

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO. 572 OF 2016
IN
MISC. PETITION NO. 116 OF 2015
IN
TESTAMENTARY PETITION NO. 473 OF 2012**

Titus A. Govaria and anr. .. Appellants
V/s.
Mrs. Monica P. Nair and ors. .. Respondents.

Mr. Jayesh Bhatt for the Appellants.
Mr. Vachan Bodake i/b M/s. Chitnis Vaithy & Co. for Respondent
Nos.1 to 14.

**CORAM: DR. MANJULA CHELLUR, C.J. &
M.S.SONAK, J.
DATE : 1 DECEMBER 2016.**

PC.:

1] The appellants appeal against the order dated 21 March 2016, by which, the learned Single Judge has revoked the probate issued on 12 April 2013 in respect of Will dated 25 June 2002 left behind by late Mrs. Petolen Valentine Govaria.

2] Mr. Jayesh Bhatt, learned counsel for the appellants, submits that the procedure as existing for service of citation was adhered to by the appellants and accordingly, there was no reason to hold that there was no proper service of citation upon the respondents. Mr. Bhatt submits that service of the citation was effected upon such parties *inter alia* by way of publication. Leave for such publication was obtained by filing a praecipe consistent

with the practice in-vogue. Accordingly, Mr. Bhatt submits that there was absolutely no reason to revoke the probate issued on 12 April 2013 and the impugned order warrants interference.

3] In the alternate, Mr. Bhatt submits that the appellants ought to have been granted an opportunity to proceed with their Testamentary Petition No. 473 of 2012 seeking probate upon due service of citation upon the concerned parties. Mr. Bhatt submits that in case this Court is not inclined to interfere with the impugned order, it may at least be clarified that the appellants are permitted to proceed with the Testamentary Petition No. 473 of 2012 from the initial stage, so that, the appellants can take necessary steps and seek probate in respect of Will dated 25 June 2002.

4] Mr. Vachan Bodake, learned counsel for respondent Nos.1 to 14, submitted that there was no service or in any case, no valid service of citation, despite the fact that most of the respondents were related to the appellants, who had full knowledge of whereabouts of such respondents. Mr. Bodake submits that there is neither any praecipe nor any order for obtaining service by publication. He submits that such procedure of obtaining orders upon mere praeceipes is improper and no reliance can be placed upon such service by publication. For these reasons, Mr. Bodake submits that there is no case made out to interference with the impugned order.

5] On the aspect of liberty to the appellants to pursue their Testamentary Petition No. 473 of 2012, Mr. Bodake submits that he leaves the matter to the Appeal Court. However, Mr. Bodake submits that he has no instructions to waive notice with regard to service of citation.

6] We have considered the submissions of learned counsel for the parties and perused the record. There is really no case made out to interfere with the finding recorded by the learned Single Judge that there was no proper service of citation upon most of the respondents and that the service by so called publication was by no means sufficient service, in the facts and circumstances of the present case.

7] As observed by the learned Single Judge, in this case, leave to serve by publication is stated to have been obtained on the basis of praecipe. Such praecipe is not even found in the records. There is no clarity as to whether any such praecipe was at all presented and if so presented, any proper order for service by publication obtained thereon. There is no record that any suitable attempts were made for service of citation personally upon the respondents and upon such attempts being unsuccessful, there was necessity to seek service by publication. Upon cumulative consideration of such circumstances, we see no error in the view taken by the learned Single Judge that there was no proper service of citation upon most of the respondents.

8] Mr. Bhatt was unable to satisfy us that the service by publication in the present case was quite consistent with the existing '*practice*' of the testamentary court. Rather, we endorse the view expressed by the learned Single Judge that every application for substituted service must be by way of a proper application for a chamber order, so that the same is duly registered and numbered, unlike, a mere praecipe. Further, the order made upon such application must be available in the file/record and uploaded in the CMIS system like all other routine orders. Apart from this being a healthy practice, we also note that leave for service by publication is not some mere formality but a judicial order to be normally made upon record of satisfaction that despite efforts at personal service, such service could not be effected upon the parties or other permissible reasons.

9] The Hon'ble Supreme Court, in *Yellawwa Vs. Shantavva*¹, has held that substituted service has to be resorted to as the last resort when the defendant cannot be served in the ordinary way and the court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way.

10] The Division Bench of this Court, in *Hamida Haji Haroon and ors. Vs. Khairunissa Haji Mohammed*², by

1 1997(11) SCC 159

2 2009 (5) Mh.L.J. 673

adverting to the provisions contained in Order V of the CPC and the Bombay High Court, Original Side Rules has held that substituted service is permitted when the summons could not be served in ordinary way or that the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service. Further, Order V Rule 20 (1) provides for the mode of substituted service and if one of the modes adopted is service by an advertisement in newspaper, then, requirement of Order V, Rule 20(1A) must also be complied with.

11] For the aforesaid reasons, we are satisfied that no case is made out to interfere with the impugned order.

12] As regards the last submission made by Mr. Bhatt, we agree that there is nothing in the impugned order, which prevents the appellants from proceeding with Testamentary Petition No. 473 of 2012, from the state of its institution. According to us, the petition can now proceed from its initial stage in accordance with law and the issue as to whether the appellants are entitled to probate will be examined. The revocation of the probate granted earlier by the impugned order is only on the ground of non-service or rather improper service of citation upon most of the respondents.

13] We, therefore, clarify that the appellants will now be entitled to proceed with their Testamentary Petition No. 473 of 2012 and for this purpose, they are placed in the same position in

which they were at the time of institution of Testamentary Petition No. 473 of 2012 seeking probate in respect of Will dated 25 June 2002 said to have been left behind by late Mrs. Petolen Valentine Govaria. Testamentary Petition No. 473 of 2012 shall therefore, now proceed from such initial stage and be disposed of by adhering to prescribed procedures in accordance with law and on its own merits.

14] Therefore, whilst not interfering with the impugned order, we dispose of this appeal with the aforesaid observations.

15] In the facts and circumstances of the present case, there shall be no order as to costs.

(CHIEF JUSTICE)

(M.S.SONAK, J.)