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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO. 434 OF 2016 IN
MISC.PETITION (L) NO.1731 OF 2014

Hameed Jaffar Ahmed
Ibrahim Mandeel
vs.
Farhat Mehdi Mandil
and others

...Appellant

...Respondents

Mr.Uday Bobade a/w Ms Aditi Bhat i/b Mr.Yatin R.
Shah for the appellant
Ms J.Sidhwa a/w Mr.Manish P. Rao i/b Bina Rao & Co.
for the respondent Nos.1 to 4.

CORAM : A.S.OKA, &
A.A.SAYED,JJ.
DATE : JULY 27, 2016

P.C.:

1 The submissions of the learned counsel for the parties were heard yesterday. With a view to appreciate the submissions made across the bar, a brief reference to the facts will be necessary.

2 By the impugned order dated 11th March 2016, the learned Single Judge has dismissed the Miscellaneous Petition (L)No.1731 of 2014 filed by the present appellant. The said Miscellaneous Petition was filed by the present appellant for revocation of the probate granted by this Court on 31st March 2004 in respect of the last Will and Testament dated 19th September 2003 executed by one Shri Mehdi Mandil

(for short 'the Testator') who died on 3rd October 2003. The third and fourth respondents herein are the executors appointed under the said Will. The first respondent is the widow of the Testator. The second respondent is the daughter of the Testator. The third and fourth respondents are the executors appointed under the said Will. Probate has been granted to the third and fourth respondents in respect of the said Will. The fifth to fifteenth respondents have supported the appellant in the petition for revocation. By the impugned order, the learned Single Judge rejected the prayer for revocation of the said probate.

3 The learned counsel for the appellant has taken us through the impugned order. The submission of the learned counsel for the appellant is that under the Shia Laws of Inheritance, the appellant and the fifth to fifteenth respondents are the sharers who have a share in the estate of the deceased Testator. His contention is that as the appellant and the fifth to fifteenth respondents had a caveatable interest, citation ought to have been served upon them. The submission is that as the citation was not served, they could not file caveat and could not contest petition for probate. The learned counsel for the appellant relied upon the Principles of Mahomedan Law as laid down by Indian Muslim Personal Law Board. His submission is that under Mahomedan Law, there is an absolute bar for making a bequest of more than one third of the estate of the Testator. His submission is that under the law of

succession, the daughter of the deceased Testator will inherit one half of the estate and a wife is entitled to one eighth of the estate and the rest of the estate will be inherited by the co-sharers. He submitted that the learned Single Judge has gone only by the opinion expressed in the Commentary of "Mulla" on Mahomedan Law 1990 edition. The learned counsel for the appellant relied upon the decision of the learned Single Judge of this Court in the case of Yasin Imambhai Shaikh (deceased by L.R's) vs. Hajarabi and others¹ in support of his submission that the bequest made in excess of one third cannot take effect unless such a bequest is consented to by the heirs after the death of the Testator. The learned counsel for the first to fourth respondents relied upon clauses 87 and 88 of Chapter VIII under the Shia Laws of Inheritance in Mulla's Principles of Mahomedan Law and submitted that the argument regarding the existence of the caveatable interest by the appellant has been rightly rejected by the learned Single Judge.

4 We have carefully considered the submissions. We have perused the impugned order. In paragraphs 5 and 6 of the impugned order, the learned Single Judge has reproduced the submissions canvassed by the learned counsel for the appellant. Paragraphs 5 and 6 read thus:

"5 However, the point that Mr.Bobade for the petitioner canvasses is that under

1 AIR 1986 BOMBAY 357

traditional Shia Laws of Inheritance, the Petitioner and respondent Nos.5 to 15 are all, what he calls "sharers" and have a pre-defined fractional share in Mehdi's estate. If he is right, and they do, they undoubtedly have a caveatable interest, and citations ought to have been served on them; and, consequently, since that was not done, the revocation Petition would have to succeed. If he is not right in his submission, however, the Petitioner and his supporting Respondents cannot be said to have any caveatable interest at all, and the Revocation Petition must fail.

6 It is not in dispute that Mehdi's parents predeceased him, and that he was survived by the 1st Respondent, his widow Farhat, and the 2nd Respondent, his daughter, Mehjabeen. In Mr.Bobade's submission, in Shia Law the shares of siblings are predefined. He bases this submission on a table of sharers in Shia Law to be found in Mulla's Principles of Mahomedan Law (19th Edition, 1990). That table relates to Sn.90 of the commentary."

5 We must note here that what is recorded in paragraphs 5 and 6 clearly show that before the learned Single Judge, the appellant did not rely upon the principles of Mohamedan Law in the compilation published by the All India Muslim

Personal Law Board, and in fact, relied upon Mulla's Principles of Mahomedan Law 19th editions.

6 At this stage, it will be necessary to make a reference to clauses 87 and 88 in Chapter VIII of the Mulla's Principles of Mahomedan Law. The title of the Chapter is "Shia Law of Inheritance". Clauses 87 and 88 read thus:

"87. Division of heirs.- The Shias divide heirs into two groups, namely, (1) heirs by consanguinity, that is, blood relations, and (2) heirs by marriage, that is, husband and wife.

88. Three classes of heirs by consanguinity.- (1) Heirs by consanguinity are divided into three classes, and each class is subdivided into two sections. These classes are respectively composed as follows:-

- I. (i) Parents;
(ii) children and other lineal descendants h.l.s.
- II. (i) Grandparents h.h.s. (true as well as false);
(ii) brothers and sisters and their descendants h.l.s.
- III. i) Paternal, and (ii) maternal, uncles and aunts, of the deceased and of his parents and grandparents h.h.s., and their descendants h.l.s.

(2) Of these three classes of heirs, the first excludes, the second from inheritance, and the second excludes the third. But the heirs of the two sections of each class succeed together, the nearer degree in each section excluding the more remote in that section (Baillie, II 278, k 280, 285].

7 We must note here that the appellant is the real brother of the deceased testator. We must also note that in the petition filed by the appellant, it is claimed that fifth to eleventh respondents are also brothers and sisters of the deceased. In paragraph 8 of the impugned order, the learned Single Judge has observed that as between the main classes, each superior class eliminates and excludes the following class. As pointed out earlier, heirs by consanguinity have been divided into three classes. First class consists of parents, children and other descendants, the second class consists of grandparents, brothers and sisters and their descendants. The learned Single Judge also referred to clause 97 of Shia Law of Inheritance dealing with the rules of succession by observing that if there are no heirs of the first class, the estate (excluded share of the husband or wife) devolves upon the heirs of the second class. The learned Single Judge also noted that in view of clause 89, a spouse is never excluded from succession but that he or she inherits together with the nearest heirs by consanguinity. Thereafter, the learned Judge referred to Clause 90 and came to the conclusion

and in our view rightly, that when there is a lineal descendant, the wife will get one eighth share. The learned Single Judge rightly observed that the table incorporated in Clause 90 is only like a ready reckoner. The learned Judge has rightly recorded a finding that the appellant and the supporting respondents would fall in the class 2 of clause 88. He rightly observed that as the deceased testator was survived by a widow and a daughter, the appellant and the supporting respondents who were falling in class 2 in clause 88 will stand excluded. That is the reason why he came to the conclusion that neither the appellant nor fifth to fifteenth respondents can be said to have caveatable interest and they cannot be said to be heirs or sharers. We must also note that the learned Single Judge also dealt with the arguments advanced on the basis of the clauses 117-118 in Mulla's Book. In fact, said provisions could not have been invoked by the appellant and the fifth to fifteenth respondents without establishing that they were the heirs.

8 The learned Single Judge also noted the argument that though the probate was granted on 30th June 2004, the petition for revocation was filed by the appellant on 14th November 2014. In paragraph 17 of the impugned order, the learned Single Judge has taken a note of objectionable allegations made by the respondents in the Miscellaneous Petition filed by the appellant. He referred to the allegation contained in affidavit of the eighth respondent that the second respondent was an illegitimate

daughter of the Testator and for the reasons recorded in paragraph 18, held that no credence can be given to the statement made in the affidavit especially when alleged illegitimacy was not made a ground of revocation.

9 In our view, the learned Single Judge has rightly held that neither the appellant nor the fifth to fifteenth respondents have a caveatable interest. Therefore, we see no merit in the appeal and the same is dismissed.

(A.A.SAYED,J.)

(A.S.OKA,J.)