

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
MISCELLANEOUS PETITION NO.51 OF 2012
IN
TESTAMENTARY PETITION NO.875 OF 2005

Renudevi Samarbahadur Singh ... Petitioner
Vs.
Shakuntala w/o. Bhaskar s/o. Setban Singh
and others ... Respondents

Mr. B. G. Saraf for Petitioner.
Mr. Dharam Sharma i/b. M/s. Dharam and Co. for Respondent No.1.
Mr. Akshay Bobade i/b. B. A. Punekar for Respondents No.2A to 2E.

CORAM : R. G. KETKAR, J.
DATE : SEPTEMBER 29, 2017

P.C. :

Heard Mr. Saraf, learned Counsel for the petitioner, Mr. Sharma, learned Counsel for the respondent No.1 and Mr. Bobade, learned Counsel for respondents No.2A to 2E at length.

2. By this Petition under Section 263 of the Indian Succession Act, 1925 (for short 'Act'), petitioner Renudevi Samarbahadur Singh has prayed for revocation and annulment of the Probate dated 17.04.2006 granted by this Court in Petition No.875 of 2005.

3. In support of this Petition, Mr. Saraf submitted that Bhaskar Setban Singh, husband of the first respondent (since deceased) had instituted Petition No.875 of 2005 for obtaining Probate of the last Will and Testament of Setban Narayan Singh (for short 'deceased'). The deceased died at Banaras on 23.06.2005 leaving behind Bhaskar Setban Singh who died on 26.12.2011, Jiten Prakash Singh, Samar Bahadur Singh and Sunita Singh (sons and daughter of the deceased) as the heirs and legal representatives under the Hindu Succession Act, 1956 (for

short 'Succession Act'). The deceased had executed alleged Will and Testament on 19.03.2004. the petitioner is the daughter in law of the deceased. She was married to Samar Bahadur Singh in the year 1985. Samar Bahadur is missing since 15.08.1994 and complaint is made with the missing bureau on 14.04.1995. He submitted that no citation / notice of Probate Petition was issued to the petitioner. He relied upon Section 263(b) of the Act to contend that the grant was obtained fraudulently by making a false suggestion and by concealing material facts from this Court. The petitioner acquired knowledge about grant of Probate in March 2012 and has instituted the present Petition in April 2012. He, therefore, prayed for revoking the Probate granted by this Court on 17.04.2006 in Petition No.875 of 2005.

4. Mr. Saraf submitted that in pursuance of the probate granted by this Court, Shakuntala Bhaskar Setban Singh and two others instituted Suit No.298 of 2013 on the Original Side of this Court inter alia praying for partition of shop No.5 situate at Dr. Gopalrao Deshmukh Marg, Cumbala Hill, Mumbai 400 026, among other properties. The petitioner herein was not impleaded in that Suit. The petitioner filed application for impleadment which was allowed and thereafter the parties entered into consent terms. During the pendency of that Suit, Notice of Motion No.756 of 2013 was taken out. Parties amicably settled the controversy raised in the Motion and they filed consent terms-cum-agreement.

5. Mr. Sharma fairly did not dispute the fact that husband of the petitioner herein or petitioner herein were not named as one of the heirs of the deceased. Even otherwise, a perusal of paragraph 10 of Petition No.875 of 2005 shows that neither husband of the petitioner who is missing since 1994 nor the petitioner were shown as one of the heirs of the deceased.

6. Mr. Bobade submitted that the grant was made in the year 2006 and the present Petition is instituted in April 2012. The Petition suffers from gross delay and laches. He submitted that Article 137 of the Limitation Act, 1963 lays down that in application for which no period of limitation is prescribed elsewhere, the proceedings are required to be initiated within three years from the date when the right to apply accrues. He submitted that the testamentary proceedings are proceedings in rem. Issuance of grant by this Court in the year 2006 would also be deemed a notice / constructive notice. He, therefore, submitted that the petitioner ought to have instituted the Petition for revocation of Probate within 3 years from 17.04.2006. As the Petition is instituted in the year 2012, it is hopelessly barred by law of limitation. In support of this proposition, he relied upon the decision of this Court in ***Lydia vs. Joseph*, 2014 (3) Mh.L.J.508**, and in particular paragraph 28 thereof.

7. Mr. Bobade submitted that a perusal of paragraph 4 of the consent terms shows that the parties agreed and admitted that the terms agreed upon in the consent terms-cum-agreement were only for the purpose of disposing of the Motion and the same was without prejudice to the rights and contentions of the parties in the Suit and / or Miscellaneous Petition for Revocation of Will dated 19.03.2004. He, therefore, submitted that Petition deserves to be dismissed.

8. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. The short question is whether petitioner has made out a case for revocation of grant of probate on 17.04.2006. Section 263 and explanation (b) of the Act reads thus,

“263. Revocation or annulment for just cause.- The grant of probate or letters of administration may be revoked or annulled for just cause.

Explanation.- Just cause shall be deemed to exist where-

(b) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case; or”

9. A perusal of Petition No.875 of 2005 filed by the husband of the first respondent shows that neither the petitioner nor the husband of the petitioner were shown as one of the heirs of the deceased. Consequently, no citation was issued either to the petitioner or her husband. Samarbahadur, husband of the petitioner is admittedly son of Setban Narayan Singh, the deceased. The relationship between the parties is not in dispute.

10. Mr. Bobade relied upon the decision of this Court in **Lydia** (*supra*). In that case, probate was granted by this Court on 03.07.1980 in favour of Joseph Anthony D'cunha in respect of the Will and testament of Andrew Satiro D'Cunha executed on 20.02.1971. Petition for revocation was instituted in the year 2013 inter alia contending that the petitioners came to know from the public notice dated 14.12.2012 in Free Press Journal dated 22.12.2012. This Court thereafter referred to the questions that arose for consideration in paragraph 19. In paragraph 21, the Court noted that in view of the consent affidavits, service of citation was not required. In paragraph 22, upon comparison of signature on the coloured photocopies of the receipts produced before the Court, a finding was recorded that signature on documents relied by the Advocate for the petitioner with the signature on the consent affidavit are of the same persons. It was further held that no case of forgery was made by the petitioners against the executor or any party as alleged in the Petition. Not only that, no steps were taken by the petitioners at any point of time to find out about the proceedings if any

filed by the respondents or by the executor for obtaining probate or any proceedings relating the administration of the estate of the said deceased. In other words, this Court did not accept the plea raised by the petitioners firstly, that they did not sign the consent affidavits and secondly, that the period of limitation will begin only upon their acquiring knowledge in pursuance of the public notice issued in December 2012. It is in that context, one has to appreciate the findings recorded by this Court in paragraph 29. It is no doubt true that the testamentary proceedings are proceedings in rem. Moot question is whether the probate is obtained in teeth of Section 263(b) of the Act. After considering the material on record, I am satisfied that the probate was obtained fraudulently by suppressing material facts, namely, by the husband of the petitioner or the petitioner, were not named as one of the heirs of the deceased. The probate was obtained without issuing citation to the petitioner or her husband. In view thereof, Petition succeeds and is made absolute in terms of prayer clause (a) with no order as to costs. Testamentary Petition is restored and is converted into Testamentary Suit. Office to proceed.

(R. G. KETKAR, J.)

Minal Parab