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In Re: Hasima Latifi and ors.

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SooperKanoon Citation : sooperkanoon.com/341924

Court : Mumbai

Decided On : Mar-14-1961

Reported in : AIR1962Bom227; (1961)63BOMLR940

Judge : Mody, J.

Acts : Succession Act, 1925 - Sections 212, 213, 213(1), 213(2), 370 and 370(1); Special Marriage Act, 1954 - Sections 21; Succession Act, 1925 - Sections 5(2) and 324(1)

Appeal No. : Petition No. 412 of 1960

Appellant : In Re: Hasima Latifi and ors.

Advocate for Pet/Ap. : Ajit Mehta, Adv.

Judgement :
ORDER

(1) This is a petition for grant of a succession certificate. Dr. Alma Latifi died on the the 16th August 1959. He was a Shia Mahomedan. He left a will which is annexed as Ex. A to the petition. By that will he appointed the three petitioners as the executrix and executors. The petitioners have by this petition applied for the grant of the succession certificate in respect of the properties mentioned in the Schedule annexed to the petition. The properties consist of two particular debts due to the deceased. Probate in respect of the said will have not been granted nor has even been applied for.

(2) It appears from the said Ex. A to the Petition that in paragraph 1 of the will the deceased has stated that his marriage with Hasima, being the first petitioner, was duly solemnized under the provisions of the Special Marriage Act 1954 on the 1st day of September 1958 and that because of that reason succession to his property is regulated by the provisions of the Indian Succession Act, 1925. As regards the statement of fact contained in that paragraph there is obviously some mistake, because it has been pointed out in the petition that the deceased married the 1st petitioner as far back as 3rd August 1908 but that what happened on the 1st September, 1958 was that that marriage between deceased and the 1st petitioner was registered under the provisions of the Special Marriage Act, 1954. The deceased has apparently made a mistake by using the word 'solemnized' instead of 'registered'.

(3) In view of the said statement contained in paragraph 1 of the will the office of the Prothonotary of this Court dealing with testamentary matters took the point that as the marriage of the deceased was registered under the Special Marriages Act, 1954, succession certificate to any property of the deceased could not be issued in view of the provisions of Section 21 of the Special Marriage Act, and that only probate of the said will could be applied for and granted. The petitioners, however, contended that there is no legal bar to the grant of succession certificate as applied for by this petition. Under the circumstances, the point for consideration is whether there is anything in Section 21 of the said Act which prevents the grant of succession certificate applied for by this petition.

(4) Now, this is an application for a succession certificate under Section 370 of the Indian Succession Act. Sub-section (1) of that section provides that a succession certificate shall not be granted with respect to any debt or security to which a right is required by Section 212 or Section 213 to be established by letters of administration or probate. As it has been stated that the deceased has left a will, Section 212 which applies when there is no will need not be considered by me. Section 213 of the Succession Act, however, applies when there is testacy and is, therefore, relevant. Sub-section (1) of that section, so far as it is relevant, provides that no right as executor can be established in any Court of Justice, unless a Court of competent jurisdiction in India has granted probate of the will or letters of

Administration with the will or with a copy of an authenticated copy of the will annexed. Sub-section (2) of that section, so far as it is material, provides that nothing in S. 213 shall apply in the case of wills made by Mahomedans. As this application for succession certificate is in respect of two debts due to the deceased a succession certificate could be granted, because of the provisions of section 370(1), only if in Sub-section (2) of Section 213 to be established by probate. As the deceased was, however, a Mahomedan, because of the provisions of Section 213(2), the provisions of sub-section (1) of that section did not apply. The bar contained in sub-section (1) of section 370 would not apply as the right could be established in respect of the said two debts. A succession certificate can, therefore, be granted under the said Section 370. The question then remains whether the provisions of Section 21 of the Special Marriage Act prevent such a grant being made.

(5) As stated earlier, the marriage of the deceased was registered under the Special Marriage Act. Section 15 permits the registration or an earlier marriage. Section 18 of that Act states what is the effect of such registration and provides that upon proper registration the marriage shall, as from the date of registration , be deemed to be a marriage solemnized under that Act. Section 21 of the Special Marriage Act is as under:

'Notwithstanding any restrictions contained in the Indian Succession Act, 1925 (39 of 1925), with respect to its application to members of certain communities, succession to the property of any Act and to the property of the issue of such marriage shall be regulated by the provisions of the said Act and for the purposes of this section that Act shall have effect as if Chapter III of Part V (Special Rules for Parsi Intestates) had been omitted therefrom.'

What is material is the provisions in this section that succession to the property shall be regulated by the provisions of the Indian Succession Act, 1925 and that it is to be so notwithstanding any restrictions contained in the Indian Succession Act, 1925, with respect to its application to members of certain communities. Now, the application of the provisions of sub-section

(1) of section 213 of the Succession Act is, by sub-section

(2) thereof, restricted to members of certain communities and, therefore, that provision does not apply to wills made by Mahomedans. The question, therefore, is whether by reason of Section 21 of the Special Marriage Act succession is to be regulated by the Succession Act. The substantive provision of sub-section

(1) of the said section 213 will apply notwithstanding the provision of sub-section (2). In other words, the question is whether the effect of section 21 of the Special Marriage Act is to remove the exception made by sub-section

(2) of Section 213 so as to make the provision of sub-sec(1) of section 213 applicable even to a Mahomedan whose marriage is solemnized or registered under the Special Marriage Act. Now, the material words of section 21 are ' Succession . . . . .shall be regulated. . . . .'. What is the meaning of the word 'Succession' as existing in the said section 21 of the Special Marriage Act? Section 21 itself refers to the Indian Succession Act,. 1925 and therefore that the word 'Succession' must have been used in the said section 21 in the same sense as the same has been used in the Indian Succession Act, 1925. A reference to various sections of the Succession Act, however, discloses that in that Act a distinction has been made between 'succession' to the property of the deceased and the 'administration' of the property of the deceased. Succession has been used in that Act in the sense of beneficial succession to the property of the deceased. Property would mean the net property remaining after all the liabilities of the estate of the deceased are discharged. Administration of the property of the deceased would be concerned with the person who would be entitled or who can be allowed by the Court to deal with the property of the deceased, i.e., to gather it, to discharge the obligations of the estate by way of payment of the taxes payable by the estate and the debts of the estate etc, and thereafter actually hand over the estate to such persons as are entitled to succeed to it. Section 5(2) of the Succession Act Prohibition Act, which contain special rules of a person deceased is regulated by the law of the country in which such person had his domicile at the time of his death. This provision concerns 'succession' and lays down according to the law of which country is the person entitle to succeed to the moveable property of the deceased determined. Sub-section

(1) of Section 324 of the Succession Act, however, provides that if the domicile of the deceased was not in India, the application of his moveable property to the payment of his debts is to be regulated by the law of India. It is obvious that section 324(1) is the counter-part of section 5(2) of the Succession Act. Section 5(2) deals with 'succession' whereas section 324(1) deals with 'administration' of the property of the deceased. Section 324 appears in Part IX of the Succession Act and scrutiny of all the sections appearing in that Part discloses that all of them deal with the administration of the property of the deceased and none with succession. As a matter of fact the heading of that Part is 'Probate, Letters of Administration and Administration of assets of Deceased' which makes it clear that that entire Part was intended to deal only with the administration of the assets of a deceased person. The opening section in Part IX is S. 217 and it specifically states that all grants of Probate and letters of administration with the will annexed and the administration of the assets of the deceased in cases of intestate succession shall be made or carried out, as the case may be, in accordance with the provisions of that Part There are other provisions in that Act which clearly bring out the distinction between 'succession' and 'administration', but I think it is not necessary for me to refer to the same as a reference only to Section 5 and section 324 is sufficient to bring out that distinction. That distinction between 'succession' and 'administration' is not confined to the Indian Succession Act nor to only Indian Statutes but the same is the meaning even according to Private international Law. Rule 93 as formulated by Dicey in Decey's Conflict of Laws, 7th edition, page 562, defines 'succession' as beneficial succession to the property of a deceased person and states that 'administration' mean the dealing according to law with the property of a deceased person by a personal representative.

(6) It is, therefore, clear that section 21 of the Special Marriage Act deals only with succession of the property and not with the administration of the property. The questions as to when a succession certificate or probate or letters of administration should be granted, to whom they should be granted etc. relate to the administration and not to the succession of the property of a deceased person. Sections 212 and 213 of the Succession Act deal with letters of Administration and probate and not with succession and, therefore, in my opinion, the provision contained in section 21 does not in any way affect or negative the exception made

by sub-section (2) of section 213. I am, therefore, of the opinion that there is nothing in section 21 which debars the petitioners from applying for and obtaining the succession certificate as applied for by this petition. I, therefore, direct the Prothonotary's office to deal with this petition on that basis.

(7) Order accordingly.

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