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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 400 OF 2018

**SHRI. AJIT RAMCHANDRA YADAV
AND ORS**

....APPELLANTS

V/s.

SHRI. DAULAT SHIVAJI YADAV

.....RESPONDENT

**Mr. Kuldeep U. Nikam for the appellants
Mr. Yajuvendra S. Singh for respondent**

CORAM : NITIN W. SAMBRE, J.

DATE: AUGUST 30, 2021.

P.C.:

1] Respondent to the first appeal, initiated proceedings under Section 276 and 278 of the Indian Succession Act, 1925 based on an unregistered Will dated 21/03/2003 allegedly executed by one Maruti Bala Yadav. Said proceedings being Misc. Application No. 194/2005 were allowed vide Judgment dated 24/10/2007 passed by 2nd Jt. Civil Judge Senior Division, Sangli. Appellants herein preferred R.C.A. No. 462/2011 which was disposed of thereby ordering return of Appeal memo for presentation before the Hon'ble High Court. As such, this

Appeal.

2] The submissions of learned counsel for the appellants are, Maruti Yadav died on 11/08/2005. He was survived by three sons, Ramchandra, Mahadeo and Shivaji and daughter Rukmini. Respondents are sons of Shivaji who had successfully applied for issuance of Probate based on an unregistered Will dated 21/03/2003.

3] According to him, while deciding the proceedings for grant of Probate, the Court below is required to issue notice to all the legal heirs of Maruti which in this case is not taken recourse to. Relying on provisions of Order 1 Rule 3 of Code of Civil Procedure, 1908, the submissions of learned counsel for the appellants are, all the legal heirs of deceased Maruti are proper parties to the proceedings. According to him, the claim could have been lawfully adjudicated by adding all the legal heirs, as they are interested parties, when it comes to succeeding to the estate of Maruti. Mr. Nikam would further claim that relationship between the parties is not disputed by respondents. Even if notice of Probate proceedings was published in

the newspaper, same cannot be termed as sufficient compliance in law. The mandate while deciding the proceedings for grant of Probate under Section 276 and 278 of the Indian Succession Act warrants an individual notice to the legal heirs, as LR's have lawful interest in the estate of deceased. Mr. Nikam would draw support from the Judgment of the Apex Court in the matter of **Manibhai Amaidas Patel and Another Vs. Dayabhai Amaidas**¹. Based on the aforesaid Judgment, his contentions are, proceedings in which the Probate is ordered to be issued in favour of respondent, suffered from a gross lacuna. As such, this Court should exercise appellate jurisdiction thereby directing remand or may adjudicate the proceedings for grant of Probate in this appeal.

4] Learned counsel for respondent-original applicant would urge that grant of Probate is based on an unregistered Will dated 21/03/2003 and legality of said Will was never questioned by the appellant in any of the proceedings. Apart from above, but for present appeal, appellant has not taken recourse to other remedies available, particularly the claim for partition of ancestral property. Learned

¹ [(2005) 12 Supreme Court Cases 154]

counsel would also urge that order of grant of Probate is based on adjudication of right of the respondent-original applicant based on Will dated 21/03/2003, testimony of the independent witnesses examined by respondent-original applicant and public notice issued in the newspaper. As such, according to him, adjudication is based on merit of the matter and that being so, appellant having chosen not to appear in the said proceedings, cannot question the same in the present appeal. As such, prayer of dismissal of first appeal is sought.

5] Considered rival submissions.

6] Relationship between parties to the present appeal is not in dispute. Appellant and respondent are successor in interest of deceased Maruti and through their respective fathers i.e. Ramchandra and Shivaji.

7] In regular course, by statutory fiction, parties to the proceedings can claim right to succeed to the estate of the deceased Maruti provided the property, subject matter of Will is a joint family

property. Respondent has claimed to have legal right over the property based on Will dated 21/03/2003 and accordingly applied for grant of Probate.

8] While deciding the proceedings for issuance of Probate, procedure as contemplated under the provisions of C.P.C. is required to be taken recourse to.

In this case what is required to be looked into is, appellant is a necessary or proper party/defendant under Order 1 Rule 3 of the Code of Civil Procedure, 1973 and who can be impleaded as defendant to the Probate proceedings.

9] It can be borne out of the record that respondent has taken recourse to proceedings before Civil Court for grant of Probate and the Court below followed the procedure of issuance of notice through publication in the newspaper. Fact remains that all the legal heirs of deceased Maruti are not impleaded as defendants.

10] If the scheme of Section 263 of the Indian Succession Act is

considered, it is evident that the District Judge is armed with powers for issuance of citations calling upon all the persons interested or are claiming to have interest in the estate of deceased to come and witness the proceedings while adjudicating the claim for Probate. In the aforesaid background, least that can be observed herein is LR's have every right to witness the proceedings. Respondent-claimant while pursuing such Probate proceedings cannot conceal from the legal heirs about the same. If concealment is noticed or it is claimed that nobody has objected, pursuant to public notice, same can be considered as misleading the Court on the merits of the proceedings as the parties like appellant loses the chance to contest the proceedings and object to the very legality of the Will based on which claim for issuance of Probate is lodged.

11] Apex Court had an occasion to deal with similar issue in the above referred Judgment of **Manibhai Amaidas Patel** [cited supra] wherein in para 8 to 10 the Apex Court has held that non impleadment of party who are having interest in the estate of deceased to the proceedings under Hindu Succession Act suffers

from gross lacuna. In that eventuality, order of adjudication cannot be sustained. Para 8 to 10 of the said Judgment reads as under:

“8. The appellants have raised several contentions in support of their appeal before us all of which are not necessary to be noted. We are satisfied that the appeal must be allowed in view of the contention, namely, that both the courts have wrongly failed to notice that Section 263 allowed the appellants to apply for revocation of the grant of Probate. The relevant extract of this section reads as under:

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

Illustrations

(i) -----

(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)-(vii) -----

9. This would clearly show that it is necessary to cite parties who would otherwise have an interest in the succession to the estate of the deceased. That would naturally include all the heirs of the deceased. Besides, Section 263 gives power to the District Judge as regards the issue of citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of Probate. Necessarily therefore the facts on the basis of which the District Judge is required to exercise his discretion must be fairly placed before him. In this case the respondent had done nothing of the sort as we have already noticed.

10. The courts below also overlooked the fact that in their application for revocation the appellants had clearly stated that in other proceedings between the members of the family of Amaidas and the respondent the Will had been successfully disputed. In the circumstances, for the respondent to say that the grant was being opposed by “nobody” was misleading. The grant was obtained by concealing from the court something which was very material to the case. The appellants were entitled to be heard and doubtless the District Judge would have directed to issue of citations to each of Amaidas’s heirs on intestacy under Section 263(1) (c) of the Act had the true facts been revealed by the respondent in his application for grant of Probate. The advertisement in this case was wholly insufficient to patch up the gross lacuna.”

12] In the background of aforesaid discussion, it has to be held that appellants LR’s of deceased Maruti were proper party to the Probate proceedings. Merely because respondent while getting his claim adjudicated for issuance of Probate has issued public notice in the newspaper about initiation of Probate proceedings, by itself will not prompt this court to infer that appellant had sufficient knowledge of

the Probate proceedings particularly when Apex Court in the matter of **Manibhai Amaidas Patel** [cited supra] has already dealt with similar issue.

The fact that respondent-applicant was aware about status of appellant as LR's of deceased Maruti and also about their detail address, will dis-entitle him to raise the above ground as individual notices were neither served nor chance to contest was offered by impleading them as party to the proceedings.

13] In the aforesaid background, Judgment impugned delivered by the Civil Court thereby granting Probate in favour of the respondent is not sustainable. Judgment dated 24/10/2007 passed by 2nd Jt. Civil Judge Senior Division, Sangli in Misc. Application No. 194/2005 is hereby quashed and set aside. Said application stood restored to the file of Court of 2nd Jt. Civil Judge Senior Division, Sangli.

14] Respondent herein is at liberty to carry out appropriate amendment to the said application/Probate proceedings within period of 6 weeks from today thereby impleading all legal heirs and

such other parties as are necessary for deciding said Probate proceedings.

15] Appellants herein undertake to appear in the said proceedings without further notice from a Civil Court.

16] In the aforesaid background, Civil Court shall proceed ahead with Probate proceedings thereby directing notice to unserved respondent-defendants to the said case. As the claim is pending since 2005, same is expedited with a direction to decide the same within period of one year from the date of completion of service of notice of the proceedings to the party respondents to said Probate proceedings.

17] First appeal stands disposed of in the above terms.

[NITIN W. SAMBRE, J.]