

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.308 OF 2017

1) Madhukar Krishnaji Kulkarni (Decd)

Thru. L/Rs.

a. Madhuri Madhukar Kulkarni & Ors.

...Petitioners

Versus

Shrikant Krishnaji Kulkarni

...Respondent

Mr. Anand S. Patil for the petitioners.

Mr. Ruturaj Pawar for the respondent.

Coram : Sharmila U. Deshmukh, J.

Date : June 30, 2023.

P. C. :

1. The Petitioners question the order dated 7th April. 2014 passed by the learned 2nd Joint Civil Judge, Senior Division, Kolhapur in Civil Misc. Application No. 205 of 2011 permitting the respondent to amend the application and to include the properties left to be included in the application.

2. The petitioners and the respondent are propounding two Wills left by one Vishwanath Vishnu Kulkarni. The petitioners are propounding a Will dated 7th February, 2002 and claiming that under the said Will, the properties are bequeathed to the petitioners whereas the respondent is propounding a Will of 19th December, 2005

and claiming that the deceased had bequeathed the properties to the respondent and the earlier Will dated 7th February, 2002 was cancelled.

3. Heard, Mr. Anand S. Patil, learned counsel appearing for the petitioners and Mr. Ruturaj Pawar, learned counsel appearing for the respondent.

4. Learned counsel appearing for the petitioners has taken this Court through the contents of both the Wills i.e. Will dated 7th February, 2002 as well as the Will dated 19th February, 2005. He has also pointed out that the two properties which are sought to be included by way of the proposed amendment, is the part of the Will dated 7th February, 2002 propounded by the petitioners. He would further submit that the amendment application has been allowed which will have effect of the amending the Will itself.

5. *Per contra*, learned counsel appearing for the respondent points out that in the application seeking probate of the Will dated 7th February, 2002, apart from the probate, there is also a challenge to the Will dated 19th December, 2005. He would further contend that the properties are included in view of the challenge to the subsequent Will propounded by the petitioners. He would urge that for proper adjudication of the entire issue, all the properties of the testator are

required form part of the probate proceedings.

6. Considered the submission of the parties.

7. It is not disputed that the petitioners and the respondent are propounding two different Wills of the deceased testator and for the said purpose they have instituted the proceedings seeking probate of the Wills propounded by them. The petitions for propounding the Will have been instituted under Chapter-4 of the Indian Succession Act, 1925. Section 276 of the Indian Succession Act, 1925 which provides for the application for probate or for letters of administration reads as under.

“(1) Application for probate or for letters of administration, with the will annexed, shall be made by a petition distinctly written in English or in the language in ordinary use in proceedings before the Court in which the application is made, with the will or, in the cases mentioned in sections 237, 238 and 239, a copy, draft, or statement of the contents thereof, annexed, and stating

- (a) the time of the testators death,
- (b) that the writing annexed is his last will and testament,
- (c) that it was duly executed,
- (d) the amount of assets which are likely to come to the petitioner's hands, and
- (e) when the application is for probate, that the petitioner is the executor named in the will.

(2) In addition to these particulars, the petition shall further state,--

- (a) when the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within

the jurisdiction of the Judge; and
(b) when the application is to a District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.

(3) Where the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another State, the petition shall further state the amount of such assets in each State and the District Judges within whose jurisdiction such assets are situate."

8. A plain reading of section 276 indicates the contents which the application for probate petition or letters of administration with the Will annexed should contain. Sub-clause (d) of sub-section 1 of section 276 provides that the application should state the amount of the assets which are likely to come to the petitioner's hand.

9. In the present case, it is not in dispute that the Will propounded by the respondent does not include the properties which are sought to be included by way of the amendment. No doubt, it is settled legal position that while adjudicating a petition for probate in exercise of the testamentary jurisdiction, the probate Court will not go into the issue of right title and interest of the properties forming part of the Will as the adjudication will be limited only to the genuineness of a Will and may either refuse or grant the probate. The Court in exercise of its power in testamentary jurisdiction will not enter into the issue of the capacity of the testator or the properties which are forming part of the Will. However it should not be lost sight that under section

289 of the Indian Succession Act probate of the Will will be granted by Court and as such by virtue of the grant of probate, the right of the party as an executor or legatee is established. It is undisputed position that the grant of the probate of Will not vest the propounder with any right title and interest of the property which will be adjudicated in appropriate civil proceedings. However, as the probate results in establishing the right of the propounder as executor or legatee, permitting the respondent to amend the probate petition to include the properties which are not forming part of the Will is clearly unsustainable. The application for probate should include the assets which are likely to come in the hands of the petitioner and the properties forming part of the Will are required to be included in the application. By the impugned order, the respondent is permitted to go beyond the properties which are not included in the Will and seek a right as a legatee in respect of these properties which are not forming part of the Will.

10. In view of the above, the impugned order dated 7th February, 2014 is clearly unsustainable and is hereby quashed and set aside. The Writ Petition stands allowed.

[Sharmila U. Deshmukh, J.]