



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION

MISCELLANEOUS PETITION NO. 120 OF 2023

IN

TESTAMENTARY PETITION NO. 1068 OF 2020

Vinayak Arvind Bajoria & Anr.

...Petitioners

Versus

Arvind Kumar Bajoria & Anr.

...Respondents

- Mr. Archit Jayakar, Mr. Rahil Jhaveri, Ms. Dimple Majetha and Mr. Rupesh Ghadi, for Petitioners.
- Mr. Modh. Akram, for Respondent No. 1.
- Mr. Nakul Jain i/b Mr. Amol Kumar, for Respondent No. 2.

CORAM : MANISH PITALE, J

DATE : 06th SEPTEMBER, 2023

P. C. :

1. Heard learned Counsel for the parties.
2. By this Miscellaneous Petition, the Petitioners are seeking cancellation/revocation of grant of probate of will dated 10th September, 2012, issued by this Court on 15th June, 2021 in Testamentary Petition No. 1068 of 2020. The probate was granted in favour of Respondent No. 1, who happens to be the father of the Petitioners herein.
3. The bedrock of the contentions raised on behalf of the Petitioners in this petition is that despite the Petitioners having a Cavetable interest, they were not cited in the Testamentary Petition and by suppression of material facts from this Court, the Respondent

No. 1 obtained probate of the aforesaid will.

4. Mr. Archit Jayakar, learned Counsel appearing for the Petitioners, in support of the aforesaid contention raised on behalf of the Petitioners, referred to a suit bearing Civil Suit No. 298 of 2020 filed by the Petitioners before the Competent Court at Jaipur. It is submitted that this aforesaid suit is a suit for partition based on the assertion of the Petitioners that the properties in question in the hands of the deceased were Hindu Undivided Family (HUF) properties, including a flat located at Bandra in Mumbai. It is submitted that Interim Application filed therein is pending, while an application filed under Order 7 Rule 11 of the Code of Civil Procedure, 1908 (CPC) by Respondent No. 1 for rejection of plaint was dismissed by the Court at Jaipur. It is submitted that in the said application Respondent No. 1 had alleged that the properties in question, including the aforementioned flat did not form part of HUF properties.

5. It is further alleged that despite pendency of the said Suit at Jaipur and being fully aware about the claims made by the Petitioners, the Respondent No. 1 filed Testamentary Petition No. 1068 of 2020 before this Court for probate of will dated 10th September, 2012, said to have been executed by the deceased. It was submitted that in the said petition, the Respondent No. 1 stated that only four persons other than the Respondent No. 1 i.e. brother Arun

Kumar Bajoria and sisters Karuna Jain, Sarita Bagrodia and Aruna Jain, were the surviving heirs of the deceased. The Petitioners were not cited, despite pendency of the aforementioned suit in the Court at Jaipur and the Respondent No. 1 being fully aware about the claims raised by the Petitioners. It was submitted that subsequently the Testamentary Petition was amended at the behest of Respondent No. 1 to add the husband and two children of Aruna Jain i.e. one of the sisters of Respondent No. 1, who expired during the pendency of the Testamentary Petition.

6. It is submitted that in such a proceeding conducted behind the back of the Petitioners, on the basis of that the persons who were cited did not raise any objection to the prayer made in the Testamentary Petition, probate was granted by this Court in respect of the said will in favour of Respondent No. 1. It was submitted that in such circumstances, the Petitioners have made out sufficient grounds for seeking revocation of probate granted by this Court.

7. It was further submitted that the Hon'ble Supreme Court in the case of *G. Gopal Vs. C. Baskar & Ors.* (order dated 03rd September, 2008 passed in Civil Appeal No. 6067 of 2008) categorically held that a person having even a slight interest in the estate of the testator was entitled to file caveat and contest grant of probate of a will. Reliance was also placed on the judgment of this

Court in the case of *Daya Subhash Tiwari Vs. Kashinath Lalta Tiwari & Ors.*¹, to contend that the issues pertaining to the claim raised on behalf of the Petitioners treating the properties as HUF properties could be a ground for showing caveatable interest of the Petitioners. On this basis, it was submitted that the Respondent No. 1 not having cited the Petitioners in the Testamentary Petition, was sufficient ground for allowing the present petition for revocation of probate.

8. On the other hand, Mr. Mohd. Akram, learned Counsel appearing for Respondent No. 1 and Mr. Nakul Jain, learned Counsel appearing for Respondent No. 2 vehemently opposed the contentions raised on behalf of the Petitioners. It was submitted that in the light of the provisions of the Hindu Succession Act, 1956 and the admitted position that the children of the deceased i.e. class-I heirs were all cited in the Testamentary Petition leading to grant of probate, was enough to show that there were no irregularities in the petition filed by Respondent No. 1 and that no ground is available to the Petitioners to claim revocation of probate. It was further submitted that even according to the Petitioners, there were only five children of the deceased, of whom one of the daughters i.e. Aruna Jain expired during the pendency of the Testamentary Petition. It was stated in paragraph no. 9 of the Testamentary Petition that all the four children of the deceased, apart from Respondent No. 1, were the

¹ 2013 (6) Mh.L.J. 535

surviving and only heirs of the deceased. There can be no dispute about the fact that they were the only class-I heirs of the deceased. It was emphasized that during the lifetime of Respondent No. 1, the Petitioners as grandchildren could not claim to have a higher right than Respondent No. 1 and hence any caveatable interest. It was emphasized that the Respondent No. 1 correctly amended the Testamentary Petition to add the husband and two children of Aruna Jain i.e. one of the sisters of Respondent No. 1, who died as parties during the pendency of Testamentary Petition.

9. It was further submitted that the claims raised on behalf of the Petitioners in the suit filed before the Court at Jaipur are yet to be adjudicated and therefore, as on today, the Petitioners cannot claim any caveatable interest only on the basis that they have instituted such a suit. It was emphasized that the said suit proceeds on the basis that, according to the Petitioners, the properties are HUF properties. It is further submitted that the dismissal of the application filed under Order 7 Rule 11 of the CPC has been challenged before the High Court at Jaipur and the challenge is pending, the suit being stayed. On this basis, it was submitted that there was no question of revocation of probate on the ground that the Petitioners were not cited in the Testamentary Petition proceedings. Reliance was placed on judgment of the Hon'ble Supreme Court in the case of

*Kanwarjit Singh Dhillon Vs. Hardy Singh Dhillon & Ors.*², particularly paragraph no. 10 thereof.

10. This Court has heard the learned Counsel for the rival parties in the backdrop of the material placed on record and the position of law brought to the notice of this Court.

11. The Petitioners claim that they ought to have been cited in the Testamentary Petition filed by Respondent No. 1, primarily on the ground that they had already instituted the aforesaid suit in the Court at Jaipur, wherein the Respondent No. 1 was indeed a party and being aware of pendency of such proceedings, the Respondent No. 1 could not have avoided citing the Petitioners in the Testamentary Petition proceedings. This Court is of the opinion that the suit filed before the Court at Jaipur by the Petitioners proceeds on their assertion that the properties in question are HUF properties. The said assertion is yet to be proved in the Court of law and therefore, it cannot be said that mere filing and pendency of the said suit would give rise to a caveatable interest of the Petitioners in the context of grant or refusal of probate of the aforesaid will of the deceased.

12. The Petitioners are unable to dispute the position of law in terms of the provisions of the Hindu Succession Act, 1956, that only the children of the deceased were the class-I heirs and they were

² (2007) 11 SCC 357

indeed specifically referred to in the Testamentary Petition at paragraph no. 9. It is also an admitted position that when during the pendency of the Testamentary Petition one of the children of the deceased i.e. the Sister of Respondent No. 1 expired, her husband and children were added in the said petition through amendment. It is also an admitted position that all the persons so cited in the Testamentary Petition did not raise any objection to grant of probate in favour of Respondent No. 1.

13. This Court is of the opinion that in the face of such admitted facts, it cannot lie in the mouth of the Petitioners that they ought to have been cited in the Testamentary Petition by the Respondent No. 1 and having failed to do so, sufficient ground has been made out for revocation of probate.

14. The learned Counsel appearing for the Petitioners also relied upon section 263 of the Indian Succession Act, 1925, to contend that the grant of probate in the present case ought to have been revoked as just cause was made out in terms of the explanation appended to the said provision, particularly in the light of the illustration (ii) to the said provision. A perusal of the same shows that a grant of probate could be revoked, if such grant was made without citing parties who ought to have been cited. This Court is of the opinion that in view of the observations made hereinabove, when

this Court has found that the Petitioners failed to demonstrate that they ought to have been cited, no ground is made out for revocation of probate under the said provision of law.

15. As regards reliance placed on judgment of the Hon'ble Supreme Court in the case of *G. Gopal Vs. C. Baskar & Ors. (supra)*, there can be no quarrel with the proposition that a person having even slight interest in the estate of the testator would be entitled to file a caveat or contest the grant of probate. But, this Court is of the opinion that in the face of the admitted facts noted hereinabove, it cannot be said that the Petitioners ought to have been cited in the Testamentary Petition filed by Respondent No. 1. As regards reliance placed on the judgment of this Court in the case of *Daya Subhash Tiwari Vs. Kashinath Lalta Tiwari & Ors. (supra)*, it is found that the observations made therein were in the facts of that particular case where caveats were filed and grant of probate was opposed. On the other hand, reliance placed on behalf of the Respondents on the judgment of the Hon'ble Supreme Court in the case of *Kanwarjit Singh Dhillon Vs. Hardyal Singh Dhillon & Ors. (supra)*, is apposite. In paragraph no. 10 of the said judgment the Hon'ble Supreme Court has held as follows :

*“10. The High Court by the impugned order, relying on a decision of this Court in the case of **Smt. Rukmani Devi and Ors. v. Narendra Lal Gupta** MANU/SC/0243/1984 :*

AIR 1984SC1866 affirmed the order of the civil court by holding that a probate granted by a competent probate court was conclusive of the validity of the Will of late S. Kirpal Singh until it was revoked and no evidence could be admitted to impeach the said Will except in a proceeding taken for revoking the probate. According to the High Court, a decision of the probate court would be a judgment in rem which would not only be binding on the parties to the probate proceeding but would be binding on the whole world. Upon the aforesaid finding, the High Court had affirmed the order of the civil court holding that the suit must be dismissed in view of the fact that the probate court had already granted probate in respect of the Will executed by late S. Kirpal Singh relating to the suit properties. We are not in a position to agree with the views expressed by the High Court in the impugned order nor are we in agreement with the order passed by the civil court. As noted herein earlier, the suit for declaration of title and injunction has been filed by the appellant inter alia on the allegations that the suit properties are joint family properties of the HUF of which the appellant and his two brothers Hardyal Singh Dhillon and Harbans Singh Dhillon, mother Surjit Kaur and unmarried daughter Amarjit Kaur are members. It has also been claimed by the appellant in the suit that by utilizing the income from the ancestral agricultural land, various properties including the suit properties were acquired. Such being the allegations made in the plaint which can only be decided on trial after parties are permitted to adduce evidence in respect of their

respective claims, it is difficult to hold that only because probate of the Will of late S. Kirpal Singh has been granted, the suit for title and injunction must be held to be not maintainable in law. It is well settled law that the functions of a probate court are to see that the Will executed by the testator was actually executed by him in a sound disposing state of mind without coercion or undue inference and the same was duly attested. It was, therefore, not competent for the probate court to determine whether late S. Kirpal Singh had or had not the authority to dispose of the suit properties which he purported to have bequeathed by his Will. The probate court is also not competent to determine the question of title to the suit properties nor will it go into the question whether the suit properties bequeathed by the Will were joint ancestral properties or acquired properties of the testator.”

16. The position of law is therefore, abundantly clear that the probate Court is not competent to determine the questions of title. In the present case, the Petitioners have already instituted the aforesaid suit in the Court at Jaipur and if they have any grievance with regard to the manner in which the Respondent No. 1 is dealing with or has dealt with properties in pursuance of grant of probate by this Court, the Petitioners would clearly be at liberty to file appropriate applications in the pending suit at Jaipur to ventilate their grievances and to seek appropriate interim reliefs. But, that in itself cannot lead to the conclusion that the Petitioners ought to have been

cited in the Testamentary Petition filed by Respondent No. 1 for grant of probate of the will.

17. Hence, no ground is made out for seeking revocation of probate. The present petition is found to be without any merit. Accordingly, it is dismissed.

(MANISH PITALE, J.)