

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

FIRST APPEAL NO.932 OF 2001

Smt.Daulat Merwan Irani ... Appellant

Vs.

Shri Himmatlal Kantilal Nihalchand & Ors. ... Respondents

Dr.Milind Sathe with Bhushan Deshmukh I/b A.A. Kocharekar and
Varsha Sawant for the Appellant

Mr.M.L. Palan i/b Mr.D.S. Mhaispurkar for Respondents

CORAM: Mrs.MRIDULA BHATKAR, J.

DATED: JANUARY 16, 2018

P.C. :

1. Admit. By consent of the parties, appeal called out for final hearing.
2. This First Appeal is directed against the judgment and order dated 10.2.1999 passed by the learned District Judge, Thane, in Civil Miscellaneous Application No.218 of 1996. The petition was filed under section 263 of the Indian Succession Act, 1925 for revocation of the probate of will of late Shri Mrs.P.. Rashid Irani which was granted in Special Civil Suit No.42 of 1980 by the learned Civil Judge, Senior Division, Thane. The said petition was

dismissed by the learned Judge mainly on the ground that the learned District Judge has jurisdiction to try and entertain the petitionu/s 265 of the Indian Succession Act r/w section 20A of the Civil Courts Act 1869. Hence, this appeal.

3. The main and the only issue contended by the learned Senior Counsel for the appellant is of jurisdiction and the power of the learned Civil Judge, Senior Division to try and entertain the contentious cases in respect of probate / letters of administration under the Indian Succession Act, 1925. The learned Senior Counsel submitted that the learned District Judge has dismissed the challenge to jurisdiction by accepting that by virtue of section 28A of the Civil Courts Act read with para 305, Chapter XIV of the Civil Manual, the powers of the District Judge to deal with the contentious issues are delegated to Civil Judge, Senior Division. The learned Senior Counsel has submitted that as the matter has come up for hearing, in between i.e. in the year 2014, the Division Bench of this Court in the case of **Nola Jonathan Ranbhise vs. Union of India**¹ declared that the subsections (2) and (3) of section 28A of the Bombay Civil Courts Act, which delegate the powers to the Civil Judge, Senior Division are inconsistent and

¹ 2014(3) Bom.C.R. 641

repugnant to section 299 of the Indian Succession Act and same accordingly stand impliedly repealed. He has submitted that therefore the Civil Judge, Senior Division has no power and jurisdiction to decide the contentious issues in respect of grant of probate or Letters of Administration and therefore, this order of the appellate Court is bad in law and illegal and to be set aside. He further submitted that the matter be remanded to the District Court for a fresh trial.

4. Mr.M.L. Palan, the learned Counsel appearing for the respondent, has submitted that there is no merit in this First Appeal and the contentions raised therein. He submitted that the ratio in the case of **Nola Jonathan Ranbhise (supra)** though is under section 28A, it will not affect on the judgment in the present case. He relied on clause (d) of para 50 of the said judgment. He submitted that the Division Bench of the High Court has executed the judgments and orders passed earlier by the Civil Judge, Senior Division by virtue of delegation of power under section 28A. He submitted that in the First Appeal, the present appellant was respondent No.2 in the probate proceeding which was granted on 30.6.1989 and the appellant filed a Special Leave Petition and it

was dismissed on 28.7.1995 in the Supreme Court. Hence, the grant of probate by the High Court was confirmed. He submitted that the appellants did not raise the issue of jurisdiction under section 28A of the Civil Courts Act earlier in the First Appeal No.271 of 1983 in the probate proceedings. Therefore, now the appellant cannot raise the issue of jurisdiction under section 263 and 264 of the Indian Succession Act and under Rule 305 of the Civil Manual.

5. On this point, he relied on the judgment of the learned Single Judge of the Bombay High Court in the case of **Shreedhar and Baba Keshav Phadke vs. Shivram and Bal Keshav**².

6. In **Shreedhar and Baba Keshav Phadke vs. Shivram and Bal Keshav**³ (supra), a learned Single Judge of this Court had an opportunity to deal with the issue of delegation of powers to the Civil Judge, Senior Division under section 28A(1) of the Civil Courts Act and Rule 305 of the Civil Manual and section 264(2) r/w 265 of the Indian Succession Act, 1925. The challenge to the jurisdiction under section 28A was raised after 16 years for the first time at the stage of final hearing that the Civil Judge, Senior

2 1997 BLR 744. [Vol.99(3)]

3 1997 BLR 744. [Vol.99(3)]

Division had no jurisdiction to try the case when there was no transfer of proceedings by the District Judge as required by law. The learned Judge held that though it is assumed that the Civil Judge, Senior Division has no jurisdiction, it is not a case of inherent lack of jurisdiction. Moreover, the question of jurisdiction must be raised at the earliest point of time preferably before the issues are settled. When the parties have submitted to the jurisdiction of the trial Court without raising objection and produced the witnesses and took a chance on merits then, such objection should not be entertained. It is further held that the defect or irregularity in any proceeding in a suit will not affect the merits of the case or jurisdiction of the Court.

7. Thus, if at all, a party wants to raise a challenge on the point of jurisdiction, then, it is to be raised at the earliest stage. In the present case, the appellants were party in the probate proceedings which was confirmed by the Supreme Court. It was the duty of the appellant to raise this issue earlier and the appellant should not have submitted to the jurisdiction of the Civil Judge Senior division. It is true that u/s 263 of the Indian Succession Act, the provision of application of revocation or

annulment can be made only after the probate is granted. However, the powers u/s 263 cannot be invoked widely for each and every application for revocation and annulment. The relief of revocation or annulment can be granted only if the applicant/petitioner is successful to show and prove a just cause. U/s 263, the instances of a just cause are mentioned in the explanation clause which runs as follows:

“263. Revocation or annulment for just cause. —The grant of probate or letters of administration may be revoked or annulled for just cause. Explanation. —Just cause shall be deemed to exist where—

- a) the proceedings to obtain the grant were defective in substance; or
- b) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case; or
- c) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently; or
- d) the grant has become useless and inoperative through circumstances; or
- e) the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect.

Illustrations

- i) The Court by which the grant was made had no jurisdiction.
- ii) The grant was made without citing parties who ought to

have been cited.

iii) The Will of which probate was obtained was forged or revoked.

iv) A obtained letters of administration to the estate of B, as his widow, but it has since transpired that she was never married to him.

v) A has taken administration to the estate of B as if he had died intestate, but a will has since been discovered.

vi) Since probate was granted, a latter Will has been discovered.

vii) Since probate was granted, a codicil has been discovered which revokes or adds to the appointment of executors under the Will.

viii) The person to whom probate was, or letters of administration were, granted has subsequently become of unsound mind.

8. The present case can only be under clause (a) that the proceedings to obtain the grant were defective in substance. The illustration of clause (a) can be given that the Court by which the grant was made had no jurisdiction. However, such challenge of jurisdiction ought to have been raised at the earlier stage and if at all it is not raised earlier or at an appropriate time, the revocation cannot be justified. If the applicant is not a party to this, it is necessary to verify whether the applicant petitioner has an opportunity at any stage to raise such objection. In the present case, when the applicant was a party to the proceedings, where

the issue of probate was involved, the applicant did not challenge the jurisdiction of the Civil Judge Senior Division, let the matter get tried and thus, took chance before the Civil Judge Senior Division and therefore, I am of the view that now the applicant is estopped from raising the objection to the jurisdiction at this stage. It is to be noted that the first probate petition was filed in 1978. Then, as a contentious issue was raised it was converted into civil Suit on 22.1.1979. The probate was granted on 30.6.1989 and thereafter, the application for revocation was made on 30.9.1996. There are laches and for this reason alone, the First Appeal is not maintainable. Secondly, the learned Senior Counsel has erroneously relied on the ratio in the **Nola Jonathan Ranbhise vs. Union of India (supra)**. He submitted that subsections 2 and 3 of section 28A are declared inconsistent with and repugnant with the provisions of section 299 of the Indian Succession Act i.e., the appeals from orders of the District Judge shall be filed in the High Court. These submissions are totally misleading because the ratio in the **Nola Jonathan Ranbhise vs. Union of India (supra)** is as follows:

“50.

(a) It is hereby declared that sub-sections (2) and (3) of Section 28A of the Bombay Civil Courts Act, 1869 are

inconsistent with and repugnant to the provisions of Section 299 of the Indian Succession Act, 1925 and consequently the same stand impliedly repealed.

Accordingly, every order made by the District Judge under the Indian Succession Act, 1925 or every order made by a Civil Judge invested with the powers of a District Judge or a District Court, as the case may be, under the Indian Succession Act, 1925 in terms of sub-section (1) of Section 28A of the Bombay Civil Courts Act, 1869 shall be subject to appeal to the High Court in accordance with the dss WP 2777.13 provisions of Code of Civil Procedure, 1908, applicable to appeals;”

9. Thus, it is to be noted that section 28A(1) of investing all the powers with the Civil Judge, is not held inconsistent with and repugnant to the provisions of section 299. Only subsections (2) and (3) of section 28A are held void. Para 50(d) is reproduced as under:

“(d) It is clarified that the judgments and orders passed by District Courts as first Appellate Courts and this Court as second Appellate Court in terms of sub-sections (2) and (3) of Section 28A of the Bombay Civil Courts Act, 1869, upto the date of this judgment and order shall be regarded as valid, notwithstanding the reasoning and declaration dss WP 2777.13 contained in this judgment and order by applying the principle akin to de facto doctrine. However, where such judgment and orders have already been challenged on the ground of inconsistency or implied repeal of the provisions contained in Section 28A(2) and (3) of Bombay City Civil Courts Act, 1865, and such proceedings are pending adjudication, then they shall not be governed by the principles of akin to de facto doctrine.”

10. Thus, it is further clarified by the Division Bench that the effect of their order and directions shall be prospective and not applicable to the judgments and orders which have been already passed.

11. In these circumstances of the case, the appeal is dismissed.

(MRIDULA BHATKAR, J.)