

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL APPLICATION NO.2194 OF 2019

IN

FIRST APPEAL (ST.) NO.9006 OF 2019

Dattu Pandit Achari .. Applicant

vs.

None .. Respondent

Mr.Sachin Kadam for the applicant

CORAM : K. K. TATED, J

DATE : JULY 16, 2019

P.C.:

. Heard.

2 By this Civil Application, applicant is seeking condonation of 308 days delay in filing First Appeal challenging the judgment and award dated 17.2.2018 passed by 5th Joint Civil Judge, Senior Division, Nashik below Exhibit-1 in Civil Misc. Application 46 of 2016 by which the appellants Application for grant of Probate under section 276 of the Indian Succession Act, 1925 of the Will of Late Smt.Chandrabhagabai Trimbak More stands rejected.

3 The learned counsel for the Applicant submits that in the present proceedings, Trial Court by its impugned order dated 17.2.2018 rejected the Application's application for probate only

on technical ground for non compliance of the provisions of section 278 of Indian Succession Act. He submits that section 281 of the said Act is not mandatory. In support of this contention, he relies on judgment of this court in the matter of ***Pralhad Ganpat Salgar vs. Sunil Dilip Kakod***. Para 9 of the said judgment reads thus: ¹

"9. The view taken by the learned single judge that section 281 is not mandatory, is correct. For reference section 281 of the Indian Succession Act is reproduced as under:-

281. Verification of petition for probate, by one witness to the Will- Where the application is for probate, the petition shall also be verified by at least one of the witnesses to the Will (when procurable) in the manner or to the effect following, namely:

"I (C.D.), one of the witnesses to the last Will and testament of the testator mentioned in the above petition, declare that I was present and saw the said testator affix his signature (or mark) thereto (or that the said testator acknowledged the writing annexed to the above petition to be his last will and testament in my presence.)"

Section 281 of the Succession Act, states a verification has to be made at least by one of the attesting witness to

¹ 2019 (15) Mah 65

the Will when procurable. Legislature has placed the words "when procurable" in brackets as an emphasis. Thus this section cannot be held as mandatory for the reason that there are various contingencies which can arise if the attesting witness is not available. Such as if he had died before filing of the application for probate. The word shall employed this provision has to be read as directory, since it has to be read with when procurable. We may also quote Rule 384 of the Bombay High Court (Original Side) Rules, which reads as under:-

"Rule 384. In the absence of attesting witness, other evidence to be produced. - If it is not possible to file an affidavit of any of the attesting witnesses, an affidavit of some other person, if any, who may have been present at the execution of the Will shall be filed, but if no affidavit of any such person can be filed, evidence on affidavit shall be produced of that fact and of the handwriting of the deceased and attesting witnesses, and also of any circumstances which may raise a presumption in favour of due execution."

Considering the provisions of section 281 of the Indian Succession Act and Rule 374(c) of the Bombay High Court (Original Side) Rules, we are of the considered opinion that the probate petition cannot be dismissed at the threshold without trial merely on the non-submission of affidavits of the attesting witnesses along

with the probate petition.

4 On the basis of these submissions, the learned counsel for the Applicant submits that Applicant has good chance of success in the matter. He submits that in the interest of Justice, this Hon'ble Court be pleased to allow the present Civil Application. He submits that if delay is not condoned, irreparable loss will be caused to the Applicant.

5 Considering the submissions made by the learned counsel for the Applicant, the averments made in the Application and as impugned order is passed by Trial Court on technical ground for non-compliance of section 278 of Indian Succession Act, I am satisfied that the Applicant has made out a case for allowing the present Civil Application. Hence, the following order:

- a) Delay in filing the First Appeal is condoned.
- b) Civil application stands disposed off accordingly.
- c) No order as to costs.

(K.K.TATED, J.)