



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

FIRST APPEAL NO. 695 OF 2010

APPELLANT : Diwakar S/o. Rajanna Bomkanthiwar,
 Aged about 59 years, Occ.: Service,
 R/o. Ramnagar, Chandrapur, Tah. &
 Dist. Chandrapur.

//VERSUS//

RESPONDENTS : 1. Sau. Seema w/o. Madan Regundwar,
 Aged about 52 years, Occ.:
 Household, R/o. Hospital Ward,
 Chandrapur.

2. Wainganga-Krishna Gramin Bank,
 Chandrapur Branch, Chandrapur,
 through Branch Manager, Old Warora
 Naka, Chandrapur, Tah. & Dist.
 Chandrapur.

Mr. Pushkar Ghare, Advocate h/f. Mr. A.M. Ghare, Advocate for
 the Appellant.

Mr. S.M. Prasad, Advocate for Respondent No.1.

CORAM : G. A. SANAP, J.

DATED : 23rd JANUARY, 2024.

ORAL JUDGMENT

. In this appeal, filed under Section 299 of the Indian
 Succession Act, 1925 (for short, “the Act of 1925”), challenge is to
 the judgment and order dated 29th June, 2010, passed by the
 learned Civil Judge (Senior Division), Chandrapur, whereby the

probate application made by respondent No.1 was allowed and the probate of the Will Deed of testator Rangubai dated 6th October, 2000 was issued in favour of respondent No.1.

02] BACKGROUND FACTS:

In this judgment, the parties shall be referred by their nomenclature in the probate application. The appellant is non-applicant No.1. Respondent No.1 is the applicant and respondent No.2 is the non-applicant No.2. Deceased-Rangubai had two sons and two daughters. It is the case of the applicant that her father Rajanna, during his lifetime, made provision for the future life of his wife Rangubai by keeping the amount of Rs.1,60,000/- in a fixed deposit. It was kept in the joint names of Rangubai and non-applicant No.1. Non-applicant No.1 did not maintain Rangubai. She was driven out of the house by non-applicant No.1 and, therefore, she was constrained to live with the applicant. Rangubai died on 16th January, 2003. It is the case of the applicant that during her lifetime, deceased-Rangubai on 6th October, 2000 executed a Will Deed in favour of the applicant and bequeathed both fixed deposits Rs.80,000/- each to her. The Will Deed was executed in the presence of two attesting witnesses. The Will Deed was notarized by advocate Mr. M.V. Deo. It is stated that after the

death of Rangubai, the applicant, being her beneficiary under the Will Deed, made the application for obtaining the probate of the said Will Deed in her favour. She stated that, as per the Will Deed after the death of Rangubai, she became entitled to the fixed deposits.

03] The non-applicant No.1 contested the application. He has admitted his relationship with the applicant. However, he contended that the applicant was not entitled to get the amount of fixed deposit as per the Will Deed. He contended that his father, during his lifetime, sold the ancestral property, including agricultural land. The sale price of the land was deposited in the name of Rangubai during his lifetime, and after her death, it was given to him. The fixed deposits were kept in their joint names because non-applicant No.1 was not given any share in the ancestral property. The non-applicant No.1 further contended that the applicant took Rangubai to her house as a guest and got the false Will Deed prepared. The Will Deed, according to the non-applicant No.1, was false and fabricated. The deceased-Rangubai had no right to execute the Will Deed in respect of two fixed deposit receipts. The applicant took advantage of her illiteracy and old age.

04] The parties adduced evidence in support of their rival contentions. The applicant examined herself as witness No.1. The applicant examined three more witnesses in support of her contention. The non-applicant No.1 examined himself as a sole witness. The learned Judge, on the basis of the available evidence, accepted the case of the applicant that the Will Deed executed by Rangubai in her favour was legal and valid. Being aggrieved by this judgment and order, the appellant/non-applicant No.1 is before this Court.

05] I have heard Mr. Pushkar Ghare, learned advocate holding for Mr. A.M. Ghare, learned advocate for the appellant/non-applicant No.1 and Mr. S.M. Prasad, learned advocate for respondent No.1/applicant. Perused the record and proceedings.

06] The following point falls for my determination:

Whether the applicant has proved that the Will Deed executed by Rangubai in her favour was legal and valid?

07] The learned advocate for non-applicant No.1 submitted that the deceased-Rangubai had no right to execute the Will Deed in respect of two fixed deposit receipts, inasmuch as the fixed deposit receipts were in the joint names of Rangubai and non-

applicant No.1. The learned advocate submitted that the Will Deed produced before the Court *prima facie* appears to be a fabricated document. The learned advocate pointed out that the original Will Deed was not produced. The learned advocate submitted that the learned judge, without considering the material on record, granted permission to the applicant to produce a photocopy of the Will Deed as secondary evidence. The learned advocate submitted that the order was *ex facie* illegal. The learned advocate submitted that the learned Judge has not properly appreciated the material on record and has come to the wrong conclusion. The learned advocate submitted that the defence of non-applicant No.1 with regard to his equal right in the fixed deposits was not properly considered. The learned advocate submitted that the admissions given by non-applicant No.1 in his cross-examination have been considered out of context.

08] The learned advocate further submitted that the application made for obtaining the probate of the Will Deed was not maintainable in view of the provisions of Section 213 of the Act of 1925. The learned advocate further submitted that the learned Judge had no jurisdiction to entertain the application because there was no notification in terms of sub-section (2) of

Section 264 to empower the learned Judge to entertain the application. In order to seek support to his submission, the learned advocate has placed reliance on the decision in the case of *Prabhakar s/o. Chinappa Chavan Vs. State of Maharashtra [2004(4) Mh.L.J. 886]*.

09] The learned advocate for the respondent No.1/applicant submitted that the applicant has adduced ample evidence to prove the Will Deed. The learned advocate submitted that the Will Deed has been proved by examining the attesting witness and the scribe of the Will Deed. The learned advocate submitted that the applicant, on the basis of cogent evidence, has proved that the fixed deposit receipts were the exclusive property of Rangubai, received by her from her husband without any fetter. The learned advocate submitted that it was her exclusive property and, therefore, she had the right to dispose of the said property. The learned advocate submitted that the movable property was bequeathed by a valid Will Deed in favour of the applicant. The learned advocate submitted that the evidence of the non-applicant No.1 is sufficient to reject his contention that the amount of fixed deposits was with a limited right during her lifetime, and it was not her absolute property. The learned advocate further submitted that the issue of

maintainability as well as jurisdiction was not raised before the Trial Court. The learned advocate submitted that the submissions advanced on the points of maintainability and jurisdiction cannot be entertained. In order to seek support for his contention, the learned advocate has relied upon a decision in the case of ***Balbir Singh Wasu Vs. Lakhbir Singh and Others [(2005) 12 SCC 503]***.

10] It would be appropriate at the outset to consider the law laid down in the case of ***Balbir Singh Wasu*** (supra). In this case, the Hon'ble Apex Court has considered the applicability of Section 213 of the Act of 1925. The Hon'ble Apex Court has held that Section 213 cannot be read as prohibiting the executor from applying for probate as a matter of prudence or convenience to the courts in other parts of the country not covered by Section 213. The relevant observations are in paragraph 5. Paragraph 5 is extracted below:

“5. The appellant’s counsel then contended that Section 213 of the Succession Act which requires an executor to obtain probate before establishing his claim under the Will was not applicable outside the Presidency Towns of Calcutta, Madras and Bombay. Assuming this to be correct, we do not read Section 213 as prohibiting the executor from applying for probate as a matter of prudence or convenience to the courts in other parts of the country not covered by Section 213. Those courts are competent to entertain such applications if made.”

11] It is seen that Section 213 of the Act of 1925, particularly sub-section (1), mandates the executor or legatee to obtain the probate of the Will. Sub-section (2) is an exception to this general rule under sub-section (1) of Section 213. In short, sub-section (2) carves out an exception and provides the cases in which probate is not necessary to establish the right as an executor or legatee. It means that in these exceptional cases, without obtaining probate, the right to the property can be established by the executor or legatee. The decision relied upon by the learned advocate for the non-applicant No.1 in the case of ***Prabhakar s/o. Chinappa Chavan*** (supra) needs consideration in the backdrop of the above settled legal position in the decision of the Hon'ble Apex Court in the case of ***Balbir Singh Wasu*** (supra). The Bombay High Court in the case of ***Prabhakar s/o. Chinappa Chavan*** (supra) has held that the Wills of the nature covered by sub-clause (c) of Section 57 are not covered by the general rule under Section 213, which requires a probate or letter of administration to enable a person to raise a claim to a right as an executor or legatee. The Legislature, by exclusion, has not made the provisions of Section 213 applicable to the Wills covered under the provisions of sub-clause (c) of Section 57. It is not ruled in this case that there is a prohibition for making an application for obtaining probate of the Will, which is not

covered by Section 213 of the Act of 1925. The perusal of this section reveals that the testator or legatee, if so desired, outside the area mentioned in Section 213 can make an application for obtaining probate of the Will. In my view, therefore, there is no substance in the submission advanced by the learned for non-applicant No.1. The probate application was maintainable before the Trial Court.

12] The jurisdiction has been conferred on the District Judge as per the provisions of Section 264 of the Act of 1925 for granting and revoking probates. Section 264 deals with the jurisdiction of the District Judge and the procedure prescribed while exercising the jurisdiction. The learned advocate was unable to point out that the notification, as contemplated under sub-section (2) of Section 264 of the Act of 1925, was not at all issued. It is common knowledge that the proceedings for issuance of succession certificates, letters of administration, and obtaining probate are entertained by the District Judge. There is a provision for delegation of powers. The non-applicant No.1 was, therefore, required to raise a specific ground in his reply and challenge the jurisdiction of the Court. He did not challenge the maintainability of the probate application or the jurisdiction of the Trial Court. In

my view, therefore, on both counts, the submissions advanced by the learned advocate cannot be accepted.

13] The next important question is as to whether the applicant has proved that the deceased, during her lifetime, bequeathed the movable property in her favour by a Will Deed dated 6th August, 2000. It is the case of the applicant that, after the sale of the ancestral property by her father, the amount of Rs.1,60,000/- was given to her mother. It is her case that her mother was illiterate and, at the relevant time, was taken care of by the husband and the non-applicant No.1. The amount was kept in the fixed deposit in the joint names of her mother and non-applicant No.1. It is her contention that the fixed deposit receipts were the absolute property of her mother and, therefore, during her lifetime, she was entitled to bequeath the same as per her wish and desire. The applicant has stated that the non-applicant No.1 did not maintain the deceased during her lifetime. The deceased was driven out of his house by him. She has further stated that the deceased took shelter with her, and she maintained her till her death. It is her contention that, due to love and affection, the fixed deposits were bequeathed to her by her mother by executing the Will Deed. The Will Deed has been proved by examining the

attesting witness as well as the scribe of the Will Deed. PW-3 is the scribe of the Will Deed. He has deposed about the execution and attestation of the Will Deed by the deceased. He has deposed that the deceased was in a good state of health and mind at the time of the execution of the Will Deed. PW-3 has deposed that the Will Deed was signed by the attesting witness in the presence of the notary. PW-4 is the attesting witness to the Will Deed. The execution of the Will Deed by the deceased has been proved on the basis of the evidence of PWs-1, 2, 3 and 4.

14] The submission has been advanced that the original Will Deed was not produced and, therefore, it creates doubt about the genuineness of the Will Deed. It is submitted that the original Will Deed was deliberately suppressed. The learned advocate submitted that if the original Will Deed was produced, then the preparation of the false Will Deed would have been established. It is submitted that the leave granted to lead the secondary evidence by the Trial Court was not in accordance with the law. It is seen that an application was made to produce a photocopy of the Will Deed as secondary evidence. It was contended in the said application that the original Will was lost. It is further seen that, after the loss of the original Will Deed, the report was lodged with the police. The

learned Trial Judge, on being satisfied with the material on record, recorded his finding that the case was made out for leading the secondary evidence, and accordingly, leave was granted to lead the secondary evidence.

15] In order to appreciate the submissions advanced by the learned advocate, I have gone through the record and evidence. In my view, there is no substance in the submission. The evidence and material on record are sufficient to establish that the original Will Deed was lost and, therefore, the Trial Court was right in granting permission to lead the secondary evidence.

16] As far as the right of the non-applicant No.1 is concerned, in my view, the same has been appropriately appreciated and considered by the learned Trial Court. It is the case of the non-applicant No.1 that the deceased-Rangubai was not the absolute owner of the movable property, and as such, the Will Deed was not a legal document. On perusal of the cross-examination of non-applicant No.1, I am satisfied that the answers given by him have caused a severe dent to the case of non-applicant No.1. In his cross-examination, he has given numerous important admissions. He has admitted that the money kept in the fixed deposits was given to the deceased-Rangubai by her husband

during his lifetime. He has also admitted that when his mother died, he was residing at Chandrapur. He has admitted that the deceased died while staying with the applicant. He has admitted that the deceased resided with the applicant before her death for 2–3 years. He has further admitted that when the money was kept in the fixed deposits, the deceased was residing with him, and he had not shown the amount in his income tax returns. He has further categorically admitted that the amount of fixed deposits was given to Rangubai by her husband during his lifetime. In my view, these admissions have sealed the fate of non-applicant No.1. The learned Judge has appreciated the entire material and recorded a finding that the Will Deed was a legal and valid document. On re-appreciation of the material on record, I do not see any reason to disturb the findings of fact recorded by the learned trial Judge. Accordingly, I record my finding on the above point in the affirmative. As a result of this, I conclude that the appeal fails. The appeal is, accordingly, **dismissed**.

17] The learned advocate for the appellant/non-applicant No.1 submits that the amount of Rs.1,60,000/- (Rupees One Lakh Sixty Thousand) has been deposited in this Court. He submits that the stay granted earlier may be continued for six more weeks.

18] The learned advocate for respondent No.1/applicant submits that respondent No.1 is a senior citizen. It is submitted that her claim has been accepted. He, therefore, opposes the prayer.

19] Considering the rights asserted by the parties and the findings of fact, I am of the view that no stay, as prayed for, can be granted. Therefore, the prayer is rejected.

(G. A. SANAP, J.)

Vijay