

FARAD CONTINUATION SHEET NO.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD.

Office Notes, Office Memoranda of Coram, appearance, Court's orders or directions and Registrar's orders.	Court's or Judge's orders.
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FIRST APPEAL NO.: 247 OF 2013

CYRUS S/O FARDOONJI BHAGAT AND OTHERS
VERSUS
KHUSRAV S/O SAROSH TARAPOREWALLA AND ANOTHER

Advocate for the Appellants: Mr. A. D. Kasliwal.
Advocate for Respondent No.1: Mr. S. V. Natu.

CORAM : T. V. NALAWADE, J.
DATED : 5th JANUARY, 2016.

PER COURT:

1. The appeal is filed against the judgment and order of Civil Application No.56 of 2005 which was pending in the Court of Civil Judge, Senior Division, Jalna. In a proceeding filed under the provisions of Indian Succession Act, 1925 a probate of will is granted in favour of Respondent No.1 Khausrav and Respondent No.2 Bejan is appointed as executor of the will. Both the sides are heard.

2. In the application filed by present Respondents, they have contended that deceased Smt. Alloo Minocher Jalanwalla was a sister of mother of Khusrav. Applicant No.2 Bejan is also a son of other sister of Smt. Alloo. It is contended that Smt. Alloo executed a will in favour of Khusrav in respect of movable and immovable properties and she has appointed Applicant No.2 as executor of the will. After the execution of will, two codicils were annexed to the will by Smt. Alloo. She died on 28th September, 2004. Many properties, movable and immovable, are mentioned in the will and codicils but the dispute is mainly in respect of a residential premises which is a part of a bungalow known as Jalnawala bungalow situated at Civil Club, Bezonji Road, Jalna. The property is situated within the local jurisdiction of Civil Court, Jalna and so the proceeding was filed for aforesaid reliefs in the Court of Civil Judge, Senior Division, Jalna. The notice was published in newspaper and after that present Appellants appeared in the matter and filed objection petition.

3. It is the case of Appellants that they have share in aforesaid residential premises. It is their case that Smt. Alloo

had given a letter to Partnership firm M/s Pastonji Meherwanji firm of which she was a partner that she will not make a will without consulting the partners of the firm. It is contended that due to such letter the will is invalid. It is alternatively contended that the will is either manipulated document or it was not executed out of free consent by deceased Smt. Alloo.

4. It is the case of Appellants that Smt. Alloo got the property by will from Meherwanji but she was not allowed to dispose of the property and so the property will devolve as per Parsi Law of Intestate Succession.

5. It is the case of Appellants that the common ancestor of Appellants and Respondents, namely Meherwanji had executed a will dated 23rd December, 1949 and he had given the properties to his son Minocher and also to his two daughters viz. Homaibai and Banu Contractor. It is contended that 3 Annas share was given to each daughter like Homaibai and Manubai by Meherwanji and in respect of that share Minocher had no right to make any will and so Smt. Alloo got nothing in respect of that share under will executed by Minocher.

6. The Appellants have contended that they are the successors of Homaibai and they have contended that Banubai has bequeathed her share to them.

7. It is the case of present Appellants that the garden portion, the adjacent land and the garage situated behind the building and also the ground floor of the building is the joint property of all partners of M/s Pastonji Maherwanji and so this property could not have been given by Smt. Alloo to present Respondent No.1. They also contended that suits were filed for dissolution of the aforesaid partnership and so the property cannot be administered under the provisions of Indian Succession Act.

8. The aforesaid contentions show that the dispute was mainly in respect of the residential premises which is situated in CTS No.4700 at Jalna and it was a part of Survey No.272. The contentions made in the objection petition show that the appellants are not disputing that Meherwanji had executed a will in the year 1949 in favour of Minocher and two daughters like Homaibai and Banubai. It is also not disputed that Minocher had in turn executed a will in favour of Smt. Alloo, wife of Minocher. The dispute is only in

respect of the will executed by Smt. Alloo in favour of present Respondent No.1 and the dispute is of aforesaid nature.

9. The matter was contested and so some issues were framed by the Court below with regard to the proof of execution and attestation of will. Present Respondents examined many witnesses including the attesting witness for proving the execution and attestation of the will. The will was registered on the next day of the execution though the codicils were not registered. The disputed property is mentioned in the will and under the codicils only the authority to administer the property was changed and present Respondent No.2 was appointed as executor of the will under one codicil. In that regard, it can be said that Appellants have no right to contest the appointment of Respondent No.2 as executor as Respondent No.1, beneficiary has no objection about it.

10. Respondent No.2 examined himself and he gave information regarding movable and immovable properties of Smt. Alloo. The original will was produced and the codicils were also produced.; He had accepted his

appointment as executor. The documents bear his signatures also. His evidence shows that he was having the custody of the other important documents of Smt. Alloo and had actually worked as executor and had made the distribution of movable property of Smt. Alloo.

11. One Shri John. Gutekar, who has signed on codicil dated 31st July, 2001 is examined but this document is in respect of movable property like a car of the deceased. In this codicil there is a mention of the will document dated 7th April, 1998 and so to that extent his evidence is relevant. The codicil is duly proved.

12. One witness Shri Neyosang Taraporwala is examined. He is also a son of sister of Smt. Alloo and is younger brother of Applicant Khusrav. He had a joint account with Smt. Alloo in a bank and so he had information about the transactions made by Smt. Alloo and her signatures. Some slips signed by Smt. Alloo are proved in his evidence and they are of Central Bank of India. His evidence shows that the will was recovered from a locker of this bank and he was present when the locker was opened by the present Respondents. One Shri Anil Gedam, Assistant Branch

Manager of aforesaid Branch is examined and his evidence is consistent with the evidence of witness Neyosang Taraporwala.

13. One witness Peshotan Jalnawala is examined to show that his father Noshirwan had signed on the aforesaid will as attesting witness. He has identified signatures of his father made at the time of execution and at the time of registration of the will. His father is dead and so this witness was examined. The attesting witness Shri Sunil Sute is examined by the present Respondents to prove the execution and attestation of the will. His evidence shows that Smt. Alloo made signature in his presence on the will for execution and even in the office of Sub Registrar when the document was presented for registration.

14. The contentions made in the objection petition do not show that there was a dispute about the fitness of Smt. Alloo. The aforesaid witnesses have given evidence that she was fit. When the will was executed in April, 1998 the codicils were executed in the year 2001. Further, the will was registered on the next day of the execution and so it needs to be presumed that the procedure under the

Registration Act was followed when Smt. Alloo had presented the will for registration.

15. The will is made in favour of a son of sister by the testatrix. The plaintiffs are claiming to be successors of Homaibai, who was a sister of husband of testatrix. It is already observed that the main dispute is in respect of residential premises which includes some open space having huge value. In view of the relationship of Smt. Alloo with present Respondent No.1, there was the reason for Smt. Alloo to execute will in favour of Respondent No.1. In a probate proceeding the jurisdiction of Probate Court is to determine only upon the genuineness and due execution of the will. Thus, title to the property is not decided by the Probate Court. The probate proceeding was decided on 31st March, 2012. Present Appellants filed a suit for declaration, injunction etc. on 18th August, 2012 (Special Civil Suit No.57 of 2012 pending in the Court of Civil Judge, Senior Division, Jalna). In this suit, the dispute with regard to the title is raised and house property CTS No.4700 is included in the said suit. Thus, there is separate suit filed for the reliefs which can be given by the Civil Court in respect

of the grievance about the title of Smt. Alloo. Further, in the said proceeding also present Respondents will have to establish their rights. The purpose behind issuing of probate and letter of administration is mentioned in Section 273 and 293 of Indian Succession Act, 1925. As against the aforesaid evidence, nothing in rebuttal is given by the Appellants in probate proceeding. Thus, on merits, it is not possible to interfere in the decision given by the Probate Court.

16. The learned counsel for the Appellants argued one technical point and he submitted that in view of the provision of Section 286 of the Indian Succession Act, 1925 the Court of Civil Judge, Senior Division could not have decided the probate proceeding as it was contested proceeding. He placed reliance on a case reported as **2014 (4) ALL MR 181 (Smt. Nola Jonathan Ranbhise V/s The Union of India & Ors.)**. This Court has carefully gone through the facts of this reported case and the ratio laid down. The point involved was altogether different. It is laid down that when a proceeding is decided by a Court of Civil Judge,

Senior Division (District Delegate) or District Court the appeal against the said decision will lie to High Court. On the other hand, the learned counsel for the Respondents placed reliance on the case reported as **AIR 1977 Bombay 419 (Mrs. Vera D. Thackersey V/s Bai Manekbai Annasaheb Thackersey)**. In this case the Division Bench of this Court has squarely dealt with the point raised by learned counsel for the Appellants. It is laid down that in views of the provisions of Bombay Civil Court Act, 1869 read with Rules of Bombay High Court Rules, Civil Judge, Senior Division has been invested with all the powers of District Judge to take cognizance of any contested proceeding under Succession Act, 1925. Thus, the Court of Civil Judge, Senior Division has the jurisdiction to decide such contested matter also.

17. Learned counsel for the Appellants placed reliance on some cases reported as **(i) 2001 DGLS (AHC) 15116 (Punjab And Haryana High Court - Yashwant Singh Yadav V/s Sharda Yadav) (ii) 2006 (Supp.) Bom.C.R. 721 - Raghunath Rajaram patil and others V/s harishchandra**

Pandurang Gaikwad and Others) (iii) AIR 1994 SC 853 (S. P. Chengalvaraya Naidu (dead) by L.Rs., V/s Jatannath (dead) by L.Rs. and others), (iv) ILR 1991 KAR 1745 (Karnataka High Court - Mrs. Veronica Mary Alison Das V/s Nil), (v) Appeal (Civil) 2464 of 2008 - Kunvarjeet Singh Khandpur V/s Kirandeep Kaur and others), (vi) AIR 1998 Himachal Pradesh 14 (Atma Ram V/s Smt. Janki and others) (vii) AIR 1995 Madhya Pradesh 131 (Vikas V/s All Concerned) and (viii) 1999 (2) BomCR 395 (Homi F. Commissariat & Another V/s Gowani Developers Pvt. Ltd.).

Some cases are of other High Courts. As there is case of Division Bench of this Court, this Court is placing reliance on the case of this High Court.

18. In view of this position of law, this Court holds that there are no merits in the present proceeding.

19. In the result, the appeal stands dismissed.

20. In view of final disposal of the first appeal itself, Civil Application for stay does not survive and the same also stands disposed of.

21. Learned counsel for the the Appellants requested for extension of interim order. The request is turned down.

(T. V. NALAWADE, J.)

Dt.05/01/2016.
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