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***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION***

APPEAL NO. 378 OF 2018

in

NOTICE OF MOTION NO. 228 OF 2017

Pralhad Ganpat Salgar

... Appellant

V/s.

Sunil Dilip Kakod

... Respondent.

Mr. Vishal Kanade a/w. Mr. Rohan Savant I/b. Sanjay Shivram
Gawde for the Appellant.

Mr. Tejas Vora a/w. Mr. D.R. Mishra, Mr. Sagar Kaskar & Mr. Sagar
Sheth for the Respondent.

***CORAM : NARESH H. PATIL, C.J. &
N.M. JAMDAR, J.***

DATE : 10 JANUARY, 2019.

Oral Judgment (Per Chief Justice):-

Heard finally by consent of the parties.

2. The Appeal is directed against the order passed by the
learned Single Judge dated 1 March 2018 in Notice of Motion No.
228 of 2017 in Testamentary Suit No. 173 of 2017. The Appellant

filed a Testamentary Suit No. 173 of 2017. The Respondent herein filed Notice of Motion No. 228 of 2017 in Testamentary Suit No.173 of 2017 praying for following reliefs:-

“(a) That this Hon'ble Court be pleased to dismiss the present Testamentary Suit being Suit No.173 of 2017 in accordance with the provisions of Section 281 of the Indian Succession Act, 1925;

(b) Ad-interim order in terms of prayer clauses (a) above;

(c) For cost of this Notice of Motion be provided for;

(d) Such other and further reliefs be granted in favour of the Applicant/Defendant as the nature and circumstances of the case may require.”

3. The Respondent herein pleaded in the affidavit in support of Notice of Motion that as the Appellant herein has failed to comply with the mandatory provisions of Section 281 of Indian Succession Act, 1925, the Probate Petition be dismissed. Paragraphs 3, 4 and 5 of the said affidavit in support of Notice of Motion is reproduced herein below:-

3. I say that on taking inspection of the original proceedings in this Hon'ble High Court as well as the purported Will dated 07.04.2007, which has been deposited in this Hon'ble Court at the time of filing of the Petition by the Plaintiff/Petitioner abovenamed, it was observed and noticed by me that the Petitioner has

not filed the affidavit of any attesting witness along with the Petition as contemplated by Section 281 of the Indian Succession Act, 1925. The said Section squarely provides that when an application for Probate is made, the Petition shall also be verified by at least one of the attesting witness to the Will.

4. It is significant to note that the Plaintiff/Petitioner has not filed the affidavit of any of the attesting witnesses, viz. Mr. Mahesh Sadanand Redkar and/or S.M. Asgar who are the attesting witnesses to the purported Will dated 07.04.2007 of my deceased father which is being propounded by the Plaintiff/Petitioner.

5. It is settled position in law that in the absence of the verification by at least one witness to the Will, the Petition shall be liable to be dismissed for non-compliance of provisions of Section 281 of the Indian Succession Act, 1925. The said Section applies to the present Petition as the Plaintiff/Petitioner has not annexed the affidavit of any of the attesting witness along with the Petition. I crave leave to refer to and rely upon the papers and proceedings of the said Petition in support of my contention that in view of non-compliance of Section 281 of the Indian Succession Act, 1925, the present Petition/Suit is liable and ought to be dismissed with cost in the interest of justice, equity and fair-play."

4. By order dated 1 March 2018, the learned Single Judge of this Court dismissed Suit No. 173 of 2017 by allowing the Notice of Motion filed by the present Respondent. The Testamentary Suit No.2 of 2018 filed by the Respondent herein was directed to be taken up for trial by the learned Single Judge.

5. The learned Counsel appearing for the Appellant submitted that the provisions of Section 281 of the Indian Succession Act is not mandatory, but directory. It is not mandatory for the Appellant to verify the Petition by at least one of the witnesses to the Will in the manner so prescribed. The Appellant is entitled in law to lead evidence. The Counsel submitted that in fact the learned Single Judge in paragraph 3 of the order has held that non-filing of an affidavit by an attesting witness is not itself fatal to the Petition. Thus the Notice of Motion filed by the Respondent ought to have been dismissed. He submitted that the issue on which the learned Single Judge dismissed the Petition was not pressed into service by the Respondent. Even otherwise, according to the learned Counsel, the observations made by the learned Single Judge and conclusions drawn except the two attesting witnesses signing both the Wills are unwarranted and is not tenable in law in the facts of the present case, the Appellant is yet to lead evidence. He submitted that the Appellant has pleaded, in response to the Will propounded by the Respondent that the testator was not in the fit state of mind. He submitted that if on this ground the second will is not proved then there will be no Will at all. The Counsel placed reliance on the judgment delivered by the learned Single Judge of Madhya Pradesh High Court in the case of *Ramesh Chandra v/s. Mahendra Kumar Sahu and Anr.*¹

1 2012(4) M.P.L.J.

6. The learned Counsel appearing for the Respondent submitted that it was mandatory for the Appellants to have submitted affidavits of the attesting witnesses in accordance with the provisions of Section 281 of the Indian Succession Act, 1925. For want of an affidavit, the Petition deserved to be dismissed at the threshold. In support of the submission, the learned Counsel has referred the provisions of Rule 374(c) of the Bombay High Court (Original Side), Rules, which reads as follows :-

“Rule 374. Application for probate – The application for probate shall be made by Petition. There shall be annexed to the Petition a copy of the last will and testament of the deceased. If the will be not in the English language, an official translation thereof shall be annexed. The original will shall be filed separately and kept by the Prothonotary and Senior Master in the strong room of his office. There shall also be annexed to the petition (1) a schedule of the property and credits which the deceased dies possessed of or entitled to at the time of his death which have or are likely to come to the petitioner's hands, (2) a schedule showing the debts of the deceased and all other items which by law the petitioners is allowed to deduct for the purpose of ascertaining the net estate of the deceased, and (3) a schedule of property, if any, held by the deceased in trust for another and not beneficially or with general power to confer a beneficial interest. The petition shall be in Form No.97 with such variations as the circumstances of each case may require and shall be accompanied by -

- (a)*
- (b)*
- (c) the affidavit of one of the attesting witnesses, if available (Form No. 102).*

The learned Counsel referred to the averments made by the Appellant in the Testamentary Suit. The Counsel submitted that the Appellant failed even to plead that the Petition is supported by an affidavit of the attesting witnesses and verified in accordance with the manner prescribed under Section 281 of the Indian Succession Act, 1925. The Counsel referred to a Judgment of the learned Single Judge of this Court in the case of *P. Ramachandran Nair v/s. Smt. Suparana Tapan Das*² in support of his contention that the provisions of Section 281 of the Indian Succession Act are mandatory in nature. As regards the submissions of affidavits of the attesting witnesses by a party praying for a grant of probate, reliance was placed to the observations made by the learned Single Judge in paragraph 22 which reads as under:-

“22. *Shri Merchant contended that there is no proper pleading regarding execution and attestation of the Will. He further submitted that there is no evidence to indicate that attesting witnesses signed the Will in the presence of the deceased, Shri Merchant referred to the decision in Rangu Vithoba v. Rambha Dina, AIR 1967 Bom 282 wherein the learned Single Judge of this Court held that in a case which is based upon the Will, the propounder must plead that the document was properly executed and duly attested and was the last Will of the testator. It was further held that he cannot say that the defendant has not denied this fact. In order to appreciate the submission of Shri Merchant, it is necessary to look to the relevant averments made by the*

2 AIR 2003 Bombay 457

plaintiff in the petition. In paragraph 3, the plaintiff has stated that deceased left a writing which is his last Will and testament. Paragraph 4 of the petition reads "That the said Will was duly executed at Bombay on 26th November 1994". There is no averment in the petition regarding due attestation of the Will. The petition does not mention the names of the persons who attested the Will. However, as required by Rule 374 of the Original Side Rules, the plaintiff has filed the original Will and annexed a copy thereof to the petition which mentions the names of two attesting witnesses. But that does not satisfy the requirement of proper pleadings regarding the Will having been duly attested. It is not enough to aver in the petition that Will was duly executed, but it must be averred specifically that Will was duly executed. Execution of document and attestation thereof are two different things. Execution of a document consists of signing a document written of, read over and understood. It does not consist of merely signing a paper or document which are not required to be attested but only those documents which law requires, are required to be attested by witnesses. For example, a mortgage deed and a Will. These documents cannot merely be executed, but they have necessarily to be attested by witnesses. Attestation means the act of witnessing the executant, signing the document and subscribing the name of witnesses in testimony of such fact. By attestation, it is meant that signing of the document to signify the attestor and his witness to the execution of the document. An attesting witness is one who signs the document in the presence of the executor after seeing the execution of the document and after receiving a personal acknowledgment from the executant as regards the execution of the document. In this connection reference should also be made to Section 3 of the Transfer of Property Act which defines the term

"attested" as meaning the instrument having been attested by two or more witnesses, each of whom as seen the executant signing or affixing his mark to the instrument or has seen some other person signing the instrument in the presence and by direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of them has signed the instrument in the presence of executant, but it shall not be necessary that more than one of such witnesses shall be present at the same time, and no particular form of attestation shall be necessary. Clause (c) of Section 63 of Indian Succession Act which deals with the attestation of the Will, is almost similar to the definition of the term "attested" as given in Section 3 of the Transfer of Property Act. In short, execution of a document and attestation of a document are two different things and therefore, where a document is by law, requires to be attested by one or more witnesses, at least one witness required to be examined to prove the execution thereof. It is necessary for the party relying upon the said document to plead specifically both the execution and attestation of it. Section 68 of Evidence Act inter alia states that if a document is required by law to be attested. It shall not be used as evidence until at least one attesting witness has been called for the purpose of proving its execution, if the attesting witness is alive and subject to process of Court and capable of giving evidence. It is basic law that what is sought to be proved, must first be pleaded. A fact cannot be allowed to be proved unless it is first pleaded. As stated earlier there is absolutely no pleading regarding the attestation of Will in question."

7. We have perused the record placed before us, and the

judgments cited.

8. The Respondent in the Notice of Motion prayed for dismissal of the Probate Petition on the ground of non-compliance of provisions of Section 281 of the Indian Succession Act. The learned Single Judge observed that the non-filing of the affidavit by an attesting witness is not itself fatal to the Petition. However, the learned Single Judge proceeded to observe further that same attesting witness cannot attest both, the later and the earlier Will, and if they do, then the first will automatically does not remain the last Will and there for the petition based on such will has to be dismissed. The learned Single Judge observed that the signatures of the attesting witnesses is not an idle formality. Reference was made to provisions of Section 59 and 63(c) of the Indian Succession Act, 1925.

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 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:-

“R. 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

10. The issue as regards the effect of same witnesses being attesting witnesses to both the Wills was not the issue raised in the Notice of Motion by the Respondent. The Notice of Motion taken out for dismissal of the Petition was only on the premise that the section 281 was mandatory and was breached. Having held that it was not mandatory, the Notice of Motion should have been dismissed. The further observation that nothing survived in the Petition since the will propounded by the appellant was not the first will, overlooked the case of the appellant. Caveat Application (Lodg.) Nos. 339 of 2017 and 340 of 2017 in Testamentary Petition No. 1699 of 2017 filed by the Appellant, they have raised the objections to the second Will on various grounds. The Appellant has pleaded that the attesting witness was not in town that day and the Testator was not in fit state of mind. This required leading of evidence.

11. This is not to say that the outcome indicated by the learned single was not a probable one, but that it was not the only one. There was an area of argument left for the Appellant, which

required trial. As pointed out by the Counsel for the Appellant, if the second Will is not proved to be validly executed, there was a case for the Appellant.

12. In the facts of the case and considering the pleadings of the parties, we find that this issue relating to attestation by the same set of witnesses should be gone into by the learned Single Judge after the parties are permitted to lead oral evidence.

13. We pass following order:-

ORDER

- (a) The Appeal is allowed.
- (b) The impugned order is quashed and set aside.
- (c) The Probate Petition in Testamentary Suit No. 137 of 2017 is restored to file.

14. It is clarified that all issues on merits are kept open in respect of both the Suits. The observations made by the learned Single Judge in respect of the effect of the same set of witnesses attesting both the Wills, are prima-facie. Such issues, as and when raised by the parties during the trial, will be looked into on its own merits by the learned Single Judge.

N.M. JAMDAR, J.

CHIEF JUSTICE