
(1995) 03 RAJ CK 0072
In the Rajasthan High Court
Case No : Special Appeal No. 22 of 1994

Smt. Suraj Devi	Vs	APPELLANT
Smt. Sita Devi		RESPONDENT

Date of Decision : 21-03-1995

Acts Referred:

Payment of Gratuity Act, 1972 — Section 4
Rajasthan High Court Ordinance, 1949 — Section 18
Succession Act, 1925 — Section 276, 63
Transfer of Property Act, 1882 — Section 6

Citation : AIR 1996 Raj 6 : (1995) 2 CivCC 314 : (1995) 1 RLW 541 : (1995) 2 WLC 640 : (1995) 1 WLN 480

Hon'ble Judges : V.G. Palshikar, J;B.R. Arora, J

Bench : Division Bench

Advocate : M.L. Shreemalee, for the Appellant; M.C. Bhoot, for the Respondent

Final Decision : Dismissed

Judgement

V.G. Palshikar, J.—This appeal is directed against the judgment dated 17th May, 1994 passed by Hon"ble single Judge of this Court in S. B. Civil Misc. Appeal No. 2 of 1994, confirming the judgment dated 4-12-93 passed by the District Judge, Jodhpur, granting Probate of a Will under the Indian Succession Act, 1925.

2. The facts giving rise to the appeal, stated in brief, are that one Shri Sohan Lal expired on 9-10-89, leaving a Will in respect of his properties. He was employed as a Mistry in the Rajasthan State Electricity Board and had retired from service months before his death. Proceedings were, therefore, initiated under the Indian Succession Act to obtain Probate of this Will. Grant of Probate was opposed by the present appellant Smt. Suraj Devi, widow of Sohan Lal Mali on the allegation that the Will is a forged document. It has been created to deprive her of her succession rights, she being legally married wife of Sohanlal.

3. In the proceedings, it was submitted by the respondent Sita Devi, in whose favour the Will is made, that Suraj Devi was divorced in 1948 and the deceased

Sohanlal stayed with his brothers and sister and the sister used to look after him and, therefore, out of natural love and affection the Will was voluntarily executed by Sohanlal. Taking into consideration the entire evidence on record, the learned District Judge came to a conclusion that the Will was genuine, it was duly proved as required by Section 63 of the Indian Succession Act. He, therefore, ordered grant of Probate.

4. This order was impugned in Misc. Appeal No. 2/94 on several grounds mentioned in the memo of appeal.

5. The learned single Judge, on reappreciation of the evidence and evaluation of the submissions made at the Bar, came to the conclusion that the grant of Probate was legal and proper. He, therefore, dismissed the appeal. Hence, the present Special Appeal.

6. The learned counsel appearing on behalf of the appellant challenged the concurrent orders on the following grounds :--

(i) That the learned single Judge has gravely erred in observing that as the close relations have admitted above a custom of divorce, hence the same is proved by the so called compromise Ex. 1. It may be relevant to mention that for proving the custom, the five points mentioned hereinabove in Para 4 have to be proved, however, none of them has at all been proved, nor is there any finding of the Courts below about proof of the said points. The judgment of the learned single Judge suffers from a substantial error of law.

(ii) That the statements of the witnesses of the respondents have not been properly scrutinised by both the Courts below. As for the learned single Judge, he has not even held that the appellant was minor in the year 1948, that cuts at the root of the authority of the father to enter into a compromise or settlement of the appellant's divorce. The question of presumption etc. is only relevant to prove the execution of Ex. 1 by the appellant's father, but so far as the authority is concerned, the same cannot be proved by the circumstances relied on by the learned single Judge. The judgment is thus suffering from substantial error of law.

(iii) That the learned single Judge's observation that even if the appellant did not put her signature, the document having not been challenged for such a long time, cannot be ignored. Firstly, it is not alleged or proved that the appellant had knowledge of the document before these proceedings, hence the question of no challenge does not arise. Secondly, when the consent of the appellant is neither alleged nor proved, the document cannot be validated by the duration of its standing. The whole approach of the learned single Judge is erroneous in law.

(iv) That though it is emphatically asserted that the appellant was major in 1948 and is supported by evidence of the respondents also. Not only this the copies of horoscope of the appellant's daughter had been submitted with an application under Order 41, Rule 27, C.P.C. but it later transpired that the judgment was rendered on the same day, though reserved after the arguments. The same may

now be taken on record as additional evidence.

(v) That even if admitted that the appellant was minor in 1948, it is immaterial as the Indian Majority Act, does not apply to marriage, dowry and divorce; as such the consent of the appellant herself was necessary. The learned single Judge has committed a grave error of law in ignoring this legal aspect.

(vi) That the circumstances relied on by the lower Courts, can only lead to the inference of strained relations between the husband and wife, but that does not and cannot deprive her of the right of succession. This aspect has been erroneously ignored.

(vii) That as for the proof of the Will, both the Courts have ignored the provisions of Sec. 63 of the Indian Succession Act. The evidence of PW Om Singh has been clearly misread. He has neither said that Shri Sohanlal signed or acknowledged his signatures on the Will in his presence; nor did he say that he signed as an attesting witness in the presence of Shri Sohanlal. The original record was not summoned by the learned single Judge, as such the original Will could not be perused, which clearly shows that there are overwritings in dates and the attestation of Om Singh was subsequently added; all these facts have been omitted to be considered.

(viii) That the learned single Judge has gravely; erred in ignoring that it was a first appeal before him. The whole evidence ought to have been examined and shifted after calling for the record, being a final court of facts. The judgments, thus, vitiated.

7. During the course of arguments, an application was filed under Order 41, Rule 2 of the Code of Civil Procedure, for raising additional grounds as under :--

(1) That even assuming, though not admitted that the Will is held to be proved, the P.F. Gratuity and Pension of Late Shri Sohanlal could not be bequeathed since bequest can only be made in respect of transferable properties. In this respect Section 6 of the Transfer of Property Act may be relevant to be noticed. Clause (g) of the said section clearly puts, pension payable to Civil Pensioners of Government has been clearly exempted from transferable property. Similarly, P.F., Gratuity are covered by Clause (a) as "any other mere possibility of a like nature". In this respect, it may be relevant to mention that the grant of P.F. and Gratuity is only a possibility if the Government Servant is retired from service on superannuation. He cannot get the same if he is dismissed from the service or resigns from service or any other such contingencies. The lower Courts have committed a legal error in issuing the probate.

(2) The appellant being a legally wedded wife of the deceased, has got a right of maintenance and no bequeath can be validly made ignoring the right of maintenance. The Will is thus void or can be read to be subject to the appellant's right of maintenance. The Courts below have erred in ignoring this purely legal aspect of the matter.

(3) That the Will does not speak of bequeathing the pension and pensionary benefits, the lower Courts have gravely erred in allowing the probate for pension to the respondent.

(4) That the question of divorce is the question of determination of a civil right and the same could not be determined in the proceedings for probate, under the Succession Act.

(5) That as per Section 295 of the Indian Succession Act, 1925, on contest the proceedings partake character of a suit, in such a case, it was incumbent upon the respondent-plaintiff to have pleaded the factum of the appellant being married wife of Shri Sohanlal and the alleged divorce, so that the appellant could be entitled to controvert the facts regarding absence of divorce and circumstances negating the same. Since the respondent, only pleaded those facts in the replication, the appellant could not have opportunity to plead relevant facts in denial controverting the same.

8. We have carefully considered the, above submissions. In our opinion, the question of marriage and divorce of the appellant Suraj Devi is irrelevant for the purposes of proceedings of Probate. Proceedings of Probate are by nature of the proceedings, restricted to the proof of legal and valid execution of the Will, of which Probate is demanded. A perusal of the provisions of Section 276 of the Indian Succession Act, under which Probate was claimed will show that all that is to be ascertained by the Court in proceedings under that Section is, whether the Will has been executed as required by law and is proved as required by Section 63 of the Indian Succession Act. The question of marriage between the present appellant and the deceased Sohanlal will become relevant only in the event of her capacity to challenge the grant of Probate is questioned. Since that was not the position, the entire question of marriage and alleged divorce becomes irrelevant and was, therefore, rightly ignored by the learned single Judge.

9. The statement of witnesses of the parties have been appreciated by the learned trial Judge and reappreciated by the learned single Judge. We see no reason sitting in appellate jurisdiction u/s 18 of the Rajasthan High Court Ordinance, 1949, to take a different view than the one concurrently taken by the learned single Judge and the learned District Judge. Second reappreciation of evidence is not warranted in the present case, though language of Section 18 of the Ordinance does not prohibit such reappreciation. It has already been held in AIR 1980 Rajasthan 212 as under (at P. 218 of AIR) :--

"No doubt, it is open to us in a special appeal to examine even findings of facts but unless there are glaring circumstances to warrant an interference with a finding of fact arrived at by the learned single Judge. We would ordinarily be not justified sitting as a court of special appeal u/s 18 of the High Court Ordinance to reappreciate the evidence."

10. In the present case also, the learned Judge has given a firm finding that the Will has been duly proved. Grant of Probate by the learned District Judge, in the

circumstances, was right and was rightly affirmed by the learned single Judge. No glaring circumstances have been pointed out to us which will warrant second appreciation of evidence. This ground also, therefore, fails.

11. In view of the fact that the question of divorce being irrelevant in the present proceedings, the contentions regarding legality or otherwise of the divorce need not be decided.

12. The horoscope of the daughter of the appellant is wholly irrelevant for the purposes of determining whether the Will was properly executed or not and for granting Probate of such Will. In our opinion, Courts are justified in completely ignoring irrelevant evidence and non-mention of such evidence which is irrelevant in itself is no error of law. The question of Indian Majority Act, not being applicable to a marriage is again supremely insignificant for the controversy on the issue. The learned District Judge was deciding a petition u/s 276 of the Indian Succession Act and was considering as to whether probate of the Will of Sohanlal should be granted or not. When the question of marriage and divorce, in such circumstances, being wholly irrelevant, was rightly ignored by the learned single Judge.

13. Even if it is assumed for the sake of this appeal that there was no divorce, nothing prohibited Sohanlal from making a Will of his properties even during subsistence of his marriage. His right to disinherit his wife, cannot be disputed. There is, therefore, no question of deprivation of right of succession.

14. It was then contended by the learned counsel that the Will has not been proved as required by Section 63 of the Indian Succession Act. Section 63 prescribes the manner in which an unprivileged Will is to be executed and it is the duty of the District Judge deciding the petition for Probate u/s 276 of the Succession Act to examine whether the document of which Probate is sought is a Will duly executed as required by Section 63. This aspect was rightly, exhaustively and properly considered by the learned District Judge. It was re-examined by the learned single Judge and it has been found as a fact that the document was duly signed by the testator Sohanlal. His signature was so placed that it appeared that it was intended thereby to give effect to the writing as a Will. The Will was duly attested by two witnesses. One of them has deposed that the Will was signed by Sohanlal and he has put his signature in presence of Sohanlal. Thus, all the requirements of Section 63 of the Indian Succession Act have been fulfilled. The finding given to that effect by the learned District Judge needs no interference.

15. Then the learned counsel submitted that the Gratuity and Pension are not property as contemplated by Section 6 of the Transfer of Property Act. In his submission, pension payable to a Government Servant is not a property which can be transferred and Gratuity is a mere possibility of or chance of receiving the same. This submission is ill-founded. Payment of Gratuity is made under the provisions of the Payment of Gratuity Act and Gratuity is payable according to

those provisions as a preliminary benefit. Gratuity can be a mere possibility of getting legacy only when the man seeks to transfer it prior to his becoming eligible thereto under the provisions of the Payment of Gratuity Act. In the present case, Sohanlal served the Rajasthan Electricity Board for several years and has superannuated before his death. The Gratuity payable to him was, therefore, certainly a property within the meaning of Section 6. It must, further be noted that what is denied by Section 6 of the Transfer of Property Act is property which can be transferred and property described in Clauses (a) to (i) are not considered to be property but only rights.

Those are made non-transferable by the provisions of Section 6. Even if the contention is accepted, which we do not accept, that Gratuity is not transferable, the transfer will become void. If that is so, the bequest cannot become void for that reason. Even if one of the bequest becomes void by operation of law, it cannot be a ground for refusal of Probate u/s 276 of the Indian Succession Act and, hence, it becomes irrelevant whether the property sought to be bequeathed under the Will is not transferable. A property can be untransferable under the provisions of any given law but that cannot render grant of Probate of a Will which seeks to bequeath such property bad. There is, therefore, no substance in this contention raised for the first time in this appeal and the same is rejected.

16. The submission that Pension is not transferable is also unsustainable in law. What is provided by Section 6, Clause (g) is that stipends allowed to Military, Naval, Airforce and Civil Pensioners of the Government and Political Pensioners cannot be transferred. What is made non-transferable is, therefore, stipend paid to Civil Pensioners and not the Pension of that Civil Pensioner. On the face of it, the submission is unacceptable. It is, therefore, rejected.

17. It cannot be said that Gratuity is a possibility. This submission is unfounded in the present case as the testator Sohanlal was neither dismissed from service nor has resigned from the service. He has factually superannuated prior to his death. This contention also is, therefore, rejected as baseless. Rest of the contentions raised by way of amendment are a mere repetition of the claim that the learned District Judge erred in holding divorce approved. In the view that we have taken that factum of divorce is irrelevant for the purposes of Probate, no further specific observation of this contention, in our opinion, is necessary.

18. The entire appeal is, thus, devoid of any substance and is, therefore, dismissed, with costs.