

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

NOTICE OF MOTION NO.56 OF 2019

IN

TESTAMENTARY PETITION NO.2278 OF 2018

Narendra Singh Chawara ... Intervenor / Applicant

In the matter of:

Hemangini Kumari Prithvi Raj ... Petitioner

Dr. Govind Singh Chawara ... Deceased

Mr. Abhishek Sawant a/w. Mr. Amit Pradhan and Ms. Ujwala Deshmukh i/b. Pradhan and Rao for Intervenor / Applicant.

Mr. Karan Bhosale a/w. Ms. Laveena Tejwani, Ms. Neha Bhosale and Ms. Anuja Divadkar i/b. Disha Parekh for Petitioner.

CORAM : MANISH PITALE, J.

DATE : FEBRUARY 29, 2024

P.C. :

. This notice of motion gives rise to an interesting question as to the manner in which this Court is to proceed with regard to entertaining an application praying for service of citation moved on behalf of the applicant. The applicant in this notice of motion claims that at the time when the notice of motion was filed, despite the fact that his father was alive and being one of the legal heirs cited in the testamentary petition, had given his consent for grant of letters of administration with Will annexed, in the peculiar facts of the present case, he was and is entitled to service of citation.

2. The facts giving rise to the present application are that the deceased i.e. Dr. Govind Singh Chawara executed a Will dated 13.04.2017, whereby he bequeathed his estate in favour of the grand daughter-in-law of his brother Ram Singh and her son. The deceased

was a bachelor and as per the details given in the testamentary petition filed for grant of letters of administration with Will annexed, the said Ram Singh was the only surviving legal heir of the deceased as the other siblings of the deceased had all expired. The said Ram Singh was also one of the attesting witnesses to the said Will of the deceased.

3. On 28.02.2018, the said Dr. Govind Singh Chawara died. Ram Singh, as the attesting witness of the aforesaid Will, swore an affidavit confirming the execution of the said Will and the said affidavit was filed along with the testamentary petition for grant of letters of administration with Will, filed by the petitioner. The said petition was filed by the beneficiaries under the Will. The other attesting witness Kan Singh also filed his affidavit confirming the execution of the aforesaid Will. The same also forms part of the testamentary petition.

4. Ram Singh, apart from filing of the aforesaid affidavit as an attesting witness of the Will and confirming its execution, also filed a consent affidavit dated 22.06.2018. In the said affidavit, he gave full and free consent to the prayer made on behalf of the petitioner in the testamentary petition and it was specifically stated in the affidavit that relief could be granted without service of any citation or notice on the said Ram Singh and without any surety being justified for his share in the estate left behind by the deceased. The said consent affidavit was also placed on record in the testamentary petition.

5. The applicant herein i.e. Narendra Singh Chawara is one of the sons of the said Ram Singh, while the beneficiaries under the subject Will are the daughter in law and her son of the brother of the applicant. The applicant claims to have taken care of the deceased and on that basis, further claims interest in the estate left behind by the deceased. It is also the case of the applicant that his relations with his father i.e. the said Ram Singh had deteriorated and that the state of mind of the said

Ram Singh was not proper, due to which, various documents were got signed from Ram Singh. It was indicated that the affidavits filed by Ram Singh in the testamentary petition were doubtful, for the reason that Ram Singh was about 101 years old and not mentally sound. It was further alleged that the aforesaid Will was a forged and fabricated document as the signatures were not that of the deceased. It appears that in respect of the said allegation, the applicant approached forensic experts for comparing the signatures of the deceased, leading to certain reports on which the applicant intends to rely.

6. In the meanwhile, in the testamentary petition, the Prothonotary and Senior Master of this Court issued citation on 11.02.2019. It was pasted on 20.02.2019 on the notice board of this Court. The present notice of motion was filed by the applicant on 11.02.2019 with an affidavit in support thereof. At the time when the notice of motion was filed, admittedly, the father of the applicant i.e. Ram Singh was alive. He filed an affidavit in the testamentary petition after the said notice of motion was filed by the applicant. In the said affidavit dated 25.06.2019, the aforesaid Ram Singh stated that he had read the notice of motion and that, the allegations against him were baseless. It was stated that being a retired army officer, he was physically fit and mentally sound. In the affidavit, Ram Singh made serious allegations of physical and mental abuse allegedly inflicted by the applicant i.e. his own son. In this affidavit also, the said Ram Singh reiterated that the subject Will was indeed executed in his presence by the deceased.

7. It is relevant to note that in the process of filing reply affidavit and rejoinder affidavit in the notice of motion, a number of documents came on record, including non-cognizable complaints registered against the applicant at the behest of the said Ram Singh, as also an affidavit dated 08.03.2018 sworn by the said Ram Singh, whereby he stated that he was

relinquishing all his rights over the property of his deceased brother Dr. Govind Singh Chawara.

8. On 09.11.2019, the said Ram Singh expired. He left behind the Will bequeathing his estate in favour of the petitioner in the testamentary petition. Upon death of Ram Singh, his son i.e. the applicant in notice of motion filed an additional affidavit claiming that upon the death of Ram Singh, the applicant himself i.e. Narendra Singh Chawara had now acquired caveatable interest, being an heir of the deceased.

9. It is in this factual backdrop that the learned counsel for the rival parties have addressed their arguments before this Court.

10. Mr. Abhishek Sawant, learned counsel appearing for the applicant in the notice of motion submitted that since the applicant i.e. Narendra Singh Chawara, being the son of the said Ram Singh is an undisputed fact, he has to be treated as a legal heir of the deceased Dr. Govind Singh Chawara. It is submitted that being the legal heir of the deceased, the applicant is clearly entitled to be served with citation as he has a caveatable interest. It is emphasized that the beneficiaries under the Will cannot be granted letters of administration with Will annexed without service of citation as per the requirements of the Bombay High Court (Original Side) Rules, 1980 read with the provisions of the Indian Succession Act, 1925 (hereinafter referred to as the 'Succession Act'). It is submitted that in the event, the succession to the estate left behind by Dr. Govind Singh Chawara is to devolve on the basis of the intestacy, the applicant Narendra Singh Chawara, being one of the surviving legal heirs, is certainly entitled to be served with citation, upon which he would have an opportunity to place before this Court sufficient material to demonstrate that the Will is forged and fabricated, in respect of which the letters of administration with Will annexed cannot be granted.

11. It is submitted that the death of Ram Singh is not disputed. During the lifetime of Ram Singh, the testamentary petition for grant of letters of administration with Will did not reach its conclusion. The stage of leading evidence in the said proceeding had not reached when the said Ram Singh expired. The moment he expired, his successors, including the applicant i.e. Narendra Singh Chawara acquired caveatable interest and this fact cannot be denied by the respondent i.e. the petitioner in the testamentary petition.

12. In this regard, the learned counsel appearing for the applicant heavily relied on judgment of this Court in the case of *Dhirendra @ Bitu Ranjit Thakkar and another Vs. Mahendra Balbhadra Thakkar*, **2014 (3) Mh.L.J. 9**. In the said case also, the attesting witness to the Will was a brother of the deceased. He gave an affidavit as an attesting witness about the execution of the Will and thereafter expired. In this backdrop, a citation was served upon the caveator, who filed caveat and affidavit in support of the caveat. Thereafter, the petition was converted into a suit and the original petitioners moved a notice of motion for dismissal of caveat on various grounds. In these facts, it was held that merely because the father of the caveator, being legal heir of the deceased, had filed an affidavit confirming attestation of the Will, it would not put an end to the caveatable interest of the son of the attesting witness. The learned counsel for the applicant submitted that the facts in the present case were identical and that therefore, the present application ought to be allowed.

13. The learned counsel further made reference to documents filed with the notice of motion and the affidavits filed therein on behalf of the applicant to contend that the applicant, at this stage itself, could demonstrate that the subject Will was suspicious and that an opportunity ought to be granted to the applicant to be served with the citation so that

all the necessary facts could be brought before this Court.

14. On the other hand, Mr. Karan Bhosale, learned counsel appearing for the respondent in the notice of motion i.e. the petitioner in the testamentary petition, submitted that when the present notice of motion was filed seeking service of citation on the applicant, the said applicant had no caveatable interest at all. The heir was Ram Singh, who had already given his consenting affidavit, apart from his affidavit as the attesting witness confirming the said Will. According to the learned counsel appearing for the original petitioner, the consent affidavit given by the said Ram Singh binds the applicant also. It is submitted that the notice of motion was filed in February, 2019 and the said Ram Singh filed a subsequent affidavit dated 25.06.2019 in the testamentary petition, referring to the present notice of motion and specifically repudiated the claims made by the applicant. It was further submitted that subsequent event of the death of Ram Singh on 09.11.2019 would not change the complexion of the case at all and hence, the notice of motion deserves to be dismissed.

15. The learned counsel for the original petitioner relied upon judgement of the Supreme Court in the case of *Elumalai @ Venkatesan and another Vs. M. Kamala and others*, **2023 SCC OnLine SC 84**, to contend that the principle of estoppel would apply in the facts of the present case and as much as the said Ram Singh could not have turned around and objected to the Will after having given the consent affidavit, equally, the applicant cannot be permitted to do so. In this regard, reliance was also placed on the judgement of the Supreme Court in the case of *B. L. Sreedhar and others Vs. K. M. Munireddy and others*, **(2003) 2 SCC 355**. The learned counsel for the original petitioner sought to distinguish the judgement of this Court in the case of **Dhirendra @ Bitu Ranjit Thakkar and another Vs. Mahendra Balbhadra**

Thakkar (*supra*) on the ground that in the said case, the attesting witness being the brother of the deceased had not filed consent affidavit, and therefore, this Court found that upon the demise of the said person, his successor could raise objections independently in respect of the subject Will. On this basis, it was submitted that the notice of motion may be dismissed and that, there was no question of serving citation upon the applicant.

16. Heard learned counsel for the parties and perused the material on record. In testamentary petitions for grant of probate or grant of letters of administration with Will annexed, the petitioner is required to give the details of all such legal heirs, who could have an interest in the estate of the deceased by intestacy. There is no dispute about the family tree placed on record at Annexure-9 of the compilation of documents filed in the notice of motion. The deceased Dr. Govind Singh Chawara had a number of siblings, including his brother Ram Singh. The deceased admittedly died a bachelor. The beneficiaries under the subject Will are the wife and son of the grandson of Ram Singh. The said Ram Singh had two sons i.e. Narendra Singh Chawara (the applicant herein) and Birendra Chawara. The beneficiaries under the subject Will are the daughter in law of Birendra Chawara and her son. In other words, they are the grand daughter-in-law of Ram Singh and her son. It is an admitted position that the said Ram Singh was one of the attesting witnesses to the subject Will dated 13.04.2017 executed by the deceased. The said Ram Singh filed an affidavit of attesting witness in the testamentary petition, confirming the execution of the said Will and he also stated that the deceased was of a sound state of mind, memory and understanding at the time of execution of the Will. It is also an admitted position that the said Ram Singh filed consent affidavit in the testamentary petition. The said consent affidavit dated 22.06.2018 reads as follows:-

“ I, Colonel Ram Singh Laxman Singh Chawara s/o. Laxman Singh Chawara (retd.) of Jaipur, Indian Inhabitant, residing at 47, Veer Vihar, Queens Road, Vaishali Nagar, Jaipur, Rajasthan, do hereby solemnly affirm and say as follows:-

- (1) That I know that the abovenamed Dr. Govind Singh Laxman Singh Chawara, the deceased died at Mumbai on 28th February, 2018 at his residence at 12, Everest, Flat No.40, Padam Tekri, Dr. Gopal Deshmukh Marg, Peddar Road, Mumbai 400 026 as intestate.
- (2) That I am also aware that the above named petitioner has filed a petition for probate before the Hon’ble High Court at Bombay in her capacity as Beneficiary / Executor named therein.
- (3) I, being the brother of the above named deceased do hereby give my full and free consent in favour of the above named petitioner and pray that the probate may be granted in her favour without service of any citation / notice upon me and without any surety being justified for my share in the estate left by the deceased.”

17. It is clear from the above-quoted consent affidavit that the said Ram Singh not only gave his consent for the grant to be issued but he also stated that the same may be issued without service of any citation or notice upon him, as also without any surety being justified for his share in the estate left by the deceased.

18. In paragraph 5 of the testamentary petition, the petitioner has given details of the heirs left behind by the deceased, who had died a bachelor. A perusal of the same shows that names of the siblings of the deceased are given, from amongst whom, only the said Ram Singh was alive. The said statement in paragraph 5 of the testamentary petition has not been disputed by the applicant, who happens to be one of the sons of the said Ram Singh.

19. The notice of motion was filed on 11.02.2019. At that point in

time, there was no question of the applicant - Narendra Singh Chawara claiming the status of an heir of the deceased, to be cited in the testamentary petition. Yet, he claimed that citation ought to be served upon him. On the face of it, on 11.02.2019, the prayer in the notice of motion could not be entertained at all.

20. It is relevant to note that during pendency of the notice of motion, which was being opposed by the original petitioner, the said Ram Singh, who had already filed his affidavit as attesting witness and his consent affidavit in the testamentary petition, filed a further affidavit dated 25.06.2019. In the said affidavit, he referred to the instant notice of motion and refuted each and every allegation made by the applicant. It was denied that the said Ram Singh was physically and mentally unfit. The affidavit stated details as to the manner in which the applicant had abused his own father i.e. Ram Singh, as a consequence of which, complaints had been registered in the concerned police station. In the said affidavit, the deponent i.e. Ram Singh reiterated the backdrop in which the deceased had executed the subject Will and that the deceased at the time of execution of the Will was in a sound state of mind.

21. In the meanwhile, the affidavit in reply and rejoinder affidavit were filed in the notice of motion. Thereafter, on 09.11.2019, the said Ram Singh expired. On 27.01.2020, the applicant filed an additional affidavit in the notice of motion, stating that since Ram Singh i.e. his own father expired on 09.11.2019, he had now a caveatable interest in the matter, for which citation ought to be served on him. The language used in the additional affidavit by the applicant demonstrates that even according to him when the notice of motion was filed on 11.02.2019, he had no caveatable interest at all.

22. The point is that in the face of the consent affidavit filed by Ram Singh, not only giving consent to the grant being issued in favour of the

original petitioner, but also stating that citation need not be served upon him, there was no impediment in issuance of grant in favour of the original petitioner. As the testamentary petition stood, there was no question of the grant not being issued. The only surviving legal heir of the deceased had given consent, apart from the fact that he also gave an affidavit as the attesting witness. The other attesting witness had also sworn affidavit confirming execution of the Will and all such affidavits formed part of the record of the testamentary petition. The notice of motion filed on 11.02.2019, praying for issuance of citation on the applicant was wholly misplaced and clearly not maintainable.

23. It is crucial that the said Ram Singh filed a further affidavit dated 25.06.2019, during pendency of the notice of motion, reiterating the stand taken earlier and specifically asserting that the deponent i.e. Ram Singh was swearing the affidavit in his full senses. What effect can subsequent event of death of Ram Singh on 09.11.2019 have on the fate of the testamentary petition? This is the crucial aspect of the matter and it needs to be examined as to whether the observations made by this Court in the case of **Dhirendra @ Bitu Ranjit Thakkar and another Vs. Mahendra Balbhadra Thakkar** (*supra*) can inure to the benefit of the applicant. The distinguishing fact between the aforesaid case and the present case is that the brother of the deceased, who was also an attesting witness i.e. Ram Singh filed a consent affidavit for issuance of grant. In the said case also, the attesting witness was the brother of the deceased. He had given his affidavit as the attesting witness confirming execution of the Will, but no consent affidavit was on record. In the facts of the said case, this Court, while holding in favour of the son of such attesting witness, who died subsequently, held as follows:-

“9. It is not in dispute that the father of the caveator was attesting witness to the Will and has filed affidavit which was annexed to the petition in which affidavit the attesting witness

has deposed that he was one of the attesting witness and was present at the time of execution of the Will. He has also deposed that the deceased was of sound mind at the time of execution of the said will. It is not in dispute that after demise of the father of the caveator, citation came to be served upon the caveator in response to which affidavit in support has been filed by the caveator claiming rights independently. It is not in dispute that the probate has not been issued by this court and the testamentary petition filed by the petitioner has been converted into suit. In my view, merely because the father of the caveator who was also legal heir of the said deceased had filed affidavit confirming attestation of Will, it would not put an end to the caveatable interest of the son of attesting witness/beneficiary on his demise. The present caveator is entitled to independently contest the Will by raising objections permissible in law. If during the life time of the father of the caveator, if any evidence would have been led, the situation would have been different. In my view, if the executor of the Will is unable to prove the execution of Will of the testator for any reasons, the caveator will have right in the estate of the deceased testator. In my view, thus caveator has caveatable interest and is entitled to challenge the said Will.”

24. The crucial words used in the above-quoted paragraph are that, ‘if during the lifetime of the father of the caveator, if any evidence would have been led, the situation would have been different’. It was further held that if the executor of the Will in that case was unable to prove the execution of the Will for any reasons, the caveator would have right in the estate of the deceased testator and on that basis, it was held that the caveator had caveatable interest.

25. But, in the facts of the present case, there was no question of the

execution of the Will being proved by leading of evidence, in the face of the fact that the only surviving legal heir at the relevant time i.e. Ram Singh had given his consent affidavit, which is quoted hereinabove. The only person, who could have had a caveatable interest i.e. Ram Singh, gave his consent and all that remained for the department to do was to issue the grant for letters of administration with Will annexed in favour of the beneficiaries.

26. Merely because the procedure of actual issuance of grant remained, cannot inure to the benefit of the applicant. This Court is of the opinion that the consent affidavit of the deceased Ram Singh would bind the applicant. On this basis, the judgement of this Court in the case of **Dhirendra @ Bitu Ranjit Thakkar and another Vs. Mahendra Balbhadra Thakkar** (*supra*) is distinguishable.

27. In the case of **B. L. Sreedhar and others Vs. K. M. Munireddy and others** (*supra*), the Supreme Court has considered the doctrine of estoppel, *inter alia*, observing that estoppel is a rule of evidence, which precludes a person from denying the truth of some statement previously made by himself. It was held that the estoppel is a rule of equity and if a person by words or conduct intimates that he consents to an act to which no opposition shall be offered, although it could not have been done lawfully without such consent, such a person cannot question the legality of the act. This principle would squarely apply to Ram Singh in the light of the affidavits including consent affidavit of Ram Singh on the record of the testamentary petition. In the case of **Elumalai @ Venkatesan and another Vs. M. Kamala and others** (*supra*) also, the Supreme Court dealt with the concept of estoppel. It was held that the effect of estoppel cannot be warded off by the persons claiming through a person whose conduct generated the estoppel. In the present case, the applicant cannot take a stand diametrically opposite to the stand taken by his predecessor Ram Singh. If that be so, there is no question of service of citation on the

applicant.

28. Several allegations have been made by the applicant as regards the mental and physical fitness of his own father Ram Singh. It is crucial that Ram Singh himself filed an affidavit dated 25.06.2019 in the testamentary petition, while referring to the present notice of motion and the allegations made by the applicant. It was reiterated that the deponent i.e. Ram Singh in his full senses was not only refuting the allegations made by the applicant, but reconfirming the factum of execution of the subject Will and his consent to the grant being issued in terms of the prayers made in the testamentary petition. This Court is of the opinion that the principle of estoppel would apply against the applicant - Narendra Singh Chawara also.

29. The notice of motion filed on 11.02.2019 praying for service of citation was wholly misplaced and not maintainable. In the light of the consent affidavit filed by Ram Singh in the testamentary petition and also the subsequent affidavit dated 25.06.2019 filed during the pendency of the notice of motion, merely because the said Ram Singh subsequently died on 09.11.2019, cannot pump life into an otherwise dead notice of motion. Hence, this Court is of the opinion that the notice of motion deserves to be dismissed.

30. Accordingly, the notice of motion is dismissed.

31. The department shall now proceed in the testamentary petition in accordance with law.

(MANISH PITALE, J.)