



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION

INTERIM APPLICATION (LODGING) NO. 20977 OF 2023

IN

TESTAMENTARY SUIT NO. 5 OF 2005

IN

TESTAMENTARY PETITION NO. 226 OF 2004

Ruby Cyril D'souza & Ors.

...Applicants

IN THE MATTER BETWEEN :

Cecilia Reynold D'souza & Ors.

...Plaintiffs/Petitioners

Versus

Ruby Cyril D'souza & Ors.

...Defendants

- Mr. Raj Patel a/w Mr. Vinayak Phadake, for Plaintiffs/Petitioners.
- Mr. Rajendra Pai, Senior Counsel a/w Mr. Nitin Gangal, Ms. Namita Mestry, Mr. Ashok Kadam, P. Shukla and Ms. Prapti Karkera, for Defendants.

CORAM : MANISH PITALE, J.

DATE : 24th JANUARY, 2024

ORDER:

1. The instant application is filed on behalf of the defendants for adding an additional issue in this suit, which is pending at the stage of final hearing. An interesting question has arisen with regard to jurisdiction of the Testamentary Court considering a prayer for grant of Letters of Administration with Will annexed in the context of sections 67 and 255 of the Indian Succession Act, 1925 (hereinafter referred to as the Succession Act).

2. This proceeding was initially filed as a petition for grant of

Letters of Administration with Will annexed. The original petitioner, being the sole beneficiary of the subject Will dated 16th April, 1994, executed by his father, filed the aforesaid petition. The four sisters of the petitioner, being the daughters of the deceased, filed caveats and opposed the prayer made in the petition, as a consequence of which, the petition stood converted into the instant suit.

3. By an order dated 30th March, 2015, this Court framed six issues for determination, which pertained to various aspects of the validity of the said Will. During the pendency of the proceedings, the petitioner / plaintiff died and his legal representatives i.e. the present plaintiffs were brought on record. Similarly legal representatives of the defendant, who died during the pendency of the suit, were also brought on record.

4. Evidence was recorded and as on today the suit is pending for final hearing before this Court.

5. At this stage, the present application has been filed on behalf of the defendants, praying for framing of an additional issue. The proposed additional issue is stated in paragraph no. 5 of the application, but during the course of arguments, the learned senior counsel appearing for the defendants submitted a draft issue in place of the proposed issue at paragraph no. 5 of the application. With the

consent of the learned counsel appearing for the plaintiffs, the draft issue tendered on behalf of the defendants during the course of arguments has been considered as the proposed additional issue on behalf of the defendants.

6. The proposed additional issue on behalf of the defendants reads as follows :

“Whether Letters of Administration with Will dated 16th April, 1994 annexed thereto can be granted to the Petitioners as the grant pursuant to the bequest made by the said Will is void under the latter part of Section 67 of the Indian Succession Act, 1925 constituting an exception to such grant under Section 255 of the said Act?”

7. The fact on the basis of which the aforesaid issue is proposed on behalf of the defendants, is that the sole beneficiary under the Will is the son of the deceased i.e. the original petitioner and the husband of plaintiff No. 1 herein. The attesting witness to the said Will is the plaintiff No.1 i.e. Daughter-in-Law of the deceased. According to the defendants, the Daughter-in-Law of the deceased having attested the Will would not mean that it is insufficiently attested, but under Section 67 of the Succession Act, the bequest under the said Will in favour of the husband of plaintiff No.1 is rendered void. On this basis, according to the defendants, Section 255 of the Succession Act comes into operation, indicating that

Letters of Administration with Will annexed, in the facts and circumstances of the present case, can be granted only with such an exception that the bequest in favour of the original petitioner itself is rendered void.

8. Mr. Rajendra Pai, learned senior counsel appearing for the defendants submitted that in the face of such facts, the proposed issue ought to be framed in these proceedings, because the aspect of exception to grant of Letters of Administration with Will annexed under Section 255 of the Succession Act deserves to be determined in these very proceedings. It is submitted that the Testamentary Court exercising jurisdiction for grant of Probate or Letters of Administration with Will annexed is the very Court that can go into the said question of applying section 67 of the Succession Act, while considering the question of the Will being void to the extent specified in the said provision. According to the learned senior counsel appearing for the defendants, a conjoint reading of sections 67 and 255 of the Succession Act clearly demonstrates that this Court in the present proceedings has the jurisdiction to consider the proposed additional issue and that therefore, the said issue ought to be framed for determination.

9. In support of the said contention, the learned senior counsel for the defendants relied upon the effect of using semicolon in

a provision, as explained in the commentary on Interpretation of Statutes by Vepa P. Sarathi. He relied upon the said commentary, wherein it is stated that a semicolon does not imply a complete break like the full stop, but only a partial break, which at the same time is a link between the sentences appearing on the subject. It is further stated that the semicolon often implies that what follows at least partially explains and amplifies the sentence that comes before it. The learned senior counsel relied upon the said commentary to emphasize that semicolon is commonly used to link two independent clauses in a sentence that are closely related in thought and that such thoughts or ideas are then given equal position or rank. This interpretation is sought to be applied on behalf of the defendants on Section 67 of the Succession Act.

10. The learned senior counsel then referred to section 255 of the Succession Act, to submit that when an exception is to be made to a Probate or Letters of Administration with Will annexed, such Probate or Letters of Administration with Will annexed has to be granted subject to the exception. According to him, Section 255 of the Succession Act has to be read with Section 67 thereof, to be applied to the facts and circumstances of the present case, giving raise to the proposed additional issue for determination. According to him, it is in these very proceedings, wherein the Court is concerned

with the question of issuance of Letters of Administration with Will annexed, that such an issue has to be decided and determined.

11. In support of the said contention, the learned senior counsel appearing for the defendants relied upon judgment of Court of Appeal delivered on 31st October, 1888, in the case of *Re POOLEY*¹, judgment of Madras High Court in *Hepzibah Annathai Rengachari Vs. R. Ananthalakshmi Rangachari*², judgment of Allahabad High Court in *J.C. Boaz and others Vs. Dr. (Mrs.) Dorothy Ruth Masih Afzal* and another³ and judgment of Kerala High Court in *Lisamma Vs. Saramma*⁴.

12. On the other hand, Mr. Raj Patel, learned counsel appearing for the plaintiffs opposed framing of the proposed additional issue. He submitted that a proper appreciation of the true scope of jurisdiction of a Testamentary Court considering grant of Probate of Will or Letters of Administration with Will annexed, would show that such a Court is concerned only with issues pertaining to the validity of the subject Will. This necessarily involves determination of only the issues pertaining to the capacity of the testator to execute such a Will, proper attestation of such a Will, as to whether the Will is genuine or a forged or fabricated document and whether it was

1 40 Ch.D.1

2 AIR 1975 MADRAS 342

3 1982 All LJ 1461

4 (2017) 2 KLJ 927

executed under undue influence or coercion. It was submitted that the Court in such a proceeding is concerned with only the said issues. He further submitted that in the context of a proceeding for grant of Letters of Administration, under Section 255 of the Succession Act, the Court would be further concerned with the right that the petitioner claims and the amount of assets that are likely to come into the hands of the petitioner. According to the plaintiffs, no other issues can be gone into in such proceedings.

13. It was further submitted on behalf of the plaintiffs that the first part of Section 67 of the Succession Act, is really concerned with the scope of the present proceedings, insofar as it indicates as to the sufficiency of attestation given by a person who receives benefit under the said Will. The second part of the said provision would not come within the exception contemplated under Section 255 of the Succession Act. It is submitted that the exception contemplated under Section 255 of the Succession Act is to be ascertained when the nature of case requires such exception to be made. It was emphasized that such an exception could be determined on the basis of the contents of the Will, wherein only part of the estate may be bequeathed in favour of the person propounding the Will or some part of the Will may be found to be unacceptable while granting Probate or Letters of Administration with Will annexed. It was submitted that

the second part of Section 67 of the Succession Act, regarding the bequest or appointment being void, is beyond the scope of Section 255 of the Succession Act, as also the jurisdiction of this Court while considering the prayer for grant of Letters of Administration with Will annexed. It is submitted that an independent proceeding may have to be instituted for such a declaration.

14. In support of the said proposition, the learned counsel appearing for the plaintiffs relied upon judgment of the Lahore High Court in the case of *Mt. Laso Devi Vs. Mt. Jagtambha Devi*⁵, judgment of the Supreme Court in the case of *Ishwardeo Narain Singh Vs. Kamta Devi and Others*⁶, judgment of this Court in the case of *Ramchandra Ganpatrao Hande alias Handege Vs. Vithalrao Hande and others*⁷, and judgments of the Madras High Court in the case of *In re, T.K. Parthasarathi Naidu*⁸ and *C. R. Ramachandra Gowder & others vs. C.P. Nanjappa*⁹. The learned counsel appearing for the plaintiff also sought to distinguish the judgment in the case of *Hepzibah Annathai Rengachari Vs. R. Ananthalakshmi Rangachari* (*supra*).

15. Reliance was also placed on commentary on the Indian Succession Act by K Kannan (12th Edition) to distinguish between the

5 AIR 1936 Lah 378

6 1953 SCC OnLine SC 34

7 2011(4) Mh.L.J.50

8 AIR 1995 MADRAS 411

9 AIR 1973 MADRAS 179

expressions “nature of the case” and “Law”. On this basis, it was submitted that the proposed additional issue is beyond the scope of jurisdiction of the present proceedings and hence, the same ought not to be framed.

16. Having heard the learned counsel for the rival parties, this Court finds that reference to Sections 67 and 255 of the Succession Act, is necessary to appreciate the rival submissions. The aforesaid provisions read as follows :

“67. Effect of gift to attesting witness. – A Will shall not be deemed to be insufficiently attested by reason of any benefit thereby given either by way of bequest or by way of appointment to any person attesting it, or to his or her wife or husband; but the bequest or appointment shall be void so far as concerns the person so attesting or the wife or husband of such person or any person claiming under either of them.

255. Probate or administration, with Will annexed, subject to exception – Whenever the nature of the case requires that an exception be made, probate of a Will, or letters of administration with the Will annexed, shall be granted subject to such exception.”

17. A perusal of Section 67 of the Succession Act shows that it consists of two parts, the first part specifies that attestation of a will would not be insufficient merely because it is attested by a person or his or her wife or husband who receives a benefit under the Will either

by way of bequest or by way of appointment. The aforesaid first part of Section 67 of the Succession Act pertains to attestation of the Will, which is clearly covered under the scope of jurisdiction of the present proceedings pertaining to the claim of the plaintiffs for grant of Letters of Administration with Will annexed.

18. The second part of Section 67 of the Succession Act declares that the bequest or appointment concerning such a person so attesting the Will, or wife or husband of such a person, is void. This part of Section 67 of the Succession Act has nothing to do with the question of attestation or sufficiency of attestation by a witness to the Will.

19. Section 255 of the Succession Act specifies that a Probate of a Will or Letters of Administration with Will annexed can be granted subject to an exception whenever the nature of the case requires that such an exception be made. The question is, as to whether Section 255 of the Succession Act can be read in conjunction with the Section 67 thereof, to hold that this Court while considering the prayer for grant of Letters of Administration with Will has the jurisdiction to go into the issue sought to be raised on behalf of the defendants. In other words, the question is as to whether the second part of Section 67 of the Succession Act can constitute an exception to the Probate of Will or Letters of Administration with Will annexed,

to indicate that in these very proceedings, as a Testamentary Court, the said issue can be gone into.

20. The commentary on Indian Succession Act by K Kannan (12th Edition) on which the learned counsel for the plaintiffs has placed reliance notes that Section 255 is taken from Coote's Probate Practice (15th Edition). It is stated therein that the words used in Coote's Probate Practice are "whenever the nature of the case and the law requires." But, Section 255 of the Succession Act does not use the words "and the Law". The only words used in Section 255 of the Succession Act are "whenever the nature of the case requires."

21. This Court is of the opinion that the use of the aforesaid words "whenever the nature of the case requires" shows that the exception contemplated under Section 255 of the Succession Act, necessarily pertains to an exception to be found within the contents of the Will, whereby the bequest may be limited or conditional. It would also apply in a situation where part of the Will is not found worthy of Probate and therefore, the exception is relatable to the contents and text of the Will.

22. In this context, when the scope of jurisdiction of the Court considering the question of Probate of Will or grant of Letters of Administration with Will annexed is taken into consideration, it is

found that the jurisdiction is limited to the aspect of valid execution of the Will, as being the last Will and testament of the deceased person, having been duly executed and attested in accordance with law. This includes further questions concerning the state of mind of the deceased at the time of execution of the Will and whether any undue influence or coercion is found in the facts and circumstances of the case. In this context, as far back as in the year 1953, the Supreme Court in the case of **Ishwardeo Narain Singh Vs. Kamta devi and Others** (*supra*) held as follows :

“4. *The dismissal of the application for probate on the ground that the disposition in favour of Thakurji is void for uncertainty can on no principle be supported and indeed the learned counsel appearing for the respondent has not sought to do so. 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. It is surprising how this elementary principle of law was overlooked by both the courts below. However, as the learned counsel appearing for the respondents has not sought to support this ground nothing further need be said on that.*”

23. A Division Bench of this Court in the case of **Ramchandra Ganpatrao Hande alias Handege Vs. Vithalrao Hande and others** (*supra*), reiterated the position of law that the Probate Court is concerned with the question as to whether the Will of the deceased is genuine and whether it was made voluntarily, also indicating that the Probate Court cannot grant interlocutory relief in respect of property which forms part of the estate of the deceased prior to grant of Probate. It was emphasized that such a proceeding is a summary proceeding by its very nature.

24. The Lahore High Court in the case of **Mt. Laso Devi Vs. Mt. Jagtambha Devi** (*supra*) also held that the Probate Court is concerned with proof of due execution of the Will and that the question of validity of the Will with regard to Section 255 of the Succession Act could not be gone into.

25. In the case of **In re, T.K. Parthasarathi Naidu** (*supra*), the Madras High Court had an occasion to consider the provisions of the Succession Act, including Section 255 thereof. It was found that Section 255 of the Succession Act would be applicable and Probate or Letters of Administration with Will annexed could be granted subject to exception when the contents of the Will indicated that there were more than one executors appointed and each executor was appointed

for a particular task. If an executor appointed for a particular task applied for Probate of the Will, the same could be granted in the form of a limited grant, which could be an exception contemplated under Section 255 of the Succession Act. It was held that when the testator's property is given without reservation, the nature of the case requires that the probate be issued without any exception or limitation.

26. The learned counsel for the plaintiff is justified in relying upon the said judgment to contend that use of the words "whenever the nature of the case requires" in Section 255 of the Succession Act are crucial and they indicate that the probate of a Will or Letters of Administration with Will annexed can be granted subject to exception, which can be found on the basis of the intention of the testator, discernible from the contents of the Will.

27. In this regard reliance placed on the judgment of the Madras High Court in the case of **C. R. Ramachandra Gowder & others vs. C.P. Nanjappa** (*supra*) is also justified, wherein it is held that the exception in Section 255 of the Succession Act, while granting Probate or Letters of Administration with Will annexed, would be limited to specific items or a fraction of the estate, as found from the contents of the Will. Otherwise the general rule is to grant Probate or Letters of Administration with Will annexed relating to the entire

properties of the deceased.

28. This Court also finds substance in the contention raised on behalf of the plaintiffs that in the cases on which the defendants have placed reliance, independent proceedings were initiated and the Court considering grant of Probate of Will or Letters of Administration with Will annexed did not decide such issues. As regards use of semicolon in Section 67 of the Succession Act, even if the interpretation indicated in the commentary of Vepa P. Sarathi is to be applied, it cannot be said that the issue arising in the second part of Section 67 of the Succession Act can be decided in these proceedings concerning issuance of Letters of Administration with Will annexed.

29. A perusal of the judgment of the Court of Appeal in the case of **Re POOLEY** (*supra*), shows that the solicitor in that case had brought an independent proceeding in the form of a Bill of Costs against the estate, claiming that he was entitled to charge for all the business done by him in relation to the estate. The solicitor was one of the persons who had attested the Will. Thus, the aforesaid question was not decided by the Court in a proceeding concerning the grant of Probate of Will.

30. Even in the case of **Lisamma Vs. Saramma** (*supra*),

wherein the Kerala High Court considered the effect of Section 67 of the Succession Act, the question arose in a Second Appeal arising from a suit for partition and division of properties filed by the plaintiff. Thus, it was not a question considered and decided by a Testamentary Court considering only the question of Probate of a Will or grant of Letters of Administration with Will annexed.

31. It is only the judgment of the Allahabad High Court, which appears to have considered the effect of Section 67 of the Succession Act in a proceeding arising out of an order passed by a Testamentary Court for grant of Letters of Administration with Will annexed. But, this Court is unable to agree with the said approach, because as per the law laid down by the Supreme Court in the aforesaid judgment in the case of **Ishwardeo Narain Singh Vs. Kamta devi and Others** (*supra*), which has been followed subsequently, the Testamentary Court considering the grant of Probate of Will or Letters of Administration with Will annexed, has the jurisdiction only to decide issues pertaining to the subject Will having been validly executed as the last will and testament of the deceased. Also whether it has been attested in accordance with law and as to whether the testator was of sound and disposing mind, not being unduly influenced, at the time of execution of the Will. Once the aforesaid scope of jurisdiction of the Court in such a proceeding is appreciated, it becomes clear that the

proposed additional issue sought to be framed on behalf of the defendants, is beyond the jurisdiction of this Court in the present proceedings.

32. Hence, the prayer made in the present application cannot be granted and the suit must proceed further for deciding issues already framed as per order dated 30th March, 2015.

33. The Testamentary Petition resulting into the present Suit was filed as far back as in the year 2004 and the suit is now at the stage of final hearing. It must be proceed to final hearing at the earliest.

34. In view of the above, the application is dismissed. Needless to say, since the application is dismissed for the reason that the proposed additional issue is beyond the jurisdiction of this Court in the present proceedings, the defendants would be entitled to raise such an issue in properly instituted proceedings, in accordance with law.

(MANISH PITALE, J.)