

(2006) 06 BOM CK 0070

In the Bombay High Court

Case No : First Appeal No"s. 1347 of 2005 and 151 of 2006

Shri Vitthal Ramchandra Mali

APPELLANT

Vs

Smt. Laxmi Ganpati Mali and Another
 Shri Shankar
Waman Thatte Vs Smt. Gayatri Bhalchandra Thatte

RESPONDENT

Date of Decision : 06-06-2006

Acts Referred:

Bombay Civil Courts Act, 1869 — Section 28A, 28A(1)
Civil Procedure Code, 1908 (CPC) — Section 141
General Clauses Act, 1897 — Section 24
Succession Act, 1925 — Section 276, 365, 372, 384, 388
Succession Certificate Act, 1889 — Section 19(1), 26, 26(1), 26(2)

Citation : AIR 2006 Bom 298 : (2006) 4 ALLMR 389 : (2006) 4 BomCR 31

Hon'ble Judges : Abhay S. Oka, J

Bench : Single Bench

Advocate : P.V. Patil, in First Appeal No. 1347 of 2005 and T.D. Deshmukh, in First Appeal No. 151 of 2006, for the Appellant;

Judgement

Abhay S. Oka, J.—The submissions of the Advocates appearing for the Appellants in these two Appeals were heard on 04th May, 2006. The challenge in both the Appeals is to orders passed by the courts of Civil Judge, Senior Division on Application u/s 372 of the Indian Succession Act, 1925 (hereinafter referred to as the said Act of 1925) for grant of succession certificate. The question to be decided in these Appeals is whether the Appeal u/s 384 of the said Act of 1925 against the decision of the learned Civil Judge, Senior Division will lie to this Court or to the District Court. In First Appeal No. 1347 of 2005, a report of the Registrar of this Court was called for on this aspect. The Report is accordingly submitted which is referred to in the later part of the judgment.

2. It will be necessary to refer to the relevant provisions of law which are necessary for deciding the aforesaid question. Section 384 of the said Act of 1925 reads thus:

384.Appeal.-(1)Subject to the other provisions of this Part, an appeal shall lie to

the High Court from an order of a District Judge granting, refusing or revoking a certificate under this Part, and the High Court may, if it thinks fit, by its order on the appeal, declare the person to whom the certificate should be granted and direct the District judge, on application being made therefor, to grant it accordingly, in supersession of the certificate, if any, already granted.

(2) An appeal under Sub-section (1) must be preferred within the time allowed for an appeal under the Code of Civil Procedure, 1908 (5 of 1908).

(3) Subject to the provisions of Sub-section (1) and to the provisions as to reference to and revision by the High Court and as to review of judgment of the Code of Civil Procedure, 1908 (5 of 1908), as applied by Section 141 of that Code, an order of a District Judge under this Part shall be final. Section 388 of the said Act of 1925 reads thus:

388. Investiture of inferior courts with jurisdiction of District Court for purposes of this Act.-(1) The State Government may by notification in the Official Gazette, invest any Court inferior in grade to a District Judge with power to exercise the functions of District Judge under this Part.

(2) Any inferior Court so invested shall, within the local limits of its jurisdiction, have concurrent jurisdiction with the District Judge in the exercise of all the powers conferred by this Part upon the District Judge, and the provisions of this Part relating to the District Judge shall apply to such an inferior Court as if it were a District Judge:

Provided that an appeal from any such order of an inferior Court as is mentioned in Sub-section (1) of Section 384 shall lie to the District Judge, and not to the High Court, and that the District Judge may, if he thinks fit, by his order on the appeal, make any such declaration and direction as that sub-section authorises the High Court to make by its order on an appeal from an order of a District Judge.

(3) An order of a District Judge on an appeal from an order of an inferior Court under the last foregoing sub-section shall, subject to the provisions as to reference to and revision by the High Court and as to review of judgment of the Code of Civil Procedure, 1908(5 of 1908), as applied by Section 141 of that Code, be final.

(4) The District Judge may withdraw any proceedings under this Part from an inferior Court, and may either himself dispose of them or transfer them to another such Court established within the local limits of the jurisdiction of the District Judge and having authority to dispose of the proceedings.

(5) A notification under Sub-section (1) may specify any inferior Court specially or any class of such Courts in any local area.

(6) Any Civil Court which for any of the purposes of any enactment is subordinate to, or subject to the control of, a District Judge shall, for the

purposes of this Section, be deemed to be a Court inferior in grade to a District Judge. u/s 372 of the said Act of 1925 an Application for grant of succession certificate is required to be made to the District Judge. Sub-section (1) of Section 388 of the said Act of 1925 empowers the State Government to invest any court inferior in grade to a District Judge with power to exercise the functions of a District Judge under Part X of the said Act of 1925 which deals with grant of succession certificates. The said power is to be exercised by the State Government by publishing a notification in the official gazette. Proviso to Sub-section (2) of Section 388 of the said Act of 1925 states that an appeal from any such order of an inferior court shall lie to the District Judge and not to the High Court. Section 384 of the said Act of 1925 provides that an Appeal shall lie to the High Court from an order of District Judge granting, revoking or refusing the succession certificate. On plane reading of the proviso to Sub-section 2 of Section 388 of the said Act of 1925, irrespective of the value of the subject matter of the Application for succession certificate, an Appeal against an order passed by a court inferior in grade to a District Judge will lie to the District Judge. The proviso will apply when there is a notification issued under Sub-section 1 of Section 388 by the State Government and the court inferior to a District Judge has exercised the power conferred by such notification.

3. It is brought to my notice that u/s 28-A of the Bombay Civil Courts Act, 1869 (hereinafter referred to as the said Act of 1869) this Court has a power to invest in any Judge powers of a District Judge under certain statutes. Section 28-A reads thus:

28A. Power to invest civil judges with jurisdiction under certain Acts. (1) The High Court may by general or special order invest any judge, within such local limits and subject to such pecuniary limitation as may be prescribed in such order, with all or any of the powers of a District judge or a District Court as the case may be under the Indian Succession Act, 1865, probate and Administration Act, 1881, or paragraph 5 of Schedule III to the Code of Civil Procedure, 1908.

(2) Every order made by a Civil Judge by virtue of the powers conferred upon him under Sub-section (1) shall be subject to appeal to the High Court or the District Court according as the amount or value of the subject-matter exceeds or does not exceed two lakh rupees.

(3) Every order of the District Judge passed in appeal under Sub-section (2) from the order of a Civil Judge shall be subject to an appeal to the High Court under the rules contained in the CPC applicable to appeals from appellate decrees.

4. The Registrar (Judicial I) has submitted a report dated 03rd May, 2006 inviting my attention to a notification dated 25th October, 1890 issued by the Governor in Council. The said notification has been issued in exercise of power conferred on Local Government u/s 26(1) of the Succession Certificate Act, 1889 (hereinafter referred to as Act No. VII of 1889). By the said notification, the Governor General in Council invested with the functions of a District Judge under

the said Act No. VII of 1889 the courts of all subordinate Judges in the State which have not been already so invested. Under the said Act 1889 a provision was made for grant of succession certificates and jurisdiction to grant succession certificate was vested in District Court.

5. It will be also necessary to refer to the relevant paragraphs of the Civil Manual and in particular paragraph Nos.304 and 305 of Chapter XIV. The said paragraphs read thus: "304. Attention is invited to Government Notification No. 5861, dated the 25th October, 1890, issued u/s 26(1) of the Succession Certificate Act (VII of 1889) and printed at page 1259 of the Bombay Local Rules and Orders under Central Acts, Volume I, 1953 edition, under which all civil judges in this State have for the purpose of the said Act been invested with the function of a District Court.

Although the Succession Certificate Act, 1889, has been repealed, the notification, dated 25th October, 1890, remains in force by virtue of Section 24 of the General Clauses Act, 1897.

305. (i) u/s 265 of the Indian Succession Act, 1925, the High Court has appointed all Civil Judges to act for the District Judge as delegates to grant probate and letters of administration in non-contentious cases arising within the local limits of their respective jurisdiction.

(ii) In exercise of the powers conferred by Section 28-A(1) of the Bombay Civil Courts Act (XIV of 1869), the High Court has invested all Civil Judges (Senior Division), with all the powers of a District Judge to take cognizance of any contested proceeding under Indian Succession Act, 1925, arising within the local limits of their respective jurisdiction that may be transferred to them by their respective District Judges.

(iii) In exercise of the powers conferred by Section 28-A(1) of the Bombay Civil Courts Act, (XIV of 1869), the High Court has invested all Civil Judges (Junior Division) with all the powers of a District Judge in the matter of issuing Succession Certificate limited to debts and securities to the extent of their pecuniary jurisdiction.

6. The Sub-section 1 of 28-A of the said Act of 1869 does not authorise this Court to invest any inferior court with the powers of a District Judge under Chapter X of the said Act of 1925. The Sub-section 1 of Section 28A authorises this Court to invest in any Civil Judge powers of a District Judge or District Court only under the Indian Succession Act, 1865 and the probate and Administration Act, 1881. Both the said enactments did not confer a power on a District Judge to grant a succession certificate. Both the enactments do not deal with grant of a succession certificate. After the said Act of 1869 came into force, the Act VII of 1889 i.e. the Succession Certificate Act, 1889 was enacted. Under the said Act No. VII of 1889, a power is vested in a District Court to grant a succession certificate in respect of debts payable to the deceased. Section 26(1) empowers the local government by a notification in the official gazette to invest in a court

inferior in grade to a District court with the functions of the District Court under the Act. As stated earlier, there is a notification issued u/s 26(1) on 25th October, 1890 by the Governor in Council by which the functions of the District Court under the said Act VII of 1889 were invested in all the sub-ordinate Judges in the State. Section 26 of the said Act VII of 1889 reads thus:

26. (1) The Local Government may, by notification in the official Gazette, invest any Court inferior in grade to a District Court with the functions of a District Court under this Act, and may cancel or vary any such notification.

(2) Any inferior Court so invested shall, within the local limits of its jurisdiction, have concurrent jurisdiction with the District Court in the exercise of all the powers conferred by this Act upon the District Court, and the provisions of this Act relating to the District Court shall apply to such an inferior Court as if it were a District Court:

Provided that an appeal from any such order of an inferior Court as is mentioned in Sub-section (1) of Section 19 shall lie to the District Court, and not to the High Court, and that the District Court may, if it thinks fit, by its order on the appeal, make any such declaration and direction as that sub-section authorises the High Court to make by its order on an appeal from an order of a District Court.

(3) An order of a District Court on an appeal from an order of an inferior Court under the last foregoing sub-section shall, subject to the provisions of Chapters XLVI and XLVII of the CPC as applied by Section 647 of that Code, be final.

(4) The District Court may withdraw any proceedings under this Act from an inferior Court and may either itself dispose of them or transfer them to another such Court established within the local limits of the jurisdiction of the District Court and having authority to dispose of the proceedings.

(5) A notification under Sub-section (1) may specify any inferior Court specially or any class of such Courts in any local areas.

(6) Any Civil Court which for any of the purposes of any enactment is subordinate to, or subject to the control of, a District Court shall for the purposes of this Section be deemed to be a Court inferior in grade to a District Court.

7. Thus, it is apparent that Sub-section 1 and Sub-section 2 of Section 388 of the said Act of 1925 are similar to Sub-section 1 and Sub-section 2 of Section 26 of the said Act VII of 1889. The said Act of 1925 was enacted with a view to consolidate the law applicable to intestate and testamentary succession. The Act VII of 1889 was repealed by the said Act of 1925. Thus, in view of Section 24 of the General Clauses Act, 1897 the notification issued on 25th October, 1890 u/s 26(1) of the said Act VII of 1889 shall be deemed to be notification under Sub-section 1 of Section 388 of the said Act of 1925 as the provisions of Section 26(1) of the said Act VII of 1889 are not inconsistent with the provisions of the said Act of 1925.

8. Therefore, the said notification dated 25th October, 1890 will have to be treated for all purposes as a notification u/s 388(1) of the said Act of 1925. If the paragraph No. 304 of the Civil Manual makes this position very clear, it must be noted here that sub-paragraph No. (iii) of paragraph No. 305 of the Civil Manual does not appear to be correct as Section 28A does not confer a power on this Court to invest any sub-ordinate court with the powers of the District Judge to grant succession certificate.

9. In view of this position, the Civil Judge, Senior Division in these two Appeals have exercised the jurisdiction under Sub-section 1 of Section 388 of the said Act of 1925. In view of the proviso to Sub-section 2 of Section 388, the Appeals u/s 384 of the said Act of 1925 against the order of the learned Civil Judge, Senior Division will therefore lie to the District Judge and not to this Court. By virtue of the proviso to Sub-section 2 of Section 388 of the said Act of 1925 in case of all appealable orders passed on Application for succession certificate by the courts referred to Sub-section 1 of Section 388, the Appeal will lie to the District Judge irrespective of the value of the subject matter of the Application for grant of succession certificate. The reason being that the forum of Appeal is created by the proviso to Sub-section 2 of Section 388 of the said Act of 1925 and not by the provisions of said Act of 1869.

10. The Registrar (Judicial I) in his report has invited my attention to a decision of the learned Single Judge of this Court reported in Manohar Sapre Vs. Bhaurao Shirbhate and another, . The learned Single Judge considered the relevant provisions of the Civil Manual which are referred to in earlier part of this Judgment. After considering Section 388 of the said Act of 1925, the learned Single Judge held that the Appeal before the District Court was maintainable against an order passed by a Civil Judge. However, it must be noted here that the subject matter of the Appeal before the learned Single Judge was an order passed on Application for probate u/s 276 of the said Act of 1925. Therefore, the said decision has no relevance to the present controversy.

11. Before I part with the Judgment, I must mention that the report submitted by Shri Sadashiv S. Deshmukh I/c Registrar (Judicial-I) was of a valuable assistance in deciding the question involved in these Appeals.

12. In my considered view, Appeals against the impugned judgments and orders will lie to the District Judge irrespective of value of subject matter of Application for succession certificate. The office is, therefore, directed to return the memorandum of Appeals alongwith accompaniments to the Advocates appearing for the Appellants for presentation to appropriate Court. The office will also return all pending Civil Applications alongwith memorandum of