

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
IN ITS TESTAMENTARY AND INTESTATE
JURISDICTION
MISCELLANEOUS PETITION NO.118 OF 2015
IN
TESTAMENTARY PETITION NO.133 OF 2012

Bhagesh Atalrai Keswani

...Petitioner.

V/s.

Mahesh Atalrai Keswani & Ors.

...Respondents.

.....

Ms. Seema Sarnaik, Advocate for the Petitioner.

Mr. Sanjay Jain with Mr. Vishal Thaker and Ms. Anjali Trivedi i/by Mr. V. Thaker, Advocates for the Respondent No.1.

Mr. Cherag Balsara with Mr. Deepan Dixit i/by M/s. Kartikeya & Associates , Advocates for respondent no.2.

Mr. Vikram Nankani, Senior Advocate with I.J.Nankani with Mr. Nishant Sasidharan with H.S.Khokhawala with Ms.

Tanuja D'Souza i/by M/s. Nankani & Associates, Advocates for respondent nos.7 and 8.

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**CORAM : A. K. MENON, J.**  
**RESERVED ON : 20TH NOVEMBER, 2015**  
**PRONOUNCED ON : 21ST NOVEMBER, 2015.**

P.C.:

1. The present petition is filed by the son of one of the legal heirs of the late Atalrai Keswani (*the deceased*) seeking revocation of the probate granted by this Court on 13.9.2013 to respondent no.1

who is the petitioner's brother, in respect of last will and testament of the deceased dated 10.5.2000 (*"the Will"*) being the subject matter of the Testamentary Petition No.133 of 2012. Respondent no.2 is also a brother of the petitioner and one of the executors of the Will. Respondent Nos.3,4 and 5 are the married daughters of the deceased. Respondent nos.6 to 9 are grand children of the deceased. Of these, respondent nos.1 to 5 are also beneficiaries under the will.

2. A few facts may be adverted to at this stage. The deceased Atalrai Keswani died in Mumbai on or about 18.11.2006. The Petitioner claims that to the best of his information and knowledge, his late father died intestate leaving behind various properties which are mentioned in Schedule I to the testamentary petition. The deceased was the owner of the Flat No.33 (**Said Flat**) in Mayur National Servants Society Bandra (West), Mumbai. The Petitioner contends that during his lifetime, the deceased handed over keys of the said flat to the petitioner and made known his intention to reside in the said flat till his demise and allow the petitioner to occupy the said flat after his time. The petitioner claims to have occupied the said flat since 1992 upto 1993 during which period the petitioner enrolled his children in the Saint Aloysius High school located in the vicinity.

3. Ms. Sarnaik submits that the respondent no.1 clandestinely broke open the lock of the flat without the petitioner's knowledge/ permission and dispossessed the petitioner. Ms. Sarnaik further submits that even in his passport issued in the year 1996, the address of the petitioner is that of the said flat and that there is sufficient evidence of his occupation of the said flat. It is the petitioner's case that after 1993, he along with his family started

residing in the United States of America but continued to be in possession of the said flat. After his father's demise on 18.11.2006, the petitioner visited Mumbai only in October, 2013. Upon arrival in Mumbai, the petitioner stayed with his sister-in-law Guni Matai since the respondent no.1 reportedly dissuaded the petitioner from residing in the flat stating that it would require a great deal of cleaning, but, when the petitioner did visit the flat, he was shocked to see that a family of unknown persons was residing there and on making enquiries, he came to know that the said persons were residing in the said flat for several years and all the articles of the petitioner had been removed. He then lodged police complaint on 28.10.2013, copy of which is at Exhibit "G" to the petition.

4. According to Ms. Sarnaik even in October, 2013 respondent no.1 did not inform the petitioner that he had obtained probate of the Will. The respondent no.1 is alleged to have given the petitioner a document stating that it was a copy of the Will of the deceased and the respondent no.1 and his Advocate tried to persuade the petitioner to counter sign the said copy of the Will and "some other papers" which the petitioner declined to do. Ms. Sarnaik submitted that the petitioner then returned to the USA and in January, 2014, the petitioner came across a letter dated 11.12.2013 addressed by respondent no.1 to respondent no.9, who is the daughter of petitioner, wherein the first respondent communicated particulars of a bequest made by the deceased in favour of petitioner's daughter and enclosing therewith a demand draft of Rs.50,000/-. According to the petitioner, his daughter has not encashed the said draft.

5. Thereafter on 22.1.2015 the petitioner claims to have received a letter from the Advocate of the respondent no.1 setting out particulars of the Will and inter-alia the fact that the deceased had

bequeathed Flat No.4/54 ,Meera Society No.1, Salisbury Park area, Pune to the petitioner and called upon him to execute necessary documents for transfer of the said flat to the petitioner. Ms. Sarnaik contends that it is only thereafter that the petitioner contacted his present Advocate and took personal search in the records of the registry on 13.3.2015 and came to know of the filing of the Testamentary Petition No.133 of 2012 and the fact that probate has been granted by this Court on 13.9.2013. The petitioner then learnt that his brother Suresh Keswani and his sister Manu Shukla, respondent nos. 2 and 3 respectively had also challenged the Will. Ms. Sarnaik submitted that the main grounds on which the petitioner assails the grant of probate and seeks revocation are as follows;

a) the attempt to probate Will is barred by limitation, the petition being filed 5 years after the demise of the deceased. Respondent no.1 has failed to explain the delay in filing for probate

b) the Will does not bear the signature of the petitioner's deceased father and is a forged document based on the alleged unequal distribution of properties.

c) the petitioner was not served with Citation. Rule 399 of the Bombay High Court (Original Side) Rules (*the Rules*) requires Citation to be served personally and acknowledgment has to be obtained.

d) Rule 400 requires that in case of Citation which cannot be served personally, must be served by publishing the same in local newspapers as the Prothonotary and Senior Master may direct.

e) the application to probate the Will was barred by the period of limitation being filed only 5 years after the demise of the deceased.

f) the Will did not bear the signature of the petitioner's deceased

father.

6. Ms. Sarnaik submitted that the citation was obviously not served. She referred to the fact that in the affidavit-in-reply filed on behalf of the respondent no.1, the respondent no.1 had annexed a copy of an affidavit of service of citation upon the petitioner dated 23.8.2013. The said affidavit is affirmed by a bailiff in the office of the Sheriff of Mumbai and records that on 17.7.2012, the first respondent lodged a packet containing the citation to be served upon the petitioner at his address at 394, Gladstone, Ln, Elgin, IL 60120, USA. The affidavit further records that on 18.8.2012 July, the said packet was dispatched and the same was delivered to the petitioner on 8.8.2012. The affidavit places reliance on the delivery report issued by the General Post Office, Mumbai dated 22.8.2013. A copy of the communication dated 22.8.2013 is also annexed to the affidavit-in-reply at page 70. Ms. Sarnaik submitted that the said letter recording the purported service of the envelope containing citation has been issued to the Sheriff's office in response to a complaint recording non-receipt of the acknowledgment. In this respect it is revealed that the Advocates for the first respondent had vide a letter dated 13.8.2013 made enquiries with the Sheriff's Office as to the fate of the postal packet containing the citation and the Sheriff's office had pursued the matter with the postal department which issued a letter dated 22.8.2013 styled as "COMPLAINT-SETTLED REPLY". In the said letter, the Postal Department informed to the Sheriff's Office that the article under reference addressed to the petitioner was delivered at 3.49 p.m. on 8.8.2012 at the address of the petitioner. Assailing the said letter Ms.Sarnaik submitted that the letter could not be equated to proof of service of the citation as required by the rules. The respondent no.1 had obviously failed to follow appropriate procedure for serving citation namely by serving personally upon the petitioner,

or in the alternative, by publication of an advertisement as provided under Rule 400. Ms. Sarnaik submitted that issuance of probate was thus fundamentally flawed and the grant was required to be revoked.

7. On behalf of the first respondent, Mr. Sanjay Jain the learned counsel submitted that the petitioner has come out with a case riddled with the inconsistencies. According to Mr. Jain the contention that the citation has not been served upon the petitioner had not been taken in the petition at all. However, it is been taken up in only in the affidavit-in-rejoinder dated 1.9.2015 filed by the petitioner. Prior to the said affidavit, the petitioner has not complained about non-receipt of the citation and/or a copy of the Will. Petitioner's contention that he received a copy of the Will for the first time only in October, 2013 is incorrect. In the affidavit-in-reply filed by respondent no.1, respondent no.1 has averred that the petitioner was duly served with the citation but chose not to file a caveat. The petitioner did not comply with the requirements of Section 263 of the Indian Succession Act, 1925, the Petition suffered from delay and the petitioner has not approached this Court with clean hands. Mr. Jain contended that via E-mail dated 8.8.2011, the respondent no.1 had sought the address of the petitioner, which the petitioner provided vide E-mail dated 9.8.2011. Along with the address, he also provided his telephone contact numbers. After the probate petition was filed, citation was issued to the petitioner at the address provided by the petitioner. The petitioner had duly received citation which fact, according to the respondent no.1 was telephonically confirmed.

8. As contended by Mr. Jain, the respondent no.1 has further stated that a scanned copy of the Will was thereafter sent to petitioner via e-mail dated 10.11.2012. The respondent no.1 of his own accord informed the petitioner that the copy of the Will sent to

the petitioner may have been faint and a darker copy would be sent in due course. Mr. Jain submitted that a draft of the petitioner's consent affidavit to be executed by the petitioner was also provided to the petitioner via e-mail dated 14.8.2013. According to Mr. Jain, the petitioner received the said e-mail along with consent affidavit. Mr. Jain further submitted that on 21.8.2013, the first respondent made enquiries via e-mail asking the petitioner whether the consent affidavit has been received to which the petitioner replied on the same day, via e-mail, confirming receipt of the consent affidavit but contending that as he was not in the country, the same could not be notarised.

9. During the course of hearing today, Mr. Jain relied upon the e-mail correspondence between the petitioner and the respondent no.1. The affidavit-in-rejoinder contains no denials apropos these emails or the contents and apart from a grievance that the copies of the e-mails were not annexed to the affidavit in reply, there is nothing on record to indicate that the e-mail exchange did not take place.

10. Mr. Nankani the learned Senior Counsel appearing on behalf of the respondent nos.7 and 8 adopted the case propounded by the first respondent. He submitted that even otherwise Rules 399 and 400 of the Rules must be read along with Rule 445 which deals with the requirements to be followed by the Sheriff of Mumbai while serving and executing process. The said rule clearly lays down that the process to be served within the local limits of the Ordinary Original Civil Jurisdiction of this Court is to be served by the bailiff or if the party so desires by the registered post pre-paid for acknowledgment and if the process is to be served beyond the said local limits, Sheriff shall serve the same by registered post pre-paid for acknowledgment. Thus, Mr. Nankani submitted that Rule 399 cannot be read in isolation

and must be read with Rule 445. He relied upon the judgment of the learned Single Judge of this Court in **Abhiraji Bansraj Singh v. Vimal Narsingh Bahadur reported in 2010 (4) All MR 236**. In that case, the Court had occasion to consider procedure for the service of citation and the Court observed that Rules 399 and 400 lay down the procedure for service of citation but Chapter XXVIII and Rule 445 prescribe the manner in which sheriff has to serve the process and since Rule 398 lays down that process under Chapter XVI dealing with the Testamentary and Intestate Jurisdiction may be served in the same manner as process is in suits on the Original Side of the High Court. The provisions of Rule 445 would be directly applicable. In the circumstances, Mr. Nankani submitted that service of citation by registered post and the affidavit of service was valid service and there can be no doubt that the citation has been served upon the petitioner.

11. Ms. Sarnaik while dealing with the replies contended that it is incorrect that the petitioner had not raised the issue of non-service of the citation upon the petitioner and that it was taken up only in rejoinder. According to her in the petition, she had taken up ground nos. XIV and XVI wherein the petitioner had stated that there is no signature of the petitioner receiving any caveat notice and the petitioner had not signed any caveat notice. Reference to the words "caveat notice", she submitted, is to be equated to the word "citation" and, therefore, it is the petitioner's contention that the petitioner has not acknowledged the receipt of citation. Ms. Sarnaik submitted that the same is a forged document based on the alleged unequal distribution of properties. On this basis, she submitted that the petition for revocation be allowed.

12. Having considered the submissions of the counsel at

length and having perused the contents of the petition, affidavit-in-reply and the affidavit-in-rejoinder, I am of the view that petitioner has failed to make out a case for revocation of the grant. She submitted that the principal ground on which the petition is lodged and revocation sought is that the petitioner was not served with the citation. She submitted that under Rule 399 of the Bombay High Court (Original Side) Rules (the **Rules**) the citation is required to be served personally and that acknowledgment has to be obtained. She further submitted that under Rule 400 in case of citation which cannot be served personally, the same would be served by publishing the same in local newspapers as the Prothonotary and Senior Master may direct. Ms. Sarnaik submitted that the citation was obviously not served.

13. On reading of Rules 398, 399 and 400 of Chapter XVI of the High Court Original Side Rules dealing with the Testamentary Jurisdiction and Rule 445, I have no doubt in my mind that a citation can be served by registered post. The Rules do not prohibit service of citation by registered post although Rule 400 refers to publication of advertisement as one of the modes in which citation may be served. The address of the legal heir in question viz the petitioner was available to the respondent no.1. There is no reason why advertisement would be resorted to as a mode of service and it is only natural that service would be effected personally including by registered post since the petitioner is not resident of Mumbai and is outside of Ordinary Original Civil Jurisdiction of this Court. Rule 445 would entitle the first respondent, (Petitioner in Testamentary Petition No.133 of 2012 ) to serve citation through the bailiff of the Sheriff of Mumbai and if he desires by registered post pre-paid for acknowledgment. The Sheriff is not bound to depute his bailiff beyond the local limits of the jurisdiction of this Court for executing the

process personally unless directed by the Court and in the present case on fair reading of the relevant rules, I am of the view that that service of citation by registered post prepaid for acknowledgement as attempted by the first respondent cannot be faulted and the same is not found to be wanting in procedural compliance.

14. Ms. Sarnaik's attempt to discredit the affidavit of service dated 23.8.2013 also must fail inasmuch as it is fairly common knowledge that the postal acknowledgements are sometime not physically received back by the senders and it is in such circumstances that the office of Sheriff of Mumbai makes enquiries with the Postmaster of the concerned post office to verify the dispatch and the fate of the despatch. In this respect Exhibit "A" to the affidavit of service is a letter issued by the Department of Post of India dated 22.8.2013. Department of Post at the General Post Office has confirmed to the office of Sheriff at Mumbai that the registered letter dispatched on 18.7.2012 had been duly delivered to the addressee at 3.49 p.m. on 8.8.2012 at Elgin IL 60120. In this respect details provided in the said letter have not been challenged by the petitioner. Ms. Sarnaik had contended that Department of Posts had not provided supporting records proving delivery of the article. In my view, the letter dated 22.8.2013 is prima-facie evidence of the delivery of the post packet and if the petitioner was desirous of challenging the contents of the letter, it was open for him to do so by adopting appropriate proceedings and disproving the contents of the letter. I am inclined to accept the contents of the letter as a true and faithful re-production of the records of the postal department which records the fact that postal article under reference was delivered to the addressee.

15. Not only must the petition fail on that ground but when we consider the fact that petitioner has deliberately suppressed the fact

that a copy of the will had been received by him by email and that copy of the affidavit of consent was also received by him by email, petitioner's case becomes unsustainable. None of the E-Mails had been denied. I enquired of Ms. Sarnaik as to whether before the rejoinder was filed, the petitioner has sought inspection of the e-mails referred and relied upon by the respondent no.1 to which Ms. Sarnaik replied in the negative. It is, therefore, not open for the petitioner to now contend or assail contents of the email exchange. Thus, whether or not the citation was served in accordance with the rules is an issue rendered academic and secondary in the light of the fact that a draft consent affidavit had actually been provided. This fact is specifically mentioned in the affidavit of the respondent no.1 but the petitioner has chosen to deny receipt of the draft. On the other hand the petitioner complains that the email forwarding the draft was not annexed to the affidavit. This contention in the affidavit in rejoinder does not appear to be bonafide since the petitioner has not denied receipt of the emails nor has he denied having responded to the email forwarding the draft of the consent affidavit. It is pertinent to mention that vide his email dated 21<sup>st</sup> August 2013 sent to the respondent no.1 at 2232 hours, the petitioner has acknowledged receipt of the affidavit but sought time as he was out of the country. This email, copy of which forms part of the compilation tendered has not been denied by the petitioner.

16. The conduct of the petitioner/son of the deceased in not having filed a caveat leads me to believe that at the material time the petitioner did not seem to have any objection to probate being granted without service of any citation. There is no reason why I must disbelieve the first respondent's case. On the other hand, petitioner has not come with clean hands in the petition. The petitioner appears to have made an incorrect statement that copy of the will was

received by the petitioner for the first time only in October, 2013. The allegation that the respondent no.1 did not provide the petitioner with any information about the probate is also fraught with inconsistencies since in the same paragraph the petitioner admits that the respondent no.1 and his Advocate attempted to hand over some papers to the petitioner who refused to accept the same. Such is not conduct of a party who makes a bonafide application to challenge the Will and grant of probate. Even otherwise, the petitioner took search of the records and proceedings in this Court on 13.3.2015 but has chosen to affirm this petition in Illinois on 8.7.2015. Moreover, although the petitioner admits receipt of a copy of the Will in 2013 when he visited Mumbai and learnt that the flat was used by some third party, he chose not to adopt any steps or proceedings and waited till March, 2015 to take inspection of record. As regards Ms. Sarnaik's contention that the petitioner seeking probate is barred the law of limitation, apart a formal plea the petitioner has failed make out a case and demonstrate as to why the application for the grant was barred. It was not. Thus, the petitioner has failed to make out any case for revocation of probate. In my view, for the reasons aforesaid, the petition must fail. I accordingly, pass the following order:

- (a) Petition is dismissed.
- (b) There will be no order as to costs.

**(A. K. MENON, J.)**