

(1979) 12 BOM CK 0008

In the Bombay High Court

Case No : T. and I.J. Petition No. 208 of 1976 and Suit No's. 35, 36, 37 and 38 of 1978

Tribhovandas M. Rugani

APPELLANT

Vs

Vimal Vasant Rao Dhurandhar

RESPONDENT

Date of Decision : 10-12-1979

Acts Referred:

Evidence Act, 1872 — Section 41, 44
Succession Act, 1925 — Section 263, 295

Citation : (1980) 82 BOMLR 404

Hon'ble Judges : Aggarwal, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Aggarwal, J.—The principal question which falls for consideration in these four testamentary suits is whether the judgment pronounced in an earlier testamentary suit in respect of the same will and estate of the deceased is a judgment in rem and u/s 41 of the Evidence Act is conclusive of the question decided and that the defendants herein are concluded by that judgment and cannot reopen the same question. The proposition is simple but has come under fire in view of the judgment of this Court in Maneklal V. Shah v. Jagdish C. Shah (1969) 72 BomLR 719 and on other points.

2. The background of the disposed suit and the present four suits coming up for hearing before me can be briefly summarised as follows: -

3. The deceased, Anandrao Nilaji Mhatre, died on January 28, 1975 at his house at Kandivali, Bombay. The deceased left him surviving his widow, four sons, five daughters and the children of two pre-deceased daughters.

4. The deceased had made a will dated January 8, 1973. On the next day he had the will registered with the Sub-Registrar of Bandra, Bombay. After the death of the deceased on January 28, 1975, his four sons went to the office of the Sub-

Registrar at Bandra on April 7, 1975 and took charge of the envelope treasuring the Will of their father. They did not succumb to the temptation to open the precious envelope immediately to see how their father had distributed his fortunes and wealth among them and others. On April 13, 1975, the envelopes containing the will was opened in the presence of the possible beneficiaries and the will was read out to those assembled by one Vasant Rao Rane, brother-in-law of one of the sons of the deceased.

5. Thereafter, Tribhovandas Maoji Rugani, a resident of Kandivali, Bombay, who was appointed as the sole Executor to administer the estate and to assign to each of the legatees their prescribed shares, filed Petition No. 208 of 1976 on February 9, 1976 for grant of probate of the last will and testament dated January 8, 1973 of the said deceased.

6. Out of the 16 heirs, 13 heirs had given their consent to the grant of probate. Out of the remaining three, one son Krishnarao Anant Rao Mhatre entered a caveat and thus the petition was converted into a suit, being suit No. 18 of 1977. The remaining two daughters of the deceased named Umabai Shankar Kelavkar and Vimal Vasant Rao Dhurandhar, neither gave their consent nor entered their caveats but became witnesses on behalf of Krishnarao in the said Suit No. 18 of 1977.

7. The said Suit No. 18 of 1977 was set down for trial before Mr. Justice Lentin on April 24, 1978. Three issues (1) whether the deceased was in a sound and disposing state of mind, (2) whether the will was duly executed and attested and (3) whether the signature of the deceased was obtained by fraud, coercion and undue influence were framed.

8. On behalf of the petitioner-plaintiff Tribhovandas Maoji Rugani, two witnesses were examined. The defendant-aviator Krishnarao gave evidence in support of his objections and also examined his sisters Umabai and Vimal, and a son of his sister Smt. Chitra Ganesh Vaidya, and Dr. Bhandari and Dr. De-vasthali.

9. The recording of the evidence ended in the first week of May 1978. The arguments were heard in the months of October and November and on November 9, 1978, the impugned will was agreed to be forwarded to the examiner of questioned documents to make a report within four weeks and the parties agreed to abide by the report as being final and binding upon them and the matter was adjourned to December 15, 1978,

10. In the meantime, on November 27, 1978, four caveats were filed by the deceased's four daughters, viz., Vimal Vasant Rao Dhurandhar and Umabai Shankar Kelavkar who were examined as witnesses in the said Suit No. 18 of 1977 and Chitra Ganesh Vaidya and Pramila Vasant Rao Rane, who had earlier given their consent to the grant of probate.

11. On December 15, 1978 when the said suit appeared on board, the report of the State examiner of documents, C.I.D., Maharashtra State, Bombay, was

opened in the Court in the presence of the learned advocates of the parties. Thereafter, by consent, the said report was taken on record.

12. During the course of the hearing before me, Mr. M.V. Jayakar made a statement across the bar to the effect that Mr. R.M. Jayakar had appeared before Mr. Justice Lentin on December 15, 1978 and stated that there were other suits and thereupon, Mr. Justice Lentin asked from the Associate if other suits were on board. Mr. Justice Lentin was informed that other suits were not on board. This is the total statement reproduced before me by Mr. M.V. Jayakar. The minutes of the hearing do not show the appearance of Mr. R.M. Jayakar nor his statement. However, there is no reason not to accept what Mr. M.V. Jayakar has stated before me. I will, therefore, proceed on the basis that such a statement was made. Moreover, according to Mr. M.V. Jayakar, this fact was also pointed out to Mr. Justice Bharucha when these four suits had come up for hearing before him and the learned advocate appearing on behalf of the plaintiff before Mr. Justice Bharucha had confirmed the same.

13. The judgment in the said Suit No. 18 of 1977 was pronounced on January 12, 1979. The order runs as follows: -

In the result, the petition is allowed. Probate to issue as prayed. Costs of the petitioner to come out of the estate. Defendant to bear his own costs.

14. Against this judgment and decree, the defendant Krishnarao has preferred an appeal and the same is pending.

15. Subject to the outcome of the appeal, what is the effect of the said judgment? Does it bind only the parties to that suit or it binds others as well? "Judgment" means the statement given by the Judge of the grounds of a decree or order. "Order" means the formal expression of any decision of a Civil Court which is not a decree. The distinction between a judgment in personam and a judgment in rem must be borne in mind to appreciate the controversy.

16. We get in Halsbury's Laws of England, Vol. 15, 3rd Edition, p. 181, a statement about a judgment in personam:

Judgments in personam or inter partes are those which determine the rights of parties inter se to or in the subject matter in dispute, whether it be corporeal property of any kind whatever or a liquidated or unliquidated demand, but do not affect the status of either persons or things, or make any disposition of property or declare or determine any interest in it except as between the parties litigant. They include all judgments which are not judgments in rem.

17. At p. 178, 179 of the said volume, he has a statement about a judgment in rem:

A judgment in rem may be defined as the judgment of a court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing (as distinct from the particular interest in it of a party to

the litigation). Apart from the application of the term to persons, it must affect the res in the way of condemnation, forfeiture, declaration of status or title, or order for sale or transfer.

18. The distinction between a judgment in rem and a judgment in personam lies in that in the former the point adjudicated upon, which is always as to the status of the res, is conclusive against all the world as to that status and in the latter the point is only conclusive between the parties.

19. Section 41 of the Evidence Act deals with judgments which are conclusive not only against the parties to them but against all, i.e., judgment in rem.

20. Section 41 is in two parts. It reads as follows: -

41. Relevancy of certain judgments in probate, etc., jurisdiction.- A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such things, is relevant.

Such judgment, order or decree is conclusive proof-

that any legal character, which it confers, accrued at the time when such judgment, order or decree came into operation;

that any legal character to which it declares any such person to be entitled, accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person;

that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease;

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.

21. The second part of the said Section 41 makes judgments, orders or decrees of Probate, Matrimonial, Admiralty and Insolvency Courts "conclusive proof" of several matters distinctly declared therein. Such a judgment or order or decree cannot be impeached unless there exist some infirmities like that the judgment was not a final judgment but an interlocutory. The opening words of Section 41 show that the judgment, order or decree must be the last, ultimate and conclusive pronouncement of the Court. Secondly, as Section 41 itself indicates, the Court must be competent Court. Section 44 of the Evidence Act makes this position clear by making an express provision about the Court being competent court. Thirdly, that the judgment was obtained by fraud or collusion as expressly

laid down in Section 44 of the Evidence Act. Another reason could be where the judgment was not given on merits. I might make it clear that I am not laying down all the circumstances in which a final judgment or order or decree of a Probate Court could be impeached.

22. With this material on what a judgment in rem means and that such a judgment is "conclusive proof" of the fact of the status of a person or thing and that the Court shall not allow evidence to be given for the purpose of disproving that fact which is declared by Section 41 of the Evidence Act to be conclusive of another unless it is open to impeachment on some of the grounds mentioned above, we can examine the rival contentions.

23. On behalf of the plaintiff who was appointed as the sole executor by the deceased, it was submitted by Mr. Sanghavi that the judgment dated January 12, 1979, passed in Testamentary suit No. 18 of 1977 allowing the petition and ordering issue of Probate is binding on the defendants in the four suits and that the said judgment being a judgment in rem it binds the whole world. In support of this proposition, Mr. Sanghavi cited (i) *Mt. Phekni v. Mi. Manki* AIR [1930] Pat 618 , (ii) *Surinder Kumar and Others Vs. Gian Chand and Others*, and (iii) *Maneklal V. Shah v. Jugdish C. Shah* (supra).

24. In my opinion, these cases establish the following principles which are material for the purpose of our case. It will be seen that the principle is one but presented in different flavours.

(1) The judgment of the Probate Court must be presumed to have been obtained in accordance with the procedure prescribed by law and it is a judgment in rem. The objection that the respondents were not parties to it is thus unsustainable because of the nature of the judgment itself. [See *Surinder Kumar v. Gianchand* (supra).]

(2) A judgment given in probate proceedings will be considered to be a judgment in rem and will bind not only the parties to the proceedings so far as the genuineness or otherwise of the Will is concerned but will also bind other persons. [*Mt. Phekni v. Mt. Manki* (supra).]

(3) The action of a probate Court when it admits a will to probate or rejects it is in the nature of a proceeding in rem and so long as the order remains in force it is conclusive as to the due execution and the validity of the will not only upon all the parties who may be before the court but also upon all other persons whatever in all proceedings arising out of the will or claim under or connected therewith, [*Mt. Phekni v. Mt. Manki* (supra) refers to *Saroda Kanta Das v. Gobind Mohan Das* (1910) 6 IC 912.

(4) When a will has been propounded by a party interested and fairly rejected on the merits, it would defeat the policy of the law and be productive of many mischiefs if it could be propounded by the same party or by others who might be interested and the contest thus renewed from time to time. The judgment or

order rejecting the will is an order against all claiming under it and it stands its footing analogous to judgment in rem. [Mt. Phekni v. Mt. Manki (supra) refers to Ramani Debt v. Kumud Bandhu Mukerji (1910) 7 IC 123.

(5) The decision in an earlier testamentary suit being a judgment in rem the filing of a caveat after the said judgment will for all practical purposes be futile. [Maneklal V. Shah v. Jagdish C. Shah (supra)].

25. Applying the above crystal propositions to the facts of our case, there is no manner of doubt that the judgment of Mr. Justice Lentin in Testamentary Suit No. 18 of 1977 is a judgment in rem and so long it is not reversed by the Appeal Court where it now rests, it remains conclusive. The validity of the will not only binds the caveat or-defendant to that suit but to all other persons.

26. The first point that was raised by Mr. Nain, learned Counsel appearing for the defendants in all the suits, was that at the stage of the judgment in Suit No. 18 of 1977, the plaintiff knew that the present four suits were pending and, therefore, it was the duty of the plaintiff to apply to Court for the consolidation of all the suits. Counsel strongly emphasised about the consolidation of the suits in light of the opinions expressed by this Court in Maneklal V, Shah v. Jagdish C. Shah (supra).

27. Now, in Maneklal's case, the view expressed is that in a case in which several caveats are filed all the caveators cannot become defendants to one suit and that the proceeding in respect of each caveat takes the form of a separate suit. Once an affidavit in support of the caveat is filed, a notice must be issued by the Court requiring the petitioner for probate or letters of administration to take out a writ of summons and once a writ of summons is taken out by the petitioner pursuant to that notice, the proceedings must automatically be numbered as a suit as laid down by Rule 710 and take the form of a suit as laid down by Section 295 of Succession Act. The combined effect of Section 295 of the said Act and Rule 710 is that once and the machinery is set in motion by the filing of a affidavit in support of the caveat, the issue of a notice and the service of a writ of summons, the proceedings initiated by the filing of a caveat must in each case automatically "take the form of a suit" and "be numbered accordingly.

28. The learned Judge seems to have taken the view that each suit is an independent suit and will have to be disposed of accordingly, though certain points might be concluded by a decision in the suit of earlier caveator. The learned Judge while having regard to the fact that the judgment of the probate Court in the testamentary suit of the first caveator would be a judgment in rem u/s 41 of the Evidence Act, yet according to him it would be desirable and fair that the hearing of all the testamentary suits in respect of the same estate should be consolidated on the application of the petitioners for probate or letters of administration, or even suo motu by the Court. The learned Judge says:

In my opinion, such an order for consolidation should ordinarily be made in proceedings for a testamentary grant, Unless that is done, the individual

proceedings in the form of suits in respect of the several caveats cannot be got rid of merely by the process of joining those caveators as party-defendants to the suit of the first caveator.

Thus, the decision in Maneklal's case emphasises the desirability of consolidation of all testamentary suits, so that the earlier testamentary suit in point of time is not heard and decided without hearing the caveators whose testamentary suits are pending. Another reason seems to be that the judgment in the earlier testamentary suit will be a judgment in rem and unless the suits are consolidated the purpose of the other testamentary suits, for all practical purposes, would be rendered meaningless.

29. The importance of consolidation of testamentary suits lies in the fact that the order for grant of a probate operates in law as a judgment in rem and binds the other parties whose suits are not heard and disposed of along with the first suit. The contest between one caveat or-defendant and the petitioner-plaintiff terminates, once for all, all contests in respect of the same will of the deceased. The other caveators, who may follow, cannot reopen the same question on the strength of their own suits. How the consolidation of the present four suits could have been achieved along with the first suit No. 18 of 1977? When Suit No. 18 of 1977 reached hearing on April 24, 1978, the present suits were not pending nor on May 5, 1978, when the recording of evidence was over. Even on the date of the conclusion of the arguments on October 19, 1978, these defendants had not filed their caveats and, therefore, there was no question of the suits being on the file of the probate Court. On November 9, 1978, the suit was on board for directions to forward the impugned will to the examiner of questioned documents for his report on various points and the matter was to be placed on board for further directions. All the caveats were filed on November 27, 1978 and, thereafter, they were numbered as suits.

30. On December 15, 1978, the report of the State examiner of questioned documents was received and by consent of the parties it was exhibited. Even on that date, what was stated by Mr. R.M. Jayakar before Mr. Justice Lentin was that there were some other suits. He did not make any application on behalf of the defendants that their suits should be heard before judgment is delivered. One fails to understand as to why Mr. Jayakar should have appeared when the present four suits were not on board nor he was instructed to make any application. It seems that these defendants had deliberately delayed the filing of their caveats and on guessing which way the wind is likely to blow in Suit No. 18 of 1977, they sought to enter the arena of contest or opposition at a very late stage. They have to thank themselves for treading on this disingenuous path. Therefore, on the facts of the present case, there was no question of consolidation of the present suits along with Suit No. 18 of 1977.

31. Mr. Nain's argument was that it was the duty of the Plaintiff to apply to the Court on December 15, 1978 for the consolidation of the suits or it was the function of the Court to do so suo motu as laid down in Maneklal's case. My

reading of the judgment in Maneklal's case is that the learned Judge preferred the consolidation of testamentary suits to making all the caveators party-defendants in one suit and in this connection, he expressed his opinion as to who should initiate consolidation of the suits. The stage contemplated in that judgment was at the stage of commencement of the trial of one suit. Of course, that would be an ideal stage but cases may arise in which that stage might have been over. At what subsequent stage, after commencement of the hearing of a suit, could there be consolidation of suits would depend from case to case. No hard and fast rule can be laid down when the facts and circumstances of a case could vary the approach.

32. A caveator who decides to file a caveat after the commencement of the trial of one suit will have to explain and satisfy the Court about the delay, if any, in filing the caveat. Normally notice of the application for probate is given to all the heirs and next of-kin of the deceased mentioned in the petition for Probate, except to those whose consent has been filed in the proceedings. In this regard, the bona fides of a caveator is of utmost importance, because the law does not prescribe any limitation of time in which he is required to file a caveat. The Probate Court has to guard against the abuse of process of the Court by caveators who do not choose to oppose the grant immediately after service of the notice.

33. The second submission of Mr. Nain was that to dispose of the present four suits without giving the defendants an opportunity to adduce evidence or without going to trial would be a violation of the principles of natural justice. The submission is attractive but without any merit. I do not see how the rules of natural justice can come in the way of rules of evidence as enacted u/s 41 of the Evidence Act, quoted above. If the rules of natural justice were to dislodge the rules of evidence, natural justice would become unnatural justice. Mr. Nain seems to suggest that the defendants are being deprived of opportunity to be heard and hence their cause will be determined without a hearing to them. No part of the principles of natural justice puts a brake on the effect of a judgment in rem. Natural justice cannot make an in-road in a judgment in rem nor can it strike at the character of "conclusive proof", conferred by Section 41 of the Evidence Act to such a judgment. Natural justice is a cherished and valuable principle, which cannot come to the rescue of litigants who make their moves in a Probate Court like on a chess board. These defendants had timed the filing of their caveats at a stage where they could create confusion or mislead the Court. Two out of four defendants were moving in the shadow of the earlier Suit No. 18 of 1977 and it is reasonable to comment that as witnesses in that suit, they were aware of the progress of that suit and could foresee which way the wind would blow. The other two defendants resiled from their consent and chose to join hands with other two defendants by entering their caveats along with them. All the four defendants have raised identical objections in their respective affidavits and these objections are in no way dissimilar to the points raised and decided in the earlier suit. I think a great deal of responsibility" rests on the Court in applying

principles of natural justice, so that they are not misused to multiply litigations or delay the disposal of matters,

34. The third and last submission of Mr. Nain is based on the reading of Explanations (a) and (b) of Section 263 of the Succession Act, 1925 relating to the revocation or annulment of the grant of probate and Section 44 of the Evidence Act relating to the right of the defendants to show, inter alia, a judgment of a Probate Court being obtained by fraud or collusion. Mr. Nain urged that the proceedings in Suit No. 18 of 1977 suffer from a substantive defect as the report of the hand-writing expert was accepted without cross-examining the expert and thus Explanation (a) of Section 263 referring to "the proceedings to obtain the grant were defective in substance" is attracted. This part of the argument is without substance. There is nothing sinister in this arrangement. It seems the parties, in order to save unnecessary expense of examining their respective experts, decided to appoint an expert in whose independence and impartiality they had faith. In these circumstances, it cannot be held that the non-examination of the expert either by way of examination-in-chief or cross-examination has resulted in the proceedings suffering from the vice of any defect much less of substance. The second part of the submission covers explanation (b) of Section 263 referring to "the grant was obtained fraudulently by making a false suggestion or by concealing from the Court something material to the case". Mr. Nain was unable to satisfy me about any false suggestion or concealment of any material of substance from the Court. All that Mr. Nain indicated was that the parties to Suit No. 18 of 1977 colluded in submitting the signatures of the deceased on the will for the opinion of an agreed expert and also in agreeing to abide by his conclusion. To the same effect, Mr. Nain contended that the defendants can show that the judgment was obtained by collusion as laid down in Section 44 of the Evidence Act. Thus the reasons for the application of explanation (b) of Section 263 of Succession Act and Section 44 of the Evidence Act are one and the same. As indicated above, there was nothing wrong in parties agreeing to accept the opinion of an expert in whom they had faith and confidence. From this circumstance I cannot draw an inference of collusion between the parties. Furthermore, the manner in which Suit No. 18 of 1977 was fought and the nature of the arguments advanced on behalf of the defendant to that suit, it cannot be said with any seriousness that that was a case of alleged collusion. Another important factor which negatives Mr. Nain's suggestion of collusion is the fact that the defendant to Suit No. 18 of 1977 has gone in appeal to challenge the correctness of the judgment and order. I, therefore, do not find any merit in this contention.

35. To sum up, the judgment dated January 12, 1979, allowing the petition for grant of probate and ordering probate to be issued as prayed, operates as a judgment in rem and binds the present defendants in the four suits before me. Since the judgment is binding on each of the four defendants, nothing survives in their suits.

36. As regards costs, Mr. M.V. Jayakar submitted that the defendants should not be made to pay the costs as the suits were not consolidated for no fault of theirs. I do not think that the defendants should be spared from the burden of the costs. Each of the defendants will pay the costs in different sets to the plaintiff.

37. In the result, the suits are dismissed with costs. Caveats discharged.