

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
MISCELLANEOUS REVOCATION PETITION NO.62 OF 2021
IN
PETITION NO.1124 OF 2012
WITH
INTERIM APPLICATION NO.150 OF 2023
IN
MISCELLANEOUS REVOCATION PETITION NO.62 OF 2021
IN
PETITION NO.1124 OF 2012

Malati @ MalatibaiRajaramaParshetye : Deceased

Dinesh Madhukar Parshetye]
Aged about 50 years, Occ : Business]
Hindu Indian Inhabitant of Ratnagiri]
Residing at & Post Devale, Taluka]
Sangmeshwar, District Ratnagiri.]
Being nephew of the deceased.].....Petitioner.

versus

Abhay Shridhar Shetye]
Aged about 65 years, Hindu Indian Inhabitant]
Residing at Dinanath Terrace Room No.2,]
L. J. Road, Mahim Mumbai – 400 016]
Being sole executor named under will and]..... Respondent
Testament of the deceased abovenamed.] (Original Petitioner)

Mr. Rajesh Kachare for the Petitioner/Applicant.

Mr. V S R Singh a/w Mr. C M Lokesh for the Respondent/Org.Petitioner.

CORAM : ARIF S. DOCTOR, J.
Reserved On : 13th January 2023
Pronounced on : 07th February 2023.

JUDGMENT :

1. The present Miscellaneous Petition has been filed for revocation of the probate dated 31st March 2016 granted by this Court in respect of the Will dated 22nd June 1989 of one Malatibai Rajaram Parshetye ("the deceased").

2. Petitioner seeks revocation of probate under Section 263(b) of the Indian Succession Act, 1925 ("the said Act") which reads thus :-

"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)

(b) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case; or

(c)

(d)

(e)

The main ground on which revocation is sought is that the Respondent had obtained probate fraudulently by falsely representing in Testamentary Petition

No.1124 of 2012 (“the Testamentary Petition”) that the Respondent was the only legal heir and next of kin of the deceased in accordance with the provisions of the Hindu Succession Act, 1956 when in fact :-

- (a) the deceased had other legal heirs through the late husband of the deceased (i.e. one Rajaram Appa Parshetye);
- (b) the Petitioner was a Class – II legal heir of the deceased as per the provisions of the Hindu Succession Act, 1956;
- (c) the Respondent is not a legal heir of the deceased according to the provisions of the Hindu Succession Act, 1956.

3. Petitioner in support of his contention that Petitioner is a Class – II legal heir of the deceased has relied upon a family tree (Exhibit-C to the Petition) which shows that the Petitioner is the nephew of the deceased, being the son of one Madhukar Dhondur Parshetye, who is deceased cousin of Rajaram Appa Parshetye (the predeceased husband of the deceased) and is thus a Class – II legal heir of the deceased. The Petition additionally set out (in Exhibit-D to the Petition) that the deceased and the Respondent had other surviving family members through the father of the deceased.

4. In the aforesaid backdrop of facts, Mr. Kachare, Learned Counsel appearing on behalf of the Petitioner invited by attention to the Testamentary Petition and pointed out therefrom that the Respondent i.e. Petitioner in the Testamentary Petition had specifically pleaded therein as follows viz. :-

"Parents of the deceased and parents of the husband of the deceased predeceased the deceased. The husband of the deceased predeceased the deceased. Deceased died as a widow and issueless. The husband of the deceased had no brother and no sister. The deceased had no legal heirs from husband her side. Deceased had only brother viz. Shridhar Tukaram Shetye and no sister. The said Shridhar Tukaram Shetye expired on 14th day of April, 2000. The said Shridhar Tukaram Shetye, brother of the deceased had only son viz. Abhay Shridhar Shetye, the Petitioner herein. The said Shridhar Tukaram Shetye, brother of the deceased had no daughter."

Mr.Kachare submitted that the aforesaid averments; (i) that the husband of the deceased had no brother and no sister; (ii) that the deceased had no legal heirs from her husbands side; (iii) that deceased had only a brother viz. Shridhar Tukaram Shetye and no sister; (iv) that the said Shridhar Tukaram Shetye, , had only son viz. Abhay Shridhar Shetye; and (v) that Shridhar Tukaram Shetye had no daughter, were all patently false to the knowledge of the Petitioner herein.

5. In support of his contention that the declaration made in the Testamentary Petition was false to the knowledge of the Respondent,

Mr.Kachare invited my attention to the Affidavit in Reply filed by the Respondent to the present Miscellaneous Petition and pointed out therefrom that the Respondent had specifically pleaded therein as follows :-

*"I say that Respondent was born on 24/08/1957 herein Bombay and brought up in Mumbai and completed all his education right from his Primary School to Engineering College herein at Mumbai and was employed in Air India in Mumbai from where he retired in the year 2014 and therefore, he was not aware about the Petitioner and his other family members as stated in Schedule Exh. C annexed herewith the Petition. I say that Respondent was also not fully aware about other family members of his father's family save and except someone. **Hereto annexed and marked Exh.7** is true copy of Respondent's Birth Certificate. **Hereto annexed and marked Exh.8** is true copy of Respondents School Living Certificate.*

(10) Legality, Propriety and genuineness of Maltibai's will . Executed on 22/06/1989.

I say that when Respondent was six months old his mother had expired and his father Shridhar Shetye was unable to maintain him at this stage and as he had another son namely Dilip and two daughters, namely Sunita and Gita and therefore, Respondent's father had given his youngest son Abhay Shetye in adoption to his sister Malatibai and her husband Rajaram Appa Parshetye and accordingly, both of them had adopted Respondent Abhay Shetye as their son when he was six months of age."

From the above, Mr. Kachare submitted that the Respondent had specifically admitted :-

- (i) that the deceased had family members from her husband's side;

- (ii) that the deceased had family members from her father's side;
- (iii) that the Respondent had a brother and two sisters.

Mr. Kachare thus submitted that from the Reply itself it was thus evident that the Respondent had obtained probate fraudulently by making false statements.

6. Mr. Kachare then submitted that the husband of the deceased was a tenant in respect of Shop No.5, Choksi Building, Ranade Road, Dadar, Mumbai – 400 028 ("the shop"). He submitted that there was no dispute that upon death of the husband of deceased (i.e. Rajaram Appa Parshetye) the tenancy in respect of the shop devolved upon the deceased. In support of his contention he invited my attention to Affidavit-cum-Declaration dated 25th October 2004 (annexed to the Affidavit in Reply filed by the Respondent) executed by the deceased in which the deceased has stated in paragraph 1 as follows :-

"1. I say that my husband late Shri Rajaram Appa Parshetye was the monthly tenant of Shop No.5, Ground floor, choksi Building, Ranade Road, Dadar, Bombay 400028, for the sake of brevity hereinafter called, "the said Shop no.5". I say that late Shri Rajaram Appa Parshetye had been running his business of selling Pan, Bidi and Cigarette etc in the name and style of "Masrise Bidi Works", in the said Shop No.5, for the sake of brevity hereinafter called "the said business"."

Basis the above, Mr. Kachare submitted that on the death of the deceased, the Petitioner being a Class-II heir of the deceased, would succeed to the estate of the deceased. He also submitted that tenancy could not be bequeathed and thus, the tenancy in respect of the shop would devolve upon the Petitioner. He, therefore, submitted that as per the provisions of Section 8 r/w Section 15(2) of the Hindu Succession Act, the Petitioner would be a legal heir of deceased on her death, and the estate of the deceased and her late husband Rajaram Appa Parshetye would devolve inter-alia upon the Petitioner. He submitted that it was thus that the Petitioner would be entitled to the service of citation. In support of his contention, he placed reliance upon the judgment of the Hon'ble Supreme Court in the case of ***Seethalakshmi Ammal v/s. Muthuvenkatarama Iyengar and another¹***. Mr. Kachare submitted that the entire attempt of the Respondent was to somehow deprive the Petitioner of the shop and usurp the same. He submitted that it was thus that the Respondent had fraudulently applied for Probate by making false statements and misrepresentations. He submitted that the alleged Will in respect of which probate had been granted was obtained inter alia by force, coercion etc. .

7. Per contra, Mr. Singh, Learned Counsel appearing on behalf of the Respondent/Original Petitioner submitted as follows :-

1

(A) Limitation

8. At the very outset he submitted that the present Miscellaneous Petition was barred by limitation. He submitted that a Caveat had already been filed by the heirs of one Purushottam Shankar Shetye and the Petitioner was aware of this fact and had been watching the entire proceedings of the Caveat, but did not at that time come forward and contest the said Will and/or the grant of probate to the Respondent. He submitted that the said Caveat had been dismissed and therefore the question of now once again inquiring into the genuineness of the said Will does not arise. He submitted that except for the Petitioner none of the other legal heirs of the deceased have come-forth to contest the grant of probate to the Respondent. He submitted that the Caveat filed by the legal representatives of late Purushottam Shankar Shetye was dismissed by this Hon'ble Court on 22nd April 2014. He submitted that the present Miscellaneous Petition has been filed by the Petitioner in collusion with the persons who were involved in litigation with the Respondent in respect of the shop and business of the deceased.

(B) Intention of Testator

9. That it was always the intention of the deceased to transfer the said property to the Respondent. Mr. Singh placed reliance upon the Affidavit-

cum-Declaration dated 25th October 2004 and submitted that as per the said Declaration intent of the Testator was made clear i.e. to enter the name of the Respondent qua the shop in the Municipal Records. He pointed out that by the said Affidavit-cum-Declaration the deceased had consented to the transfer of the tenancy right of the shop in the name of the Respondent.

(C) Relationship of the deceased with the Respondent.

10. Mr.Singh then submitted that Respondent was the adopted son of the deceased and would therefore exclude the Petitioner from succession. He invited my attention to the statement made by the deceased as contained in the Affidavit of Examination-in-Chief dated 4th August 2005 which had been filed in S.C. Suit No.979 of 1990 in the City Civil Court at Mumbai wherein the deceased had stated on oath that Respondent had been adopted by the deceased.

(D) Due execution of Will

11. Mr. Singh laid great emphasis upon the fact that Will dated 22nd June 1989 of the deceased, in respect of which probate had been granted, had been duly and validly executed. He submitted that the deceased was mentally and physically examined before the deceased executed the said Will by one Dr. R. M. Patekar who had himself read over and explained the contents of the said Will to the deceased. It was only after this that the deceased had executed the

said Will in the presence of Dr. R. M. Patekar and two other witnesses namely Shri. Kiran J. Masurkar and Shri. R. A. B. Mani on 22nd June 1989. He submitted that the Will had thereafter been duly registered at the office of the Sub-Registrar of Assurances at Bandra, Mumbai on the same day. He thus submitted that there could be no dispute raised in respect of the writing dated 22nd June 1989 regarding its legality and validity which he said was the last Will and Testament of the deceased. Mr. Singh then submitted that the tenancy right was inheritable under Section 7(15)(d) r/w Section 31(2) and was also transferable with the consent of the Landlord under Section 56 of the Maharashtra Rent Control Act, 1999. In support of his contention he placed reliance upon a judgment of the Hon'ble Supreme Court in the case of ***Gaiv Dinshaw Irani and others v/s. Tehmtan Irani and others***² He submitted that the shop premises had devolved upon the deceased on the death of her late husband (i.e. Rajarama Appa Parshetye) who was the tenant in respect of the shop and since the deceased and her husband died issueless, the same devolved upon the Respondent. He submitted that Respondent had since 1988 been paying monthly rent of the said premises from his account which continued till date. He submitted that pursuant to the Affidavit-cum-Declaration filed by the deceased, the Landlord of the shop had transferred the tenancy of the shop to the Respondent. He submitted that the deceased had executed a Power of

2 AIR 2014 SC 2326

Attorney dated 11th August 1986 in favour of the Respondent to recover possession of the shop and pursuant thereto the Respondent had filed Suit No.979 of 1990 in the City Civil Court at Mumbai as also Declaratory Suit No.649 of 1988 in the Small Causes Court at Mumbai.

(E) Citations deemed to be duly served.

12. Without prejudice to the aforesaid submissions, Mr. Singh submitted that though Citations were not personally served upon the legal heirs, the same were duly published in both Free Press Journal (in English) and Navshakti (in Marathi) on 30th June 2015. He submitted that the Citations copies were also affixed both in the Court as also in the office of Collector of Bombay as required under Rule 397 of the Bombay High Court (O.S.) Rules and therefore Citations were duly deemed to be served as required by law. He submitted that Citations once published in newspapers constituted proper service by way of substituted service under the provisions of Order V Rule 20(1A) of the Code of Civil Procedure. In support of his contention he placed reliance upon the judgment of the Hon'ble Supreme Court in the case of ***Sunil Poddar and others v/s. Union Bank of India***.³ Mr. Singh then submitted that persons mentioned in Exhibit-C (i.e. legal heirs of the deceased husband the said Rajarama Appa Parshetye) and Exhibit-D (i.e. legal heirs of the deceased

3 2008 (2) Mh. L.J. 84

through her father) had no caveatable interest in respect of the tenancy of the shop premises and therefore grant of probate would not prejudice them in any manner.

(F) Registered Will.

13. Mr. Singh then submitted that the Will of the deceased in the present case was a registered Will. He submitted that in law a registered document carries with it a presumption that it was validly executed. In support of his contention he placed reliance upon the judgment of the Hon'ble Supreme Court in the cases of *Jamila Begum (d) through legal representative v/s. Shami Mohammed (D) through legal representative and Anr.*⁴; and *Prem Singh and others v/s. Birbal and others*⁵; He then placed reliance upon the judgment of the Hon'ble Supreme Court in the case *Sayyed Mohd. Baker El-Edroos (dead) by Lrs. v/s. Abdul Habib Hsan Arab and others.*⁶ to contend that Procedural law is always in aid of justice and not in contradiction or to defeat the very object which is sought to be achieved. Procedural law is always subservient to substantive law. He submitted that even the legal heirs and representatives of Judgment Debtors in S.C. No. 979 of 1990 had filed Caveat on the similar ground which had been dismissed.

4 2019 SAR (Civil) 166

5 (2006) 5 SCC 353

6 1998 SAR (Civil) 527

(G) No just cause for revocation.

14. Mr. Singh submitted that the Court must also consider the genuineness of the Will while deciding the present Miscellaneous Petition for revocation of probate. In support of his contention, he placed reliance upon the judgment of the Hon'ble Supreme Court in the case of **Anil Behari Ghosh v/s Smt. Latika Bala Dasi and others**⁷ in which the Hon'ble Supreme Court in paragraphs 15 and 16 was pleased to hold as under :-

"15. It cannot be laid down as a general proposition that no question of the genuineness of the Will arises for consideration till the Court has decided that the Probate must be revoked on one or more of the grounds specified in Section 263. Section 263 also contemplates a case for revocation based on the single ground that the Will in respect of which the grant in question was obtained was a forged one. In such a case, whether or not the Will was a forged one would be the only question to be canvassed before the Court before the Order of revocation could be made out.

16. The omission to issue citations to persons, who should have been appraised of the Probate proceedings may well be in a normal case a ground by itself for revocation of the grant. But this is not an absolute right irrespective of other considerations arising from the proved facts of a case. The law has vested a judicial discretion in the Court to revoke a grant where the Court may have prima facie reasons to believe that it was necessary to have the Will proved afresh in the presence of interested parties. The court may refuse to grant annulment in cases where there is no likelihood of proof being offered that the Will admitted to Probate was either

⁷ AIR 1955 SC 566

not genuine or had not been validly executed."

He therefore submitted that given the totality of circumstances, there was no reason to revoke the issuance of probate in the facts of the present case. He also placed reliance upon the judgment of the Hon'ble Supreme Court in the case of ***Ishwardeo Narain Singh v/s. Smt. Kamla Devi and others***⁸ in which the Hon'ble Court in paragraph 20 was pleased to hold as under :-

"20. The Court of Probate is only concerned with the question as to whether the document put forward as the Last Will and Testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the Testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the Probate Court."

Mr. Singh thus submitted that the present Miscellaneous Petition ought to be dismissed with cost.

15. Mr. Kachare in rejoinder submitted that Petitioner had no connection with the legal proceedings relied upon by the Respondent. He submitted that those proceedings were between the deceased and/or Respondent and the Licensee of the shop. He reiterated that it was only in or about March 2021 that the Petitioner became aware of the grant of probate as

8 AIR 1954 SC 280

more particularly stated in paragraph 12 of the Miscellaneous Petition.

16. Mr. Kachare submitted that in any view of the matter what had been seen was the basis on which the probate had been applied for and consequently been issued. He reiterated that the Respondent had in the Testamentary Petition deliberately and willfully suppressed the true and correct facts of the case and misrepresented to the Court that the deceased did not have any legal heirs. He submitted that the conduct of the Respondent was calculated only with a motive of depriving the Petitioner of an opportunity of objecting the said Will and pointing out why the same was obtained by (a) force, misrepresentation and coercion; and (b) how the shop in law could never either be bequeathed to or devolved upon the Respondent. Mr. Kachare laid great emphasis in pointing out that the Respondent had not denied and/or disputed that the deceased had legal heirs through her late husband (i.e. Rajaram Appa Parshetye), and thus the stand taken in the Affidavit in Reply was completely contrary to the case pleaded in the Testamentary Petition. He submitted that while the Respondent now contended that the Respondent was the adopted son of the deceased, the Respondent had in the Testamentary Petition stated that the Petitioner was the nephew of the deceased. He pointed out that even in the Affidavit-cum-Declaration of the deceased dated 25th October 2004 relied upon by the Respondent the deceased had stated that the

Respondent was the nephew of the deceased and not the adopted son as was now being alleged. Mr. Kachare submitted that service of general citations would not absolve from the false and fraudulent case pleaded in the Testamentary Petition. He thus submitted that the present Miscellaneous Petition may be allowed.

17. I have heard Learned Counsel for the parties and considered the pleadings and case laws cited. Though Learned Counsel for the Respondent advanced various different arguments to oppose the Miscellaneous Petition, the only question that arises for determination in this matter is, whether or not the Respondent has obtained probate fraudulently by making a false suggestion and/or by concealing material facts from the Court. The answer to this is an emphatic yes ! In the present case, the sole ground for seeking revocation is not that the alleged Will is forged, as was in the case of *Anil Behari Ghosh* (supra) relied upon by Mr. Singh but that the Respondent had obtained probate fraudulently by making false statements in the Testamentary Petition. Thus at this stage I need not go into any of the other issues raised and strongly urged by Mr. Singh, as they are completely irrelevant to the issue at hand.

18. In light of the above, let me now set out the reasons why I have come to the conclusion that the Respondent has obtained probate fraudulently

by making false statements, viz.

i. The Respondent has in Testamentary Petition admittedly declared that the Respondent is (a) the only legal heir and next of kin of the deceased according to the provisions of the Hindu Succession Act, 1956 and (b) that the Respondent does not have a brother or a sister. In the Affidavit in Reply to the Petition, the Respondent does a complete volte facie and admits that (a) the deceased has legal heirs through the husband of the deceased and (b) that the Respondent has a brother and sisters. The Respondent has not so much attempted to deny the legal heirs of the husband of the deceased as set out in Exhibit C or the other family member of the Respondent as set out in Exhibit D to the Petition. Therefore it is clear that the Respondent has willfully and deliberately made a false declaration in the Testamentary Petition.

ii. Another factor which amplifies that the Respondent has willfully and brazenly made false statements in the Testamentary Petition is that the Respondent, on the one hand, has pleaded in the Affidavit in Reply that *"he was not aware about the Petitioner and his other family members as stated in Schedule **Exh. C** annexed herewith the Petition"* while in the very same Affidavit has pleaded, *"I say that the heirs and Legal Representative of late deceased Purushottam Shankar Shetye, for the sake of brevity hereinafter called **"deceased Purushottam,"** had already filed their Caveat in Respondent's Testamentary Petition No.1124 of 2012 and at that time Petitioner Dinesh Madhukar Parshetye was also coming alone with heirs and Legal*

Representatives of late Shri Pursushottam and watching the entire proceedings of Caveat but at that time neither the Petitioner nor any other persons whose names have been mentioned in the Scheduled Exh.C and Exh.D annexed with above Petition, did not come forward and filed their Caveat to challenge the grant of Probate to the Respondent."

iii. Additionally, the Respondent has sought to oppose the present Miscellaneous Petition and justify the grant of probate on the ground that the Respondent is the adopted son of the deceased and her late husband (i.e. Rajaram Appa Parshetye). Respondent has specifically pleaded in the Affidavit in Reply to the present Miscellaneous Petition that the Respondent was adopted by the deceased and her late husband when the Respondent was only six months old. The Respondent on this stated/claimed to be a "family member" of the deceased and therefore entitled to the probate. However, in the Testamentary Petition the Respondent has described himself as a nephew of the deceased and not the son/adopted son.

19. In light of the above, I therefore have no hesitation in holding that the Respondent has obtained probate fraudulently by willfully and deliberately making a false declaration in the Testamentary Petition. Such conduct must be deprecated as it sullies and pollutes the course of justice. It is well settled that any order or judgement obtained by playing a fraud on the Court is a nullity.

20. In view of the aforesaid findings, the present Miscellaneous Petition is therefore allowed in terms of prayer clauses (a) and (b) which read as under :-

- (a) *The Original Grant of Probate in respect of Will dated 22nd June, 1989 of deceased Malatibai Rajaram Parshetye be revoked and cancelled;*
- (b) *Original Grant of Probate in respect of Will dated 22nd June, 1989 of deceased Malatibai Rajaram Parshetye and the Original Will dated 22nd June, 1989 be directed to be deposited with the Prothonotary and Senior Master, High Court, Bombay forthwith;*

21. Given that I have found that the Respondent has obtained probate fraudulently by willfully and deliberately making a false declaration in the Testamentary Petition and that such conduct must be deprecated as it amounts to a gross abuse/misuse of the process of law and of this Hon'ble Court, I am inclined to award costs of Rs.25,000/- (Rupees Twenty Five Thousand only) to be paid to the Petitioner.

22. Office to take necessary steps as per the Rules

23. It is made clear that this Court has not considered nor opined on any issue other than the fact that the probate has been obtained fraudulently.

Several other contentions urged on behalf of the Respondent were not decided by this Order as the same are irrelevant to the issue at the hand and thus left open.

24. The present Miscellaneous Petition is accordingly disposed of.

25. In view of the disposal of the Miscellaneous Petition, Interim Application No.150 of 2023 does not survive and the same is accordingly disposed of.

(ARIF S. DOCTOR, J.)

AFTER PRONOUNCEMENT :

After this order was pronounced, an application for stay was made by Learned Counsel for the Respondent.

Given that I found that the probate was obtained fraudulently, the application for stay is rejected.

(ARIF S. DOCTOR, J.)