

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

MISCELLANEOUS PETITION NO. 15 OF 2022

Rajendra Tribhovandas Zaveri ...Deceased

Saroj Rajendra Zaveri ...Petitioner

Versus

Mukund Rajendra Zaveri ...Respondent

* * *

- Ms. Vidhisha Rohira a/w Mr. Arun H. Mehta i/b Akshar Laws, for Petitioner.
- Ms. Kanchan Pawar, (Legal Aid Counsel) for Respondent

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CORAM : MANISH PITALE, J

DATE : 29th JANUARY, 2024.

P. C. :

1. Heard learned counsel for the parties.
2. By this petition, the petitioner is seeking revocation of grant of probate issued by this Court on 14th June, 2018. The probate was granted in respect of Will dated 20th May, 2015, executed by the deceased, who was the husband of the petitioner and the father of the respondent herein.
3. The testator died on 01st June, 2015. The probate petition was filed by the respondent, wherein consent affidavit dated 20th July, 2017, of the petitioner herein was placed on record. This Court proceeded to grant the probate as an uncontested proceeding and the same was issued on 14th June, 2018.

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4. The present petition has been filed on the ground that the aforesaid consent affidavit dated 20th July, 2017, was fraudulently obtained by the respondent, indicating to the petitioner that the said document was required for some other purpose. According to the petitioner, she was not aware about the true purport of the said consent affidavit and on this ground alone the present petition seeking revocation of the grant ought to be allowed.

5. Apart from the aforesaid aspect of the matter, the petitioner also claims that the respondent, despite being her son, has neglected her. Emphasis was also placed on clause 5 of the subject Will, wherein the deceased had specifically stipulated that the respondent would take care of the petitioner in all respects and he will protect her till her death. On these grounds, it was submitted that the present petition deserves to be allowed.

6. The respondent filed an affidavit-in-reply disputing the claims made on behalf of the petitioner and it was submitted that the petitioner was very much aware about the contents of the consent affidavit and further that the contents thereof were also explained to her in Gujarati language by the notary public. It was further submitted that the petitioner failed to make out any ground for revocation of the grant issued by this Court.

7. Ms. Vidhisha Rohira, the learned counsel appearing for the petitioner submitted that the documents filed along with the petition, as also the rejoinder affidavit and an additional affidavit filed on behalf of the petitioner would show that the respondent himself had admitted that the petitioner was not highly educated and that therefore, it was clear that the consent affidavit was obtained by fraud. Specific reference was made to stand taken on behalf of the respondent himself in a proceeding initiated by the petitioner under the provisions of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007. It was submitted that the respondents himself had conceded to the fact that the petitioner was not highly educated. It was further submitted that the bold stand taken in the reply affidavit in the present petition that the contents of the consent affidavit were explained in Gujarati language to the petitioner is falsified by the contents of the consent affidavit itself. It was submitted that there was no such remark or noting by the notary public or otherwise, indicating that the contents of the consent affidavit were indeed explained to the petitioner in Gujarati language.

8. Apart from this, it was submitted that despite the stipulation in clause 5 of the subject Will, the respondent had failed to take care and protect the interest of the petitioner. This was evident from the fact that the petitioner was constrained to initiate

proceedings under the aforesaid Act before the Competent Tribunal. It was submitted that a meager amount of Rs. 5,000/- per month was granted by the Tribunal by an order dated 30th April, 2024, which was upheld by the Appellate Authority and that Writ Petition No. 180 of 2022, filed by the petitioner against the said order is pending before this Court.

9. The learned counsel for the petitioner placed reliance on judgment of the Supreme Court in the case of *Ramathhal and Others Vs. K. Rajamani (Dead) Through Lrs and Another*¹, to contend that the ground being raised on behalf of the petitioner in the present petition pertained to the issue of *non est factum* on the assertion that the petitioner was not aware about the contents of the consent affidavit when the respondent had obtained her signatures on the same. It was submitted that in such circumstances, the Court ought to pass an order in favour of the petitioner. Reliance was also placed on judgment of the Calcutta High Court in the case of *Seema Sarin and another Vs. Sudesh Chander Talwar*², to submit that in similar circumstances the Court thought it fit to accept the contention raised on behalf of the petitioner therein pertaining to the issue of *non est factum*. On this basis, it was submitted that the petition deserves to be allowed.

1 2023 SCC OnLine SC 1022

2 AIR 2014 Cal 44

10. On the other hand, Ms. Kanchan Pawar, the learned counsel appearing for the respondent submitted that the consent affidavit of the petitioner on record demonstrates that she had signed in English. It was submitted that the stand taken on behalf of the petitioner about not understanding English language is only an afterthought, which is not borne out by the material on record. It was further submitted that the proceeding pertaining to maintenance and the entitlement of the petitioner thereto, under the provisions of the said Act, is a matter pending before this Court in the aforesaid writ petition, which ought not to be a factor to be taken into consideration, while deciding the present petition. It was submitted that the petitioner has approached this Court only after bitterness and bickering has arisen between the parties after the grant was issued. On this basis, it was submitted that the petition deserves to be dismissed.

11. This Court has considered the rival submissions in the backdrop of the material placed on record. The main ground raised on behalf of the petitioner, while seeking revocation of grant is that the consent affidavit was obtained by fraud by the respondent. It is claimed that the petitioner was not aware as to the nature of the document that she was signing and that she had signed the same purely on faith reposed in the respondent, who is the son of the

petitioner. It is submitted that the aforesaid faith reposed by the petitioner was misused and the consent affidavit allegedly fraudulently obtained by the respondent was the basis for issuance of the said grant. In that light, the petitioner has invoked Section 263 of the Indian Succession Act, 1925 (hereinafter referred to as the Succession Act), particularly explanation (b) thereof.

12. In order to examine the said contention, this Court has perused the material on record. Paragraph no. 10 of the written submissions filed on behalf of the respondent in the proceedings before the Tribunal under the provisions of the said Act, shows that the respondent has conceded to the fact that the petitioner is not highly educated, although it is denied that the petitioner is unable to maintain herself. The aforesaid statement made on behalf of the respondent does indicate that even according to him, the petitioner could not be said to be highly educated.

13. The petitioner has specifically asserted that if the contents of the consent affidavit had been properly explained to her, she would not have signed the consent affidavit, which was filed in the probate petition. It is indicated that the petitioner is conversant with Gujarati language.

14. In this context, a perusal of the affidavit in reply filed on

behalf of the respondent in the present petition shows that in paragraph no. 8(ii), a positive assertion has been made on behalf of the respondent that the notary public, before whom the consent affidavit was executed, had explained the contents of the consent affidavit to the petitioner in English, as also in Gujarati language and thereafter, the petitioner had signed the consent affidavit.

15. A perusal of the consent affidavit shows that there is no such noting by the notary public and there is no other material in the consent affidavit dated 20th July, 2017, to show that the contents thereof, were properly explained to the petitioner and there is nothing to indicate that the contents had been explained in Gujarati language.

16. Considering the aforesaid material, this Court is inclined to accept the contention raised on behalf of the petitioner and the law pertaining to the same, in the context of the issue of *non est factum* as applicable to the facts of the present case. In paragraph no. 19 of the aforementioned judgment of the Supreme Court in the case of **Ramathhal and Others Vs. K. Rajamani (Dead) Through Lrs and Another** (*supra*), the ingredients of the plea of *non est factum* have been explained. Having perused the material on record in the present case, this Court is convinced that the petitioner indeed belongs to a class of persons who can be said to have suffered from disability to

understand the purport of the document that she was signing and that she appears to have signed the document without being aware of the real purport of the same, perhaps on the basis that the document that she signed was materially different from the actual contents of the consent affidavit. The judgment of the Calcutta High Court in the case of **Seema Sarin and another Vs. Sudesh Chander Talwar** (*supra*), indicates that in the facts of the said case, the Court found it fit to set aside the order of the learned Single Judge and revoked the probate upon accepting contentions that appear to be similar to the contentions raised in the present petition.

17. The Testamentary Court is a Court of conscience and once the court is satisfied that the probate has been obtained, projecting it to be an uncontested proceeding, while the consent affidavit can be said to have been obtained by suppression or fraud, the petition seeking revocation of such a grant ought to be allowed in the interest of justice.

18. This Court is of the opinion that allowing the present petition would not leave the respondent remediless, in the sense that the original probate petition would stand revived and the respondent would still have sufficient opportunity to prove his assertions and to seek probate of the subject will.

19. This Court is not commenting upon the proceedings arising out of the application filed by the petitioner under the provisions of the said Act before the Competent Tribunal i.e. pending Writ Petition No. 180 of 2022. But, the contents of paragraph no. 5 of the Will itself indicate that as a part of the bequest, the respondent does have a responsibility to take care of the interest of the petitioner till her death.

20. In view of the above, the petition is allowed in terms of prayer clause (a) and grant is revoked.

21. The probate petition bearing Testamentary Petition No. 2279 of 2017, as a consequence, stands revived. The petitioner would be at liberty to take such steps as available in law in the context of the said petition.

(MANISH PITALE, J.)