Bombay High Court
Maya Harichand Makhija vs Asha Kanayalal Bajaj on 22 November, 2011
Bench: D.G. Karnik

mpt

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

TESTAMENTARY AND INTESTATE JURISDICTION

NOTICE OF MOTION NO.81 of 2011
IN
TESTAMENTARY SUIT NO.103 of 2010
IN

TESTAMENTARY PETITION NO.84 of 2010

Vimla L. Rajani ... Deceased

Maya Harichand Makhija ... Plaintiff
versus
Asha Kanayalal Bajaj ... Defendant
And

Deutsche Bombay School Educational
Institution ... Respondent

...

Mr. S.C. Naidu i/b Indian Law Alliance for the plaintiff. Mr.S.J.Shah with Mehul Shah for the defendant/caveator in support CORAM : D.G. KARNIK, J DATED : 22nd November 2011 ORAL ORDER:-

1. This motion is taken out purportingly under section 247 of the Indian Succession Act 1925 (for short "the Succession Act") for appointment of an administrator pending decision of the suit.

2. The plaintiff and the defendant are sisters being the daughters of Vimal L. Rajani. Vimal (hereinafter referred to as "the deceased") was the owner of the immovable properties consisting of a residential flat (bearing flat no.904, 15A, Peddar Road) situate at Mumbai a residential flat in Bharat Apartments in Bangalore and a vacant plot of land at Bangalore. The deceased also owned certain movable properties with which we are not concerned at this stage.

The deceased died on 2 March 2009 in Mumbai leaving behind her a writing alleged to be the last Will and testament dated 19 December 1994 whereby she bequeathed her flat at Mumbai to the plaintiff and her immovable properties at Bangalore to the defendant. By the said Will, the deceased appointed the plaintiff to be an executor of the flat at Mumbai and appointed the defendant to be the executor of the properties at Bangalore.

3. The plaintiff filed testamentary petition no.84 of 2010 for grant of probate to the Will of the deceased. The defendant filed a caveat and opposed the grant of probate alleging that the Will was forged and fabricated on account of the caveat the testamentary petition has been converted into and re-numbered as the present suit. In the suit, the defendant has taken out the present motion for appointment of an administrator in respect of the flat at Mumbai pending decision of the suit and has also prayed for issuance of a direction to the plaintiff to deposit the rent/license fee received by her by giving the Mumbai flat on rent or leave and licence.

4. The motion is seriously opposed by the plaintiff interalia on the ground that the defendant had previously taken out another notice of motion (bearing notice of motion no.167 of 2010) for identical reliefs, save and except that therein the prayer was for appointment of a court receiver instead of an administrator. The grounds for appointment of an administrator are the same as the grounds that were pleaded for appointment of a receiver in the earlier motion. The second motion for the very same relief in a slightly different form on the very same grounds is not maintainable. Secondly, the counsel submitted that appointment of an administrator would amount to revocation of an authority of an executor to administer the estate. Such revocation cannot be made lightly unless there were strong grounds for removing the executor and appointing an administrator in his place. In the present case, there were no grounds for revoking the authority of the plaintiff to act as an executor and to administer the part of the estate of the deceased i.e the flat at Mumbai for which she was appointed as an executor under the will and no ground for appointment of an administrator was made out. He further submitted that the testamentary court has no power to grant any injunction or grant any interim relief (in the present case interim relief claimed is of direction to the plaintiff to deposit the licence fee in the court). In support, he referred to and relied upon my own decision in the case of Mahadeo Shankar Shinde Vs. Maruti Shankar Shinde & ors, 2003(4) Bom.C.R. 645 and the decision of a Division Bench in Ramchandra Ganpatrao Hande Vs. Vithalrao Hande & ors., 2011 Vol.113 (2) Bom.L.R. 1302.

5. Learned counsel for the defendant (applicant) apart from challenging the validity of the Will submitted that the testator had no power to appoint two separate executors for two separate

properties. Under section 224 of the Succession Act, it is permissible for a testator to appoint more than one executors but all the executors so appointed must act jointly. A person cannot be appointed as an executor of only a portion of the property and another as an executor of the remaining part of the property of the testator. Appointment of different executors for different parts of the properties of a testator is not recognised by the Succession Act. The plaintiff cannot claim that she is the sole executor in respect of the flat at Mumbai and defendant is the sole executor in respect of the Bangalore property of the testator. If the Will is proved, both of the executors must act jointly to administer the whole of the estate of the deceased. Plaintiff cannot act as the sole executor of the flat at Mumbai. Since the plaintiff was acting as the sole executor in respect of the flat at Mumbai and giving it on leave and licence, the plaintiff had committed an act of exclusion of one of the executors and this was one of the grounds for appointment of an administrator.

6. The issue as to whether two different persons can be appointed separately as executors for different parts of his property by the testator came up for consideration before a Division Bench of the Gujarat High Court in H.H.Maharani Vijaykunverba Saheb Vs. Commissioner of Income Tax, Gujarat-III (1982) 136 ITR 18. In that case, Maharaja Mahendrasinghji of Morvi owned extensive properties in India as well as in England. In his life time, he made two distinct Wills, one of the property in India and another of the property in England. He appointed two separate sets of executors under the two Wills. The widow of the testator was one of the executors appointed to administer the property of the testator situate in India. She was however not appointed as an executrix in respect of the property of the testator situated in England. The High Court held that law permits a person to make more than one Wills in respect of different items of his property and also to appoint different executors in respect of different parts of his property. The Court observed:

> "The testator may, however, make two distinct wills, one of property in his own country, another of property abroad, and he may appoint certain person executors of his property within the country and others of his property abroad. Even in the same will, a testator may appoint different executors for different parts of his estate wherever situate. In the ordinary course, however, an executor's appointment is absolute and he is charged with the administration of the whole will and of all the testator's property. When the testator appoints an executor in respect of a particular or special property, such an executor is called a special executor. Executors appointed generally for all the property are called the general executors (See Jarman on Wills, 8th Edn, p.157, Williams on Executors and Administrators, 14th Edn, p. 19, Executors and Administrators, 5th Edn, by Mustoe, pp.1 & 2 and Halsbury's Laws of Engliand, 4th Edn. Vol. 17, paras.712 and 713)"

7. The High Court then considered the provisions of section 224, 248, 255 and 257 of the Succession Act and held that if an application is made by an executor (Special Executor) appointed for any limited purpose specified in the will, the probate will be granted to him only limited to the purpose relatable to his appointment and if the application is made by a General Executor, probate will be granted to him as in the ordinary case but with the reservations of the Special Executor appointed by the Will.

8. I am in respectful agreement with the views expressed in the case of Maharaja Mahender Singhji (supra). In my view, it is permissible for a person to make two or more distinct wills or Codicils for different parts of his property. It is also permissible for him to appoint different executors for different properties under the different Wills or Codicils. It is also permissible for a person to appoint two or more different executors in respect of different parts of his properties under a single Will. Section 224 of the Succession Act cannot be interpreted to mean that if multiple executors are to be appointed under a Will or a Codicil they must be appointed jointly. Section 224 of the Succession Act only deals with grant of probate to several executors simultaneously or at different times. It does not deal with nor does it restrict the power of the testator to appoint different executors for different parts of his property. In my view, there is no prohibition in law for a testator appointing one executor or one set of executors for administering one or more properties forming part of his total estate and appointing another person or set of persons as executors for the other parts of his property. For these reasons, the first contention of learned counsel for the defendant that the will, so far as it appoints two sets of executors for two sets of properties, is invalid or that the two executors cannot be appointed separately for two separate properties and they must act jointly cannot be accepted.

9. Section 247 of the Succession Act undoubtedly confers a power on the court, including a testamentary court to appoint an administrator pending decision of a suit touching the validity of the will of a deceased person or a suit for obtaining or revoking any probate or grant of letters of administration. The power to appoint an administrator can be exercised by a testamentary court considering validity of a will in a suit for grant of probate or letters of administration. For, section 247 says that an administrator can be appointed in a suit for obtaining or revoking of a probate or grant of letters of administration. There is however a distinction in between the court having a power to do a thing and exercise of the power. A power may exist but that can be exercised only for good and valid reasons. It cannot be exercised arbitrarily. An administrator cannot be appointed merely because the court has a power so to do. There may be several reasons for appointment of an administrator and it is not feasible to enumerate all the reasons for which the court can appoint an administrator. Misuse of the property, or applying the property for a purpose which is not permitted by the will by an executor may be some of the grounds on which a court may exercise the power for appointment of an administrator.

10. In the present case, in my view, no ground is made out for appointment of an administrator. It is permissible for a court to appoint an administrator of the property on the grounds on which a receiver would ordinarily be appointed. In the present case, an application for appointment of a receiver was made by the defendant and the same was rejected. The grounds on which the application for appointment of receiver was made are the very same grounds on which the application for appointment of an administrator is made. The court once having rejected the request for appointment of a receiver, in my view, it would not be appropriate for it to consider the appointment of an administrator on the very same grounds. Apart from it, even on merits, I am not satisfied that any ground exists for appointment of an administrator.

It is alleged that the plaintiff has been given on leave and licence the flat at Mumbai and that it is an act of mismanagement if not a misappropriation. Giving of a property on leave and licence cannot

be regarded as an imprudent act of management. In fact, the plaintiff is protecting the property or else it may be deteriorated by non-use. Furthermore, he is deriving income from the property. Counsel for the plaintiff states that the plaintiff is maintaining proper accounts of the income received and is willing to account for the same as and when ordered by the court. The statement made by the counsel for the plaintiff that plaintiff would maintain proper accounts of the income received from the property is recorded and accepted as the undertaking given to this court. In view of this undertaking, no ground is made for appointment of an administrator.

11. As regards the prayer by the defendant that the plaintiff be directed to deposit in the court the entire amount received by her as licence fee, in my view, such a direction cannot be given. In Mahadeo Shankar Shinde Vs. Maruti Shankar Shinde (supra) I have held that testamentary court hearing petition for grant of probate of a will is only concerned with finding out whether the writing which is alleged to be a will is the last will of the testator and the same has been duly executed in accordance with law i.e it has been executed by the testator of a sound, disposing state of mind and has been duly attested in accordance with law. It is no duty of the testamentary court to consider the question of title to the property.

12. In Ramchandra Ganpatrao Hande Vs. Vithalrao Hande (supra) a Division Bench of this court has considered the nature of the jurisdiction of a testamentary court (Probate Court) and has affirmed that the probate court is only concerned with the question as to whether the alleged Will is the last will and testament of the deceased person and was duly executed and attested in accordance with law and whether at the time of said execution, the testator had sound disposing state of mind. The question whether a particular bequest is good or bad is not within the purview of the probate court. The Division Bench affirmed the view taken by Single Bench of this court in Rupali Mehta Vs. Tina Narinder Sain Mehta 2006(6) Bom.C.R. 778 that in a petition for probate,an order for injunction cannot be granted in relation to the property of the deceased. Issuing of a direction to the plaintiff to deposit the money in the court is in the nature of mandatory injunction to deposit. Such a relief cannot be granted by a testamentary court hearing a petition for grant of probate. Hence, prayer clause (b) in the motion for a direction to deposit the amount of the licence fee also cannot be granted.

13. Even otherwise, the plaintiff is the sole legatee in respect of the flat at Mumbai. She would therefore be entitled to the income from the said flat unless the will is not proved. The undertaking given by the plaintiff of account of the money received by way of a licence fee is an adequate protection to the defendant in the event the will is disproved and no ground is made out for appointment of an administrator at this stage.

14. For these reasons, there is no merit in the motion which is hereby rejected.

(D.G.KARNIK, J)