

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION***

***MISCELLANEOUS PETITION NO.17 OF 2017
IN
TESTAMENTARY PETITION NO.1222 OF 2014***

Atu s/o Shewakaram Amarnani .. Petitioner
Vs.
Dayal Shwakram Bhambhwani .. Respondent/Org.Petnr.

Mr.Francisco X. D'Souza for the petitioner.
Mr.Gaurav Mehta a/w Mr. S.N.Fadia and Ms.P.S.Fadia i/by Mr.Shashank Fadia for the respondent/org.petitioner.

***CORAM : R.D. DHANUKA, J.
DATE : 7th June 2017***

P.C. :

. By this petition filed under Section 263 of the Indian Succession Act, 1925, the petitioner seeks recall of the order dated 29th October 2015 passed by the Prothonotary and Senior Master rejecting the caveat of the petitioner and also seeks revocation of grant of probate issued in favour of the respondent by this Court. The petitioner also seeks restoration of the Caveat (L) No.124 of 2015 and seeks that the matter be heard on merit. Some of the relevant facts for the purpose of deciding this petition are as under :-

2. The petitioner and the respondent are the sons of the deceased Mr.Shewakram Motumal Bhambhani who died on 28th March 2004 and has alleged to have executed a Will on 18th August 1998. On 22nd July 2014, the executor appointed by the testator filed Testamentary

Petition (L) No.1199 of 2014 for grant of probate of the Will of the deceased testator. On 20th August 2014, the said testamentary petition was registered and was granted final number as Testamentary Petition No.1222 of 2014. Citation was served upon the petitioner herein. On 1st April 2015, the petitioner herein lodged a Caveat (124 of 2015) through advocate Mr.B.P.Shukla.

3. It is the case of the respondent that a copy of the said caveat as well as the affidavit-in-support thereof was not served upon the respondent herein by the petitioner.

4. On 29th October 2015, the learned Prothonotary and Senior Master of this Court granted four weeks' time to the petitioner to remove office objections and passed a conditional order that if the office objections were not removed within four weeks, the caveat filed by the petitioner herein would stand rejected. The four weeks' period expired on 26th November 2015.

5. On 29th February 2016, admittedly this Court granted probate in favour of the respondent herein. On 13th April 2016, the petitioner herein through his advocate Mr.B.P.Shukla took out Misc. Revocation Petition (L) No.806 of 2016 inter alia praying for revocation of probate.

6. By an order dated 2nd May 2016 passed by Shri Justice G.S. Patel, the petitioner herein was allowed to withdraw the said miscellaneous revocation petition with liberty to take out appropriate

proceedings including the challenge to the order dated 29th October 2015 passed by the Prothonotary and Senior Master rejecting the caveat.

7. On 7th November 2016, the respondent herein executed a Deed of Transfer in respect of the flat in question in favour of the beneficiary under the said Will. On 16th November 2016, the petitioner filed a Misc. Petition (L) No.2340 of 2016 inter alia praying for revocation of the probate and for setting aside the order passed by the Prothonotary and Senior Master on 29th October 2015. On 25th January 2017, the said Misc. Petition (L) No.2340 of 2016 came to be registered and numbered as Misc. Petition No.17 of 2017.

8. It is the case of the respondent that this miscellaneous petition was served by the petitioner upon the respondent only in the month of April 2017 though was filed as far back as on 16th November 2016.

9. Learned counsel appearing for the petitioner invited my attention to the copy of the alleged Will dated 18th August 1998 and also the death certificate dated 28th March 2004. The first submission of the learned counsel for the petitioner is that the address of the deceased testator mentioned on the Will was 715, Flat No.5, Chandralok, 12th Road, Khar (West), Mumbai – 400 052 whereas in the probate petition filed by the respondent herein, the address of the deceased was mentioned as 101, 1st Floor, Pinky Panorama, 6th Road, Khar (West), Mumbai - 400 052. He submits that in the probate petition, the fixed place of abode mentioned by the respondent herein is 101, 1st Floor, Pinky Panorama, 6th Road, Khar (West), Mumbai - 400 052. He submits that the difference

in the addresses mentioned on the Will and in the probate petition would indicate that the Will was forged and was not a genuine Will.

10. Learned counsel for the petitioner then invited my attention to the certificate dated 18th August 1998 alleged to have been issued by the Notary Public Mr.Bhagat Dayaram Jaisinghani stating that the Will comprising of two pages had been executed by Mr.Shewakram M. Bhambhawani who had admitted execution thereof on 18th August 1998 in presence of attesting witnesses mentioned therein. It is further stated that in token whereof, he had signed on the endorsement before the Notary Public. He invited my attention to the two pages of the Will and would submit that if the attesting witnesses had signed in presence of the Notary Public, the said Notary Public himself could be the attesting witness of the said alleged Will. He submits that it would indicate that the Will is thus fabricated and is not a genuine Will.

11. The next submission of the learned counsel for the petitioner is that the year (1998) put by the alleged attesting witnesses on the Will below the signatures of both the attesting witnesses is by the same person which would show that the alleged will has been forged and is interpolated by the same person.

12. The next submission of the learned counsel for the petitioner is that in the probate petition, the property bearing Flat No.6, Chandralok, 2nd floor, Plot No.715, 12th Road, Khar (West), Mumbai – 400 052 is deliberately included in the schedule of the property of the deceased testator by the respondent though the said property of the deceased was not disclosed in the alleged Will of the testator. The

respondent has fraudulently obtained probate also in respect of the said property not disclosed in the Will.

13. Learned counsel for the petitioner submits that in the facts of this case, Section 263 of the Indian Succession Act, 1925, explanation (b) and (e) thereto would be attracted and in view of the petitioner having satisfied that his case falls under those two explanations, the order passed by the learned Prothonotary and Senior Master rejecting the caveat and the order granting probate deserve to be set aside.

14. Mr.Mehta, learned counsel appearing for the respondent (original petitioner), on the other hand, submits that no case is made out for revocation of probate granted by this Court or for setting aside the order passed by the learned Prothonotary and Senior Master. He submits that admittedly the citation was served upon the petitioner herein. On 2nd March 2015, though the petitioner herein had lodged the caveat and affidavit in support of the caveat in the probate petition, copy thereof was not served upon the respondent. He submits that the said caveat remained in office objections till October 2015. He submits that on 29th October 2015, the learned Prothonotary and Senior Master granted four weeks' time to remove such office objections and passed a conditional order. He submits that since the conditional order passed by the learned Prothonotary and Senior Master was not complied with by the petitioner herein, the caveat filed by the petitioner came to be rejected. He submits that there was no other caveat filed by any of the other legal heirs who were served with citation. Other legal heirs had filed affidavit giving no objection for grant of probate. On 29th February 2016 the probate came to be granted in favour of the respondent.

15. It is submitted that the petitioner, however, filed an application for the first time in the month of April 2016 for various reliefs and withdrew the said application on 2nd May 2016 with liberty to file appropriate proceedings. He submits that after more than six months, the petitioner filed this revocation petition and more particularly on 16th November 2016. It is submitted that the entire petition is pressed on the ground that the earlier advocate representing the petitioner was negligent and he did not remove office objections.

16. In so far as the submission of the learned counsel for the petitioner that the Will was fabricated on the ground that the address mentioned on the alleged Will by the testator and the address mentioned in the probate petition filed by the respondent herein are different is concerned, learned counsel for the respondent invited my attention to the Will executed by the alleged testator which is at 715, Flat No.5, Chandralok, 12th Road, Khar (West), Mumbai – 400 052. He also invited my attention to the averments made in the probate petition. He submits that the testator was residing at the address mentioned in the Will when the Will was executed in the year 1998 whereas he expired at the address mentioned in the petition. He submits that accordingly, the respondent had mentioned in the petition the address of the deceased at the time of his death i.e. 101, 1st Floor, Pinky Panorama, 6th Road, Khar (West), Mumbai - 400 052. He submits that that cannot be a ground to allege that the Will is forged.

17. Learned counsel for the respondent invited my attention to the death certificate of the deceased showing the permanent address as 101, 1st Floor, Pinky Panorama, 6th Road, Khar (West), Mumbai-400 052.

He submits that the address mentioned in the death certificate would not indicate or support the case of the petitioner that the Will was forged.

18. In so far as the reliance placed on the alleged notary certificate by the learned counsel for the petitioner is concerned, it is submitted that there is no such allegation made by the petitioner in the revocation petition. There are no particulars of the alleged fraud or forgery in the execution of the Will made by the petitioner in the misc. petition and those allegations are totally vague.

19. Learned counsel for the respondent submits that there is also no substance in the ground raised in the petition that there was no affidavit of one of the attesting witnesses annexed to the testamentary petition. He invited my attention to the affidavit of the attesting witness Mr. Pushotam G. Kukreja annexed to the probate petition, a copy whereof is also annexed by the petitioner himself to misc. petition. He submits that the petitioner has made various oral submissions before this Court which are not raised in the revocation petition and thus cannot be considered by this Court.

20. The learned counsel for the petitioner in rejoinder submits that the advocate representing the petitioner was totally negligent. He submits that the petitioner herein had filed a similar caveat and the affidavit-in-support in the testamentary petition in respect of the alleged Will of the brother of the petitioner which were accepted by the office and the said testamentary petition was converted into a suit. He submits that the petitioner was under an impression that the caveat in this case would be similarly accepted and the testamentary petition would be

converted into a suit. It is submitted that the papers and proceedings in this petition were sought to be served upon the respondent immediately after the same was filed, however, the same could not be served since the house of the respondent was found closed. He reiterates his submission that since the Flat No.6, Chandralok, 2nd floor, Plot No.715, 12th Road, Khar (West), Mumbai – 400 052 was not disclosed in the alleged Will of the testator and was disclosed for the first time in the schedule of the property annexed to the probate petition, the probate was obtained by the respondent herein fraudulently in respect of the said property also.

21. It is not in dispute that the petitioner herein was served with citation. It is not in dispute that the petitioner had filed a caveat and also affidavit-in-support of the caveat. The said caveat, however, remained in office objections for more than six months. The office objections were not removed. The matter thereafter appeared before the Prothonotary and Senior Master. It is not in dispute that the name of the advocate who had filed vakalatnama on behalf of the petitioner appeared on the board of the Prothonotary and Senior Master. The learned Prothonotary and Senior Master took a liberal view and granted four weeks' time to remove office objections which were not removed for more than six months before such order. The petitioner or his advocate did not bother to remove office objections despite an opportunity was granted by the Prothonotary and Senior Master.

22. In these circumstances, the learned Prothonotary and Senior Master rejected the caveat filed by the petitioner. The petitioner did not apply for setting aside the order passed by the Prothonotary and Senior

Master immediately and waited for substantial period of time. The earlier miscellaneous petition filed by the petitioner was withdrawn with liberty to file appropriate proceedings. No proceeding was filed for six months thereafter. The argument made across the bar by the learned counsel for the petitioner is that in the caveat filed by the learned advocate on behalf of the petitioner, the learned advocate had inadvertently mentioned the Caveat Application in Proposed Letters of Administration in Testamentary Petition No.1244 of 2014. The endorsement on the caveat indicates that there were various objections raised by the office.

23. A perusal of the order dated 29th October 2015 passed by the learned Prothonotary and Senior Master indicates that it is observed by him that the caveat lodged on 2nd March 2015 and affidavit-in-support of the caveat lodged on 1st April 2015 were under objections. Till 29th October 2015, no steps had been taken for removal of the said office objections. The learned Prothonotary and Senior Master accordingly granted four weeks' time to remove the office objections. A perusal of the roznama of the Prothonotary and Senior Master indicates that none had appeared for the caveator when the matter was on board of the Prothonotary and Senior Master on 29th October 2015.

24. It is not in dispute that the same advocate Mr.B.P.Shukla against whom the allegation of negligence are now made by the petitioner across the bar had filed the earlier miscellaneous petition bearing (L) No.806 of 2016. It is not the case of the petitioner that the learned advocate who had filed the earlier miscellaneous petition had accepted his negligence in not removing the office objections in filing the caveat in

the said petition or before this Court. Though the learned counsel for the petitioner raised serious allegation of negligence against the previous advocate, no correspondence is alleged to have been exchanged between the petitioner and his previous advocate placed on record. No notice of the present proceedings is served upon the previous advocate. No action is taken by the petitioner against the previous advocate. A perusal of the averments in Miscellaneous Petition (L) No.806 of 2016 indicates that no such allegations are made against the same advocate. I am thus not inclined to grant any reliefs in favour of the petitioner on this ground.

25. A perusal of the record further indicates that no steps were immediately taken by the petitioner for removal of the office objections or for challenging the order passed by the Prothonotary and Senior Master and even after this Court granted liberty to withdraw the earlier petition with liberty to file appropriate proceedings.

26. In so far as the submission of the learned counsel for the petitioner that the Will is ex facie fabricated on the ground that the address of the testator mentioned on the Will and in the probate petition are different is concerned, a perusal of the address mentioned on the Will clearly indicates that in the Will, the testator had mentioned the address as 715, Flat No.5, Chandralok, 12th Road, Khar (West), Mumbai- 400 052 at the time of execution of the said Will which was executed on 18th August 1998. It is not in dispute that the testator died on 28th March 2004 i.e. after more than five and half years. I am inclined to accept the submission of the learned counsel for the respondent that in the probate petition, his client had rightly mentioned the address of the deceased testator at the time of his death where he was staying i.e. 101, 1st Floor,

Pinky Panorama, 6th Road, Khar (West), Mumbai - 400 052. In my view, this submission of the learned counsel for the petitioner is thus totally without merit and is rejected.

25. In so far as the submission of the learned counsel for the petitioner that in the testamentary petition, the respondent had given fixed place of abode of the testator at 101, 1st Floor, Pinky Panorama, 6th Road, Khar (West), Mumbai - 400 052, the respondent had given the said address where the deceased testator had expired at the time of his death. I do not find any merit in the submission of the learned counsel for the petitioner that in view of the said address mentioned in paragraph 2 of the probate petition, it can be inferred or any conclusion shall be made that the Will was fabricated on this ground.

26. In so far as the submission of the learned counsel for the petitioner that since the Notary Public had issued a certificate certifying that the deceased testator had admitted execution of Will on 18th August 1998 in presence of the attesting witnesses whose signatures were attested by the Notary Public and thus the Notary Public himself could be the attesting witness is concerned, in my view, there is no merit in this submission of the learned counsel for the petitioner. The Notary Public was not required to be one of the attesting witnesses under any of the provisions of law. It was for the Notary Public to decide whether to be an attesting witness or not if requested by the testator. Two other persons had already attested the Will. No conclusion thus can be drawn that the Will was fraudulent or fabricated on this ground. This submission of the learned counsel for the petitioner is totally devoid of merit.

27. In so far as the submission of the learned counsel for the respondent that though the property being Flat No.6 situated at Chandralok, 2nd floor, Plot No.715, 12th Road, Khar (West), Mumbai – 400 052 was not mentioned in the Will, the same was disclosed in the schedule of the property of the deceased and thus the respondent had fraudulently obtained probate in respect of the said property also is concerned, no such allegation is made by the petitioner nor any such ground raised in the miscellaneous petition under Section 263 of the Indian Succession Act, 1925. Be that as it may, the Testamentary Court does not decide the title of the property of the testator and thus even if an additional property of the deceased testator is mentioned in the schedule which was not specifically mentioned in the Will would not indicate that the Will is fabricated or it can be inferred that the probate was obtained fraudulently by the executor of the Will in respect of such property. There is thus no merit in this submission also made by the learned counsel for the petitioner.

28. A perusal of the affidavit-in-reply filed by the respondent indicates that the executor has already implemented the probate granted by this Court in toto. I am inclined to accept this averment made by the executor in the affidavit-in-reply and statement made by the learned counsel for the executor across the bar. In my view, no case is made out under any of the grounds set out in the explanation to Section 263 of the Indian Succession Act, 1925 and in any event, under explanation (b) and (e) as sought to be canvassed by the learned counsel for the petitioner. In my view, the petition is totally devoid of merit and is accordingly dismissed. No order as to costs.

R.D. DHANUKA, J.