

ars

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
MISCELLANEOUS PETITION NO. 140 OF 2013
IN
TESTAMENTARY PETITION NO. 577 OF 2009**

Rashidaben W/o. Ibrahimbhai Babvani	...Petitioner
<i>Versus</i>	
Dilip Modji Donkia & Ors.	...Respondents

Mr. P.D. Patel, *for the Petitioner.*
Mr. Tejas Vora, *i/b G.K. Vora, for Respondent No.1.*

CORAM: G.S. PATEL, J
DATED: 5th January 2015

PC:-

1. The Petitioner seeks revocation of Probate issued on 4th September 2009 in Testamentary Petition No. 577 of 2009. That Probate was issued in the following circumstances.

2. On 12th January 2008, one Madhuben Sadhusingh Agrawal (“**Madhuben**”) a Hindu widow who had no children executed her last Will and Testament in Mumbai. Madhuben passed away on 28th April 2009. Some time later that year, the Executor named in her Will, the present 1st Respondent, Dilip Modji Donkia, filed

Testamentary Petition No. 577 of 2009 for Probate to Madhuben's Will. On 4th September 2009, Probate was order to be issued.

3. In 2010, one Zarina alias Taushida Latif Qureshi filed Miscellaneous Petition No. 119 of 2010 seeking a revocation of this Probate. Zarina claimed to be a grand-daughter of Madhuben's sister. More precisely, Zarina said that she was the daughter of one Soniben, who in turn was said to be the daughter of one Jomiben, and Jomiben was alleged to be Madhuben's sister. The allegation was that Madhuben was born a Muslim to one Ibrahim and his wife Puriben, and that her name was originally Hawaben.

4. Zarina's Revocation Petition was seriously contested. Documents were led in evidence. Oral evidence was also led. This was recorded by a Commissioner. All of this material was considered and dealt with in a detailed and elaborate judgment dated 25th July 2002,¹ by which a learned Single Judge of this Court (Mrs. Roshan S. Dalvi, J) dismissed Zarina's Revocation Petition. In that Judgment the learned single Judge was moved to observe *inter alia* that the evidence led by Zarina was not only inadequate and exposed the fact that the Petition for revocation was entirely baseless. The learned single Judge observed that the Petitioner Zarina did not even know why she had filed a Revocation Petition. She believed it had been filed for recovering money from Madhuben. She accepted that the Revocation Petition was filed at the instance of her mother-in-law. Zarina also was unable to establish any knowledge of how she was related to the Madhuben or any knowledge of Madhuben's alleged original birth name. In

¹ Now reported in 2012 (5) Mh L J 863

paragraph 37 of the Judgment the learned Single Judge observed that the evidence of none of the witnesses including Zarina herself could be accepted. That Petition was therefore dismissed. It seems it was carried in appeal, but the appeal was withdrawn.

5. Some three years after Zarina filed her Petition and about a year after it was dismissed comes the present Miscellaneous Petition. It is filed by one Rashida who is none other than Zarina's sister. Rashida was apparently not one of the witnesses called by Zarina, although she could and very likely ought to have been called as witness. Mr. Patel, learned advocate for the Petitioner, states that Zarina did not marshal her evidence properly. This, as Mr. Vora learned advocate for the Respondent points out, is a submission that only needs to be stated to be rejected. It is not open to Rashida to reagitate issues now closed. She is undoubtedly litigating under the same title as was Zarina. Judgments of a Probate Court are judgments *in rem*. The reported decision of this Court in Zarina's Revocation Petition binds Rashida as well.

6. Also apart from a bald statement that Rashida and Zarina are today at daggers drawn, there is nothing on record to show why Rashida could not have been produced as a witness in Zarina's Revocation Petition if Rashida, is, in fact, in possession of such telling and startling evidence as would demand acceptance of a Petition for Revocation. In Zarina's Petition and evidence, a family tree was produced. That family tree, in of its many branches, shows Rashida as Zarina's sister. The submission that Rashida be allowed to lead evidence, that the matter should be reopened again and that

Rashida should be permitted to persuade a Court to take a wholly different view is a submission that is impossible of acceptance.

7. There is also a question of gross delay and laches. Probate was obtained on 4th September 2009. Rashida must have had knowledge at least at the time when Zarina did. Yet, the present Petition is filed in 2013, nearly four years after the grant of Probate. This is yet another reason to refuse the Petitioner relief.

8. As I have noted, Zarina filed an appeal against the order of the learned single Judge dismissing her revocation petition, but later withdrew it. This does not in any way assist Mr. Patel. On the contrary it makes matters significantly worse; for, had Rashida been serious at that time, she might have sought an intervention in the Appeal Court. This too she has not done.

9. The real ground so far as I can make out is not because of any great love that Rashida might have had for the deceased, but for an undeniable attraction that she does have for a very substantial immovable property, viz., a flat. That is the only motivating factor in this Revocation Petition. That flat has been sold and transferred to one Captain Hoshang Bhimji Patel by a sale deed dated 24th March 2014. That transaction was for a valuable consideration. It is well settled law that such transactions during the currency of a Probate validly granted are not to be set aside unless it is demonstrated that Probate was obtained by fraud. A revocation can and generally will only operate prospectively and it is only in a very limited and exceptional set of circumstances that a revocation can

be invoked to set aside the concluded transaction. That is not the case here.

10. Finally, Section 263 of the Indian Succession Act requires that the Petitioner in a Petition such as this make out some ground for interference. In the words of the statute a petition for revocation or an annulment must make out just cause. The explanation to that section provides a deeming fiction when just cause can be said to exist. The present Petition does not fall within any of the deeming fictions in the explanation to Section 263. Even otherwise, as I have observed there is absolutely no just cause for the present Petition. At the cost of repetition, the dismissal of the earlier Revocation Petition by Zarina and Rashida's deliberate and studied silence at that time defeats her case in the present matter.

11. There is no substance to the Petition. The Petition is, in my view, thoroughly mischievous, motivated and vexatious.

12. The Petition is dismissed. The only reason that costs are not awarded in this Petition is because Mr. Vora does not press for them.

(G. S. PATEL, J.)