

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY & INTESTATE JURISDICTION
MISCELLANEOUS PETITION NO.57 OF 2014
IN
TESTAMENTARY PETITION NO.869 OF 2011

Sonali Arvind Nadkarni ...Petitioner
V/s.
Snehlata Arvind Nadkarni & Ors. ...Respondents

.....

Mr. Atul G. Damle i/by Mr.K.S.Dubey, Advocates for the Petitioner.
Mr. Prashant Govind Karande, Advocate for the Respondent Nos.1 and 2.
Mr. Vishwajeet S. Kapse, Advocate for Respondent Nos.3 and 4.

.....

CORAM : A. K. MENON, J.

DATE : 4TH FEBRUARY, 2016.

PC.:

This is a Petition seeking revocation of probate granted in respect of last Will and testament of Arvind Puttappa Nadkarni in Testamentary Petition No.869 of 2011. Probate was granted on 9.11.2012. The Petitioner is the daughter of the deceased and the Respondent Nos.1 and 2 are the executor of the Will. The Respondent No.3 is a Doctor who had opined on the state of health of the deceased. The Respondent Nos.4 and 5 are the attesting witnesses.

2 Mr. Damle, the learned Senior Counsel appearing on behalf of the Petitioner, contended that the Will of the deceased is false and fabricated principally on the ground that on the date when the Will was believed to be executed, the deceased was hospitalised and was in the Intensive Care Unit. The deceased never recovered from his illness and passed away in the hospital itself. In this background, the Will is stated to have been executed at the residence of the deceased on 9.12.2010. Making reference to the Will, Mr. Damle submitted that the execution clause clearly indicates that the deceased had not affixed his signature in his handwriting. However, he is stated to have affixed his thumb impression in the presence of the Respondent Nos.4 and 5. A medical certificate is also seen to be incorporated in the Will by the Respondent No.3 and the execution of the Will is seen to be witnessed by the Respondent Nos.4 and 5. The executor is also shown to have signed on the Will on the same date.

3 According to Mr. Damle, it is impossible for the Will to be executed at the premises of the hospital since the deceased was in poor state of health and he made reference to the certificate issued by the hospital as to cause of death which indicated that the deceased was suffering from renal failure. He further submitted that the Petition seeking

grant of probate was filed after an affidavit of consent was obtained from the Petitioner. Although the Petitioner admits having executed the affidavit of consent, it is her contention that she signed affidavit without understanding its contents.

4 In paragraph 10 of the Petition, the Petitioner states that she was only child and after demise of her father, the first Respondent's behaviour towards her changed and the Petitioner was in depression for about six months due to demise of her father. It is alleged that the Respondent Nos.1 and 2 took advantage of the Petitioner's depressed state of mind and obtained the signature of the Petitioner on the consent affidavit by misrepresenting to the Petitioner that her signatures were required for complying with the formalities and since the Petitioner was under depression, the Petitioner did not enquire about the contents of the documents but she signed in good faith and without reading the documents. She admits that at the relevant time, some negotiations were underway regarding some sale of the properties and, therefore, the Petitioner did not specifically enquire as to the contents of the affidavit of consent.

5 According to the Petitioner, since she was an adopted child, the Respondent No.1 has always paid less attention to the Petitioner and she was more attached to the deceased. Mr. Damle referred to paragraphs 10, 13 and 17 of the Petition and contended that she was never aware of the contents of the testamentary petition and the fact that it was filed until “Petitioner suspected certain suspicious movement on the part of the Respondent No.1 in January, 2013”.

6 I enquired of Mr. Damle what these “suspicious movement” was. He conceded from the contents of the Petition or the affidavit-in-rejoinder it was not possible to establish the suspicious circumstances. His main contention is that if the deceased was in hospital from 1.12.2010 till 20.12.2010 and that too in a serious condition, the Will could not have been executed on 9.12.2010. Mr. Damle further pointed out that in form no.4 issued by the Bombay Municipal Corporation, the medical certification of the cause of death clearly supports the plea that he was in hospital from 1.12.2010 till his demise. Mr. Damle admits that paragraph 20(d) of the Affidavit of Respondent Nos.4 and 5 it was mentioned that the deceased was unable to sign since he was suffering from Parkinson's disease and, therefore, his left hand thumb impression was affixed on the Will. Further, what is material to note is the absence of

denial of the fact that the Petitioner was not present at the hospital on the dates when the deceased was at the hospital. Thus, I find it inexplicable that the Petitioner did not attend the hospital although she contends that she was close to the deceased.

7 Mr. Damle then referred to the contents of the testamentary petition and the Affidavits filed by the attesting witnesses both of whom had stated that the deceased executed the Will on 9.12.2010 at his residence. He submitted that this is an obvious give away inasmuch as if the Petitioner was admittedly hospitalised during the period, there is no question of the deceased executing the Will at his residence. On this basis, Mr. Damle submitted that the grant is required to be revoked. Mr. Damle also referred to the contents of the affidavit-in-rejoinder, in particular paragraph 25, wherein the Petitioner has stated that she had neither voluntarily executed any consent affidavit nor she waived citation. Mr. Damle contended that the Respondent Nos.1 and 2 had deceived the Petitioner and obtained grant of probate which she came to realise much later when she applied for certified copies of the Petition and the proceedings on 12.2.2013 and which she received on 1.10.2013. Accordingly, she has filed this Petition. However, despite having complete knowledge of the same, I find that the Petition is affirmed only on

2.5.2014. There is no explanation for the delay in approaching this Court after having received copies on 1.10.2013.

8 As against this, Mr. Karande, who appears for the Respondent Nos.1 and 2 pointed out that the entire case of the Petitioner is unbelievable. Firstly, there is no explanation for delay of more than one and half years after receiving copies of the papers and proceedings. Furthermore, the Petitioner herself was about 25 years old when the affidavit of consent was signed and was a practising Advocate. It is, therefore, not possible to accept the contention that the Petitioner signed the affidavit of consent without reading the contents thereof. Mr. Karande also relied upon the contents of paragraphs 19 and 21 of the affidavit-in-reply to the effect that the deceased was admitted to the hospital for treatment of high grade fever with suspected infection and is not as if the deceased was unable to make his Will. He further submitted that the deceased was suffering from Parkinson's disease, which was initially mild but was aggravated in the subsequent years. He was unable to hold pen and sign and, therefore, his thumb impression was affixed on the last Will which was as per his desire and which was executed in the hospital itself on 9.12.2010. He relied upon the certificate issued on 1.8.2014 by Dr. Ashwini Wagh in whose care, the deceased was treated at the hospital.

According to the said Doctor, the deceased was completely conscious, well oriented and was having sound mental condition. Respondent No.1 also denies that the Petitioner was in state of depression as alleged in paragraph 10 of the Petition.

9 Mr. Karande, further, pointed out that the Petitioner had not made out any case as to the suspicious circumstances as alleged in paragraph 12 and denied that there was any change in the behaviour of the first respondent towards the Petitioner. He further submitted that Advocate Chandrashekhar D. Patwardhan had opened the Will on or about 7.1.2011 at the residence of the Respondent No.1 in the presence of the Petitioner, brother of the deceased Uday Nadkarni and his wife Manda Nadkarni and as such, the Petitioner was well aware of the contents of the Will way back in January, 2011. He relied upon the contents of paragraph 32 of the reply to the Petition wherein the Deponents have stated that with reference to the deceased having died intestate, document relied upon by the Petitioner being a declaration appearing at Page 72 to the Petition since that the property was disposed of at the instance of the Petitioner and it was not mentioned in the Will. It is for this reason that the document mentions that the deceased had died intestate. It is pertinent to mention that the Petitioner also received an amount of

Rs.2,06,250/- towards her share in disposition of that property. According to Mr. Karande, the Petitioner had herself misbehaved with the first Respondent and at one stage, had filed criminal complaint alleging that the first Respondent attempted to kill the Petitioner resulting in an F.I.R. being filed and the Respondent had obtained anticipatory bail on or about 12.6.2014. He referred to the contents of the order passed in this respect.

10 Mr. Karande, further submitted that Advocate Chandrashekhar Patwardhan also made an affidavit in support of case of the Respondents to the effect that he himself had gone to the hospital and to Intensive Care Unit to have the Will executed as seen from paragraph 3 of Exhibit 'E' to the reply to the Petition wherein he states inter-alia that on 9th December, 2010 at about 5.30 p.m., he along with the Respondent Nos.4 and 5 approached deceased. The deceased was in sound and disposing condition of mind although suffering from infection and upon the request of the deceased, the Respondent No.2 being the executor, read out the Will and the deceased agreed to execute the same and proceeded to put his thumb impression thereon. The Affidavit describes in detail sequence of the events leading to the execution of the Will by the testator.

11 As regards the contents of the affidavits of the attesting

witnesses and the statement therein that the Will was executed at the residence of the deceased, an explanation is provided in paragraph 6 of the Affidavit of the said Advocate to the effect that while preparing testamentary petition, he had taken assistance of experienced clerk Mr. M.M.Nayak, who mainly attends testamentary work and who had prepared the draft. He had thereafter inadvertently omitted to notice that the Affidavits of the two Attesting Witnesses contained an averment that the Will was executed at the residence of the deceased. He states that the statement was incorrect and it was not noticed either by him or by the attesting witnesses and that this error was taken advantage of by the Petitioner.

12 Mr. Karande then referred to the notarial register wherein he has pointed out that all the Respondents and the Petitioner herself had signed notarial register at the time when the Consent Affidavit was affirmed by her. This is seen at Serial Number 104 of Exhibit I annexed to the reply. So also the Petitioner is seen to have put the date of 8.5.2011 since she was not available on 4.5.2011 when the first Respondent signed affidavit of consent and attended office of notary. Accordingly, the Petitioner had not signed affidavit on the same day and had subsequently visited address of the notary on 8.5.2011 and signed the register. This, in

my view, is another indicator of the fact that the Petitioner was not unaware of what she is doing since the Affidavit was not obtained by misrepresentation or coercion as is sought to be alleged. There was no question of her attending the office of notary four days later to enter her signature upon the notarial register maintained. It is pertinent to mention that there is no challenge to the effect that the Petitioner had signed these documents which included Affidavits of Consent, Notarial Register as well as the document, which was relied upon by the first Respondent.

13 The Respondent Nos.1 and 2 have in their joint affidavit in sur-rejoinder annexed at Exhibit "I" at Page 404, a document which sets out the fact that the Will was read out on Friday, 7.1.2011 at the deceased's residence in the presence of six persons namely, (1) Smt. Snehlata Arvind Nadkarni, (2) Miss Sonali Arvind Nadkarni, (3) Shri Uday Putappa Nadkarni, (4) Mrs. Manda Uday Nadkarni, (5) Shri Brahmesh Balkrishna Sanzgiri and (6) Shri C.D.Patwardhan. The aforesaid six persons have also signed this document. The Petitioner has not denied her signature on this either. However, apart from the first set of signatures, the document also contains a second part under the head '**CONFIRMATION**' wherein the first Respondent and the Petitioner have declared and affirmed that last Will dated 9.12.2010 of the deceased was read out on

Friday, 7.1.2011 between 8.45 p.m. and 9.30 p.m. Inadvertently the process of reading was described as 'Executed'. The subsequent portion makes it clear that the Will was read out and confirmed. The relevant portion is extracted for ease of the reference:

“.....The entire WILL was read over by the Executor and we have inspected the contents of the said Will and also seen Left Hand Thumb Impression of the deceased. We hereby confirm the same.

We as the legal heirs and successors of the deceased hereby further confirm that we have accepted and admitted the contents of the said WILL and we have 'NO OBJECTION' for the same. We have signed this confirmation as per our own wish and desire and without any undue influence and or coercion of whatsoever nature by any person/s. We shall co-operate to each other to implement the said WILL without obtaining the 'Probate' of the said WILL.”

14 This document is also signed at the foot by the first Respondent and the Petitioner. Once again, signatures of the Petitioner on this document are not denied. Mr. Damle objects to the document being produced at this late stage in the sur-rejoinder when all along the Respondent No.1 was in possession could have produced it at the time of filing reply. However, when one considers contents of paragraph 28 of the affidavit in reply dated 12.8.2014, it is seen that the document is not one

that is “got up” at the stage of sur-rejoinder but was referred to in express terms in paragraph 28 of the affidavit-in-reply dated 12.8.2014. Furthermore, the Affidavit of Mr. Patwardhan in support of the first Respondent's case, in paragraph 4, states that he conducted meetings for the purposes of opening and reading the Will and that the meeting was attended by the Petitioner and the Respondent Nos.1 and 2 and the younger brother of the deceased Uday along with his wife Manda.

15 In the circumstances, in my view, there is no substance in the contention raised by the Petitioner that the said document cannot be relied upon at this late stage since reference to it has already been made in paragraph 28 of the reply as aforesaid. While dealing with paragraph 28 in paragraph 25 of her rejoinder, the Petitioner has contended while denying that she has voluntarily executed the affidavit of consent, she craved leave to rely upon true meaning and interpretation of the contents of the affidavit of Mr. Chandrashekhar Patwardhan. However, there is no denial of the contents of the said affidavit. Furthermore, although she does not admit that the said document was opened and read the Will on 7.1.2011, she has not denied her signature on the document at Exhibit 'I' to the affidavit in sur-rejoinder dated 3.2.2016. This in my view, stares the Petitioner in the face and in my view, it is fatal to the Petitioner's attempt

to have grant revoked. Furthermore, in paragraph 25 of the affidavit-in-rejoinder although she denies having inspected Will or having read the Will or even signed the papers after reading the Will, she merely contends that on 7.1.2011, she was at her office. Although she denies having “signed” the papers, nowhere in her affidavit in rejoinder does she contend that the said document was forged and/or fabricated and that signature appearing on Exhibit 'I' to the sur-rejoinder is not her signature. It is also pertinent to mention that the document Exhibit I records that the will was read out between 8.45 p.m. and 9.30 p.m. The contention that, being Friday, the Petitioner was in office is of no avail, considering the time at which Will was opened and the contents read out. This is corroborated by the affidavit of Chandrashekhar Patwardhan who states that on 7.1.2011 after “waiting for some time”, the Will was read out in the presence inter-alia the Petitioner. This aspect has not been denied by the Petitioner although she craved leave to refer to and relied upon the true meaning and interpretation of the affidavit of the said Advocate, who had prepared Will and the Petition.

16 In the circumstances, taking an overall view of the matter, I am not persuaded to hold that affidavit of consent was executed by the Petitioner under a depressed state of mind. For the reasons aforesaid.

The Petition must fail and I, accordingly, pass the following order:

- (1) Miscellaneous Petition No.57 of 2014 is dismissed.
- (2) There will be no order as to costs.

(A. K. MENON, J.)