IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AT AURANGABAD.

First Appeal No. 422 of 2019

District : Aurangabad

Rajendra s/o. Sadashiv Shreshtha,
Age : 53 years,
Occupation : Business,
R/o. Raja Bazar, Aurangabad,
Taluka & Dist. Aurangabad. .. Appellant (Original applicant)

versus

Gopinath s/o. Sadashiv Shreshtha,
Age : 67 years,
Occupation : Pensioner,
R/o. Saliwadad, Khultabad,
Taluka Khultabad,
Dist. Aurangabad. .. Respondent (Original respondent)

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Mr. Dhananjay A. Mane, Advocate, for the appellant.

Mr. K.V. Pawar & Mr. P.A. Satdive, Advocates, for the respondent.

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CORAM : SMT. VIBHA KANKANWADI, J.

Date of reserving the judgment : 18th June 2019

Date of pronouncing the judgment : 29th July 2019.

JUDGMENT :

01. Present appeal has been filed by the original respondent, in order to challenge the judgment and order passed in Civil Misc. Application

No. 77 of 2016, by 2nd Joint Civil Judge (Senior Division), Aurangabad, dated 21-01-2019, whereby the petition filed by the present respondent came to be allowed and the probate granted to the present appellant in MARJI No.77 of 2015, dated 07-06-2015 was revoked. *[Parties are referred hereinafter, as per their nomenclature before the trial Court.]*

02. The facts which are not disputed are that the petitioner and respondent are real brothers. Their father Sadashiv died on 07-03-2009. He was survived by widow, three sons and two daughters. One of the son i.e. Shridhar expired on 16-03-2013. It is further not in dispute, that the suit for partition bearing Regular Civil Suit No. 109 of 1971 was filed. As aforesaid, it is not in dispute, that MARJI no.77 of 2015 was filed by the original respondent - present appellant for grant of probate and it came to be allowed on 07-06-2015.

03. With the above said admitted facts, original petitioner - present respondent had come with a case that the original respondent had forged and fabricated will allegedly left by Sadashiv in respect of house properties in his favour. When he had filed MARJI no.77 of 2015, he had not included the petitioner and other heirs left by Sadashiv as party to that proceedings. He had deliberately given proclamation in a newspaper called Anandnagari which

has no large circulation in Aurangabad. Because of the said step, petitioner could not come to know about the petition filed for grant of probate and he could not object by appearing in the matter. According to the petitioner, their father Sadashiv was around 95 years of age at the time of his death. It was not possible for him to execute the said will. The will was notarized on the same day before notary; however, alleged signature on the will is not that of his father. Fitness of his father regarding sound state of mind was not attached. Further, he was not residing with the father at the time of his death but was in touch of his father. There was no disclosure by his father regarding will. Therefore, on the ground that the probate has been fraudulently obtained from Court, prayer was made to revoke and set aside the probate.

04. The original respondent contested the petition by filing say. It was stated that the house properties were the self acquired properties of Sadashiv. The partition suit which was filed by Rangnath and others was withdrawn on 30-07-1977. It is stated that, in fact, the petitioner had filed suit against father as well as other brothers i.e. R.C.S. No.471 of 2005 in respect of the house properties wherein the house properties have been held to be self acquired properties of Sadashiv. That suit filed by the petitioner was dismissed on

merits on 03-05-2008 and the appeal filed by the petitioner i.e. R.C.A. no.160 of 2008 was dismissed on 07-08-2014. It is denied that there was a compromise in partition suit bearing R.C.S. No. 109 of 1971 and the house properties were given to the share of Sadashiv. It has been further contended that Sadashiv was in a sound state of mind when the will was executed by him; so also, he has notarized the same. The proclamation was issued in the probate proceedings as per the order of the Court and nobody had put objection. Since the house properties were self acquired properties of Sadashiv, Sadashiv had every right to dispose it of as per his wish. Under such circumstance, there was no necessity to add his legal heirs as party to the proceedings. It is stated that he had taken care of his parents and due to love and affection, Sadashiv had executed the said will in his favour. It is stated that the petitioner has suppressed the decision of the suit filed by him and also the appeal. In view of the will, he has become absolute owner and therefore, he prayed for rejection of the petition.

05. Taking into consideration the rival contentions, issues were framed. Parties have led oral as well as documentary evidence. Taking into consideration the evidence on record, learned trial Court has come to the conclusion that the respondent had obtained the order in probate proceedings i.e.

MARJI no.77 of 2015 by making misrepresentation, fraud by concealing material facts from the Court and, therefore, the petition was allowed and the probate was revoked. The said order is under challenge in this appeal.

06. Heard learned Advocate Mr. D.A. Mane for the appellant and learned Advocate Mr. K.V. Pawar for the respondent.

07. It has been vehemently submitted on behalf of the appellant, that the revocation can be granted under Section 263 of the Indian Succession Act, 1925 **[For short, "Succession Act"].** Chapter IV of the Succession Act deals with practice in granting and revoking probates and letters of administration. Section 264 deals with jurisdiction of District Judge in granting and revoking probates, etc. Section 265 deals with power to appoint delegate of District Judge to deal with non-contentious cases. Sub-section 1 of Section 265 of the Succession Act provides that "*The High Court may appoint such judicial officers within any districts as it thinks fit to act for the District Judge as delegates to grant probate and letters of administration in non-contentious cases, within such local limits as it may prescribe*." Sub-section 1 of Section 265 of the Succession Act does not make a provision for grant of powers in case of revocation to Civil Judge (Senior

Division) though for grant of probates, the High Court has given powers to Civil Judge (Senior Division). Therefore, the decision rendered in this case is beyond the jurisdiction. He also relied on Section 272 of the Succession Act which provides "*Probate and letters of administration may, upon application for that purpose of any District Delegate, be granted by him in any case in which there is no contention, if it appears by petition, verified as hereinafter provided, that the testator or intestate, as the case may be, at the time of death had a fixed place of abode within the jurisdiction of such Delegate*."

08. Learned Advocate for the appellant relied on the decision in *Mrs. Sara Moiz Khyrullah & others Vs. Sri Dilip Kumar Singh & others* [2015 CJ(Cal) 591], wherein an ex parte grant of probate by the District Delegate in a non-contentious case was sought to be revoked by appellants by filing an application Section 263 of the Succession Act on various grounds, including the ground of non-citation of one of the legal heirs of testator was in question; the District Judge held that having regard to the fact that probate was granted ex parte by District Delegate only course which was left to the party was to get it set aside under Order IX Rule 13 of the Code of Civil Procedure, 1908 before the District Delegate who granted such probate. The Division Bench of Calcutta

High Court, after taking Sections 263, 264 and 265 of the Succession Act into consideration, formed an opinion that the provisions do not confer any jurisdiction upon the District Delegates to revoke grant of probate. Even the said provision does not authorise the District Delegates to grant any probate in a contentious case. Finding was given, that "*Thus, we find that limited and/or restricted jurisdiction to grant probate is conferred upon the District Delegates and that too only in non-contentious cases. The said provision thus makes it abundantly clear that the District Delegates have no jurisdiction either to revoke the grant of probate or to grant probate in a contentious case*."

09. Further submission has been made on behalf of the appellant, that as per the order passed by the Court in MARJI no.77 of 2015, the citation was issued in the newspaper and when no objection was filed, the concerned Court after taking evidence had granted probate in favour of the appellant. Learned trial Court relying on the decision in *Manibhai Amaidas Patel Vs. Dayabhai Amaidas* [LEX (SC) 2005(3) 147], held that the petitioner and other heirs of Sadashiv ought to have been made as party; but the trial Court lost sight of the fact that in the suit filed by the petitioner, it has been concluded that the suit properties are the self acquired properties of Sadashiv. The appeal filed by the petitioner was also dismissed. Under

such circumstance, when Sadashiv had every right to dispose of his property, there was no question of making his other heirs a party to the probate proceedings. There was no question of suppression or misrepresentation or fraud played upon the Court when the probate was granted in favour of the petitioner. Therefore, the learned trial Court has erred in allowing the petition and revoking the probate granted to the appellant.

10. Per contra, learned Advocate appearing for the respondent submitted that the said case has been decided by proper Court. In fact, the petition that was filed before the trial Court was under Section 263 of the Succession Act which deals with revocation or annulment for just cause. If it is pointed out to the Court which had granted the probate, that the said probate has been obtained by misrepresentation, fraud, etc., which situations have been enumerated in the section itself, then the concerned Court which granted the probate can exercise its jurisdiction under Section 263 of the Succession Act. Learned trial Court had rightly relied on the decision in *Manibhai Amaidas Patel's case (supra)* when the other legal heirs of Sadashiv were necessary parties to the probate proceedings. When the question of proof of the will was involved in the said matter, then if notice would have been given to the petitioner as well as other brothers and heirs of Sadashiv, then

they would have pointed out as to how the said will is fabricated, not executed in a state of sound mind, etc. But then intentionally the citation was published in Anandnagari newspaper which is not having large circulation in Aurangabad and thereby the opportunity to contest has been taken away. The said fraud was played by the appellant on the Court and, therefore, under Section 263 of the Succession Act, the said Court had jurisdiction to revoke it. The decision has been rightly rendered and does not require any interference.

11. The first point i.e. as regards jurisdiction of learned Civil Judge (Senior Division) for entertaining the present application is concerned, it appears that the said point was never taken in the written statement / say by the respondent. It appears that it has been taken for the first time before this Court. However, since it is related to the jurisdiction and the point of jurisdiction can be raised at any stage, it is required to be dealt with. As aforesaid, the objection has been raised stating that the learned Civil Judge (Senior Division) had no jurisdiction to revoke the probate on the ground of the fact that those powers were never conferred on concerned Court. The objection that power of revocation is with District Court and the application ought to have been dealt with by the District Court only, is in fact, not *res integra*. Though the

learned Advocate for the appellant has relied on the decision in *Mrs. Sara Moiz Khyrullah (supra)*, we are required to consider as to whether any other provision is made in respect of the Courts subordinate to this High Court. In view of the fact that Section 265 of the Succession Act gives power to High Court to appoint judicial officers as District Delegates for non-contentious cases, then what is the position as regards contentious cases. Taking into consideration the fact that after the objection is raised, the matter would become contentious, whether the legal position becomes different. Another fact to be borne in mind is that a specific provision has been made under Section 263 of the Succession Act for revocation or annulment for just cause. The explanation to Section 263 of the Succession Act gives five examples or circumstances which can be treated as just cause and if these circumstances are proved, then the Court shall presume those circumstances as just cause for revocation or annulment. One of the circumstance stated in Clause 'b' is concealment of fact from the Court and Clause 'a' included that the proceedings to obtain the grant were defective in substance. Therefore, when these circumstances give rise for revocation of the probate or the letters of administration, then in normal course, the same Court which would have granted the probate would be having jurisdiction to deal with the said application.

12. The Division Bench of this Court in *Vera D. Thackersey Vs. Bai Manekbai Annasaheb* (AIR 1977 Bom. 419) has noted the provisions of Sections 264, 265 and 272 of the Succession Act together with Section 28-A(1) of the Bombay Civil Courts Act, 1869; Rule 255 of the High Court Rules (Civil Manual) and after considering all these provisions together, has held that *"We do not subscribe to the contention that Section 264 of the Indian Succession Act is in conflict with Section 28-A of the Bombay Civil Courts Act. Section 264 gives jurisdiction to the District Judge to grant or revoke probates or letters of administration in all cases within his district, whereas Section 28-A empowers the High Court to invest Civil Judges with all or any power of a District Judge or a District Court."* Further observations are also important which read thus :-

> *"16. There is also no merit in Mr. Paranjape's contention that the High Court's power of delegation was circumscribed statutorily by Section 265(1) of the Indian Succession Act or that this was brought to the forefront by Section 272 of that Act. As already stated earlier, Section 265(1) empowers the High Court to appoint judicial officers to act for the District Judge as delegates for the grant of probate or letters of administration in non-contentious cases. We see no force in the contention urged before us, that hence the High Court could not by virtue of Section 28-A of the Bombay Civil Courts Act invest a Civil Judge with all or any of the*

powers of a District Judge, including the jurisdiction to decide a contentious matter, Section 272 which provides for grant of probate and letters of administration by a Delegate in non-contentious cases, carries the matter no further. It is nobody's case that a Delegate could do otherwise. "

The said ratio in *Vera D. Thackersey's case (supra)* was considered again in *Raghunath Rajaram Patil & others Vs. Harishchandra Pandurang Gaikwad & others* (AIR 2006 Bombay 78) *(Single Bench)* wherein the case of contentious case was involved. This Court considered the relevant provisions of the Civil Manual, Succession Act and Section 28-A(1) of the Bombay Civil Courts Act, 1869 and observed that under the said Act, the said matters may be adjudicated by the District Judge or the Civil Judge (Senior Division) to whom such proceedings have been transferred. While referring to the ratio in *Vera D. Thackersey's case (supra)*, it has been noted in *Raghunath Rajaram Patil's case (supra)* as under:-

" In Vera Thackersey's case application for letters of administration was made by the widow of the deceased in the District Court, Pune. The District Judge transferred the application to the Civil Judge, Senior Division, Pune. The mother of the deceased challenged the jurisdiction of the Civil Judge, Senior Division, Pune on the ground that he was merely a

delegate of the District Judge and since the matter had become contentious the application should be returned to the applicant for presentation to the court of the District Judge under Section 288 of the said Act which provides for procedure to be followed by District delegate for return of the application, if he feels that the petition filed before him should be returned to District Court. This court held that reading section 28-A of the Bombay Civil Courts Act, 1869 and R. 55(ii) of the Bombay High Court Rules (Civil Manual Vol. 1, 1960) there can be no doubt that the Civil Judge, Senior Division has been invested with all the powers of a District Judge to take cognizance of any contested proceeding under the said Act, which may be transferred to him by the District Judge and the Civil Judge, Senior Division, to whom the application for grant of letters of administration is so transferred by the District Judge, could dispose of the same on merits irrespective of the fact that a caveat had been entered and the matter has become contentious."

13. In *P.P. Sharma (Reference forwarded from 7th Civil Judge, Senior Division, Kolhapur)* (2017(4) Mh.L.J. 748) the Division Bench of this Court at principal seat has held, that *"Section 28-A of the Maharashtra Civil Courts Act, 1869 Act provides that High Court may by general or special order 'invest' in Civil Judge within such local limits as may be prescribed, with all*

or any of powers of District Judge or District Court. Section 265 of Succession Act provides that High Court may appoint judicial officer within any district as it thinks fit to act for District Judge as 'Delegate' to grant probate and letters of administration in non-contentious cases. It is clear that there is no infirmity in 'investment of power' in Civil Judge, as provided under section 28-A(1) of 1869 Act. Under section 28-A(1) High Court has invested Civil Judge with power of District Judge under Succession Act, 1925 in terms of paragraph 305 of Civil Manual. There is difference between 'investment of power' and 'delegation of power'. In case of investment, District Judge exercises his power as a Judge of original jurisdiction and not as a delegate of District Judge. In view of this fact position there is no inconsistency between provisions of section 28-A(1) of Maharashtra Civil Courts Act, 1869 and provision of Succession Act, 1925. " In this case also, the decision in *Vera D. Thackersey's case (supra)*, was referred, especially the paragraphs no.15 and 16 of *Vera D. Thackersey's decision* and in the aforesaid decision, the Division Bench was concerned with the conflict, if any, between the provisions of Section 28-A(1) of the Maharashtra Civil Courts Act, 1869 and Section 264 of the Succession Act. The challenge was based upon the premise expression 'District Judge' as used in Section 264 of the Succession Act refers to *persona designata*. This premise was found to be fallacious as this Court after due consideration of various provisions of the Succession Act came to the conclusion that 'District Judge' as used in Section 264 of the Succession Act means principal Civil Court

of original jurisdiction as defined in Section 2(bb) of the Succession Act. This Court also pronounced that the High Court has power to 'invest' Civil Judges within such local limits as may be prescribed and Section 28-A(1) is not inconsistent with the provisions of the Indian Succession Act, 1925. The Division Bench of this Court has also taken into consideration the provision of paragraph 305 of the Civil Manual, especially clause no.02 thereof, which reads thus :-

> *"(ii) In exercise of the powers conferred by section 28-A(1) of the Maharashtra Civil Courts Act (XIV of 1869), the High Court has invested all Civil Judges (Senior Division), with all the powers of a District Judge to take cognizance of any contested proceeding under Indian Succession Act, 1925, arising within the local limits of their respective jurisdiction that may be transferred to them by their respective District Judges."*

Therefore, in contested proceedings under Indian Succession Act also, the Division Bench of this Court has held that Civil Judges (Senior Division) have jurisdiction to decide those cases arising within the local limits of their respective jurisdiction that may be transferred to them by their respective District Judges. Therefore, there is no substance in the submission on behalf of the appellant, that the Civil Judge (Senior Division) had no jurisdiction to

entertain an application for revoking probate granted by it.

14. As aforesaid and at the cost of repetition, it can be said that the proceedings before the trial Court in this case were under Section 263 of the Indian Succession Act, 1925 and in view of para no.305 of Civil Manual read with Section 28-A(1) of the Bombay Civil Courts Act, 1869, Civil Judge (Senior Division) had the jurisdiction to deal with the application for revoking the probate which was granted by it. Similar provisions, as it appears from the decision before the Calcutta High Court, were not prevalent. Under such circumstance, the ratio of said case cannot be said to be helpful to the appellant. Help can also be taken from the decision in *Khachar Rana Laxman & another Vs. Dhadhal Hathiyabhai Mulubhai & another* (AIR 1971 Gujarat 115) wherein it was observed thus :-

> *" Thus on plain reading of Section 263 of the Indian Succession Act, together with the Explanation and the Illustration (vi) given therebelow, it is abundantly clear that the Court which had power to grant probate or letters of administration has been also invested with powers to revoke or annul the same. That power has to be, however, exercised where there exists a "just cause"."*

15. Now, it is required to be seen as to whether the circumstances before the trial Court which can be said to be within those five circumstances set out in explanation to Section 263 of the Succession Act. There is no dispute that Sadashiv had left applicant, respondent and other two sons behind him. Even if we consider that in the suit which was filed by the applicant i.e. R.C.S. No. 471 of 2005, it was held that the suit properties were the self acquired properties of Sadashiv and the said decision confirmed in appeal bearing R.C.A. No.160 of 2008 thereby now achieved finality; yet, applicant had every right to object to the alleged will and grant of probate based on the said will. Even if it is accepted that Sadashiv had every right to dispose of his self acquired property, yet, his heirs have right to dispute the execution of the will. The respondent cannot decide that they are not necessary parties or in other words, that the applicant and other heirs of Sadashiv cannot challenge the will. The respondent had not given any cogent reason as to why he had not added the present appellant and other heirs of Sadashiv as party to his application for grant of probate. Further, he does not dispute that the citation was issued in newspaper called Anandnagari. It was categorically stated and deposed by the applicant, that the said newspaper has no large circulation in Aurangabad; respondent could have adduced evidence as to how much is the circulation of

the said newspaper. It was expected from the Court concerned who granted the probate, that the citation is issued in a largely circulated paper so that the person who could object, should get notice about such proceedings. Therefore, the learned trial Court found substance in the contention raised by the applicant, that since the other heirs of Sadashiv have not been joined as party and the citation was not issued properly, "just cause" is shown to revoke the probate. In *Manibhai Amaidas Patel's case (supra)*, the Apex Court was considering the point of revocation or annulment for just cause and in that case, the respondent in whose favour the probate was granted had not mentioned that Amaidas (who had executed the will) had left behind him any other heirs when he died. In that matter, the cause title in the probate application showed opposite party as "nobody". Under such circumstance, when it was pointed out that Amaidas had left heirs; it was held thus :-

> *"10. The courts below also overlooked the fact that in their application for revocation the appellants had clearly stated that in other proceedings between the members of the family of Amaidas and the respondent the Will had been successfully disputed. In the circumstances, for the respondent to say that the grant was being opposed by "nobody" was misleading. The grant was obtained by concealing from the court*

something which was very material to the case. The appellants were entitled to be heard and doubtless the District Judge would have directed to issue of citations to each of Amaidas's heirs on intestacy u/s. 283(1)(c) of the Act had the true facts been revealed by the respondent in his application for grant of probate. The advertisement in this case was wholly insufficient to patch up the gross lacuna. "

Definitely, the case before us having similar facts and therefore, the said ratio is applicable here. Even prior to that, in *Anil Behari Ghosh Vs. Smt. Latika Bala Dassi & others* (AIR 1955 SC 566), it was observed that *"The omission to issue citations to persons who should have been apprised of the probate proceedings may well be in a normal case a ground by itself for revocation of the grant."* Thus, in this case, when citation was not given to applicant and other heirs left by Sadashiv and the citation / newspaper publication was not in a largely circulated newspaper in Aurangabad area, then definitely case was made out by the applicant for revocation of the probate. In fact, there is no suppression of fact by applicant on the count of decision in R.C.S. No. 471 of 2005 and R.C.A. No. 160 of 2008. It is for the simple reason, that in spite of the said decision definitely being the heir of Sadashiv, the applicant had every right to challenge the so called will executed by Sadashiv in favour of respondent.

16. Therefore, for the reasons stated above, it can be said that there is absolutely no merit in the present appeal; it deserves to be dismissed and accordingly it is dismissed with costs.

(Smt. Vibha Kankanwadi)
JUDGE

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