

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

TESTAMENTARY AND INTESTATE JURISDICTION

**MISCELLANEOUS PETITION NO. 42 OF 2014
IN
TESTAMENTARY PETITION NO. 1115 OF 2010**

Arunkumar Jagdish Prasad Patel & Ors.] Petitioners

Vs.

Dinesh Kumar Ramji] Respondent

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Ms. R.C. Nichani a/w Mr. N.R. Tiwari, for petitioner.

Mr. Chetan Kapadia a/w Ms. Deepa Poluja, Ms. Srividya Venkat i/b
M/s. J. Law & Associates for respondent No.1.

Mr. Karl Tamboly i/b Auris Legal, for applicant.

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CORAM : R.G. KETKAR, J.

DATE : 12TH SEPTEMBER, 2017.

P.C.:

Heard Ms. Nichani, learned Counsel for petitioners, Mr. Kapadia, learned Counsel for respondent No.1 and Mr. Tamboly, learned Counsel for applicant.

2. By this Petition, petitioners have prayed for revoking Letters of Administration annexed to the Will granted to the first respondent Dinesh Kumar Ramji Patel in Testamentary Petition No. 1115 of 2010.

3. Respondent No.1 had instituted Testamentary Petition No. 1115 of 2010 for Letters of Administration with the Will annexed to the property and credits of Ramji Shivnarayan Kurmi

alias Ramji Shivnarayan Kurami [for short 'deceased'], inter alia, contending that deceased died in Mumbai on or about 18th September, 1983. Deceased left his writing which is last Will and Testament. The Will was executed at Mumbai on 9th September, 1982. Copy of the Will was annexed at Exhibit B and official translation was annexed at Exhibit C. In paragraph 9, respondent No.1 had set out details of heirs and next of kin of the deceased according to Hindu Succession Act, 1956. Respondent No.1 had enclosed consent affidavits of Jagdish Prasad Ramji Kurmi Patel, Champadevi Chetannarayan Patel, Lakhraji Ramji Kurmi Patel, Rekha Nitin Gangawar, Saraswati Brijraj Patel, Girijadevi Umashankar Patel and Madhuri Arunsing Patel. All dated 7th October, 2010. In pursuance thereof, on 2nd May, 2011, Letters of Administration with the Will annexed to the property and credits of the deceased was granted to the first respondent.

4. The Petition was originally instituted by Jagdish Prasad Ramji Kurmi praying for revocation of Letters of Administration with the Will annexed. During pendency of the Petition, Jagdish Prasad expired on 17th September, 2012 leaving behind widow Smt. Dularidevi, Sons Arunkumar, Hemantkumar and Prashant. Present Petition is prosecuted by these persons.

5. In support of this Petition, Ms. Nichani submitted that for the grounds set out in paragraph 4 of the Petition, Letters of Administration deserve to be revoked. She submitted that Will which was annexed at Exhibit B to the Testamentary Petition is a forged document. Signature appearing on that Will is not that of

the deceased. The Will is a forged document as is clear from the contents of the same. She submitted that there are following discrepancies in the said Will:

- [a] It is said in the said Will that the age of Shri Ramji Shiv Narayan is not mentioned.
- [b] The Will does not specifically mention the details of the properties.
- [c] In the will the Respondent is described as the only son of the deceased Shri Ramji Shiv Narayan which is totally wrong as Jagdish Prasad is also one of the legal heirs.
- [d] Further in the year all the legal heir have formed a legal trust in the name of late deceased Shri Ramji Shiv Narayan Trust, wherein petitioner as well as respondent were the trustee & also other as well as present C.A the son of petitioner is the beneficiaries.

6. Ms. Nichani submitted that basically Letters of Administration were granted without issuing citation to Jagdish Prasad. She has taken me through the present Petition as also affidavit in reply dated 9th June, 2014 made by the first respondent and in particular paragraphs 4,5 and 7 thereof. She submitted that in paragraph 7, no details as regards consent affidavit filed by Jagdish Prasad in the Testamentary Petition were given. In fact, in this affidavit reliance is placed only on two documents, power of attorney and the consent affidavit. She has also taken me through Power of Attorney given by Jagdish Prasad Ramji Patel to respondent No.1 Dinesh Kumar Ramji Patel on 26th August, 2010

and declaration dated 9th July, 2010 made by Jagdish Prasad Ramji Patel.

7. Ms. Nichani has also taken me through the additional affidavit filed by the first respondent dated 3rd April, 2017 wherein for the first time, affidavits-cum-no objection certificate dated 14th June, 2010 given by Saraswati and Rekha daughters of the deceased were produced. Apart from power of attorney dated 26th August, 2010 and 9th July, 2010, respondent No.1 also produced copy of consent affidavit dated 7th October, 2010 given by the legal heirs of the deceased for the first time.

8. Ms. Nichani submitted that in the Will dated 9th September, 1982, respondent No.1 is described as the only son of the deceased which is factually incorrect as Jagdish Prasad is also one of the sons of the deceased. That apart, under that Will, no property was bequeathed in favour of Jagdish Prasad.

9. Ms. Nichani has also taken me through the rejoinder dated 12th June, 2017, additional affidavit filed on behalf of the first respondent wherein it is contended that documents produced by the first respondent in Testamentary Petition and also in the present proceedings are forged and fabricated documents. She further submitted that deceased had executed Will dated 8th August, 1982. In pursuance of that Will, Trust was created and deceased had appointed his three brothers as trustees. Jagdish Prasad and respondent No.1 Dinesh Kumar are the beneficiaries under the Will from 1982 till 2005. Trust was managing properties

of the deceased and thereafter partnership firm was constituted. She relied upon following decision in support of her case;

[1] Ashok Kothari v. Dipti Bavishi, AIR 2007 Calcutta 21 and in particular paragraph 15 thereof which deals with the procedure laid down in Indian Succession Act, 1925 with regard to Probate both in the common and solemn form. In paragraph 16, reference was made to Mortimer on Probate Law and Practice, 2nd Edition, Page 550 which deals with the practice followed. It is set out therein that persons in particular are entitled, on account of their interest, to commence an action for the revocation of probate, viz” any person entitled to share in the deceased's estate in the event of an intestacy or the representative of any such person. Any such person who has acquiesced in probate of a will being taken in common form, and has even received a legacy thereunder, may still put the executor to proof of the will in solemn form, but he must bring into Court the amount of the legacy paid to him to abide the result of the suit.

[2]Dr. R.V. Venkatesan V. D. Jenbagalakshmi & Ors., AIR 2012 Madras 94 and in particular Head Notes C & E.

10. On the other hand, Mr. Kapadia submitted that no case is made out for revocation of Letters of Administration dated 2nd May, 2000. He has invited my attention to paragraph 9 of T.P. No. 1115 of 2010 and the consent affidavits filed by heirs of the deceased. He has taken me through the Will dated 9th September, 1982 executed by the deceased wherein it was specifically set out that the deceased had two sons. Reference was also made to the accident Jagdish prasad had met and because of the accident, his one leg and fingers of both the hands were cut off. He submitted that a perusal of the Will shows that deceased had bequeathed flat in Mahavir Apartment in the name of Jagdish Prasad and that

name of both the sons Jagdish Prasad and Dinesh Kumar shall be there in the said flat. In other words, he submitted that ground raised in paragraph 4 of the Petition that the Will refers that respondent No.1 is the only son and that nothing was bequeathed to Jagdish Prasad is factually incorrect and contrary to the contents of the Will. He submitted that in view of the consent affidavits filed by the heirs of the deceased, Letters of Administration with the Will annexed were granted. Even after grant of Letters of Administration, public notices were issued in Free Press Journal [English Edition] and Navshakti [Marathi Edition]. It specifically refers to obtaining Letters of Administration dated 2nd May, 2011 in Petition 1115 of 2010.

11. Mr. Kapadia submitted that in the entire Petition, original petitioner Jagdish Prasad and present petitioners have not dealt with consent affidavit dated 7th October, 2010 filed by Jagdish Prasad in the Testamentary Petition. Even, in the rejoinder, they have not contended that consent affidavit does not bear signature of Jagdish Prasad or that his signature is forged on the consent affidavit. He further submitted that contentions based on Will dated 8th August, 1982 are wholly mis-conceived as the said Will is superseded by subsequent Will dated 9th September, 1982. He relied upon Rule 397 of the High Court Original Side Rules to contend that in all applications for probate, letters of administration and succession Certificate, notice of the application shall be given to all the heirs and next-of-kin of the deceased mentioned in the Petition **except to those whose consent has been filed in the proceedings.**

12. In the present case, as consent affidavit was filed by Jagdish Prasad and other heirs in terms of Rule 397, citation was not required to be issued to them. He also relied upon decision of.

Haripada Roy alias Haripada Gokulbihari Roy and Raana Haripada Roy Vs. Subhash Chander Rewari, 2014 Mh. L. J. 234 and in particular paragraph 10 thereof.

13. Mr. Tamboly invited my attention to the Chamber Summons No. 103 of 2017 filed by Amit Vasant Kenia and others and in particular paragraph 4(c) of affidavit in support of the Chamber Summons. In paragraph 4 (c), consent affidavits signed by the legal representatives were referred to and annexed as Exhibit B. He submitted that petitioners filed reply to the Chamber Summons and in paragraph 8f dealt with assertions made in paragraph 4(c) of affidavit in support of Chamber Summons.

[emphasis supplied]

He submitted that petitioners have not asserted that signature of Jagdish Prasad appearing on the consent affidavit dated 7th October, 2010 is forged and fabricated and/or that it is not his signature. He submitted that fraud is required to be pleaded and proved. There are no pleadings about fraud and also no proof in that regard. He relied upon decision of **G. Shanmugham Chetti & Anr. Vs. Chinnammal, AIR 1978 Madras 304** and in particular paragraphs 7 and 11 thereof.

14. I have considered rival submissions of learned Counsel for the parties. I have also perused the material on record. The question that arises is whether petitioners have made out a case for

revocation of Letters of Administration with the Will annexed? My answer is in the negative for the reasons to follow.

15. As noted earlier, respondent No.1 had filed Testamentary Petition No. 1115 of 2010 in this Court. Along with that Petition, he had annexed copy of the Will at Exhibit B and English translation at Exhibit C. A perusal of this Will shows that deceased had clearly stated he has two sons viz: Jagdish Prasad and first respondent herein. Further perusal of this Will also shows that flat purchased by the deceased in Mahavir apartments was bequeathed in favour of Jagdish Prasad. In view thereof, I do not find any merit in the submission of Ms. Nichani that the Will describes respondent No.1 as the only son of the deceased.

16. A perusal of Testamentary Petition also shows that in paragraph 8, details of legal representatives of the deceased were given. Respondent No.1 had also annexed consent affidavits of the legal representatives dated 7th October, 2010. Rule 397 (1) of the Rules reads thus:

“R. 397. Notice of next-of-kin.- (1) In all applications for probate, letters of administration and succession Certificate, notice of the application shall be given to all the heirs and next-of-kin of the deceased mentioned in the petition **except to those whose consent has been filed in the proceedings.**

17. Ms. Nichani submitted that the petitioners have contended that all the documents relied upon by respondent No.1 in the Testamentary Petition as also in the present proceedings are forged and fabricated documents which implicitly includes the

contention that consent affidavit is also forged and fabricated document. It is not possible to accept this submission. In the first place, original Petition instituted by Jagdish Prasad is totally silent about his consent affidavit. Secondly, even in the rejoinder filed by the petitioners to the additional affidavit, it is not contended that consent affidavit does not bear signature of Jagdish Prasad or that said signature is forged and fabricated.

18. In the case of **Haripada Roy** [supra], learned Single Judge of this Court referred to the decisions of the Apex Court in paragraph 10, which reads thus;

“Supreme Court in case of Bihar State Electricity Board, Patna and others vs. M/s. Green Rubber Industries and others reported in MANU/SC/0075/1989 : (1990) 1 SCC 731 has held that a person who signs a document which contains contractual terms is normally bound by them even though he has not read them, even though he is ignorant of the precise legal effect. Similar view has been taken by the Supreme Court in case of M/s. Grasim Industries Ltd and another vs. M/s. Agarwal Steel reported in MANU/SC/1763/2009 : AIR 2010 SC (Supp) 291. It is held that when a person signs a document, there is a presumption, unless there is proof of force or fraud, that he has read the document properly and understood it and only then he has affixed his signature thereon, otherwise no signature on a document can ever be accepted. In my view, the petitioner being a graduate would not sign such consent affidavit without reading such affidavit or without applying his mind and without understanding the legal effect thereof. If the justification which is sought to be given by the petitioner is accepted by this Court and that also at this stage, there would be no legal sanctity of such affidavit already filed and accepted by this court”.

19. In view thereof, I do not find that the petitioners have pleaded and proved the fraud played by the first respondent. The petitioners have merely made bald allegations that documents relied by the first respondent are forged and fabricated. After obtaining Letters of Administration, public notices were also issued in Free Press Journal and Navshakti setting out therein that Letters of Administration were obtained on 2nd May, 2011.

20. For the reasons set out hereinabove, no case is made out for revocation of Letters of Administration. The decisions relied on by Ms. Nichani do not advance case of the petitioners. Hence, Petition fails and the same is dismissed.

21. At this stage, Ms. Nichani orally applies for continuation of interim order dated 12th August, 2014. By that order, respondent No.1 was directed not to act upon Letters of Administration in T.P. No. 1115 of 2010. Mr. Tamboly submits that in respect of following properties, third party interest had already been created in favour of respondents No. 2 to 5 by executing registered instruments.

SCHEDULE OF PROPERTIES

Sr. No.	Property description	Deed executed	Nature of Right
1.	All that piece and parcel of the freehold land or ground together with the messuages tenements or buildings standing thereon, situate lying and being at Old Agra Road, Kurla, Greater Mumbai, Registration Sub District of Bandra and in Mumbai suburban district admeasuring 728 sq yards equal to 609.03 sqmtrs, barely forming survey No. 221, Plot No.8 and now non agricultural survey no. 243/3 and CTS Nos 354/22 to 354/40 of the Revenue Village, Kurla part 4, Taluka Kurla and Dist. Mumbai Suburban and assessed by the Municipal Corporation of Greater Mumbai, L Ward as House No. 29 but no assessed by Municipal Corporation of Greater Mumbai under L ward Nos. 1074 and 1071 and street No. 29 and 32A respectively, Old Agra Road, LBS Marg.	Conveyance deed dated 28 th March, 2012 read along with deed of rectification dated 27 th April 2013.	Ownership rights.

2.	All that piece and parcel of leasehold land or ground together with the tenements or buildings and dwelling house standing thereon, situated lying and being at Old Agra Road, Kurla in Greater Mumbai, in the Registration Sub District of Bandra and in the Mumbai Suburban District admeasuring equal to 1763.16 square mtrs of thereabout and bearing formerly Survey No. 221, Plot No.8 and now non agricultural Survey No. 282 Hissa No.1 (part) and CTS No. 354, 354/1 to 21 and 354/41 to 50 of the Revenue Village Kurla Part 4, Taluka Kurla and Dist. Mumbai Suburban and assessed by the Kurla Borogh Station ward and House No. 28 but now assessed by the municipal Corporation of Greater Mumbai under L ward Nos. 1076 and Street No. 28, Old Agra Road, L.B.S. Marg.	Deed of Assignment of Lease dated 28 th March, 2012 read along with deed of rectification dated 27 th August, 2013.	Leasehold rights.
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3.	FIRST: All that piece and parcel of leasehold land or ground with the messuage, tenements or dwelling house standing thereon, situate lying and being at Kurla in the station Ward house No. 31 in the Registration Sub District of Bandra of Mumbai Suburban District, having 23 rooms in all containing by admeasurement on the East side near the lavatory about 45 feet, on the west side about 28 feet, on the south side about 131'9 and on the north side about 114'9 and bearing formerly Survey No. 221 and Municipal No. 153A but now Non agricultural Survey no. 248 and assessed by the Greater Mumbai Municipal Corporation under L ward No. 1073 and Street No. 31 Old Agra Road, LBS Marg. SECOND: All that piece and parcel of leasehold hand on ground with the messuage, tenements or dwelling house standing thereon, situate lying and being at Kurla in the station Ward house No. 32 but now assessed by the Greater Mumbai Municipal Corporation under L ward No. 1070 and street No. 32 Old Agra Road, LBS Marg in registration Sub District Bandra in the Mumbai Suburban District containing by admeasurements from East to West on the North side about 78'-4" in length and on the South side about 80" and from North to South on both side about 30"-6' in breath bearing non agricultural Survey No. 248(part)	Deed of Assignment of Lease dated 28th March, 2012.	Leasehold rights.
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	THIRD: All that piece and parcel of leasehold land or ground with the messuage, tenements or dwelling house standing thereon, situate lying and being at Kurla in the station Ward house No. 30 but now assessed by the Greater Mumbai Municipal Corporation under L Ward No. 1072 and street No. 30 in the Registration Sub District, Bandra of the Mumbai Suburban District containing by admeasurements from North to South 45'-6" in length and from East to West 13'-6" in breadth bearing non agricultural Survey No. 248 (part). There is also an open space on the North side of the above structure and a gully admeasuring 2'-8" in width and 16" in length which are also included in the above plot, under occupation and lease of the original leaseholder Mr. Ramji Shivnarayan.		
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23. In view thereof, notwithstanding dismissal of the Petition, interim order dated 12th August, 2014 shall remain in force for a period of 8 weeks except in respect of the above properties transferred in favour of respondents No. 2 to 5 by executing registered instruments.

[R.G. KETKAR, J.]