The position is same in this will also. Having once examined the attesting witness to the Will who has supported the case of the Petitioner-Plaintiff in all respect and as nothing could be extracted in the cross examination to destroy the case and the evidence of the Petitioners on any count. The Defendant has not disputed the signature of the deceased on the Will and even the signature of the attesting witness. The Petitioners proved the said Will in accordance with law. The line of cross examination so put, also no way sufficient to discard the case of the Plaintiffs and or to support the case of the defendant.

7. Issue Nos. 2 and 3: Both these issues require the defendant to prove that the deceased executed the said Will under the undue influence and does not possess the requisite testamentary capacity to make this Will. The defendant only examined herself. There is no material to demonstrate, and not placed on record through any other witness, to discharge the basic burden as per these two issues. The allegations of undue influence need detailed material and supporting evidence which in the present case are missing. Mere allegations are not sufficient. Even in the cross-examination of the Plaintiff-Petitioners' witness the defendant unable to extract any substantial material to support the case of undue influence and or mental incapacity.

8. What remains is the basic submission that the defendant has been excluded in other words one branch of the family i.e. heirs of the elder brothers. The Court needs to consider the contents of the Will. It is difficult for the person to read the mind of deceased, now. Such exclusion which in no way can be said to be the sufficient reason to raise doubt and or to create suspicious circumstances. The concept of the Will itself means, the deceased, for whatever reason but with clear understanding and with a clear physical and mental state of mind bequeaths the property to any person, which is permissible. The Will as stand today, cannot be discarded at the instance of the respondent/defendant.

9. The Defendant's claim pursuant to the alleged agreement or contract and or promise, even if not taken care of and as contended, still that also, in my view, no reason to accept the case of the defendant that the Will was prepared undue influence and the deceased was not in mental and physical capacity. Any such dispute or claim against the deceased, that need to be reiterated in different proceedings. While considering the probate petition, it is difficult for the Court to decide any question with regard to the title, ownership or any such disputes. The remedy is elsewhere. The Learned Counsel appearing for the defendant has strongly relied on Ram Piari Vs. Bhagwant and others, in support of his case. That judgment itself has recognized that such mode of bequeathing the property is not bad or illegal.

10. In answer to this, the Learned Counsel appearing for the Petitioner has relied on Ramabai Padmakar Patil (D) through LRs. and Others Vs. Rukminibai Vishnu Vekhande and Others, , Mrs. Jerbanoo Khurshed Cursetji and Others Vs. Adi Khurshedji Cursetji, and contended that the exclusion of others that itself cannot be the reason to overlook the validly proved Will. On that ground, the authenticity of the Will cannot be tested basically in the present facts and circumstances of the case, where admittedly as recorded, there were earlier Wills and codicils of the year 1995 which also provided the same pattern of distribution of the property. It means, for whatever the reasons read with present Will, the deceased wish and desire was always to bequeath the property in favour of the Petitioners. It also means that the exclusion was intended since long. These facts, in my view, are also sufficient to accept the case of the Petitioners and to reject the case of the Defendant.

11. The defendant failed to prove, though alleged that testator was suffering from illness and he was not in mental capacity or condition to execute the Will. The Petitioners have examined two witnesses as recorded and proved the Will. The cross-examination, even if any, that itself has not disturbed and proved the case of the defendant about the illness or any mental incapacity. Even otherwise, considering the above facts, I am not accepting the submissions on behalf of the defendant as defendant failed to prove the burden on both the issues.

12. In the present case after going through the record, evidence and material on the record, I am of the view that the Petitioners have proved the case as issue No. 1, whereas, the defendant failed to discharge the burden with reference to issue Nos. 2 and 3. The Will is genuine, it is validly made by the deceased in his clear mental and physical condition. There are no suspicious circumstances.

13. Taking into consideration all the facets as contemplated u/s 63 and 68 of the Indian Succession Act and the Evidence Act respectively, in my view, the Plaintiff has proved his case, whereas the Defendant failed to do so, as contemplated in Bharpur Singh and Others Vs. Shamsheer Singh, , K. Laxmanan Vs. Thekkayil Padmini and Others, , Anil Kak Vs. Kumari Sharada Raje and Others, .

14. Resultantly, issue No. 1 is answered in affirmative and Issue Nos. 2 and 3

answered in Negative.