

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.4807 OF 2018
(Harjit Singh s/o Tirathsingh Sawhney Vs. Paramjitsingh s/o
Tirathsingh Sawhney)

Mr.Harjit Singh Tirath Sawhney, Party in person/petitioner.
Mr.S.V.Adwant, Advocate to assist the Court.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 07/03/2019

PER COURT :

1. The petitioner in person, upon being granted a certificate by the competent Committee, has addressed the Court. His grievance is that, by the impugned order dated 21/07/2017 passed by the Trial Court in MARJI No.969/2011, it is concluded that the application filed by the respondent seeking revocation of the probate, is rightly accompanied by a court fee of Rs.10/-.

2. Despite service of Court notice on the respondent, who is the real brother of the petitioner in person, no appearance has been entered.

3. On 21/01/2019, I had recorded the submissions of the petitioner in the order at paragraph Nos. 1 to 3, as under :-

“1. The petitioner is aggrieved by the order dated 21.7.2017, passed by the trial Court in MARJI No. 969 of 2011, in view of the objections of the petitioner, concluding that the applicant in the said proceedings had rightly paid court fees of Rs.10/- while seeking a review / revocation of the probate judgment dated 2.8.2010. Contention is that the property is valued at Rs.29,12,460.49 as on date when this petitioner was granted the probate by order dated 2.8.2010 in MARJI No. 701 of 2009. He had paid the stamp duty of Rs.75,000/-.

2. The respondent has moved the trial Court in 2011 seeking revocation of the probate by paying a court fee of Rs.10/-.

3. I am not convinced by the submissions of the petitioner to the extent of the contention that Article 9 under Schedule I of the Maharashtra Court Fees Act, would be applicable to the respondent, who is seeking revocation of the probate. However, I find some substance in his submissions that Article 18(b) under Schedule II of the said Act, would be applicable to the respondent. Since the valuation of the property exceeds Rs.10,000/-, his revocation application has to be subjected to ad-valorem payment of court fees.”

4. I adjourned the proceedings on 4 occasions to enable the respondent to participate in the hearing of this matter. However, the respondent has chosen to remain away from the Court. On 01/03/2019, as I found that the petitioner in person had his own

limitations in so far as his knowledge of law was concerned, that I called upon Mr.Adwant, learned Advocate to assist the Court in this proceeding. He graciously agreed to do so.

5. Today, the matter has been heard extensively. Mr.Adwant has recapitulated the factual aspects of the matter as under :-

“ GRANT OF PROBATE :

1. The petitioner herein has filed an application for grant of probate of the Will of his father, Late Tirathsingh, executed on 30.8.2008, before the Civil Judge, Senior Division, Aurangtabad, which was registered as MARJI No.701/2009.

2. The citation of the proceeding was published in Daily Tarun Bharat on 23.10.2009.

3. Upon the disclosure of the valuation of the properties for which the Probate was sought (Rs.29,12,460.49), the petitioner herein has paid the requisite ad valorem court fees of Rs.75,000/- as per Schedule I Article 10 of the Bombay Court Fees Act, 1950, to the satisfaction of the testamentary court, pursuant to which the said court has issued the probate in the name of the petitioner herein, on 2.8.2010.

REVOCATION OF PROBATE :

4. The respondent herein is the real brother of the petitioner herein and has filed an application for revocation of the probate issued in the

name of the petitioner herein, before the Civil Judge, Senior Division, Aurangabad, which was registered as Misc.Application No.969/2011 on 19.9.2011. The said application has been filed on a fixed court fees of Rs.10/-.

5. The petitioner herein has caused appearance in the matter and filed an application at Exh.20 on 21.3.2014, with a prayer -

“The petitioner be directed to deposit required court fees as per rule otherwise the application for revocation of probate may kindly be rejected.”

6. The respondent herein has filed his say to Exh.20 on 16.9.2014.

7. The learned Civil Judge, Senior Division, Aurangabad, has while disposing of the application filed at Exh.20 on 10.2.2015, framed the following preliminary issue and the parties were at liberty to adduce evidence on the preliminary issue.

“Whether correct court fees is paid on the present application, as per the provisions of the law ?”.

8. The learned Civil Judge, Senior Division, Aurangabad, has passed the following order below Exh.1 on 13.10.2015 -

“Since framing preliminary issue, respondent did not lead evidence. Proceed without his evidence.”

9. The respondent herein has filed a pursis below Exh.27, informing the Civil Court that he does not want to lead evidence on the preliminary issue, thus the matter was argued by the parties and the finding on the preliminary issue was recorded in the affirmative on

21.7.2017 and the parties were directed to proceed with the matter.

10. Feeling aggrieved by the order passed below Exh-1 on 21.7.2017, the present petitioner has been filed.”

6. In Part-B of his submissions, he contends that the issue before this Court is as to whether, an application filed for revocation of the probate of a Will, should bear the same court fees which the recipient of the probate, the present petitioner, was required to pay by Law at the time the probate was issued and not at the time the application for probate was filed by him. In this context, he refers to Section 222 and 263 of the Indian Succession Act, 1925 which read as under :-

222. Probate only to appointed executor.—

(1) Probate shall be granted only to an executor appointed by the Will.

(2) The appointment may be expressed or by necessary implication. Illustrations

(i) A Wills that C be his executor if B will not. B is appointed executor by implication.

(ii) A gives a legacy to B and several legacies to other persons among the rest to his daughter-in-law C, and adds “but should the within-named C be not living I do constitute and appoint B my whole and sole executrix”. C is appointed executrix by implication.

(iii) A appoints several persons executors of his will and codicils

and his nephew residuary legatee, and in another codicil are these words,—“I appoint my nephew my residuary legatee to discharge all lawful demands against my Will and codicils signed of different dates”. The nephew is appointed an executor by implication.

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—

(a) the proceedings to obtain the grant were defective in substance; or

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

(c) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently; or

(d) the grant has become useless and inoperative through circumstances; or

(e) the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect.

Illustrations

(i) The Court by which the grant was made had no jurisdiction.

(ii) The grant was made without citing parties who ought to have

been cited.

(iii) The Will of which probate was obtained was forged or revoked.

(iv) A obtained letters of administration to the estate of B, as his widow, but it has since transpired that she was never married to him.

(v) A has taken administration to the estate of B as if he had died intestate, but a will has since been discovered.

(vi) Since probate was granted, a latter Will has been discovered.

(vii) Since probate was granted, a codicil has been discovered which revokes or adds to the appointment of executors under the Will.

(viii) The person to whom probate was, or letters of administration were, granted has subsequently become of unsound mind.

7. He then submits that it would be a worthy exercise to refer to Section 141 of the Code of Civil Procedure which, in certain circumstances, defines miscellaneous proceedings. Section 141 and the explanation there below read as under :-

“Section 141 – Miscellaneous Proceedings :- *The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.*

[Explanation : In this section, the expression “proceedings”

includes proceedings under Order IX, but does not include any proceeding under article 226 of the Constitution.]”

8. He then draws my attention to Chapter 14 of the Civil Manual pertaining to the proceedings under the Indian Succession Act, 1925 and the Bombay Regulation VIII of 1827 and especially to paragraph 307 and 308 which read as under :-

*“**307.** The stamp duty for certificate issued under the Indian Succession Act, 1925, should be levied on the market value of the properties and not on the face value. Before issuing the certificate, the Judge should ascertain what the market value of the properties is and recover the duty on such value. He should for this purpose insist on a affidavit and make such inquiry as may be necessary. The certificate should be issued in the form set forth in Schedule VII of the Act.*

***308.** Probate duty should always be taken in the form of Court Fee Stamps. The courts should not under any circumstances accept cash in payment of such duty.”*

9. In so far as the levying of court fees is concerned, he further draws my attention to Section 20 (1)(iv) and Section 29, 31 and 36 which read as under :-

“ Section 20(1)(iv), 29, 31 and 36 of the Maharashtra Court Fees Act :-

20(1)(iv) Exemption of certain documents : - Probate of a

will, letters of administration, and, save as regards debts and securities, a certificate under Bombay Regulation VIII of 1827 or any corresponding law in force, where the amount or value of the property in respect of which the probate or letters or certificate shall be granted does not exceed one thousand rupees.

29. Payment of court fee in respect of probate and letters of administration :- *(1) No order entitling the petitioner to the grant of probate or letters of administration shall be made upon an application for such grant until the petitioner has filed in the court a valuation of the property in the form set forth in the third schedule, and the Court is satisfied that the fee mentioned in No.10 of the first schedule has been paid on such valuation.*

31. Sections 5 and 40 not to apply to probates and letters of administration :- *Nothing in section 5 or section 40 shall apply to probates or letters of administration.*

36. Rate of fee in force on date of presentation of document to be applicable :- *All fees shall be charged and collected under this Act at the rate in force on the date on which the document chargeable to court-fees is or was presented.”*

10. Mr.Adwant has then assisted by drawing a distinction between the entries below Schedule 1 which pertain to calculations of ad-valorem fees and Schedule 2 which deals with fixed court fees. He submits that Article 10- Schedule 1 would deal with the valuation of

the properties and the percentile of the court fees to be calculated thereon. The maximum Court Fees, in matters of probate of a will or letters of administration with or without annexing the Will, is said to be Rs.75,000/-.

11. In so far as Schedule 2 is concerned, he indicates Article 18 (b) by which the amount or value of the estate upto Rs.2,000/- would attract Rs.10/-. The petitioner in person indicates from a recent print out that he has obtained of the Maharashtra Act No.X of 2018 which received the ascent of the Governor, published in the Maharashtra Government Gazette on 16/01/2018 that the value of the estate upto the limit of Rs.10,000/- would attract court fees of Rs.50/. This is in relation to the revocation of a probate.

12. The submissions of Mr.Adwant on the aspect of Law can be summarized as under :-

[a] The payment of court fees is a matter between the State and the suitor of the claim.

[b] The payment of court fees is a revenue which is for the welfare of the public and it is in the interest of the public and the society at large, that the mode of collecting the court fees is prescribed.

[c] The Court Fees Act is a taxing statute and is subject to

interpretation.

[d] Section 29 of the Maharashtra Court Fees Act lays down that no probate shall be issued to any applicant unless he has paid the court fees as required by Article 10 under Schedule I which is a charging article and mandates payment of ad-valorem court fees.

[e] Article 10 under Schedule 1 would not apply to an application filed for seeking revocation of a probate which would be covered by Article 18-b under Schedule II as such an application is to be treated as a Misc.application.

13. He then submits that Article 11 under Schedule I of the Madhya Pradesh Court Fees Act is in *pari materia* with Article 10 under Schedule 1 of the Maharashtra Court Fees Act. He further adds that Section 263 of the Indian Succession Act provides for certain grants on the basis of which a probate could be revoked and such an application is to be treated as a Misc. application, to be disposed of in a summary trial or permit parties to lead evidence depending on the facts and circumstances of each case.

14. He has placed reliance upon a judgment delivered by the Madhya Pradesh High Court (Division Bench) in the matter of **Pishorilal Sethi Vs. Arvind K.Jauhar [AIR 2009 MP 128]** wherein it was held that in view of Article 11 of Schedule I of the Madhya

Pradesh Court Fees Act, the words used would indicate that the court fees are required to be paid on the probate of a Will and not on the application seeking the probate. The court fees prescribed on the amount or value, is not to be affixed on the application, but would become payable and will have to be affixed on the probate of a Will.

15. Reliance is placed on the judgment of the Hon'ble Apex Court in the matter of **Nalini Navin Bhagwati and others Vs. Chandravadan M.Mehta** [1997(9) SCC 689] wherein the Hon'ble Apex Court has concluded in paragraph No.7 as under :-

“But when the grant of probate or letter of administration is sought to be revoked, it is not clear to what nomenclature would be ascribed to it and what procedure would be adopted for its disposal. Take for instance a situation when the suit is decreed ex parte. Order IX Rule 13 provides for making of an application to set aside the decree on proof of certain grounds ex parte decree gets set aside. Similarly when the suit was dismissed for default, under Order IX Rule 9 an application would be filed and on proof of the circumstances for absence, the order would be set aside and suit would get restored. Similarly, when probate or letter of administration is granted and it is sought to be revoked, [Section 263](#) provides for the grounds on the basis of which it would be revoked. When the grounds are sought to be

proved, the question is: whether such an application would be treated to be a suit? We are of the considered view that an application to revoke probate or letter of administration would be treated as miscellaneous application and may be disposed of on the fact situation in an appropriate case either summarily or after recording evidence. The application to revoke the probate or letter of administration thus may be disposed of by the District Judge either summarily or in a given situation where it requires proof of the facts by adduction of evidence by the parties by recording such evidence as is adduced by the parties. The burden will be on the applicant to prove the facts to revoke the probate or letter of administration and the respondent who obtained probate or letter of administration has to disprove the contentions of the applicant. In that situation, based upon the given facts situation, it will be for the Court to dispose it of either summarily or after giving opportunity to both the parties to adduce evidence and consideration thereof. Under these circumstances, it is not necessary that the application for revocation of the probate or letter of administration would be treated as a suit as a contemplated under [Section 295](#) of the Act. If the contention of Shri Puri merits acceptance, then any proceedings under the application to revoke the probate or letter of administration should be treated as a suit: the applicant cannot prove the will and at the same time cannot contend that the will was not validly executed. Therefore, it would be self contradictory to adopt such a procedure. Accordingly, we are of the view that the procedure required under [Section 295](#) need not be adopted for disposal of the application filed under [Section](#)

263 for revocation of the probate or the letter of administration. It would be treated as miscellaneous application and disposed of as indicated earlier according to the given fact situation. In fact, the Bombay High Court came to consider the question, not directly on this issue but in an analogous situation in *Narbheram Jivaram Purohit vs. Jevallabh Harijivan*, [Vol.XXXV(1933) BLR 998]. Therein, the learned single Judge had held that the proper procedure for revocation of probate granted by the High Court is by way of a petition filed in the testamentary and intestate jurisdiction of the Court, and not by way of suit in its Ordinary Original Civil Jurisdiction. In other words, the Court indicated that it need not be treated as a suit on the original side of the Court but it could be disposed of as an application independent of the suit. Thus we hold that the High Court was clearly in error in reaching the conclusion that it should be treated as a suit and disposed of under Section 295.”

16. It is, therefore, quite obvious that an application seeking revocation of a probate or the letter of administration cannot be treated as a suit and shall be treated as a Misc.application to be disposed of on the fact situation, either summarily or after recording evidence. The burden of proof for seeking such a revocation would therefore lie on the applicant, the respondent herein, in view of Section 263 of the Indian Succession Act.

17. Further reliance is placed on the judgment of the Single Judge of the Madhya Pradesh High Court in the matter of **Bablu Mandal Vs. Vandana Bhowmik [2008(1) MPLJ 522]** wherein it was concluded that the revocation or annulment of a grant of probate will be deemed to be a miscellaneous application under Order IX Rule 13 of the CPC. It was also concluded that a mere mention of a wrong provision of law when the power can be exercised under a different provision, by itself is not a sufficient ground to deny justice in a matter merely because the application, which ought to have been filed u/s 263 of the Act, was filed under Order VII Rule 11 of the CPC. Reliance is then placed upon the judgment of the Single Judge of this Court in the matter of **Shobha Prakash Lala Vs. Nandlal Hotchand Bhatija and others [1995(1) Mh.L.J. 602]** wherein this Court has concluded that an application filed for seeking revocation of probate, shall be treated to be filed under Order IX Rule 13 of the CPC.

18. Considering the above, I do not find that the impugned order dated 21/07/2017 could be termed as being perverse or erroneous. It, however, needs to be noted that the respondent shall pay an additional court fees of Rs.40/- in view of the 2018 Amendment cited

by the petitioner in person.

19. The writ petition is, therefore, dismissed.

20. I must record my compliments to Adv.Adwant for the admirable assistance extended by him in this matter.

(Ravindra V.Ghuge, J.)