

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.1 OF 2015
IN
CHAMBER SUMMONS NO.46 OF 2013
IN
TESTAMENTARY SUIT NO.94 OF 2000
IN
TESTAMENTARY PETITION NO.1233 OF 1999**

Haresh Chetan Thadhani Appellant.

V/s

Mrs. Komal Suresh Chainani
and Others Respondents.

Mr. Arif Bookwala, Senior Counsel alongwith Mr. Aniket Tripathi, Mr. Ashish Ghadge i/b Tambhane & Co. for the Appellant.

Ms. R.C. Nichani for Respondent Nos. 2 and 3.

Mr. Aditya Shiralkar for Respondent No.4.

**CORAM: V. M. KANADE &
REVATI MOHITE DERE, JJ.**

DATE: 27th January, 2015.

P.C.:- (Per V.M. Kanade, J.)

1. Appellant, who is original Defendant No.1, has filed this Appeal challenging the Order passed by the learned Single Judge dated 16/12/2014 in Chamber Summons No.46 of

2013. By the said order, the learned Single Judge was pleased to make the Chamber Summons absolute in terms of prayer clauses (a), (b), (c) and (d) and permit the Respondents/original Plaintiffs to amend the suit and to add Plaintiff Nos 1(a) and 1(b) in place of the deceased Plaintiff and was also pleased to set aside the order of abatement of the suit.

2. Brief facts are that the original Plaintiff filed Petition for probate claiming to be the executor of a sole beneficiary of the Will of one Chetan Bulchand Thadani, who died in Mumbai on 19/05/1993. Defendants entered their caveat and the Probate Petition was converted into a suit. Plaintiff, however, passed away on 06/11/2012. The Chamber Summons was taken out by husband of the deceased and the Plaintiff's married daughter, seeking conversion of the Petition of Probate into Petition for Letters of Administration with the Will annexed.

3. The learned Senior Counsel appearing on behalf of the Appellant submitted that in view of the ratio of the judgment of this Court in *Thirty Sam shroff v. Shiraz Byramji Anklesaria & anr*¹, the order passed by the learned Single Judge is liable to be set aside. He submitted that it was a settled position in law that on the death of the sole executor, proceedings which were taken out for seeking Probate of the

¹ 2007(2) Bom.C.R. 560

Will did not survive and, therefore, the application taken out for substitution in the probate proceedings was liable to be dismissed. The learned Senior Counsel further submitted that the judgment of the Apex Court in *Shambhu Prasad Agarwal & Ors v. Bhola Ram Agarwal*¹ on which reliance was placed by the learned Single Judge was distinguishable on facts. He relied on para 5 of the said judgment and more particularly on the following sentence from the said para:-

“5..... It is true that where an executor dies, his heirs cannot be substituted because the executor possessed personal right, but this is not applicable where the heirs of a legatee apply for issue of letters of administration.....”

He submitted that the applicants were not legatees.

4. The learned Senior Counsel appearing on behalf of the Appellant invited our attention to the following observations made by the learned Single Judge in para 5 of the said order:-

“5.....I do not believe that could have been the intention of any Division Bench of this court, and particularly a Division Bench that, with respect, was always renowned for its justice-oriented approach rather than an emphasis on technicalities, to suggest that in such proceedings the probate petition

¹ (2000) 9 SCC 714

should be ordered to should stand abated and the heirs of the Petitioner should then be forced to file a fresh Petition for Letters of Administration with Will annexed in respect of the very same testamentary instrument....”

He submitted that, in fact, the Division Bench had in terms, after considering all the judgments of the Apex Court and various High Courts, had not permitted conversion of the Probate Petition into a Petition for Letters of Administration. He submitted that the said observation, therefore, was not tenable. He then submitted that the learned Single Judge had not considered the ratio of the judgment of the Apex Court. He invited our attention to para 7 of the order passed by the learned Single Judge, which reads as under:-

“7. The Supreme Court has, Ms. Nichani, points out repeatedly addressed that a technical approach should not be used where many years have been lost in litigation [Shambhu Prasad Agarwal & Ors v. Bhola Ram Agarwal (2000) 9 SCC 714]. In the present case, 14 years have been so lost. One party to the original action has passed on. If the course suggested by the Defendants is to be adopted, there is every likelihood that the Defendants too will pass on. This endless cycle will continue with no resolution. I see no reason why the reliefs sought by Ms. Nichani ought to be refused.”

He submitted that ratio of the judgment of the Apex Court

and facts of this case were not even referred to by the learned Single Judge.

5. On the other hand, the learned Counsel for the Respondents/original Plaintiff submitted that the Apex Court in *Shambhu Prasad Agarwal*¹ (supra) had in terms held that in a case where party was entitled to file Petition for Letters of Administration, Petition for Probate should not be dismissed on highly technical ground. She submitted that ratio of the said judgment is applicable to the facts of the present case.

6. In our view, submission made by the learned Senior Counsel appearing on behalf of the Appellant is not acceptable. Admitted position is that the original Plaintiff was an executor and the sole beneficiary of the Will which was executed by one Chetan Bulchand Thadani. Plaintiff herself died on 06/11/2012. Plaintiff was a beneficiary under the said Will and was therefore also a legatee under the Will. Applicants in the Chamber Summons are husband of the original Plaintiff and her married daughter and, therefore, they are the heirs of a legatee.

7. It is true that Division Bench of this Court in *Thirty Sam*

¹ (2000) 9 SCC 714

*shroff*¹ (supra) has held that on the death of the executor of a Will, the right to sue did not survive and, therefore, it was not possible to set aside the order of abatement on the death of the executor of a Will. Division Bench, therefore in para 32 and 33 of its judgment has observed as under:-

“32. Once it is clear that the proceeding does not survive on the death of last surviving executor, such proceeding is bound to abate. The question of entertaining any application for substitution in an abated proceeding cannot arise, till and until the abatement is set aside. The question of setting aside the abatement would arise only in a case where right to sue survives and sufficient case is made out by moving the Court to set aside the abatement and to bring the legal representatives on record. Once it is clear that in a probate proceeding, there is no right to sue which can survive, the question of setting aside of abatement does not arise. Once the abatement cannot be set aside, it means proceedings cannot be revived. Once a proceeding is dead, the question of entertaining any application therein does not arise. Hence, the contention about the substitution of the deceased executor and thereafter transforming the proceeding into a proceeding for Letters of Administration does not arise.”

1 2007(2) Bom.C.R. 560

“33. The question of transformation from one form of proceeding into another form of proceeding would arise only when the proceeding in the first form is surviving or pending. In a case where the proceeding itself has abated and is neither surviving nor pending, the question of transforming the same into another form does not arise.”

8. Unfortunately, the judgment of the Apex Court in *Shambhu Prasad Agarwal*¹ (supra) was not brought to the notice of the Division Bench. In the said case, one Maina Devi, wife of late Baidyanath Agrawal executed a Will on 14/6/1976 nominating her nephew Matadin Agarwal to be the owner of her house, landed properties and other immovable properties. On 23/09/1981 Maina Devi died. Soon thereafter Matadin Agarwal filed probate petition which was converted into suit in 1985. On 13/7/1987 Matadin Agarwal died. On the death of Matadin Agarwal, his heirs filed an application for their substitution in place of Matadin Agarwal and also filed another application for amendment of the Petition. In the application for amendment, it was prayed that legal heirs may be granted letters of administration instead of grant of probate. Trial Court dismissed the said application. Against this order, Revision Application was also dismissed by the High Court. Apex Court in the light of these facts observed in para 5 as under:-

1 (2000) 9 SCC 714

“5. We find that it is not disputed that Matadin Agarwal was a legatee under the will. It is true that Matadin Agarwal ought to have applied for issue of letters of administration and not for probate. However, this did not debar his heirs to get the probate petition amended. The trial court rejected both the applications of the appellants on the ground that since the probate petition filed by the legatee related to his personal right, therefore, no right accrued to the appellants for their substitution in his place. This view, according to us, is not correct. Matadin Agarwal as stated above, was a legatee and not an executor under the will. It is true that where an executor dies, his heirs cannot be substituted because the executor possessed personal right, but this is not applicable where the heirs of a legatee apply for issue of letters of administration. It is not disputed that today the appellants can file a petition for issue of letter of administration. Since considerable time has elapsed, we feel that the interest of justice demands that the proceedings should come to an end as early as possible and we should not dismiss this appeal merely on highly technical ground.”

Apex Court then permitted the Appellant therein to be substituted in the proceedings and also permitted them to amend the Petition.

9. In our view, the facts in the said case¹ before the Apex Court are identical to the facts of the case in this appeal. We are, therefore, of the view that the learned Single Judge has rightly permitted the Respondents/original Plaintiff to amend the Petition for Probate and seek Letters of Administration. It is not in dispute that the Respondents/original Plaintiff were entitled to file a Petition for issuance of Letters of Administration. No useful purpose will be served therefore in now asking them to file a separate Petition for Letters of Administration. As it is, Petition for Probate was filed in 1999 and it is pending in this Court for last about 14 years.

10. Appeal is therefore dismissed.

(REVATI MOHITE DERE, J.)

(V.M. KANADE, J.)

1 Shambhu Prasad Agarwal and Ors vs. Bhola Ram Agarwal (2000) 9 SCC 714