

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

INTERIM APPLICATION NO. 13537 OF 2024.

IN

FIRST APPEAL NO. 1162 OF 2019.

Lt. Col. Adi Minoo Chinoy

...Applicant/Appellant.

Versus

Mr. Kantilal Achaldas Oswal

...Respondent.

Mr. Sanjiv Sawant a/w Mr. Abhishek Matkar i/by Mr. Abhishek Deshmukh for the Appellant/Applicant.

None for the Respondent.

Coram : Sharmila U. Deshmukh, J.

Date : October 4, 2024.

P. C. :

1. At the outset, learned Counsel appearing for the Applicant seeks leave to amend date of death of the sole Executor. Leave granted. Amendment to be carried out forthwith.

2. Interim Application has been preferred by the Applicant who is the Original Appellant seeking revocation of the probate granted in favour of the Respondent in respect of Will dated 2nd February 2008, alleged to have been executed by the deceased Ardeshir D. Chinoy, on the ground that the grant has become inoperative within the meaning of Section 263 of Indian Succession Act, 1925 (the said Act) on account of the death of the Respondent who was the sole Executor of the alleged Will.

3. The matter was listed from time to time and appearance was caused on behalf of the Respondent. None appears for the Respondent and the Application has been taken up for hearing. The First Appeal has been preferred challenging the impugned Judgment dated 27th March, 2019, in an Application filed by the Respondent seeking grant of probate under Section 276 of the said Act in respect of Will dated 2nd February 2008, alleged to have been executed by the deceased Ardeshir D. Chinoy. The present Applicant raised an objection to the issuance of the probate contending that the Will is not genuine and it is not the last Will and testament of the deceased Ardeshir D. Chinoy. The Trial Court after hearing the parties granted Probate of the Will in favour of the Respondent by the impugned Judgment dated 27th March, 2019.

4. During the pendency of the First Appeal the Original Respondent expired on 26th December, 2022. The copy of the death certificate is tendered by Mr. Sawant, learned Counsel appearing for the Applicant. The same is taken on record.

5. Interim Application came to be filed on 16th September 2024, seeking revocation of the grant of probate under Section 263 of the said Act.

6. Mr. Sawant, learned Counsel appearing for the Applicant would contend that the Appeal against the impugned Judgment was

duly admitted by this Court and pending the hearing of the Appeal, the Respondent who was the sole Executor of the alleged Will dated 2nd February 2022, has expired. He submits that the present Application has been preferred under Section 263 (d) of the said Act, which provides for the revocation on annulment for just cause. He submits that the legal position has been settled by the Division Bench Judgment of this Court in the case of ***Thrity Sam Shroff vs. Shiraz Byramji Anklesaria & Anr.***¹ that upon the death of the sole Executor the proceedings abate and do not survive. He would submit that the provisions of Order XXII Rule 4A of the Code of Civil Procedure have been held to be inapplicable to the probate proceedings and therefore the moment sole Executor dies the question of the proceedings being kept alive does not arise at all. He submits that as such the grant has become inoperative within the meaning of Section 263 (d) of the said Act. He submits that no Application for substitution would thus be available, as no right to sue survives. He submits that the Appeal is a continuation of the proceedings and the legal position as enumerated in the decision of ***Thrity Sam Shroff (supra)*** will apply in the present case.

7. Considered the submissions and perused the record.

8. It is well settled that Probate is granted only to an

1 [2007 (4) Mh.L.J. 56]

appointed Executor under Section 222 of the said Act. In the present case, by the impugned Judgment of 2019, the Respondent who was the sole Executor was granted Probate of the Will. The death certificate on record would indicate that during the pendency of the present proceedings, the sole Executor has expired. The Division Bench of this Court in the case of ***Thrity Sam Shroff (supra)*** was considering the issue as regards the abatement of the proceedings upon the death of the Executor and the applicability of the provisions of Order XXII of the CPC. The Division Bench held in paragraph No. 30, 32, 36 as under.

“30. Considering all the above decisions, it is abundantly clear that the probate proceeding, though on being contested, becomes contentious proceeding, and therefore, it is to be proceeded in the form of a suit, but that by itself does not transform the proceeding into a suit under the Code of Civil Procedure. The provisions of Code of Civil Procedure would apply to such proceedings to the extent they are not inconsistent with the provisions of law comprised under the said Act. Section 226 of the said Act specifically provides that in case of death of an executor, representation would survive to the surviving executor or executors, as the case may be. At the same time, section 222 clearly specifies that the probate can be granted only to an executor. In other words, the probate proceedings are essentially at the instance of the executors so named in the Will, and can survive till the executors survive. Moment the sole executor dies or all the executors die, the question of proceeding being kept alive does not arise at all, as there would be no occasion in such a case to grant any probate. Such a proceeding would die a natural death as a consequence of non survival of any executor. In such circumstances, the question of applicability of Order XXII of the Code of Civil Procedure does not arise at all.

32. Once it is clear that the proceeding does not survive on the death of last surviving executor, such proceeding is

bound to abate. The question of entertaining any application for substitution in an abated proceeding cannot arise, till and until the abatement is set aside. The question of setting aside the abatement would arise only in a case where right to sue survives and sufficient case is made out by moving the Court to set aside the abatement and to bring the legal representatives on record. Once it is clear that in a probate proceeding, there is no right to sue which can survive, the question of setting aside of the abatement does not arise. Once the abatement cannot be set aside, it means, proceeding cannot be revived. Once a proceeding is dead, the question of entertaining any application therein does not arise. Hence, the contention about the substitution of the deceased executor and thereafter transforming the proceeding into a proceeding for Letters of Administration does not arise.

36. As regards Rule 4A of Order XXII of the Code of Civil Procedure is concerned, it would have no application to such proceedings. Firstly that the right to sue does not survive in such proceeding. Secondly the said rule applies to "suits" within the meaning of the said expression under the Code of Civil Procedure and not to proceedings like those for grant of probate. Thirdly, section 226 read with section 222 of the said Act clearly indicates that the proceeding would abate on the death of all the executors. Being so, in probate proceedings, the provisions of Order XXII, Rule 4A of the Code of Civil Procedure are not attracted."

9. Perusal of the said decision would make it clear that as Section 222, of the said Act specifies that the probate can be granted only to an Executor, therefore the proceedings are essentially at the instance of Executor so named in the Will and can survive only till the Executor survives. The Division Bench has clearly laid down that the moment the sole Executor dies or all the Executors dies, the proceedings cannot be kept alive as there would be no occasion in such

a case to grant any Probate.

10. In the present case, by the impugned Judgment Probate had been granted to the sole Executor. Even, if the present appeal, is dismissed, upon hearing on merits, the grant of the Probate of the Will would be ineffective as the sole Executor has already expired.

11. Such an eventuality is one of the grounds for revocation or annulment under Section 263 (d) which provides that the grant of probate may be revoked for just cause and the just cause is deemed to exist where grant has become useless and inoperative through circumstances.

12. In the present case, even if it is accepted that the Probate has been rightly granted by the Civil Court there cannot be any execution of the Will by reason of the fact that the sole Executor has already expired. There is also force to the contention of Mr. Sawant, that the Appeal being a continuation of proceedings, the decision in the case of ***Thrity Sam Shroff (supra)*** would also apply to the Appellate proceedings. Viewed from any angle, the grant of the Probate of the Will has become inoperative by reason of death of the sole Executor. It is also well settled that the legal heirs of the sole Executor cannot step into the shoes of the Executor and upon death of the Executor the proceedings stands abated.

13. Interim Application has been rightly preferred under the

provisions of Section 263 of the said Act and in light of the above discussion, Interim Application stands allowed in terms of prayer clause

(a) which reads thus:-

“a) This Hon’ble Court be pleased to revoke the probate granted in favour of the Respondent i.e. Kantilal Achaldas Oswal in respect of alleged Will dated 2nd February, 2008 of the Deceased Mr. Ardeshir D. Chinoy, as the grant thereof has become inoperative within the meaning of Section 263 of Indian Succession Act, 1925 on account of the death of the Respondent who was the sole Executor of the said alleged Will;”

[Sharmila U. Deshmukh, J.]