
(2005) 07 MP CK 0051

In the Madhya Pradesh High Court

Case No : Writ Petition No. 1731 of 2004

Vijendra (Brijendra) Singh Yadav

APPELLANT

Vs

Smt. Raj Kumar i Yadav and Others

RESPONDENT

Date of Decision : 08-07-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 113
Succession Act, 1925 — Section 213, 213(2), 57

Citation : (2005) 3 JLJ 173 : (2005) 3 MPHT 486 : (2006) 1 MPJR 381 : (2005) 4 MPLJ 160

Hon'ble Judges : S.S. Jha, J

Bench : Single Bench

Advocate : R.K. Soni, for the Appellant; Vishal Mishra, for the Respondent

Final Decision : Allowed

Judgement

S.S. Jha, J.

This petition is filed against the order passed by Shri Rajendra Mahajan, Additional District Judge, Gwalior in Civil Suit No. 16-A/03. This order is passed by him and he has signed the order as Special Judge (Atrocities), Gwalior, but he has not mentioned his specific post as Additional District Judge. He has not kept in mind that he is deciding a civil case and not the special case.

By this order preliminary issue No. 6 has been decided wherein it is held that Datar singh Yadav has executed a Will at Bhopal on 28-3-1998 in favour of plaintiff and he has further pleaded that a forged Will has been prepared by defendant Nos. 1 to 3. Objection was raised that said Will can not be examined in the Court unless probate has been obtained. Court while deciding the application has held that only probate Court has right to adjudicate the validity of the Will relying upon the judgment in the case of Chiranjilal Shrilal Goenka (Deceased) through Lrs. Vs. Jasjit Singh and Others, . Contrary view has been taken in two judgments that the validity of Will can only be examined in a probate proceeding. Previous judgments of this Court were not considered by the two Single Bench

judgments and law settled earlier. Dispute was referred to the Larger Bench and which has been decided in the case of Phool Singh and two Ors. v. Smt. Kosa Bai and two Ors. [1999(1) MPJR 352]. Division Bench has referred to various judgments of this Court and other High Courts and has held that in case of two contesting or rival "Wills" which are not covered by Section 57(a) and (b) of the Indian Succession Act, obtaining of probate is not compulsory and jurisdiction of the Civil Court would not be barred. Division Bench has considered the applicability of Will made by a Hindu, Buddhist, Sikh or Jain, who is residing outside the territories mentioned in Section 57(a) of the Indian Succession Act is not covered by the said Act. In other words it is not mandatory to get probate of Will by Hindu, who is not residing within the territories mentioned in Section 57(a) of the Indian Succession Act.

Earlier view of this Court was considered by this Court in Lachman Singh v. Smt. Brishbhan Dulari (1966 MPLJ SN 8), Marwad Saw Mills v. Nemichand (1984 MPLJ SN 6), Chandmal v. Devisingh (1982 MPWN 297), Shobha Kshrisagar v. Janki Kshirsagar and Anr. (1988 MPLJ 28) and Ruprao Ranoji v. Ramrao Bhagwantrao (AIR 1952 Nag 88) and Ahemad s/o Abdul Latif and Anr. v. Ghisia Hira Teli and Anr. (AIR 1945Nag 237) and Madangopal and Anr. v. Smt. Ramjiwanibai and Ors. [1987 CCLJ (MP) 28], wherein it is held that in a case of a Hindu executing a Will in Madhya Pradesh regarding the property situated within the territories of Madhya Pradesh, probate of a "Will" need not compulsorily be obtained, in view of Section 213(2) of the Act. Contrary view has been taken in the case of Ram Datta v. Krishna Datta (1987 JIJ 198) and in the case of Ramshankar v. Balakdas (AIR 1992 MP 224) . It is held that Ramshankar's case (supra) and Ram Dulta (supra) does not lay down correct law. u/s 213(2) probate of Will is applicable of those who are residing within the territories mentioned in Section 57(a) of the Indian Succession Act. Punjab High Court in the cases of Ram Chand Ganesh Dass Vs. Sardara Singh and Another, , Dr. Mrs. Joginder Kaur Malik and Another Vs. Malik Anup Singh, , Behari Lal Ram Charan Vs. Karam Chand Sahni and Others, , Allahabad High Court in the cases of Bhaiya Ji Vs. Jageshwar Dayal Bajpai, , Administrator General, Uttar Pradesh, Allahabad Vs. Late Dharamvir alias Mohd. Haroon, and Rajasthan High Court in the case of Mst. Jadav Vs. Ram Swarup and Another, has taken a view that probate is not necessary in the light of plain and simple language of Section 57 and Section 213 of the Act. Contrary view taken in the case of Ram Dulla (supra) and Ramshankar (supra) does not lay down the correct law. Division Bench of Madras High Court in the case of Namberumal Chelti v. Veemperumal Filial and Ors. (AIR 1930 Mad 956) has held that probate need not be taken where disposition does not relate to immovable property in Madras and it is not necessary to take probate of the Will as the disposition did not relate to immovable property in Madras.

Judgment of Division Bench was referred before the learned Additional District Judge. He held that only probate Court has jurisdiction to decide the question of Will relying upon the judgment in the case of Chiranjilal. Shrilal Goenka (supra). Chiranjilal Shrilal Goenka died at Bombay and an application for probate of his

Will was filed in the Bombay High Court. While probate proceedings were pending the same dispute relating to properties came before the Delhi High Court and with the consent of the parties Delhi High Court appointed arbitrator to decide the dispute. In this case Apex Court held that even with the consent powers can not be conferred upon the arbitrator to decide the Will. It is held in Para 17 that in this country, jurisdiction can be exercised only when provided for either in the Constitution or in the laws made by the legislature. Jurisdiction is thus the authority or power of the Court to deal with a matter and make an order carrying binding force in the facts. Thus, since the probate proceedings were pending and said Chiranjilal died in Bombay, the rival Will could only be examined by the probate Court and not by the Civil Court.

Learned Additional District Judge while disagreeing with the Division Bench judgment has completely overlooked the law laid down by the Division Bench and without considering the facts of the case has held that Division Bench has overlooked the decision in the case of Chiranjilal (supra). Law laid down by the Apex Court is on the different aspect and the question was whether arbitrator has right to determine the question of Will. This case again came before the Apex Court in the case of Chiranjilal Shrilal Goenka (dead) v. Jasjil Singh [(2001) 1 SCC 486], wherein the question of Will was considered and it was held that in the probate Court execution of "Will" was not objected and the orders were passed. In the circumstances it was held that the arbitrator had no jurisdiction to hold that the Will executed by Chiranjilal is inoperative and award requires to be set aside and was set aside because the caveators/defendants conceded execution and genuineness of the Will executed by deceased Shrilal Goenka before the probate Court.

It is apparent that learned Additional District Judge has not at all cared to go through the provision of Section 57 and Section 213 of the Indian Succession Act. The ratio is laid down by the Division Bench that since the "Will" is not executed within the territories mentioned in Section 57 (a) and (b) of the Act, provision to obtain probate is not mandatory in the light of Section 213 of the Act. Section 213 of the Act is not applicable to cases not covered by clauses (a) and (b) of the Section 57. Section 213 provides that this section shall not apply to the cases of Will and shall only apply in the cases of Will made by Hindu, Buddhist, Sikh or Jain where such "wills" are of classes specified in clauses (a) and (b) of Section 57. Section 213 relates to grant of probate and this section will not be applicable to the "Will" executed by Hindu, Buddhist, Sikh or Jain, who are not residing within the territories mentioned in Section 57 (a) and (b) of the Act. Learned Additional District Judge has not read the provisions and has not considered the ratio laid down by the Division Bench of this Court. It should be kept in mind that the judgment of Division Bench is binding upon the Subordinate Courts. Judicial decorum should be maintained by the Judicial Officers. When ratio of specific question has been decided by the Division Bench of this Court, there was no necessity for him to refer another judgment of Supreme Court in which the question of applicability of Section 213 of Indian

Succession Act to the persons not covered by Section 57 (a) and (b) is not considered. Since this question has not been determined by the Apex Court, he was duty bound to follow the law laid down by this Court.

Even otherwise if he had some doubt about the correctness of judgment he was bound to refer the question u/s 113 of the Code of Civil Procedure, though it was not at all necessary. Without examining the facts of the case, great miscarriage of justice has been done by the Trial Court in referring to the judgment of Apex Court without considering the facts of the case and without reading the Division Bench judgment of this High Court. Judicial discipline demands that if such occasion arise, the Court should refer the question of law to the High Court for its opinion and should not on its own hold that the Single Bench judgment is correct and Division Bench judgment is not correct. From the entire order of the Trial Court it appears that Trial Court has not at all cared to go through the provisions of the Act and judgment of Apex Court and has read some portion of the judgment of Apex Court. Division Bench of this Court has decided about the question that it is not mandatory for Hindu to obtain probate and Civil Court has jurisdiction to decide the validity of Will. The Division Bench judgment of this Court has not been overruled or set aside by the Apex Court. On the contrary, question of said Will which was executed at Bombay was under consideration before the Apex Court. Trial Court was bound to follow Division Bench judgment of this Court. It is apparent that Trial Court has shirked his responsibility of deciding the validity of "Will".

In the result, order passed is set aside and it is held that Civil Court has jurisdiction to decide the rival "Wills". Petition succeeds and is allowed without any order as to cost. Copy of the order be placed before Hon"ble Chief Justice on the administrative side.