

Ashwini

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
NOTICE OF MOTION NO. 233 OF 2018
IN
TESTAMENTARY PETITION NO. 1906 OF 2015**

Sayana Jayesh Kudchadkar ...Petitioner

Supriya Jacob Nee Supriya D Nadkarni ...Deceased

Mr AK Saxena, for the Petitioner.

**CORAM: G.S. PATEL, J.
DATED: 2nd February 2021**

PC:-

1. The Motion seeks that a delay of 641 days be condoned and that the Petition be restored to file. For the reasons set out in the Affidavit in support, I will allow the Motion in terms of prayer clauses (a) and (b).

2. The office has in any case raised a requisition in regard to furnishing a death certificate. I am unable to grant the prayer for dispensing with the requisition in view of the order of 29th March 2016 which reads thus.

“1. The application is for dispensing with an office objection in this probate Petition.

Atul G.
Kulkarni

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2. The objection relates to paragraph 8 of the probate Petition. Here, it is said that the deceased died unmarried and that her only heir was her mother Shalini. Then it is stated that during her lifetime the deceased Supriya was married to one Jacob Mani but that they separated in 1980, his whereabouts are unknown, they had no children, and while there was no divorce there was a mutual separation. Mr. Saxena insists that a long separation is enough to raise a presumption of divorce. But the averment made is that the deceased “died a spinster”, i.e., that she was never married. Obviously, this assertion is incorrect. According to the Petitioner herself, the deceased was indeed married. The departmental objection is merely that some material needs to be provided showing the factum of separation and the fact that Jacob Mani has not been heard of for the past many years, or, at any rate, for more than seven years.

3. I do not think that it is possible without any material at all to dispense with this objection. Reliance is placed on behalf of the Petitioner on the decision of the Supreme Court in *M. Govindaraju v K. Munisami Gounder (D) & others*.¹ This has no application to the present case. It speaks of a customary divorce. The situation before the Supreme Court was one where the lady left the house of her first husband. However, the issue before the Supreme Court was as to the legitimacy of the son. I do not see how this decision is of any assistance to the Petitioner. At least in the case that went up to the Supreme Court there was some amount of material. Here there is none other than the *ipse dixit* with the Petitioner. That is not enough.

4. Reliance is also placed on a decision of a learned Single Judge of this Court (Dr. D.Y. Chandrachud, J., as he

1 (1996) 5 SCC 467

then was).² There the submission was that a Hindu Marriage has been dissolved by mutual consent following a custom in the Darji community of Gujarat. What Chandrachud J observed in paragraphs 3 and 4 was that there was material on record in the form of Affidavits, Identity Cards and so on, all establishing a customary divorce followed by a long period of cohabitation with another lady sufficient to raise a presumption of legitimacy of marriage. Again, I am unable to see the relevance of this.

5. All that paragraph 8 of the Petition says, in complete generalities, is that the deceased was once married and that she was separated for a long time. Nothing is adduced to show this. The mere averment is no proof at all. There is no material to support this. I do not see how, once having acknowledged the factum of marriage, a submission can be made that the deceased died “a spinster”, for that can only mean that she died without ever being married.

6. The application to waive the departmental requisition is rejected. The Petitioner is at liberty to produce such material evidencing separation of the deceased from her husband as may be thought fit. The Petitioner shall also be at liberty to make such application in that regard in independent proceedings as she may be advised.”

3. The submission now is that a citation be published in newspapers in lieu of the need to produce a death certificate. That unfortunately does not begin to answer the problem. In the Petition that is filed and is now in my hands, not only are their blanks (paragraph 7 and paragraph 8) and I have no idea how the department has permitted this Petition to even receive a numbering, but there has

² Petition No. 44 of 2009, decided on 24th April 2009

not been the slightest attempt to comply with what was required by the order of 29th March 2016.

4. Five years have gone past and the Petition is in 2021 exactly where it was in 2016, except that in the time in between it has been actually dismissed. Restoration is one thing. Allowing the Petition to proceed without the necessary amendments is quite another. Prayer clause (c) of Notice of Motion is rejected. It may be renewed in an appropriate Interim Application that proposes a suitable amendment to the Petition.

5. Notice of Motion is disposed of accordingly.

6. This order will be digitally signed by the Private Secretary of this Court. All concerned will act on production of a digitally signed copy of this order.

(G. S. PATEL, J)