

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

**FIRST APPEAL NO.2078 OF 2007
WITH
CIVIL APPLICATION NO.4272 OF 2007**

Smt. Kamal Mahaling Patil
Age 55 years, Occ: Household,
R/o. Jirgyal, Taluka: Jat,
Dist. Sangli
Vs

... Appellant

1 Smt. Indubai Mahaling Patil
Age 60 yrs., Occ: Household
R/o. Ambyal, Taluka: Athani,
Dist. Belgaum

2 Shri Vijay Mahaling Patil
(Deceased) through legal heirs
2.1 Smt. Savitri Vijay Patil
Age 40 yrs., Occ: Household
2.2 Kum. Arati Vijay Patil
Age 15 yrs., Occupation: Education
Both residing at Mole, Taluka: Athani
Dist. Belgaum

3 Sou. Shevanta Ramchandra Sargar
Age 44 yrs., Occupation: Household,
Now R/o. Kavathe Ekand, Near Water Tank,
Nandre Road, Taluka: Tasgaon,
Dist. Sangli.

4 Sou. Jyoti Bhimu Sejul
Age 33 yrs., Occupation: Household,
R/o. Ambyal, Taluka: Athani

Dist: Belgaum (Karnataka)

5 Shri Sanjay Mahaling Patil
Age 33 yrs., Occupation: Service,
R/o. Jirgyal, Taluka: Jat,
District: Sangli

6 Shri Rajendra Mahaling Patil
Age 31 yrs., Occupation: Education,
R/o. Jirgyal, Taluka: Jat,
Dist. Sangli.

7 Sou. Suman Harischandra Narute
Age 29 yrs., Occupation: Household,
R/o. Jaysingpur, Taluka: Shirol,
District: Kolhapur,
Railway Station Road,
B.H.Kulkarni Mala

... Respondents

...

Mr. T.S.Ingale for the Appellant.
Ms. Rati S. Sinhasane I/by Mr. Umesh R. Mankapure for the
Respondent No.1.

CORAM : SANDEEP K. SHINDE J.

DATE : APRIL 26, 2019

JUDGMENT :

Scope of jurisdiction to be exercised by the Probate Court is to be examined in this appeal, and accordingly answer the points raised for consideration .

2 Appellant had filed an application under Section 276 of the Indian Succession Act for probate of will dated 12th March, 2007

of her deceased husband, Mahaling R. Patil in the Court of Civil Judge, Senior Division, Sangli. The learned Judge dismissed the said application, however, counter-claim filed by the opponent, therein for issuing the succession certificate, was granted vide order dated 24th April, 2007. However, as against the order granting succession certificate, the appellant had filed Regular Civil Appeal No.76 of 2009 in the District Court and, therefore, in this appeal challenge is to the order, declining the probate. It may be stated that the Regular Civil Appeal No.76 of 2009 preferred by the appellant was dismissed by the learned Appellate Court, against which Second Appeal No.463 of 2014 was filed. The Second Appeal was heard and dismissed by this Court on 1st February, 2019.

3 Facts giving rise to this First Appeal are thus;

One Mahaling Ramchandra Patil, who died on 5th May, 2001 at Sangli was a primary teacher. He opted for voluntary retirement but his service was pensionable. On 12th March, 2001, he executed a will and bequeathed family pension and other properties to the appellant. That for claiming terminal benefits and family

pension, the Zilla Parishad, Sangli called upon the appellant to produce succession certificate or probate issued by the Court of competent jurisdiction. Appellant, therefore, filed an application under Section 276 of the Indian Succession Act. In the said application counter-claim was made by the respondent no.1, who is also claiming to be a wife of the deceased, Mahaling and prayed for succession certificate. The learned Judge granted succession certificate and dismissed probate application as stated here-in-above.

4 This First Appeal is preferred against the order rejecting the probate application.

5 In view of the order passed by this Court on 22nd November, 2007, the question to be answered in this appeal is; “Whether the Courts below exercised the jurisdiction vested in Probate Court, and/or failed to exercise the jurisdiction and/or exceeded jurisdiction, while deciding the Probate Application No.104 of 2001 filed under Section 276 of the Indian Succession Act.” Mr. Ingale the learned counsel for the appellant would submit that jurisdiction of the Probate Court is limited being confined only to

consider genuineness of the will and the question of title cannot be addressed in the probate proceedings. He would, therefore, submit that construction of the will relating to right, title and interest of any other person is beyond the domain of probate Court.

6 Mr. Ingale has taken me through the impugned judgment and invited my attention to the discussion made in paragraph, fifteen thereof. The learned Judge, as it appears, has gone into the question, whether the deceased could have made a testamentary disposition of the family pension, vis-a-vis the provisions of Section 6(h) of the Transfer of Property Act, 1882. The learned Judge has held that pension being statutory right and not 'Property', as described under the provisions of the Transfer of Property Act, the deceased was not competent to bequeath pensionary benefit to the appellant. That, as such, the learned Judge has held that such bequest being contrary to provisions of the law, it defeats the right of and prevent, lawful person to get or claim such pensionary benefits.

7 Mr. Ingale, the learned counsel for the appellant, in support of his submission has relied upon the judgment of the

Division Bench of this Court in the case of **Ramchandra Ganpatrao Hande v. Vithalrao Hande and Others 2011(4) Mh.L.J.**, wherein it is held that in the proceedings for grant of probate or for grant of Letters of Administration with a will annexed, the Court exercising testamentary jurisdiction is not concerned with title to property. Reliance was placed on the judgment of the Apex Court in the case of **Ishwardeo Narain Singh vs Sm. Kamta Devi And Ors. AIR 1954 SC 280** wherein it is held;

“2..... 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.”

8 In the case at hand, it may be stated that the appellant herein had filed Regular Civil Appeal No.76 of 2009 against the order directing issuance of succession certificate to respondent no.1. In the said Regular Civil Appeal while answering point no.1, the learned Judge has held thus, “

“6 Thereafter Kamal has deposed about the last will executed by Mahaling. That Will dated 12th March, 2001 is at Exhibit 76. To prove the execution of Will,

she has examined the attesting witnesses AW 2 Keshav (Exh.49). This witness very specifically deposed that at the time of Will he was personally present there. In his presence Mahaling has signed the Will and thereafter he has attested it. Thus, appellant has proved the execution of Will Exhibit 76." (emphasis supplied)

The Regular Civil Appeal was, however, dismissed on 16th April, 2014 confirming the order dated 24th April, 2007 relating to directions for issuing the succession certificate in the name of the respondent Smt. Indubai Mahaling Patil.

9 That the findings rendered in Regular Civil Appeal No.76 of 2009 in paragraph no.6 (reproduced herein above) that the appellant herein has proved execution of the will dated 12th March, 2001 has attained the finality, since the respondents herein have not preferred appeal against it.

10 Thus, taking into consideration facts of the case and settled law as regards scope of jurisdiction of the Probate Court, in my view, the learned Judge while deciding the application for probate has exceeded its jurisdiction by enquiring into the issues of title in the probate proceedings. The learned Judge while deciding the application for probate ought not to have made enquiry about

the competency of the deceased to bequeath the pensionary benefits to the appellant and ought to have only enquired into, whether appellant has proved execution of the will and the deceased was in sound state of mind at the time of executing the will.

11 In fact, the learned Judge while answering this issue relating to execution of will has enquired into competency of the testator to bequeath pensionary benefits to his wife and, therefore, clearly exceeded its jurisdiction. The learned Judge in paragraph 15 has held thus:

“15.....The right to a pension is a statutory right. It is not property as described under the provisions of Transfer of Property Act and therefore, by executing a Will Mahaling was not entitled to transfer the right which would have accrued to the legally wedded wife i.e. to Indubai after the death of Mahaling. Such a transfer being against the provisions of law and to prevent the lawful person to get his or her lawful right which is absolutely unknown to the law and therefore, the Will though might have been executed by Mahaling being against the provisions of Pension Rules and Pension Act it is unexecutable. Moreover, Kamal being the second widow or a mistress of Mahaling, she is disqualified to get the family pension under the rules. Therefore, also she is not entitled to receive the probate as prayed.....”

12 Thus, the probate application has been decided without answering, whether will was genuine and its due execution has been

proved by the appellant. However, at the same time, in the proceedings in relation to issuance of succession certificate, the appellant herein examined herself and attesting witness Mr. Keshav and proved the genuineness and due execution of the will and the findings to that effect has been rendered by the learned Judge in Paragraph six (reproduced here-in-above) of the judgment in Regular Civil Appeal No.76 of 2009. Admittedly, this finding has not been challenged by the respondent.

13 That since, the appellant has proved genuineness of the will and its due execution, the Probate Application No.104 of 2001 is required to be allowed and allowed accordingly. Resultantly, the order dated 24th April, 2007 passed in Probate Application No.104 of 2001 by the learned Civil Judge, Senior Division, Sangli is quashed and set aside only to the extent, dismissing the Probate Application.

14 That for the reasons stated here-in-above, First Appeal is allowed. Decree be drawn accordingly.

15 The appeal is disposed of accordingly. Civil application stands disposed of accordingly.

(SANDEEP K. SHINDE, J.)