

Shephali

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
NOTICE OF MOTION NO. 244 OF 2017**

IN

TESTAMENTARY PETITION NO. 1699 OF 2017

Sunil Dilip Kakod

...Petitioner

Versus

Ratan Dilip Kakod & Ors

...Respondents

WITH

TESTAMENTARY SUIT NO. 173 OF 2017

IN

TESTAMENTARY PETITION NO. 68 OF 2017

WITH

CAVEAT NO. 264 OF 2017

AND

NOTICE OF MOTION NO. 228 OF 2017

**Mr Tejas Vora, with DR Mishra & Sagar Kasar, for the Plaintiff/
Applicant in NMT/244/17.**

Mr Dhananjay C Pathak, for Respondent No. 1.

CORAM: G.S. PATEL, J

DATED: 1st March 2018

PC:-

A. NOTICE OF MOTION NO. 228 OF 2017

1. There are two Petitions seeking Probate of two different Wills of the deceased, Dilip Malharrao Kakod. Testamentary Petition No. 1699 of 2017 propounds a Will dated 3rd March 2016. The attesting witnesses to this Will are one Mahesh Sadanand Redkar and one SM Asgar. These are the very same persons who are said to have also attested an earlier Will of the same deceased dated 7th April 2007. This is the subject matter of Testamentary Suit No. 173 of 2017.

2. The two attesting witnesses had each filed an Affidavit in Support of Testamentary Petition No. 1699 of 2017 propounding the later Will. The identity of the two witnesses is not in dispute. Neither witness has filed an Affidavit supporting the Petition and Suit propounding the earlier Will of 7th April 2007. An Affidavit of a supporting witness is required under Section 281 of the Indian Succession Act 1925 and is also, in a Probate Petition, necessary under Rule 374 of the Bombay High Court (Original Side) Rules.

3. The non-filing of an Affidavit by an attesting witness is not itself fatal to the Petition, FOR sometimes an attesting witness may need to be summoned. This much is true.

4. However, what is determinative in this case is that once the two attesting witnesses have confirmed by supporting Affidavits that they attested the due execution of the later Will of 3rd March 2016, this automatically results in their acceptance that the earlier Will of 7th April 2007, which too they themselves attested as witnesses, was

not the ‘last’ Will and Testament of the deceased. The due execution and attestation of the later Will results in the revocation of the earlier Will. Considerations may have been different if the attesting witnesses to each of the two testamentary instruments were not the same. But the same attesting witnesses cannot attest to both a later and an earlier Will as both simultaneously being the ‘last’ Will and Testament of the deceased.

5. The result inevitably is that Testamentary Suit No. 173 of 2017 must fail. Even if the attesting witnesses give evidence that they attested that earlier Will, their affidavits and affirmation of their attestation of the later Will dislodges the earlier one. The Plaintiff in Suit No. 173 of 2017 cannot lead the evidence of the same attesting witnesses contrary to their assertions in support of the later Will propounded in Testamentary Petition 1699 of 2017. This is a peculiar situation that arises *only because the attesting witnesses to both Wills are the same persons*. Had they been different persons, then each set of attesting witnesses would affirm or attest to the due execution and attestation of the competing Wills separately. The two attesting witnesses’ support to the due execution and attestation of the later Will is not an idle formality. They are in effect proving the due execution and attestation of the later Will, i.e., that it complies with the provisions of Section 59 and 63(c) of the Succession Act, 1925. They cannot simultaneously attest to the due execution and attestation of both the earlier and the later Wills as each being concurrently valid; their evidence in support of the later Will displaces their evidence in support of the earlier Will. Otherwise it would amount to the attesting witnesses being allowed to approbate and reprobate. Suit No. 173 of 2017 is,

therefore, dismissed and the Motion for this purpose taken out by the Petitioner in this Suit succeeds.

6. This does not however mean that Testamentary Petition No. 1699 of 2017 will automatically succeed. There is still a challenge to that Will and it is mounted by the Plaintiff in Testamentary Suit No. 173 of 2017 who has filed a Caveat. That challenge will continue. Testamentary Petition has already been numbered as Testamentary Suit No. 2 of 2018. That Suit can be taken up for trial.

7. All contentions in that Suit are left open, including specifically the contention of the Caveator that the Will of 3rd March 2016 is a forgery, the plea specifically taken.

8. List Testamentary Suit No. 2 of 2018 for framing issues on 27th March 2018.

9. Mr Vora points out that one of the two attesting witnesses, Mr Redkar, has passed away. This is noted.

B. NOTICE OF MOTION NO. 244 OF 2017

10. In this Notice of Motion, the filings have reached up to Additional Rejoinder. No further Affidavits without leave of the Court.

11. List this Notice of Motion for hearing and final disposal at the end of the supplementary board on 27th March 2018.

(G. S. PATEL, J)