

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****APPEAL NO.65 OF 2024****IN****INTERIM APPLICATION(L)NO.20977 OF 2023****IN****TESTAMENTARY SUIT NO.5 OF 2005****IN****TESTAMENTARY PETITION NO.226 OF 2004**

Ruby Cyril D'souza
through POA Holder
Viz James Nunes & Ors

..Appellants
(Orig.Defendants)

Versus

Smt.Cecilia Reynold D'souza
the widow of the deceased,
Mazgaon, Mumbai & Ors

..Respondents
(Orig.Plaintiffs)

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WITH**INTERIM APPLICATION NO.971 OF 2024****IN****APPEAL NO.65 OF 2024****IN****INTERIM APPLICATION(L)NO.20977 OF 2023****IN****TESTAMENTARY SUIT NO.5 OF 2005****IN****TESTAMENTARY PETITION NO.226 OF 2004**

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Smt.Cecilia Reynold D'souza
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..Respondents
(Orig.Plaintiffs)

Mr.Nitin Gangal with Prerna Shukla, Prapti Karkera
i/b Namita Mestry, Advocates for the Appellants.

Mr.Raj Patel with Vinayak J. Phadake, Karshil Shah,
Abhishek Khabekar, Martha D'souza, Vishal Tiwari,
Advocates for the Respondents.

**CORAM: B. P. COLABAWALLA &
FIRDOSH P. POONIWALLA, JJ.**

Reserved On: 26th August, 2024.

Pronounced On:16th January, 2025.

JUDGMENT (Per B. P. Colabawalla, J.)

1. The above Appeal challenges the order dated 24th January 2024 passed by a learned Single Judge of this Court in Interim Application (L) No.20977 of 2023 in Testamentary Suit No.5 of 2005 in Testamentary Petition No.226 of 2004. By the impugned order, the learned Single Judge dismissed the Interim Application filed by the Defendants which *inter alia* sought a prayer to frame an additional issue in the above Suit. What the issue was, we will refer to later, as we go along.

2. The facts of this case would reveal that the deceased, John Dominic D'Souza, died on 21st June 1999. The deceased, at the time of his death, was survived by his son Reynold John

D'Souza and four daughters, namely, (i) Ruby Cyril D'Souza, (ii) Edna Nobert Remedius, (iii) Mrs. Alda Alex Fernandes and (iv) Jennifer Alexandra. Under the Will of the deceased, Reynold John D'Souza (the son) was named as a sole beneficiary. Advocate Mr. Dineshchandra G. Jain was an attesting witness along with Cecilia D'Souza, the wife of Reynold D'Souza. Since, under the aforesaid Will of the deceased, no executor was appointed, the beneficiary Reynold D'Souza applied for Letters of Administration with Will annexed. The daughters of the deceased, namely, Ruby Cyril D'Souza, Edna Nobert Remedius, Mrs. Alda Alex Fernandes, and Jennifer Alexandra, contested the grant and the above Testamentary Petition No.226 of 2004 was converted into Testamentary Suit No.5 of 2005. It appears that during the pendency of the proceedings, some of the parties to the Suit [as originally filed] have passed away and their legal heirs have also been brought on record.

3. Be that as it may, on the basis of the pleadings, issues were framed (in the above Testamentary Suit) by order dated 30th March 2015. These issues pertained to various aspects of the validity of the Will executed by the deceased. The issues framed were as under:-

1. *Whether the Plaintiffs prove that the writing dated 16th April 1994 was duly and validly executed in accordance with law by John Dominic D'Souza as his last Will and testament?*
2. *Whether the Plaintiffs prove that at the time of said writing the deceased was of sound and disposing state of mind, memory and understanding?*
3. *Whether the Defendants prove that the alleged Will is false and fabricated?*
4. *Whether the Defendants prove that the alleged Will was procured by undue influence?*
5. *Whether the Defendants prove that the alleged Will is unnatural?*
6. *What Relief and Order?*

4. On the basis of the aforesaid issues, the parties led their respective evidence and the same was completed in October 2019. Thereafter, since April 2021, the above Suit is being listed for hearing and final disposal.

5. It is at this stage [i.e. the stage of hearing and final disposal] that the Appellants (Original Defendants) filed Interim Application (L) No.20977 of 2023 seeking to frame an additional issue in the above Suit. The proposed additional issue was stated in paragraph 5 of the Interim Application, but during the course of arguments, the learned advocate appearing for the Appellants (Original Defendants) submitted a draft issue in place of the

proposed issue at paragraph 5 of the Interim Application. That proposed draft issue tendered to the Court was the issue that the learned Single Judge was considering as to whether the same should be added or otherwise. The additional issue proposed by the Defendants was as under:-

“Whether Letters of Administration with Will dated 16th April, 1994 annexed thereto can be granted to the Petitioners as the grant pursuant to the bequest made by the said Will is void under the latter part of Section 67 of the Indian Succession Act, 1925 constituting an exception to such grant under Section 255 of the said Act?”

6. The addition of this issue was opposed by the Respondents herein (Original Plaintiffs) by filing a reply to the Interim Application. Thereafter, the learned Single Judge heard the parties and by a detailed order dated 24th January 2024 (the impugned order) dismissed the Interim Application essentially holding that the jurisdiction of the Testamentary Court was limited to the aspect of whether the Will was validly executed and the said Will was the last Will and testament of the deceased person. It is being aggrieved by this decision of the learned Single Judge that the present Appeal is filed.

7. Mr. Gangal, the learned counsel appearing on behalf of the Appellants (Original Defendants), submitted that the

aforesaid issue was proposed by the Original Defendants because the sole beneficiary under the Will of the deceased was his son (the Original Plaintiff) and the husband of Plaintiff No.1. One of the attesting witnesses to the said Will of the deceased was Plaintiff No.1 herself (i.e. daughter-in-law of the deceased). According to the Defendants, since the daughter-in-law of the deceased has attested the Will and her husband was the beneficiary thereunder, would not mean that the Will is insufficiently attested, but under Section 67 of the Indian Succession Act 1925, the bequest under the said Will in favour of her husband would be void. The learned counsel submitted that in the face of such facts, the issue propounded by the Defendants ought to have been framed by the learned Single Judge because the aspect of exception to grant of Letters of Administration with Will annexed [under Section 255 of the Indian Succession Act, 1925] deserves to be determined in these very proceedings (namely, the Testamentary Suit). It was the case of the learned counsel that the Testamentary Court exercising jurisdiction for grant of Probate or Letters of Administration with Will annexed, is the very Court that can go into the said question by applying Section 67, and if necessary, hold that the Will is void to the extent specified in the said provision. According to the learned counsel, a conjoint reading of

Section 67 and Section 255 (of the Indian Succession Act, 1925) clearly demonstrates that this Court in the present proceedings had the jurisdiction to consider the proposed additional issue, and therefore, the learned Single Judge ought to have framed the same for determination. In not having done so, the learned Single Judge clearly erred which requires interference in appeal by us. The learned counsel also took us through the provisions of Section 67 as well as Section 255 of the Indian Succession Act, 1925. Relying upon the aforesaid provisions, the learned counsel submitted that Section 255 has to be read with Section 67 and when done so, it would be clear that the Testamentary Court would certainly have jurisdiction to decide the issue proposed by the Defendants. In support of the said proposition, the learned counsel appearing on behalf of the Appellants (the Original Defendants) relied upon the following decisions:-

- (a) *Re POOLEY* [40 ChD 1] [Court of Appeal dated 31st October 1988];
- (b) *Hepzibah Annathai Rengachari vs R. Ananthalakshmi Rangachari* [AIR 1975 MADRAS 342].
- (c) *J. G. Boaz & Ors vs Dr. (Mrs) Dorothy Ruth Masih Afzal & Anr* [1982 All LJ 1461].
- (d) *Lisamma v/s Saramma* [(2017) 2 KLJ 927.

8. On the other hand, Mr. Patel, the learned counsel appearing on behalf of the Respondents fully supported the

impugned order passed by the learned Single Judge. Mr. Patel submitted that the learned Single Judge has correctly understood and interpreted the provisions of Section 67 and Section 255 of the Indian Succession Act, 1925. He submitted that it is now too well settled that in probate proceedings or in proceedings for Letters of Administration with Will annexed, the Court is only concerned with the question as to whether the Will of the deceased is genuine and that it has been made voluntarily. Any questions of title of any property, or any bequest of a property, or the validity of any bequest of a property, forming the subject matter of the Will is not within the domain or purview of the Testamentary Court to rule on. For those purposes, the aggrieved party would have to approach a Civil Court. This is exactly what has been held by the learned Single Judge, and therefore, the above Appeal holds no merit and ought to be dismissed.

9. We have heard the learned counsel for the Appellants as well as the Respondents. Before we proceed further, it would be apposite to reproduce the provisions of Section 67 and Section 255 of the Indian Succession Act, 1925.

“67. Effect of gift to attesting witness. – A Will shall not be deemed to be insufficiently attested by reason of any benefit thereby given either by way of bequest or by way of appointment to any person attesting it, or to his or her wife or husband; but the bequest or appointment shall be

void so far as concerns the person so attesting, or the wife or husband of such person, or any person claiming under either of them”

“255. Probate or administration, with Will annexed, subject to exception –
Whenever the nature of the case requires that an exception be made, probate of a Will, or letters of administration with the Will annexed, shall be granted subject to such exception.”

10. From a bare perusal of Section 67, it becomes clear that the said Section is in two parts. The first part of Section 67 clearly stipulates that the Will shall not be deemed to be insufficiently attested by reason of any benefit thereby given either by way of bequest or by way of appointment to any person attesting it, or to his or her wife or husband. In other words, like in the present case, if the beneficiary’s wife is an attesting witness would not mean that the Will is insufficiently attested. The second part of Section 67 of the Indian Succession Act, 1925 declares that such bequest or appointment as contemplated in the first part shall be void in so far as it concerns the person so attesting or the wife or the husband of such person, or any person claiming under either of them.

11. Section 255 specifies that a probate of a Will or Letters of Administration with Will annexed can be granted

subject to an exception whenever the nature of the case requires that such an exception be made.

12. It is the case of the Appellants that reading Section 255 in conjunction with Section 67, and considering the prayers sought are for grant of Letters of Administration with Will annexed, this Court has jurisdiction to go into this issue. In other words, it is the case of the Appellants that the second part of Section 67 (namely that the bequest is void) can constitute an exception to the probate of the Will or Letters of Administration with Will annexed, and which can be determined in these very proceedings. We are afraid, we are unable to agree with this submission. The use of the words “whenever the nature of the case requires” appearing in Section 255 clearly indicates that the exception contemplated thereunder necessarily pertains to an exception found within the contents of the Will, whereby the bequest may be limited or conditional. It would also apply in a situation where part of the Will is not found worthy of probate, and therefore, the exception is relatable to the contents and text of the Will. The question whether the bequest is void or otherwise would not, in our opinion, fall within the “exception” as contemplated in Section 255 to confer jurisdiction on the

Testamentary Court to rule on whether a particular bequest is void or not. Section 257 provides that whenever a grant with exception, has been made, the person entitled to the Probate or the Letters of Administration of the remainder of the deceased's estate may take a grant of Probate or Letters of administration, as the case may be, of the rest of the deceased's estate. The general rule is that an application for Probate or Letters of Administration with Will annexed must ordinarily be in reference to whole of the estate, but where the nature of the case requires that an exception be made, then the Probate or the Letters of Administration may be granted subject to such exception mentioned in the Will. As an illustration, if the testator appoints one Executor for a special purpose or in respect to a special fund only, and another executor for all other purposes, the latter may take Probate, save and except for that special purpose or the special fund.

13. In fact, we find that the issue raised in the present Appeal, namely whether the Testamentary Court can rule whether a particular bequest is void or otherwise, is squarely covered by a decision of the Hon'ble Supreme Court in the case of *Ishwardeo Narain Singh v/s Kamta Devi & Ors* [1953 SCC OnLine SC 34 : (1953) 1 SCC 295]. In the facts of this case, one Jagdishwar Prasad

Singh died on 18th August 1934 leaving a minor daughter Kamta Devi. His wife had predeceased him, but Jagdishwar Prasad Singh did not remarry. It was alleged that Jagdishwar Prasad Singh had on 18th December 1930 made his last Will and testament which was attested by two witnesses, one Sahdeo Singh and one Rameshwar Lal. By this Will, the testator had appointed one of his step-brothers, namely, Ishwardeo Narain Singh, as the Executor. In the said Will, the testator had inter alia directed that after his death a grove should be planted on certain lands situated in village Kundesar and a temple should be constructed in the grove and an idol of Sri Thakurji should be installed therein and all the zamindari rights together with the grove and the Katcha properties and the zamindari share in certain villages mentioned therein should be dedicated to Thakurji and the income therefrom should be utilized towards the expenses relating to the rag, bhog, puja and construction and repairs of the Thakur Bari. On 29th October 1934, Ishwardeo Narain Singh presented a Petition to the District Judge, Ghazipur for grant of Probate to him. At the foot of that Petition, Rameshwar Lal, one of the attesting witnesses, declared that he was present and saw the testator affix his signature thereto. An objection was put in on behalf of Kamta Devi, the daughter of the testator. Thereafter, the said Petition went to trial. After the

evidence was led and hearing took place, the Trial Court was satisfied that the Will had been duly executed and that the testator had a sound disposing mind. He, however, found that the disposition contained in the Will in favour of Thakurji was void for uncertainty. The learned Trial Court held that the Will was not expressive of any definite intention and was, therefore, not a Will as defined in Section 2 (h) of the Indian Succession Act, 1925. In view of this finding, the learned Trial Court rejected the application for Probate. The order of the Trial Court was thereafter challenged before the High Court also without any success. In these facts, the Supreme Court, after inter alia opining that whether a particular bequest is good or bad is not within the purview of the Probate Court, allowed the Appeal filed before it. What is important to note in this judgment is the opinion of the Hon'ble Supreme Court in paragraph 4 which reads thus:-

“4. *The dismissal of the application for probate on the ground that the disposition in favour of Thakurji is void for uncertainty can on no principle be supported and indeed the learned counsel appearing for the respondent has not sought to do so. 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. It is surprising how this elementary principle of law was overlooked by both the Courts below. However, as the learned counsel appearing for the respondents has not sought to support this ground nothing further need be said on that.*”

(emphasis supplied)

14. We find that the facts of the present case squarely fall within the ratio laid down by the Hon'ble Supreme Court in the case of *Ishwardeo Narain Singh (supra)*. Whether a particular bequest is good or bad is not for the Probate Court to examine. This, as the Supreme Court succinctly puts it, is an elementary principle of law. Once this is the case, we find that the learned Single Judge was fully justified in dismissing the Interim Application filed by the Appellants seeking to incorporate an issue, seeking a ruling on whether a particular bequest made under the Will was void under the latter part of Section 67 of the Indian Succession Act, 1925. This is something that the Testamentary Court would have no jurisdiction to go into, and therefore, the learned Single Judge correctly did not frame the aforesaid issue and dismissed the Interim Application filed by the Appellants.

15. We are not separately dealing with the judgments relied upon by the learned counsel for the Appellants because the same have been correctly and adequately dealt with, by the learned Single Judge in the impugned order.

16. For all the aforesaid reasons, we find that the learned Single Judge was fully justified in dismissing the Interim Application filed by the Appellants seeking to frame the additional issue as set out by us above. Consequently, we find no merit in the above Appeal, and it is accordingly dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

17. In view of the dismissal of the above Appeal, nothing survives in the above Interim Application and the same is also accordingly disposed of.

18. This order will be digitally signed by the Private Secretary/ Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

[FIRDOSH P. POONIWALLA, J.]

[B. P. COLABAWALLA, J.]

19. After the judgment was pronounced, the learned advocate appearing on behalf of the Appellant submitted that they would like to test our judgment by filing an SLP before the Hon'ble Supreme Court. They, therefore, requested that the interim relief

granted by this Court on 27th June 2024, by which it was directed that Testamentary Suit No.5 of 2005 shall not proceed till the Appeal is heard, be continued for a period of eight weeks from today.

20. We have heard the learned counsel appearing on behalf of the Appellant. We are not impressed with this argument. We find that the issue in this case is squarely covered by a decision of the Hon'ble Supreme Court. We, therefore, do not think that this is a fit case where the interim order passed by us on 27th June 2024 ought to continue further. This is more-so when one takes into consideration that the Testamentary Suit is of the year 2005 and is ripe for hearing and final disposal. In these circumstances, the aforesaid request is rejected.

21. This order will be digitally signed by the Private Secretary/ Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

[FIRDOSH P. POONIWALLA, J.]

[B. P. COLABAWALLA, J.]