

Karnataka High Court

Dr. Sharatkumar Desai S/O Late Dr. ... vs Kusumakar Desai S/O Late Sanjeeva ... on 20 July, 2007

Equivalent citations: ILR 2008 KAR 1652

Bench: K S Rao, L N Swamy

JUDGMENT

1. For the sake of convenience parties are referred to as per their ranking in the Court below.
2. The deceased first respondent made an application Under Sections 270, 276 and 307(2)(I) of the Indian Succession Act for grant of probate and also for removal of the restrictions imposed in the Will for disposal of the properties mentioned in the Will, in particular the house property called 'Badarikashrama' and the open space appurtenant to the said house.
3. The material facts are as follows:

Late Sanjeev Rao Desai executed a Will in question bequeathing properties in favour of his children. The deceased 1st respondent is one of the sons and named as an executor in the Will. One Greeshma kumar the eldest son of the testator was also named as an executor in the Will. The said Greeshma Kumar gave up his right to act as an executor. Therefore, the deceased 1st respondent was the sole executor. The 1 respondent wanted to sell a plot adjacent to 'Badarikashrama' which is the subject matter of the Will. The appellant filed a suit in Q.S. No. 342/1981 on the file of Munsift Gulbarga, seeking injunction against alienation on the ground that the said open space is reserved for extension of the house 'Badarikashrama' and the said property is bequeathed in his favour in the Will. The suit was decreed in favour of the appellant. The first appellate Court reversed the decree. This Court in the second appeal in R.S.A. No. 278/1989 held that the suit for permanent injunction is not maintainable and the executor was advised to approach the competent Court under the Indian Succession Act seeking for necessary permission.

4. In review petition this Court by an order dated 17.10.1998 held that the translated Will produced in the suit need not be looked into and only the original Will to be read for the purpose of understanding of the Will. Pursuant to the directions the 1st respondent filed the petition seeking probate and removal of restrictions in the Will for disposal of the property.
5. The appellant filed objections contending that under the Will, life interest in the house 'Badarikashrama' is bequeathed in favour of the eldest son - Grishma Kumar and after his demise the house is bequeathed as vested remainder absolutely in favour of the appellant. It is further submitted that the open space including the house 'Badarikashrama' is not the common property and that the administrators have the right to sell the same.
6. The trial Court found that the house property 'Badarikashrama' is not bequeathed in favour of the appellant and it is to be treated as a common property. The 1 respondent was permitted to sell the property and distribute the sale proceeds to all the legal heirs. Hence this appeal.

7. The 1st respondent died during the pendency of the appeal. His wife is impleaded as legal heir, 1 respondent died without issues. Grishma Kumar the eldest son of the testator also died during the pendency of the suit without issues. The material portion relating to bequest of the house property in question in the Will is in Kannada language. The same is extracted verbatim:

English version is as follows:

The house 'Badarikashrama' should be made over in the name of Grishma Kumar. The house should be used for the common enjoyment of the family members. Thereafter the said house property should be given to Sharath Kumar. In the plots provided the six children should construct their houses separately. One plot should be given to Anirudda Desai and one Plot to Ratangapani, (nephews of the testator). The open space adjoining 'Badarikashrama' is kept for development and extension of the house 'Badarikashrama'. The 22 plots should be sold, the said sale proceeds to be used for celebrating marriage of the daughter of the testator, for discharge of the Bank loan, to meet the repair expenses of the building 'Badarikashrama' and the balance if any should be distributed amongst all 6 children equally.

8. The Senior Counsel Sri. Jaya Vittal Rao Kolar submitted that the terms of the Will does not disclose that there is absolute bequest made in favour of the appellant. The terms of the Will disclose that the house property should be kept for common residence of all the members of the family and that all the legal heirs have equal right of residence and share. Therefore, the administrator is entitled to sell the plots including the house property for distribution of the sale proceeds to all the legal heirs to give effect to the intention of the testator. It is contended that the house 'Badarikashrama' is totally in a dilapidated condition. The reconstruction of the house requires huge amounts of money for which there are no funds, hence sought for permission to sell the plots and the house 'Badarikashrama' for distribution of sale proceeds amongst all the legal heirs.

9. It is argued that this Court in RSA. No. 278/1989 has interpreted the terms of the Will in respect of the house 'Badarikashrama' and it is held that the appellant has no exclusive right over the said property. Therefore, it is not open to the appellant to argue in the probate proceedings that the absolute bequest is made in his favour. The counsel further argued that in the probate proceedings which are of summary in nature and of limited jurisdiction the question of title to the property should not be gone into and also that the probate court has no jurisdiction to interpret the terms of Will if it amounts to adjudication and declaration of title.

10. It is of course well settled that in probate proceedings the Court has to consider only the factum of valid execution of the Will. The probate Court has no jurisdiction to go into the question of title of the testator over the property covered under the Will. In other words, when the competence and the title of the testator in respect of bequest property is disputed, the probate Court cannot go into the question of title and decide the title of the testator. In the instant case the question of title of the testator is not in dispute. The nature of bequest made in respect of the house 'Badarikashrama' and the legatees who are entitled to the bequest is in issue. When there is a dispute between the legatees inter se regarding their title and share in the bequest property, it is within the jurisdiction of the probate court to interpret the terms of the Will for deciding the rights of legatees claiming under the

Will. In fact, the interpretation of the terms of the Will becomes imperatively necessary for adjudicating the rights of the legatees in respect of the bequest made under the Will by the Probate Court, otherwise, the scope, purpose of the Probate Court would be superfluous and a redundant exercise to the parties. The adjudication of the rights of the legatees by interpreting the terms of the Will should not. be misconstrued as one deciding the title of the testator over the property which is the subject matter of the bequest.

11. A plain reading of the Will unambiguously discloses that the predominant intention of the testator is that the house 'Badarikashrama' is to be bequeathed in favour of the elder son - Grishma Kumar. However, directed that the house should be enjoyed for common residence of all the family members so long they reside jointly. The testator had formed 30 plots and has bequeathed the said plots at the rate of one each to all his sons and two nephews. The sale proceeds of remaining 22 plots is directed to be utilized for the purpose of marriage of his daughter, for discharging the Bank loans and to be utilized for the repairs of the house 'Badarikashrama'.

12. The careful reading of the Will indicates that the bequest in favour of the appellant would take effect after the demise of Grishma Kumar and after the severance of joint family status. However, Grishma Kumar is dead. The contention of the 1st respondent that the house property 'Badarikashrama' is to be considered as the joint family property and all the heirs are entitled to share in the property is untenable. The request made for removal of restrictions in the Will and to permit the sale of 'Badarikashrama' is untenable in law in view of the terms of the Will Accordingly the appeal is disposed of in the terms indicated above.