
(2003) 01 BOM CK 0039
In the Bombay High Court
Case No : Appeal from Order No. 808 of 1992

Shri Mahadeo Shankar Shinde	Vs	APPELLANT
Shri Maruti Shankar Shinde and Others		RESPONDENT

Date of Decision : 06-01-2003

Acts Referred:

Succession Act, 1925 — Section 180, 181, 182, 183, 184

Citation : AIR 2003 Bom 312 : (2003) 2 ALLMR 559 : (2003) 4 BomCR 645 : (2003) 2 MhLj 446

Hon'ble Judges : D.G. Karnik, J

Bench : Single Bench

Advocate : Tejpal Ingale, for the Appellant; A.N. Mulla, (Absent), for the Respondent

Final Decision : Allowed

Judgement

D.G. Karnik, J.—In this appeal, the appellant challenges the judgment and order of remand dated 20th April, 1992 passed by the learned Additional District Judge, Sangli setting aside the judgment and order dated 7th December, 1984 passed by the Joint Civil Judge, Senior Division. Sangli in Miscellaneous Application No. 111 of 1981 granting letters of administration with the will annexed thereto in favour of the appellant in respect of the last will and testament dated 16th November, 1975 executed by late Shankar Babaji Dhor (Shinde).

2. Shankar Babaji Dhor (Shinde) (hereinafter referred to as the testator) died on 4th December, 1975 leaving behind his last will dated 16th November, 1975. The appellant being the grand son and a beneficiary under the will, filed an application for letters of administration of the said will dated 16th November, 1975. Sons and daughters of the testator challenged the said will and opposed the grant of letters of administration on the ground that the alleged will was fraudulent, executed in suspicious circumstances and that the thumb impression of the testator was obtained on the said will by under influence and fraud. They

also contended that the property which was bequeathed under the will was not the self acquired or separate property of the testator but, was the property of the joint family of which the testator was only a karta and therefore, he had no right to execute the will in respect of whole of the said property ; at the most the testator could have executed the will in respect of his undivided share in the property.

3. The trial court framed the issues to consider whether the testator had made the will on 16th November, 1975, and whether the will was valid and legal and whether the appellant was entitled to the letters of administration. The trial court did not frame an issue as to the power or authority of the testator to bequeath the whole of the property nor was an issue framed whether the property was self acquired or joint family property. After considering the evidence before him, the trial court held that the testator had legally and validly executed the will on 16th November, 1975 and in view thereof passed an order granting letters of administration in respect of the said will to the appellant.

4. The respondents challenged the said judgment and order passed by the Civil Judge, Senior Division, Sangli by filing an appeal in the District Court, Sangli. The learned Additional District Judge held that the lower court erred in granting letters of administration to the will without ascertaining the nature of the properties in the hands of the testator. The learned Additional District Judge held that the trial court ought to have examined whether the property bequeathed by the will was the separate property or whether it was jointly owned by the testator and his descendants or members of joint family. The learned Additional District Judge held that it was necessary to examine the power and the authority of the testator to make the disposition and to what extent he could have disposed of the property under the will. In view of this, the Additional District Judge set aside the order of the trial court and remanded the matter back to the trial court with a direction to decide the matter afresh after framing the relevant issues regarding the nature of the property and the power and the authority of the testator to make a disposition in respect of the same. The learned Additional District Judge however, did not record any finding on the issue whether the will dated 16th November, 1975 was legally and validly executed by the testator.

5. In my opinion, the learned Additional District Judge clearly erred in remanding the matter back to the trial court for enquiry as to the nature of the property and the power or authority of the testator to bequeath it. The court which considers whether probate or letters of administration should be granted or not (hereinafter referred to as the probate court) is only concerned with the questions as to whether the document was the last will of the testator was duly attested in accordance with law and whether at the time of such execution the testator had a sound disposing state of mind. The question whether a particular bequest is good or bad on the ground that the testator was or was not the owner of the property is not within the purview of the probate court. It would not be out of place to mention here that Chapter XXII of Part VI (Sections 180 to 189) of

the Indian Succession Act, 1925 does contemplate the testator bequeathing the property not belonging to him and the effect thereof where the testator professes to dispose of the property which he has no right to dispose of, the person to whom the property belongs is required to elect to confirm the disposition or to dissent from it at the pain of giving up the benefits conferred on him under the will. Heading to Section 182 of the Indian Succession Act reads: "Testator's belief as to his ownership immaterial." These provisions do show that the testator can, subject to Sections 180 to 189 bequeath even the property not belonging to him.

6. The probate court does not determine the title to the property. Even after the probate is granted in respect of the will which contains a disposition of the property, it is open for any other person who claims ownership of that property to contend and prove to the satisfaction of the court in any collateral proceedings that he is the real owner and the testator was not the owner of the property at the time when he made the will. Reference may be made to the decision of this court in *Bai Parvatibai v. Raghunath Laxman* reported in 42 Bom. L.R. 1063, wherein this court observed:

"In my opinion, a testamentary court dealing with the question of issuing grant of probate is concerned to see whether the will is duly executed as required by law by a testator of sound and disposing state of mind. In case of grant of letters of administration, the court has to see that the person properly entitled to represent the estate of the deceased person according to the Indian Succession Act has come to the court, and is given the grant. It is no part of the duty of the testamentary Judge to consider the question of title to property."

(Underling supplied)

The question whether a particular bequest is good or bad is not within the purview of the probate court and the probate court is concerned only with the question as to whether the document which contained the bequest was the last will and testament of the deceased duly executed and attested in according with law by the testator having a sound disposing state of mind.

7. The Additional District Judge therefore, clearly erred in remanding the matter back to the trial court for enquiry as to the nature of the property or nature of the title of the testator to the property disposed of under the will.

8. In the grounds of appeal which were taken before the first appellate court, the respondents herein had contended that the will was executed under suspicious circumstances and the thumb impression of the testator was obtained by exercising undue influence and fraud. They had challenged the evidence of the attesting witness. These matters have not been dealt with by the first appellate court. In the circumstances, the matter would have to be remanded back to the first appellate court to decide all these challenges.

9. For these reasons, the appeal is allowed. The matter is remanded back to the

first appellate court (District Court, Sangli) for deciding the appeal after considering all other grounds which were taken before him. In the circumstances of the case, parties shall bear and pay their own costs.