

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**FIRST APPEAL NO.3388 OF 2019
AND
CIVIL APPLICATION NO.12678 OF 2019**

1. Dinyar Furdoonji Bhagat (Died),
through legal heirs
- 1A. Gool Dinyar Bhagat,
Age : 84 years, occ. Household,
r/o.788 Avabai Mansion, Parsi Colony,
Dadar East, Mumbai
- 1B. Avan Kayomars Doomasia,
Age : 52 years, Occ. Service,
r/o. 788, Avabai Mansion,
Parsi Colony, Dadar East,
Mumbai
- 1C. Mehernosh Dinyar Bhagat,
Age : 48 years, Occ. Service,
r/o. 788, Avabai Mansion,
Parsi Colony, Dadar East,
Mumbai
2. Cyrus Fardoonji Bhagat
Age:72, Occ. Nil,
Mentally retarded, under guardianship
of Mehernosh Dinyar Bhagat,
r/o. 788, Avabai Mansion, Parsi Colony,
Dadar East, Mumbai
3. Persis Danesh Irani,
Age:50 years, Occ.Nil,
r/o. Dhun Abad,
106, Bhulabai Desari Road,
Mumbai

..Appellants

Vs.

1. Khusrao Sarosh Taraporewala,
Age : 75, Occ. retired,
r/o. Gardent View, Flat No.4,
Raghunath Mhatre Road,
Dahisar, Mumbai
2. Bejan Homi Bharucha,
Age : 80 Occ. Service,
r/o. 7, Nirmal Mahal, 12-A,
Bohaji Patel Road,
Mumbai
3. State of Maharashtra,
through the Govt. Pleader,
High Court, Aurangabad
4. Naryosang Sarosh Taraporwala,
Age : 65, Occ. Business,
r/o. Flat No.14, Siddhivinayak Manor,
Ramnagar, Akola ..Respondents

Mr.P.V.Mandlik, Senior Advocate for appellants
Mr.S.V.Natu, Advocate for respondent nos.1 and 4
Mr.R.B.Bagul, Advocate for respondent no.3

CORAM : R.G. AVACHAT, J.
RESERVED ON : SEPTEMBER 14, 2021
PRONOUNCED ON : SEPTEMBER 20, 2021

ORDER

The challenge in this appeal is to the judgment and order dated 28.08.2019 passed by learned 6th Joint Civil Judge, Senior Division, Jalna, rejecting Civil Misc. Application No.17 of 2013 for revocation of the probate dated 04.05.2012.

2. Heard. Perused the documents relied on. Considered the submissions made by respective learned counsel.

FACTS:-

3. The parties to this appeal are Parsis. One Meherwanji was common ancestor. He was survived by a son – Minocher and two daughters – Homai and Banoo. Late Alloo was widow of Minocher. Respondent no.1 herein is a legatee under a Will and two codicils executed by late Alloo. The appellants herein claimed through Homai.

4. Respondent nos.1 and 2 herein preferred an application, bearing Misc. Civil Appln. (MARJI) No.56 of 2005, for grant of a probate of Will executed by late Alloo on 07.04.1998 and her subsequent two codicils dated 21.07.2001 and 26.12.2001. Said application was moved by these respondents in the capacity of respondent no.1 being legatee; and respondent no.2 to have been appointed executor of the Will. The appellants herein had appeared in the said application and objected for grant of probate. The application (56 of 2005) was allowed vide judgment and order dated 31.03.2012 in terms of the following order:-

"1. This petition for probate is hereby allowed.

2. Probate of the Will bearing no.1517/1998 dated 7th April, 1998, executed by Alloo w/o. Minocher Jalnawalla is granted in favour of the petitioner no.1 Khusrav Sarosh Taraporewala and the petitioner no.2 Bejan Homi Bharucha is permitted to act as an executor of the Will bearing No.1517/1998 as per the Codicil of deceased Alloo w/o. Minocher Jalnawalla."

5. The appellants herein challenged the aforesaid judgment and order in appeal, being First Appeal No.247 of 2013 to the High Court. Pending the appeal, respondent nos.1 and 2 herein moved an application for issuance of probate in terms of the order dated 31.03.2012 passed in MARJI Application No.56 of 2005. It appears that said application was titled as 'application for re-probate'. Meanwhile, this Court dismissed the appeal challenging the judgment and order dated 31.03.2012 passed in MARJI Application No.56 of 2005. As such, the order for grant of probate has attained finality. Learned senior Counsel for the appellants herein, therefore, could not be heard to say in a proceedings for revocation of probate that no probate could have been issued in favour of association of persons. In an application for revocation of probate moved under Section 263 of the Indian Succession Act, 1825 ("the Act", for short),

the Court cannot travel beyond the grounds, on which the probate could be sought to be revoked.

6. Section 263 of the Act reads as under:-

"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."

7. According to Mr.Mandlik, learned senior Counsel for the appellants-herein, the probate has been obtained by misrepresentation of facts and practicing fraud as well. According to

him, the application for re-probate is alien to the Indian Succession Act. An affidavit dated 21.04.2012 replete with false averments therein, was filed for obtaining probate dated 04.05.2012. Admittedly, there is non-compliance of the provisions of Section 276(d) of the Act. The probate could only be issued to an appointed executor under the codicils dated 21.07.2001 and 26.12.2001. The appointment of respondent no.2 as executor had already been revoked. The affidavit dated 21.04.2012 was filed for compliance of Section 317 of the Act. Under the list of inventory, 20% undivided share of common ancestor – Meherwanji in house property, bearing C.T.S. Nos.4700, have been included. On the strength of the application for re-probate, respondent no.1 sold entire 20% share in the said house property to Agrawal family. The purchasers filed an affidavit before Hon'ble Supreme Court admitting their vendor to have had shares less than 20% share in the said property. The purchasers made submission before the Hon'ble Supreme Court that no third party interest in respect of the purchased house property, would be created. It appears that the cause for moving the application for revocation of probate is the appellants' right, title and interest in the house property, C.T.S. No.4700.

8. According to Mr.Natu, learned counsel for the

respondents, it was not an application for re-probate. The probate has been issued in terms of the order that has attained finality. Only inventory of the property was submitted as compliance of Section 317 of the Act.

9. As already stated above, the application for grant of probate was preferred by respondent nos.1 and 2. Respondent no.1 had claimed grant of probate in his favour as legatee under the Will. Issuance of probate in the name of respondent no.2 was prayed for in his capacity as executor. Title of the application vouch for the same. Learned Judge also granted the application in terms of the prayers in the said application. The order has already been reproduced above. The same has attained finality in view of dismissal of the First Appeal (247 of 2013). There can be no two views over the legal proposition that the probate can be granted only to the executor appointed under the Will. It cannot be granted to the association of persons. Section 276 of the Act speaks of petition for probate. Clause (d) of sub-section (1) of Section 276 of the Act requires to mention in the application, the amount of assets which are likely to come to the petitioner's hand. While Section 317 of the Act requires that an executor or administrator shall, within six

months from the grant of probate or letters of administration, or within such further time as the Court which granted the probate or letters may appoint, exhibit in that Court an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person to which the executor or administrator is entitled in that character; and shall in like manner, within one year from the grant or within such further time as the said Court may appoint, exhibit an account of the estate, showing the assets which have come to his hands and the manner in which they have been applied or disposed of.

10. The application-cum-affidavit dated 21.04.2012, which is said to have been false, was filed with a view to comply with the mandate of Section 317 of the Act. It is true that in the said affidavit, respondent no.1, through his constituted power of attorney, made a statement claiming to have been executor of the will, when, in fact, vide the codicils dated 21.07.2001 and 26.12.2001, his appointment as executor was revoked appointing respondent no.2 as executor. It is very true that the said statement in the affidavit has rightly been found by the trial Court to be untrue. It, however, appears to be a case of mistake or inadvertence. True,

in terms of clause (b) of Section 263, grant of probate may be revoked or annulled if the grant was obtained fraudulently by making a false suggestion or by concealing from the Court something material to the case. Clause (c) of Section 263 may overlap with clause (b). The affidavit dated 21.04.2012 was filed post application for grant of probate was allowed. The trial Court has, thus, rightly observed that the said affidavit was not the basis for allowing the application for probate.

11. The probate has to be issued in the form set forth in schedule VI (Section 289 of the Act). For better appreciation, the form is reproduced below:-

SCHEDULE VI
(See section 289)
FORM OF PROBATE

I, _____ Judge of the District of _____ [or Delegate appointed for granting probate or letters of administration in (here insert the limits of the Delegate's jurisdiction)], hereby make known that on the ____ day of ____ in the year ____, the last Will of ____, late of ____, a copy whereof is hereunto annexed, was proved and registered before me, and that administration of the property and credits of the said deceased, and in any way concerning his Will was granted to ____, the executor in the said Will named, he having undertaken to administer the same, and to make a full and true inventory of the said property and credits and exhibit the same in this Court within six months from the date of this grant or within such further time as the Court may, from time to time, appoint, and

also to render to this Court a true account of the said property and credits within one year from the same date, or within such further time as the Court may, from time to time, appoint.

12. In view of this Court, the trial Court ought to have issued the probate in the name of the executor alone. It appears that the probate dated 04.05.2012 has not been in conformity with the form set out in Schedule VI. It further appears that issuance of probate in the form inconsistent with the form set out in Schedule VI, is nothing but irregularity. The same also appears to have been result of the order passed in application (56 of 2005) for grant of probate which has attained finality in view of dismissal of the First Appeal. For ready reference, the probate dated 04.05.2012 is reproduced below:-

IN THE COURT OF CIVIL JUDGE (S.D.),JALNA
FORM OF PROBATE
(See Section 289)
(Court Fee Rs.75,000/-)

M.A.(RJD) NO.56/2005 Khusrav vs. State and ors.

I -----, Civil Judge Senior Division Jalna Delegate appointed for granting probate to M.A.(RJI) No. 56/2005 on 31/03/2012 jurisdiction Jalna District, hereby make known that on the 6th day of April in the year 1998 the last will of Alloo widow of Minocher Meherwanji Jalnawalla died on 28/09/2004 a copy whereof is here unto annexed was proved and registered before me, and that administration of the property and credits of the said deceased, and in any way concerning this will was granted

to 1) Khusrav S/o Sarosh Taraporewala, Age:Major, Occupation: Service, R/o Garden View, Flat No. 4, Raghunath Mahatre Road, Dahisar (W) Mumbai 400 069, 2) Bejan S/o Homi Bharucha, Age:Major, Occupation Service, R/o 7, Nirmal Mahal, 12-A, Bomhaji Patel Road, Mumbai, Mumbai 400 036, the executor in the said will named, he having, undertaken to administer the same, and to make a full and true inventory of the said property and credits and exhibit the same in this court within six months from the date of this grant or within such further time as the Court may from time to time appoint and also to render to this Court a true account of the said property and credits within one year from the same date or within such further time as the Court may, from time to time appoint.

Given under my hand and seal of this court on this day of 4th May, 2012.

Encl. Annexure-A

Sd/-
Civil Judge, Senior Division,
Jalna

It is true that on the strength of the aforesaid probate, entire 20% undivided share in the house property bearing C.T.S. No.4700, has been sold to Agrawals.

13. It needs no mention that a person cannot give better title than he himself has (*nemo dat quod non habet*). It is also a settled position that a final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to

be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

14. No right as executor or legatee can be established in any Court of justice, unless a Court of competent jurisdiction in India has granted probate of the Will under which the right is claimed, or has granted letters of administration with the Will (Section 213 of Indian Succession Act). This section applies in case of Wills made by any Parsi. Clause (ii) of sub-section (2) of Section 213 of the Act, reads thus:-

“(ii) in the case of Wills made by any Parsi dying, after the commencement of the Indian Succession (Amendment) Act, 1962 (16 of 1962), where such Wills are made within the local limits of the ordinary original civil jurisdiction of the High Courts at Calcutta, Madras and Bombay, and where such Wills are made outside those limits, in so far as they relate to immovable property situated within those limits.”

15. Needless to mention that the Will in the present case, relates to immovable property situated at Bombay and Jalna as well. In a proceedings for grant of probate or letters of administration, the

question of right, title and interest in movable and immovable property of the testator cannot be gone into. It is reiterated that the application for revocation of probate was moved only with an apprehension that the right, title and interest of the appellants herein in the house property (C.T.S. No.4700) would be at stake in view of grant of the probate and sale of the said property to Agrawals. Admittedly, the suit for partition and separate possession *inter alia* the said house property has been *sub judice* before the competent Civil Court. They would necessarily get their share, if any, in the property left behind by the common ancestor – Meherwanji and inherited by them as heirs or legatees of the common ancestor or his the next of kins.

16. The trial Court has passed a well reasoned order. No case is made out for interference with the impugned judgment and order. In the result, the appeal fails. The same is dismissed. Civil Application stands disposed of.

[R.G. AVACHAT, J.]

KBP