
(2002) 12 KAR CK 0010

In the Karnataka High Court

Case No : Miscellaneous First Appeal No. 419 of 1998

Smt. Severine D" Souza and Another

APPELLANT

Vs

Felix Ambrose D" Souza

RESPONDENT

Date of Decision : 02-12-2002

Acts Referred:

Karnataka Land Reforms Act, 1961 — Section 61
Succession Act, 1925 — Section 213, 227

Citation : (2003) 1 KCCR 495

Hon'ble Judges : Tirath S. Thakur, J;H. Rangavittalachar, J;D.V. Shylendra Kumar, J

Bench : Full Bench

Advocate : G.S. Visweswara, for M. Sajan Poovayya, for the Appellant; K. Gopal Hegde, for the Respondent

Judgement

Tirath S. Thakur, J.—This Miscellaneous First Appeal arises out of an Order passed by the Probate Court allowing an application seeking probate in respect of a Will executed by one Sri Juvam D" Souza. The appeal came up for hearing initially before V.G. Sabhahit, J., who noticed a conflict between the law as declared by the Supreme Court in Ishwardeo Narain Singh Vs. Sm. Kamta Devi and Others, and that declared by a Division Bench of this Court in Maria Bai and Anr. v. Jayamma in MFA No. 2353/1990 disposed of on 25/5/1999. A reference made by Learned Single Judge brought the matter before a Division Bench comprising two of us [Tirath S. Thakur, D.V. Shylendra Kumar, JJ]. The Division Bench was of the view that the decision in Maria Bai's case deserved reconsideration which could be more appropriately done by a Full Bench. That is precisely how the appeal has come up before us to answer the limited question whether there is any conflict between the law as declared by the Supreme Court and that by the Division Bench in Maria Bai's case supra. The brief facts in the backdrop whereof the controversy arises may be stated as under:

An application seeking a probate in respect of a Will dated. 14.10.1988 allegedly executed by one Sri. Juvam D"Souza was filed by the Respondent before the III

Additional District Judge at Mangalore. The prayer made in the application was opposed by the Appellants herein, with the result that the application was converted and registered as Original Suit No. 8/1994. Evidence was then let in by the parties in support of their respective cases culminating in an Order passed by the Trial Court on 22.11.1997 whereby the Respondent was held entitled to the probate prayed for. Aggrieved by the said Order, the Defendants-Appellants have filed MFA No. 419/1998 which came up for hearing and disposal before V.G. Sabhahit, J. At the hearing, the main contention urged by the Appellants it appears was that the Will in question was contrary to the provisions of Section 61 of the Land Reforms Act, in as much as the property bequeathed by the Will comprised agricultural land in respect of which occupancy rights had been conferred upon the testator by the competent authority under the Land Reforms Act. The execution of a Will in respect of any such property was according to the Appellants forbidden by law rendering the same illegal and disentitling the Respondent to the probate thereof. It was argued that once a probate application became contentious and was converted into a suit, the Court dealing with the same was entitled to examine the question of title to the property and the competence of the testator to bequeath the same. Reliance in support of that proposition was placed by the Appellants upon a Division Bench decision of this Court in Maria Bai and Anr. v. Jayamma in MFA No. 2353 of 1990 disposed of on 25.5.1999. The Division Bench was in that case dealing with a similar contention. The question was whether a Probate Court could even in a contentious suit for grant of probate, entitled to examine the question of title of the testator to the property. The Court answered the said question in the affirmative in the following words:

The next contention of the learned Counsel that in a proceedings for grant of letter of administration the Court has no jurisdiction to consider the question of title. In this regard there cannot be any dispute regarding the principles laid down in the decision reported in Dhane Ali Mia and Others Vs. Sobhan Ali and Others, wherein it is clearly held that "In a proceedings for grant of letter of administration it is not for the Court to decide the question of title." But we have to bear in mind that when the petition filed for grant of letter of administration the Defendants herein have questioned the validity of the execution of the Will by the testator and therefore the matter was converted into a Civil Suit. When once a matter is converted into a Civil Suit, the Court gets jurisdiction to determine the question of title to the property and the competency of a testator to execute a Will or not. In that view of the matter, the submission of the learned Counsel that the Court has no jurisdiction to go into the question of title is without any force. We have to observe that the grant of occupancy right is subject to non-alienation clause for a period of 15 years and any such alienation either by way of Will, gift or assignment is a clear bar u/s 61 of the Land Reforms Act. The intention of the legislature is to protect the interest of the tenant. In that view of the matter, the assignment of any right within the period prescribed u/s 61 of the Act is a clear violation of law. Therefore, the testator could not have executed

such Will as he did not have absolute title to the property for execution of the Will.

(Emphasis supplied)

2. The observations extracted above came in conflict with the law declared by the Supreme Court in *Ishwardeo Narain Singh Vs. Sm. Kamta Devi and Others*, where the scope of proceedings before a Probate Court was indicated and the question of title of the testator to the property held alien to the proceedings under the Indian Succession Act, 1925. Reconsideration of the view in *Maria Bai's* case thus became inevitable, as did a reference to the Full Bench.

3. We have heard Mr. Visweswara, Learned Counsel for the Appellants and Mr. Gopal Hegde for the Respondent.

4. The Indian Succession Act, 1925 inter alia deals with the grant of probates and succession certificates. Section 213 of the Act provides that no right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in India has granted probate of the Will under which the right is claimed, or has granted letters of administration with the Will. Section 227 of the Act deals with the effect of probate and provides that probate of a Will when granted establishes the Will from the death of the testator and renders valid all intermediate acts of the executor. The net effect of the said provision is that once a probate is granted, the same establishes the Will retrospectively from the date of the death of the testator and vests the property in the executor thereof. The grant of the probate provides the evidence regarding the Will from which the executor derives his title.

5. The nature of the proceedings conducted by a Probate Court dealing with the prayer for grant of probate has been the subject matter of numerous judicial pronouncements. In the case of *Alagammai and others Vs. V. Rakkamal*, Justice Nainar Sunderam (as His Lordship then was) speaking for the Bench held that the decision of a Probate Court on the question of validity, genuineness and due execution of the Will was a Judgment in rem and could not be attacked in Courts of ordinary Civil jurisdiction. The decision drew a comparison between the jurisdiction of Civil Court and a Probate Court in the following words:

As between the decision rendered by an ordinary Civil Court and the decision rendered by a Probate Court, on the question of truth, validity, genuineness and due execution of a Will, the decision of the Probate Court is a judgment in rem, which will bind not only the parties before it, but the whole world is a well accepted proposition, which does not admit of any dispute. The decision of the ordinary Civil Court, dealing with the same issue, would not constitute a Judgment in rem. Such is the sanctity annexed to the decision of the Probate Court, which is a Court of exclusive jurisdiction. The Probate Court is a Court of conscience. It applies its mind to find out as to whether the document put forth in the last Will or codicil of the deceased. It must arrive at the satisfaction as to the due execution of the document. It must be satisfied as to the testamentary

capacity of the deceased. It is an exclusive Court dealing with Probate matters in contract to the ordinary Civil Court, which is concerned only with deciding rights between parties. The Probate Court does not decide rights between parties. Once the Probate Court renders its decisions, that will take precedence on the relevant questions, over the decisions of the Courts of ordinary Civil jurisdiction at all levels and will be binding on proceeding pending before such Court. Those principles are so well known, we do not think we should cite authorities for them.

6. To the same effect is the decision in *Smt. Rukmani Devi and Others Vs. Narendra Lal Gupta*, where the Supreme Court held that failure of an interested person to enter caveat to contest the proceedings would preclude them from contesting the validity of the Will in every other proceedings.

7. In *Ishwardeo Narain Singh Vs. Sm. Kamta Devi and Others*, their Lordships summarised the scope of the proceedings before the Probate Court in the following words:

The Court of Probate is only concerned with the question as to whether the document put forward as the last Will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the Probate Court.

8. To the same effect is the decision of the Supreme Court in *Mrs. Hem Nolini Judah* (since deceased) and after her Legal Representative *Mr. Marlean Wilkinson Vs. Isolyne Sarojbashini Bose and Others*, . The Court declared that the question of title to the property are not decided in proceedings for the grant of probate and letters of administration. The grant of probate or letters of administration declared the Court did not establish that the person making the Will was the owner of the property which he may have given away by the Will and that any person interested in the property included in the Will can always file a suit to establish his right to the property to the exclusion of the testator in spite of the grant of probate or letters of administration. The proceedings for probate or letters of administration are not concerned with the title to the property but are only concerned with due execution of the Will. The following passage is in this regard relevant:

Now it is not in dispute that the grant of probate or letters of administration does not establish that the person making the Will was the owner of the property which he may have given away by the Will, and any person interested in the property included in the Will can always file a suit to establish his right to the property to the exclusion of the testator in spite of the grant of probate or letters of administration to the legatee or the executor, the reason being that proceedings for probate or letters of administration are not concerned with the title to the property but are only concerned with due execution of the Will.

(Emphasis supplied)

xxxxxx xxxxxx xxxxxx As we have already said questions of title are not decided in proceedings for the grant of probate or letters of administration. Whatever therefore might have happened in those proceedings would not establish the title to the house either of the Appellant or of Mrs. Mitter.

(Emphasis supplied)

9. The above position is reiterated by the Supreme Court in Chiranjilal Shrilal Goenka (Deceased) through Lrs. Vs. Jasjit Singh and Others, in the following words:

The Succession Act is a self-contained code in so far as the question of making an application for probate, grant or refusal of probate or an appeal carried against the decision of the probate Court. This is clearly manifested in the fascicule of the provisions of the Act. The probate proceedings shall be conducted by the probate Court in the manner prescribed in the Act and in no other ways. The grant of probate with a copy of the Will annexed establishes conclusively as to the appointment of the executor and the valid execution of the Will. Thus it does no more than establish the factum of the Will and the legal character of the executor. Probate Court does not decide any question of title or of the existence of the property itself.

(Emphasis supplied)

10. The Division Bench in Maria Bai's case does not appear to have noticed the true legal position as settled by the above pronouncements of the Apex Court. The observations made by the Division Bench that once a probate application is converted into a Civil Suit, the Court gets jurisdiction to determine the question of title to the property and the competency of a testator to execute a Will or not, cannot therefore be said to be stating the legal position correctly.

11. We have in that view no option, but to hold that the Division Bench decision in Maria Bai's case is a Judgment per incuriam and shall accordingly stand overruled. The reference is answered accordingly with a direction that the appeal shall now be posted for hearing and disposal before the Learned Single