

In Re: Anthony Fernandes and ors.

In Re: Anthony Fernandes and ors.

SooperKanoon Citation : sooperkanoon.com/359877

Court : Mumbai

Decided On : Oct-12-1992

Reported in : 1993(1)BomCR580

Judge : D.R. Dhanuka, J.

Acts : [Succession Act, 1925](#) - Sections 2 and 390; [Code of Civil Procedure \(CPC\), 1908](#) - Sections 2(4)

Appeal No. : Misc. Petition No. 3 of 1992

Appellant : In Re: Anthony Fernandes and ors.

Advocate for Def. : Milind Sathe, Amicus Curie

Advocate for Pet/Ap. : Clive D'souza, Adv.

Judgement :

D.R. Dhanuka, J.

1. The petitioners are legal heirs of Mr. Custodio Nocholas Fernandes (hereinafter referred to as 'the deceased'). The deceased died at Karad on or about 16th December, 1989. Smt. Olive Fernandes, wife of the deceased died on 29th September, 1989. The petitioners are children of the deceased. The deceased was an Employee of the Metal Box Co., of India Ltd., and was entitled to receive gratuity and other dues from his employers. The petitioners seek issue of heirship

certificate from this Court under Clause 3 of Bombay Regulation VIII of 1827 in form prescribed in Appendix 'B' thereto.

2. The petitioners had originally made an application for the same relief to the Bombay City Civil Court at Bombay by filing Miscellaneous Petition No. 34 of 1991.

3. By an Order dated 2nd February, 1991, Shri V.D. Deshmukh, the Additional Principal Judge of Bombay City Civil Court at Bombay, held that the petition was not maintainable in the Bombay City Civil Court at Bombay as it could be filed only before 'The District Judge' and the expression 'District Judge' as used in the applicable provisions of law meant a Judge of 'Principal Civil Court of Original Jurisdiction'. The learned Judge took the view that the Bombay City Civil Court was not a Principal Civil Court of Original Jurisdiction and the Bombay City Civil Court had no jurisdiction to entertain the petition. The learned Judge carefully analysed the provisions of law contained in Bombay City Civil Court Act 1948 and held in substance that the High Court alone had jurisdiction to entertain the petition. Thereafter, the petitioner has filed the present petition in this Court.

4. By an Order dated 27th September, 1991, I.G. Shah, J., directed issued of proclamation under Rule 2 of the Bombay Regulation VIII of 1827 in the form prescribed in Appendix 'A' to the said Regulation inviting objections from persons concerned within one month from the date of the said proclamation. The Proclamation was duly published. No objections were received. By my Order dated 20th August, 1992, I made the petition absolute in terms of prayer (A) of the petition.

5. After the petition was made absolute, the Assistant Prothonotary & Senior Master Shri Bapat saw me in Chamber and invited my attention to the standard commentary of Paruck's. The Indian [Succession Act, 1925](#) (7th Edition) at page 613 reading inter alia as under :

'Bombay Regulation No. VIII of 1827 is not repeated. Certificates of heirship are still being granted by the courts in the districts in the State of Bombay and such a certificate is a prima facie evidence that the holder of it is the rightful heir of the

deceased. The Regulation does not apply to High Court.'

Thus a doubt was created in the mind of the Court as to whether the High Court had jurisdiction to issue heirship certificate. It was considered necessary to examine as to whether Bombay Regulation No. VIII of 1827 continues to be in force. The Court was also given to understand that no applications are being received by the High Court for issue of heirship certificate for all this Court these years and this case appear to be perhaps first of its kind. It became necessary for this Court to examine the issue as to whether the Bombay Regulation No. VIII of 1827 continues to be in force and whether the High Court has jurisdiction to issue heirship certificate under the said regulation. Since the matter required research into the legislative history of this old provision and detailed study of the subject, including interpretation of the expression 'Zilla Court' used in the said regulation, I thought it proper to appoint an advocate of this Court as an Amicus Curie to assist this Court.

6. The Court appointed Shri Milind Sathe, Advocate as Amicus Curie to assist the Court. The Court explained the above referred questions to the learned advocate for the petitioner Mr. Clive D'souza and requested him to study the points involved and assist the Court. I passed an Order dated 11th September, 1992 that the above referred questions will have to be examined in detail with the assistance of learned Counsel and till these questions were decided, Order passed by the Court on 1st October, 1992, must be kept in abeyance.

7. The Court has been ably assisted by the learned Counsel Shri Milind Sathe as well as learned Counsel Shri Clive D'souza. Written submissions have been filed by learned Counsel on both sides tracing the history of the relevant provisions and referring to the relevant case law. With the above preface, I shall proceed to determine the questions which arises for consideration of the Court in this case.

8. In a slightly different context the Hon'ble Supreme Court has already traced the history of 26 Regulation known as 'The Elphinston Code'. The entire legislative history of the Regulating Act 1773 and the regulation made thereunder is traced with admirable clarity by Madon, J., speaking for the Bench of the Apex Court in the case of Umaji Keshao Meshram and others v. Smt. Radhikabai and another, :

[1986]1SCR731 . In that case the question before the Court was as to whether an intra-Court appeal was maintainable before the Division Bench of the High Court under Clause 15 of Letters Patent from the judgment of Single Judge in writ petition under Article 226 or 227 of Constitution of India. I have carefully gone through the said judgment as well as the written submissions filed by the learned Counsel in this case. The relevant provisions are required to be summarised in so far the same are relevant to this case.

10. In the year 1773, for the first time, the British Parliament asserted its authority and control over the East India Company's activities, both in India and in England by enacting statute 13 Geo III (Section 63 of 1773) commonly known as the 'Regulating Act'. By the East India Company Act, 1780, the Governor General in Council was empowered to frame regulations for the provincial Court and Councils . In August 1820, Governor Elphinston setup a Committee to examine the existing and practice to prepare a comprehensive Code, expressed in non-technical language which would be as far as possible preserve native institutions. Following up the recommendations of the Committee on January 1, 1827, 26 Regulations known as 'Elphinston Code' were passed which (with the exception of Regulation XVIII) came into force on September 1, 1827.

11. Regulation II of 1827 established Zilla or District Courts, 'There is no difference between the expression 'Zilla Court' and 'District Court'. Both the said expressions have identical meaning Bombay Regulation VIII of 1827 empowers 'Zilla Court' to issue a certificate of heirship executorship or administratorship. Clause 2 of the said Regulation enables the heir, executor or administrator of the deceased to make an application for issue of certificate of heirship, executorship or administratorship to 'Zilla Court'. By Clause 2 of the said Regulation it was prescribed that the Judge of 'Zilla Court' on receipt of application, shall issue a proclamation in the form contained in Appendix 'A' inviting all persons who dispute the right of the applicant to heirship etc. appear in the Court within one month from the date of proclamation and enter their objections if any. Clause 3 of the said regulation provides that 'If no sufficient objection has been made, the Court shall forthwith receive such proof as may be offered of the right of the person making the claim, and, if satisfied, shall grant a certificate in the form contained in

Appendix B, declaring him the recognised heir, executor or administrator of the deceased'. If it appears to the Judge that the question is of a complicated or of a difficult nature, the Judge may direct the party to file a regular suit.

12. By Act No. XV of 1874, known as the 'Laws Local Extent Act, 1874'. Bombay Regulation VIII of 1827 was continued to be in force in the whole of the State of Bombay except as regards the Scheduled Districts. i.e. 6 villages notified therein. The said 6 villages were belonging to the Mehwassi Chiefs :

(1) The Parvi of Kathi

(2) The Parvi of Nal

(3) The Parvi of Singpur

(4) The Walwi of Gaohalli

(5) The Wassawa of Chikhl

(6) The Parvi of Nawalpur

13. Bombay Regulation VIII of 1827 was continued as a law in force under Article 372 of the Constitution of India and the same is not yet repealed expressly or by necessary implication. Section 390 of the Indian [Succession Act, 1925](#) provides that the provisions of Indian [Succession Act, 1925](#) listed in the said section shall apply to certificates granted under Bombay Regulation VIII of 1827. Thus Indian [Succession Act, 1925](#) supplements the law on the subject. Issue of heirship certificates is thus governed by both the Acts.

14. Having regard to the above referred legislative history of the said provisions, I have no doubt in my mind that the Bombay Regulation VIII of 1827 continues to be 'Law in force'.

15. Section 2(4) of the Code of Civil Procedure 1908 defines the expression 'district' as under :

'District'---The local limits of the jurisdiction of a Principal Civil Court of Original Jurisdiction (hereinafter called a 'District Court') and includes the local limits of the Ordinary Original Civil Jurisdiction of a High Court.'

The expression 'Zilla Court' in Bombay Regulation VIII of 1827 shall have to be harmoniously interpreted keeping in mind the definition of expression 'District Judge' in section 2(bb) of the Indian [Succession Act, 1925](#) and 'District' in section 2(4) of the Code of Civil Procedure. Section 2(bb) of the Indian [Succession Act, 1925](#) defines the expression 'District Judge' as under:

'District Judge' means the Judge of a Principal Civil Court of Original Jurisdiction'.

Provisions of law contained in Bombay Regulation VIII of 1827 are supplemented by the relevant provisions contained in the Indian [Succession Act, 1925](#). The two provisions must be read together. Section 214 of the Indian [Succession Act, 1925](#) prescribes condition precedent to the recovery of debts through the Court from the debtor of deceased person and specifically provides that no Court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming on succession to be entitled to the debt from the deceased person or permit execution of such decree except on the production of a probate or Letters of Administration, a certificate granted under section 31 or 32 of the Administrator General's Act 1913, or a succession certificate granted under Part X and having the debt specified therein or a certificate granted under the Succession Certificate Act, 1889 or a certificate granted under Bombay Regulation No. VIII of 1827 and if granted after the first day of May 1889, having the debt specified therein.'

This provision also indicates that Bombay Regulation VIII of 1827 is still in force and the provisions contained in the said regulation must be read alongwith the relevant provisions contained in Indian [Succession Act, 1925](#) as broadly indicated above.

16. In *Raja Soap Factory and others v. S.P. Shantharaj and others*, : [1965]2SCR800 the question before the Apex Court was as to whether the High Court of Mysore had jurisdiction to entertain a suit for passing off instituted under section 105 of the Trade and Merchandise Marks Act 48 of 1958. The Act

conferred jurisdiction on 'District Court' to entertain passing off actions under section 105 of the Trade and Merchandise Marks Act. Shah, J., speaking for the bench of the Hon'ble Supreme Court held that the High Court could be considered as 'District Court' within meaning of section 2(e) of the Trade and Merchandise Marks Act only if it possessed ordinary original civil jurisdiction. It was in terms held that the High Court possessing ordinary original civil jurisdiction was the 'principal Civil Court' and thus the 'District Court' for purposes of section 2(4) of the Code of Civil Procedure and section 2(e) of the Trade and Merchandise Marks Act 48 of 1958. The High Court of Bombay undoubtedly has ordinary original civil jurisdiction. By an Act passed by British Parliament known as Indian High Courts Act, 1861 the Crown was authorised to issue Letters Patent for Charters for purpose of empowering High Court of Judicature at Fort William in Bengal and at Madras and Bombay i.e. for three presidencies. On establishment of the High Court under the Letters Patent as contemplated under the Indian High Courts Act 1861, the Supreme Court of Judicature at the presidency Town and the Sadr Diwani Adalat and Fojdari Adalat were to stand abolished. Section 10 of the above referred Act provided that the High Court shall have same jurisdiction as the former Supreme Court had. The then Supreme Court of Judicature Bombay was formerly inaugurated on May 8, 1824. On 14th May 1862, Letters Patent were issued for the High Court of Bombay. The said letters patent was repealed by issue of fresh Letters Patent dated 20th December, 1865. The said Letters Patent continues to govern inter alia the jurisdiction of the High Court of Bombay. Clause 11 of the Letters Patent dated 20th December, 1865, clearly provides that the High Court of Judicature at Bombay shall exercise Ordinary Original Civil Jurisdiction within the limits prescribed. The Ordinary Original Civil Jurisdiction of the High Court has been continued by section 223 of the Government of India Act 1935 and Article 225 of the Constitution of India. The High Court of Bombay in its capacity as the Court exercising ordinary original civil jurisdiction is thus 'Deemed District Court', it being Principal Civil Court of original jurisdiction within meaning of the expression 'District Court' or 'Zilla Court' used in the statutes under consideration.

17. A somewhat similar question arose before the Hon'ble Division Bench of High Court of Madras in the case of *The Daily Calendar Supplying Bureau, Sivakasi v. The United Concern*, : AIR1967 Mad381 . The Division Bench of the High Court of

Madras took the view that the High Court exercising Ordinary Original Civil Jurisdiction under Clauses 11 and 12 of the Letters Patent was liable to be considered as the Principal Civil Court of Original Jurisdiction in the presidency town, and was thus a 'District Court' within meaning of section 2(4) of the Civil Procedure Code, 1908. It was also held by the Court that the expression 'District Court' as used in section 62(1) of the Copyright Act, 1957, could not be construed with reference to definition of 'District Court' used in section 3 of General Clauses Act, 1897.

18. Before I conclude with the discussion on the relevant questions arising in this case, I must observe that I completely agree with the reasoning of Order dated 2nd February 1991 passed by the learned Additional Principal Judge Shri V.D. Deshmukh in Miscellaneous Petition No. 274 of 1990 holding that the Bombay City Civil Court was merely an additional Civil Court and was not a District Court within the definition of the said expression used in the Code of Civil Procedure and was thus not a Zilla Court for the purpose of Bombay Regulation No. VIII of 1827. The expression 'District Judge' as defined in Article 236 of Constitution of India includes Judge of the Bombay City Civil Court for certain purposes. The said definition is relevant only for purposes specified in the constitution including control of High Court over the subordinate judiciary and is not applicable mutatis mutandis for the purpose of determination of jurisdiction of the Court in a case of this kind.

19. In view of the above discussion, I summarise my conclusions as under:

(a) The Bombay Regulation VIII of 1827 continues to be 'law in force'. Provisions contained in the said regulation are supplemented in certain respects by the provisions contained in Indian Succession Act 1925.

(b) The expression 'Zilla Court' used in Bombay Regulation VIII of 1827 is liable to be equated to the expression 'District Judge' used in section 2(bb) of the Indian Succession Act 1925. The said expression means 'principal Civil Court of Original Jurisdiction'. Wherever the High Court has Ordinary Original Civil Jurisdiction, the High Court is 'deemed District Court' for purpose of exercise of powers under Bombay Regulation VIII of 1827. The Bombay City Civil Court has no jurisdiction to grant heirship certificate or certificate of executorships or administrator ship.

The City Civil Court is not 'Zilla Court' within meaning of the said expression as used in Bombay Regulation VIII of 1827.

(c) Paruck's commentary at page 613 of the Indian [Succession Act, 1925](#) (7th Edition) to the effect that Bombay Regulation No. VIII of 1827 does not apply to High Court is erroneous.

(d) The Prothonotary & Senior Master is duty bound to entertain and process the applications for issue of necessary certificate under Bombay Regulation No. VIII of 1827 and place the same for orders and determination of disputes before the learned Judge taking testamentary and Intestate matters and need not entertain any doubt about maintainability of these applications in this Court.

20. I express my gratitude to Shri Milind Sathe who was appointed as a Amicus Curie in this case for his able assistance to the Court. I also express my gratitude to Mr. Clive D'souza who has assisted the Court equally well by his thorough preparation on the subject.

21. I direct the Prothonotary & Senior Master High Court, Bombay to implement the Order passed by the Court on 20th August 1992, making the petition absolute expeditiously. I vacate my Order dated 11th September 1992, whereby my Order dated 20th August 1992, was kept in abeyance.

22. The Prothonotary & Senior Master is requested to issue the heirship certificate expeditiously and within two weeks from today as far as possible.

23. The Prothonotary & Senior Master may issue the certificate on the basis of ordinary copy of this Order duly authenticated by the Associate of this Court.

24. Issue of certified copy is expedited.