

Balwant Vs. Mainabai

Balwant Vs. Mainabai

SooperKanoon Citation : sooperkanoon.com/497392

Court : Madhya Pradesh

Decided On : Oct-06-1989

Reported in : AIR1991MP11

Judge : K.L. Shrivastava, J.

Acts : [Evidence Act, 1872](#) - Sections 61 and 68; [Succession Act, 1925](#) - Sections 276 and 299; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 11 and 104 - Order 41, Rule 22 - Order 43, Rules 1 and 2; Madhya Pradesh Land Revenue Code, 1959 - Sections 258; Madhya Pradesh Mutation Rules, 1965 - Rule 32; Limitation Act, 1936 - Sections 137

Appeal No. : Misc. Appeal No. 53 of 1988

Appellant : Balwant

Respondent : Mainabai

Advocate for Def. : R.C. Verma, Adv.

Advocate for Pet/Ap. : D.M. Shah, Adv.

Disposition : Appeal allowed

Judgement :

K.L. Shrivastava, J.

1. This appeal under Section 299 of the Succession Act, 1928 (for short 'the Succession Act') is directed against the order dt. 12-12-1987 passed by the Additional Judge to the District Judge, Indore, at Mhow, dismissing the appellant's application under Section 276 *ibid* for grant of Probate, on the finding that it is barred under Article 137 of the Limitation Act, 1963 (for short 'the Limitation Act').

2. Circumstances giving rise to this appeal are there. The appellant Balwant filed an application before the learned lower Court on 26-4-80 under Section 276 of the Succession Act for grant of Probate stating that Bonder who died on 24-12-73 had executed a Will dt. 20-9-1973 and thereunder he is the legatee and also the executor.

3. The aforesaid application was opposed by respondent Mainabai who is the widow of Kanhaiyalal, pre-deceased son of Bonder. According to her the Will is a forged one.

4. It was also urged on behalf of the respondent that in the mutation proceedings under the M.P. Land Revenue Code, 1959 (for short 'the Revenue Code') the Will has been found to be a forged one and this decision operates as *res judicata*.

5. On the contentions canvassed by the Parties, the learned lower Court framed two preliminary issues, one regarding the bar of *res judicata* and the other regarding the bar of limitation.

6. By the impugned order the learned lower Court has held that the decision of the Revenue Court does not operate as *res judicata*. On the issue regarding limitation it held that the application not having been filed within 3 years of the death of Bonder; was under Article 137 of the Limitation Act, impugned order came to be passed.

7. The contention of the learned counsel for the appellant is that the learned lower Court erred in holding that an application for grant of Probate is governed by Article 137 of the Limitation Act. According to the learned counsel the Limitation Act does not deal with enforcement of right under a Will and the right to apply for a Probate accrues from day to day so long as the Will remains un-probated. In

support of his submission he placed reliance on the decisions in *Shobha v. Janki*, 1988 MPLJ 28 : (AIR 1987 Madh Pra 145) and *Ramanand Thakur's case*, AIR 1982 Patna 87.

8. The point for consideration is whether the appeal deserves to be allowed.

9. It may be stated at the outset that the respondent's contention that as attesting witnesses; are dead the Will can in no circumstance be proved is wholly devoid of merit. A plain perusal of Section 68 of the Evidence Act shows that the requirement of examining at least one attesting witness is to be fulfilled 'if there be an attesting witness alive'. Where the attesting witnesses are dead the will can certainly be proved in the manner provided for proof of a document.

10. The next contention of the respondent's learned counsel that this miscellaneous appeal is incompetent and the appellant ought have filed a regular appeal, must also fail. Section 295 of the Succession Act provides that in any case in which there is contest the proceedings shall have, as nearly as may be, the form of a regular suit, according to the provisions of the Civil P.C., 1908 (for short 'the Code'). Section 299 of the Succession Act which provides for appeal is in these terms:--

'Every order made by a District Judge by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), applicable to appeals.'

11. Reference at this stage may be made to Section 104 of the Code which relates to appeals from orders. Sub-section (1) thereof expressly enumerates certain orders under the Code and reads as under :--

'An appeal shall lie from the following orders and save as otherwise expressly provided in the body of the Code or by any law for the time being in force, from no other orders.'

Order, 43 Rule 1 of the Code provides that an appeal shall lie from the orders thereunder enumerated under the provisions of Section 104. The orders thereunder enumerated are those passed under the Code. Sub-section (2) of

Section 104 of the Code lays down that no appeal shall lie from any order passed in appeal under this section. It is by virtue of Rule 2 of Order 43 that the rules of Order 41. So far as may be become applicable to appeal from orders.

12. From the foregoing discussion it is clear that the impugned order is an appealable order as provided by the Succession Act and miscellaneous appeal is competent. Reference in this connection may usefully be made to the decisions in Shaikh Munshi's case, 1962 MPLJ (SN) 123 wherein disposing of the Civil Miscellaneous appeal, with reference to Section 299 of the Succession Act it has been pointed out that appeal against the decision of an Additional District Judge whether or not invested with powers co-extensive with those of District Judge regarding grant of Letters of Administration, lies to the High Court.

13. The next contention of the learned counsel for the respondent is that in view of the provision embodied in Order 41, Rule 22 of the Code even without filing cross-objection it is open to the respondent to urge that the decision on the question of res judicata ought to have been in her favour. According to the learned counsel in view of Explanation VIII added to Section 11 of the Code in 1976 by Amendment Act No. 104 of 1976, the decision of a Revenue Court touching the will operates as res judicata. For this submission reliance was placed on the decision in Kanubai's case, 1983 MPWN 316.

14. A plain perusal of the provision in Order 41, Rule 22 of the Code shows that any respondent may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour, and may also take any cross-objection to the decree which he could have taken by way of appeal and it is open to the present respondent to contend that the issue regarding res judicata ought to have been decided in her favour.

15. According to the learned counsel for the respondent Rule 32 of the Mutation Rules, made by the State Government in 1965 for mutation and preparation of land records, requires that the decision has to be made on the basis of title and not mere possession. He urges that though the proceedings were summary in nature, even on the question of title the Revenue Court's decision would operate as res judicata. Reliance for this submission was placed on the Apex Court's

decision in Chandroji Rao's, 1970 RN 1, and in Prabhakar's case, AIR 1984 Bom 65.

16. The contention of the learned counsel for the appellant is that though by enacting Explanation VIII in Section 11 of the Code decisions of 'Courts of limited jurisdiction' have been brought within the purview of Section 11 but the probate proceedings stand on quite a different footings from proceedings in which decisions are binding only between contending parties and those claiming under them. According to the learned counsel the decision of even a Civil Court cannot operate as *res judicata* in probate proceedings in probate Court which has exclusive jurisdiction. In support of this submission he has placed reliance on the decision in J. Rustomji's case, AIR 1955 Bom 447. Therein it has been observed as under (para 1) :

'A decision as to the proof of the will given by any Civil Court can under no circumstance operate as *res judicata* in probate proceedings taken out in the probate Court. In a civil suit the Court is only concerned with deciding the rights between the parties. The Probate Court is a Court of conscience, and it does decide rights between parties but it has to deliver a judgment which would become a judgment in rem and this judgment will bind not only the parties before it but the whole world. Therefore, the approach of a Probate Court to the question before it is different from the approach of a Civil Court adjudicating upon the rights between the parties, and this position is made clear by the provisions of Section 41, Evidence Act. Therefore, a judgment in rem, which is the judgment with which Section 41 deals, is a judgment passed by a Court as the exclusive Court dealing with probate matters.

The decision in Zubeda Khatun's case, 1985 MPWN 437, may also be usefully perused.

17. Relying on the decision in J. Rustomji's case (AIR 1955 Bom 447) (*supra*), I hold that the decision of the Revenue Court touching the will does not operate as *res judicata* in the probate proceedings in which the sole question involved is as to the proof of the will.

18. This brings us to the question of limitation in relation to an application for probate. In the decision in Ramanand Thakur's case (AIR 1982 Patna 87) (supra) it has been observed as under:--

'In the case of an application for grant of probate or Letters of Administration, it is difficult to find out as to when the right to apply accrues and unless that date is fixed, there is no question of starting of the period of limitation. The right to apply for a probate accrues from day to day so long as the will remains unprobated. In other words, the right to apply accrues every day and the cause of action for an application for probate arises every moment so long as the will remains unprobated and, therefore, for such an application there is no period of limitation.'

19. In the decision in Shobha v. Janki (AIR 1987 Madh Pra 145) (supra) the decision in Kerala S.E. Board's case, AIR 1977 SC 282 has been distinguished. Therein, observing that it is not obligatory for Hindus to obtain probate but if a probate is obtained, Section 216 of the Succession Act becomes operative, it has been pointed out that Limitation Act does not deal with enforcement of a right under a will and Article 137 of the Limitation Act has no applicability to probate proceedings or the application for probate. Reference in this very connection may also be made to the Division Bench decision in Zimali's case, AIR 1949 Nag 154.

20. As a result of the foregoing discussion I hold that the finding recorded by the learned lower Court that the application for grant of probate is barred under Article 137 of the Limitation Act is erroneous and deserves to be set aside.

21. In the result the appeal is allowed. The impugned order dismissing the application for probate as barred by time is set aside. The case is sent back to the learned lower Court for decision in the light of the law as discussed above. The respondent shall bear her own costs and shall pay to the appellant the latter's costs of this appeal. Record of the Court below be sent back immediately.