

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
MISCELLANEOUS PETITION NO. 96 OF 2022
IN
TESTAMENTARY PETITION NO. 816 OF 2015**

Kantilal Dharshi Shah ... Petitioner
vs.
Jayesh Jayant Shah ... Respondent

Mr. Ashish Kamat, Senior Advocate alongwith Mr. Chandra K. Naik, Ms. Akanksha Saxena and Ms. Diti Joshi for the Petitioner. Mr. Ankit Lohia alongwith Ms. Pooja Batra instructed by Mr. Rajiv Jadhav for the Respondent.

**CORAM : MANISH PITALE, J.
DATE : 22nd APRIL, 2024**

P.C. :

- . Heard the learned Counsel for the parties.
2. By this petition filed under Section 263 of the Indian Succession Act, 1925 (hereinafter referred to as "Succession Act"), the petitioner seeks revocation of letters of administration alongwith the will (hereinafter referred to as "LOA") granted on 16th January 2018.
3. The respondent in the present case had filed a testamentary petition bearing No. 816 of 2015 in this court, seeking grant of LOA in the context of will dated 13th May 2005

executed by the deceased. The respondent was the beneficiary under the said will and since the sole executor had renounced executorship, the respondent was constrained to file the aforesaid petition for grant of LOA. In the testamentary petition, the only legal heir of the deceased gave her consent and accordingly, the LOA was granted on the basis of the testamentary petition being treated as an uncontested proceeding.

4. Subsequently, the petitioner filed third party application seeking copies of the record of the testamentary petition. The said application was allowed by the department against which the respondent filed a notice of motion in the testamentary petition, challenging the said order of the Prothonotary and Senior Master.

5. By an order dated 29th November 2018, the learned Single Judge of this Court allowed the notice of motion and set aside the order of Prothonotary and Senior Master of this Court with a clarification that if any suit is filed by the respondent herein based on such LOA and it is relied upon, the Petitioner herein may take recourse to the provisions of the Code of Civil Procedure, 1908, for seeking inspection and copies thereof.

6. The Petitioner filed an appeal bearing No.31 of 2021 against the said order of the learned Single Judge of this Court. The Division Bench of this Court by an order dated 18th August 2021, allowed the Petitioner to withdraw the appeal with liberty to file a review petition before the learned Single Judge. The

Appeal was disposed of as withdrawn with liberty as sought by the Petitioner and it was clarified that the learned Single Judge was to decide the review petition strictly on merits, by keeping all contentions of the parties open, including the issue of maintainability.

7. By an order dated 20th October 2021, the learned Single Judge of this Court dismissed the review petition with costs of Rs.25,000/- after taking note of the fact that the respondent had already filed two civil suits and it was recorded that the petitioner had already taken inspection and certified copy of the record from the office of the Prothonotary and Senior Master of this Court.

8. The said order was again challenged by the petitioner by filing Appeal (L) No.26842 of 2021. The said Appeal was disposed of by an order dated 10th December 2021, whereby it was clarified that the petitioner could file a petition under Section 263 of the Succession Act in the context of the said LOA. All contentions of parties, including issue of maintainability, were kept open.

9. The present revocation petition filed under Section 263 of Succession Act was taken up for consideration in this backdrop.

10. At the outset, Mr. Lohia, learned Counsel appearing for the respondent raised issue of maintainability and submitted that the petitioner does not have any caveatable interest as he cannot be said to be an heir required to be cited when the

original testamentary petition was filed by the respondent as the beneficiary under the subject will. It is submitted that the petitioner is neither a class I nor a class II heir under the Hindu Succession Act, 1956. It is further submitted that therefore, present petition is not maintainable. It is further submitted that the grounds stated in the present petition are not covered under grounds available under Section 263 of the Succession Act while seeking revocation of the grant. It was emphasised that contentions sought to be raised in the present petition were considered and rejected in the earlier round of litigation between the parties in the context of the application filed on behalf of the petitioner for grant of certified copies of the record of the original testamentary petition. It is submitted that none of the grounds available under Section 263 of the Succession Act are made out by the petitioner and therefore, the present petition deserves to be dismissed on the ground of maintainability as well as on merits.

12. Mr. Kamat, learned Senior Counsel appearing for the petitioner submitted that so long as the petitioner is able to show that he has interest in the property in respect of which the respondent herein has initiated litigation, he has locus to approach this Court to demonstrate that the respondent indulged in suppression of material facts, misled this Court and violated Rule 414 of the Bombay High Court Original Side Rules, 1980, giving rise to grounds for revocation of grant under Explanations a, b and e to Section 263 of the Succession Act. It is submitted

that even if the petitioner cannot qualify as a legal heir of the deceased, in the light of the peculiar facts and circumstances of the present case, the objection raised purely on the ground of maintainability cannot survive, as sufficient material is available before this Court to indicate that grounds under Explanations a, b and e to Section 263 of the Succession Act are clearly made out.

13. As regards the earlier rounds of litigation and orders passed by the Division Bench of this Court, it is submitted that the said orders cannot come in the way of the petitioner in pursuing the present petition. The Court's attention was drawn to the contents of the subject will, the LOA issued in favour of the respondent, particularly the schedule appended thereto. It was further submitted that reference was being made to the suit filed by the respondent before the Court of Principal Senior Civil Judge, Mandvi-Kachchh and the order passed below Exhibit-5 therein, only for the purpose of demonstrating the manner in which the respondent has proceeded to misuse the grant issued by this Court.

14. This Court has considered the rival submissions. In order to succeed in the present petition, the petitioner is required to make out any one of the grounds available under Explanations a to e to Section 263 of the Succession Act. In the present case, the petitioner claims that the grounds available under Explanations a, b and e to Section 263 of the Succession Act have been made out. Hence, it would be appropriate to refer to the

said Section which reads as follows :

“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. the proceedings to obtain the grant were defective in substance; or

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

c. the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such a allegation was made in ignorance or inadvertently; or

d. the grant has become useless and inoperative through circumstances; or

e. the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit and inventory or account in accordance with the provisions of chapter VII of this part, or has exhibited under that chapter an inventory or account which is untrue in a material respect.”

15. In the present case, the LOA was granted on 16th January 2018. A perusal of the same, read with the schedule annexed thereto shows that the schedule refers to movable properties. In order to appreciate the contentions raised by the rival parties, it is also necessary to consider the contents of the subject will in the context of which the LOA was granted.

16. The relevant portion of will dated 13th May 2005 reads thus :

“As of today I do not have any immovable property in my possession, however, my movable properties consist of my ornaments – trinkets,

cash amount, investments and equity shares etc. I myself am making the entire management thereof.

As regards my diamonds, gold, silver ornaments as well as silver utensils, which my middle son Kantilal Dharshi has usurped from me, I have given absolute authority to my grandson Jayesh Jayant Shah to take all the actions to retrieve the same. It is okay if I get the above mentioned articles during my life time, otherwise, after my death, I give and bequeath all these articles to my grandson Jayesh Jayant Shah.

There is a bungalow by name Dhan Villa, which bears survey number 27 and 876, in Vaniya Fariya and Mota Layaja, Kutch. The said bungalow was in my possession for the last 37 years. My middle son Kantilal Dharshi has broken open the lock of the said bungalow and put his lock to it. In order to recover the possession of the said bungalow and to retrieve my furnitures and fixtures lying in the bungalow, I request Jayesh Jayant Shah to initiate the legal action and recommend to initiate court proceeding in Kutch and to recover my things and articles – furniture and fixture as well as tenancy right / possession of the premises. If all these things are implemented after my death, then, I give all the properties responsibilities to my grandson Jayesh Jayant Shah.

My middle son Kantilal Dharshi Shah has obtained my signatures on totally blank papers by way of intimidation and coercion. And he has even forged the signature of my deceased husband Dharshi Narshi Shah on some papers in front of me. I suspect that Kantilal Dharshi

might have made (executed) some kind of writing on the said blank papers. If it is so, then all such writing is not approved of by me. Therefore, I rescind all such writings. Now, after complying with all the action, now I request my executors to distribute all my remaining properties, as they may deem proper, only among the two families that is to say the family of Shri. Kishorbhai Liladhar Shah and the family of Shri. Jayant Dharshi Shah.”

17. It is the case of the petitioner that the respondent indulged in suppression for the reason that the schedule filed alongwith the testamentary petition on the basis of which LOA was granted, referred to only movable properties that could be referred to in the subject will. There was no reference to any immovable property, much less the property which is subject matter of the proceedings initiated in the appropriate Court at Kachchh i.e. Special Civil Case No.195 of 2018. It is the case of the petitioner that the entire suit proceeds on the strength of the aforesaid LOA granted by this Court, despite the fact that the schedule annexed to the grant does not mention the aforesaid property in Gujarat in respect of which the said suit has been filed. According to the Petitioner, the aforesaid act of the respondent in filing the suit on the strength of LOA granted by this Court, not only amounts to misuse of the grant but it also demonstrates that the respondent has willfully and without reasonable cause suppressed relevant material facts from this Court while obtaining the LOA. According to the petitioner, the

respondent ought to have included in the schedule the said property referred to in the subject will wherein the deceased testator claimed right of possession.

18. It is case of the petitioner that by filing the aforesaid suit in the manner in which it has been filed, sufficient grounds arise under Explanations a, b, and e to Section 263 of the Successions Act.

19. Perusal of Explanations a, b and e to Section 263 of the Succession Act indicates that the grant can be revoked as per Explanation a, where proceedings for obtaining the grant are defective in substance. Explanation b pertains to false suggestion made while obtaining grant. Explanation e indicates that the grant can be revoked where the person to whom the grant was issued willfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of the Succession Act.

20. The basis on which the petitioner alleges that the said grounds have arisen, also concerns violation of Rule 414 of the High Court Original Side Rules and failure to exhibit inventory of the properties that form subject matter of the will. This Court has perused Rule 414 of the aforesaid Rules. The testamentary petition read with the schedule annexed thereto forming the basis of grant in the present case cannot be said to be violating Rule 414 of the aforesaid Rules, simply for the reason that the concerned movable properties finding mention in the will have all been stated in the schedule filed with the testamentary

petition. The dispute pertaining to possession of the property in question with which the suit filed in the said Court at Gujarat is concerned, can be relatable to tenancy rights that the deceased testator may have had in the said property. It is a settled position of law that tenancy rights cannot be bequeathed under the will. Therefore, it cannot be said that the respondent violated Rule 414 of the aforesaid Rules in any manner by stating only movable properties that form part of the estate. Besides, the above quoted portion of the will shows that even according to the testator, she was not in possession of any immovable property.

21. It is a completely different matter that the subject matter of controversy in the suit before the Court at Gujarat may eventually consider the nature of rights of the deceased testator in the suit property. But, that in itself cannot be a ground to claim that the respondent in the present case indulged in any suppression or that the respondent gave a false suggestion or further that the grant itself was rendered defective in the facts and circumstances of the present case.

22. The question of grant being revoked under Explanation e, to Section 263 of the Succession Act would arise only if it could be demonstrated that the respondent had willfully and without reasonable cause omitted to execute an inventory or account in accordance with the provisions of Chapter VII of the Succession Act. This Court fails to understand how the said ground can be available in the facts and circumstances of the present case.

23. The tenor of submissions made before this Court, on behalf of the petitioner indicates that according to the petitioner the respondent could not have filed the aforesaid suit in the court at Gujarat on the strength of LOA granted by this Court. This is indeed the stand taken on behalf of the Petitioner before the Court at Gujarat. The same is reflected in the submissions made on behalf of the Petitioner when the Court at Gujarat decided the application for temporary injunction at Exhibit 5. The record shows that despite the aforesaid stand taken on behalf of the petitioner, the Court at Gujarat granted the order of status quo, indicating that the submissions made on behalf of the Petitioner could certainly be considered at the time of trial.

24. Thus, it is evident that the Petitioner has indeed canvassed his case before the Court at Gujarat in the suit filed on behalf of the respondent. The petitioner can very well demonstrate on merits that the suit deserves to be dismissed. But, the grievance of the petitioner on alleged misuse of the grant cannot become the basis for revocation of the grant itself. This court can exercise jurisdiction to revoke the grant only if any of the grounds under Section 263 of the Succession Act are made out.

25. As noted hereinabove, none of the grounds agitated on behalf of the petitioner can be accepted in the facts and circumstances of the present case.

26. The petitioner has not even claimed that he could have any caveatable interest in the facts and circumstances of the

present case and therefore, there is a serious question with regard to the very maintainability of the present petition at the behest of the present petitioner.

27. The learned Senior Counsel for the petitioner relied upon the Judgment of Madras High Court, in the case of *Dr. R.A. Venkatesan v/s. D. Jenbagalakshmi*, O.S.A. No.324 of 2010. This court has perused the portion upon which the learned Counsel for the petitioner placed reliance. There is nothing therein to assist the petitioner in his claim that grounds under Explanations a, b and e of Section 263 of the Succession Act are made out.

28. Reliance placed on the Judgment of this Court in the case of *Peter John D'Souza and others v/s. Armstrong Joseph D'souza*, Misc. Petition No.69 of 2012 in Testamentary Petition No.722 of 2010, can also not assist the petitioner. Reliance is placed on the observations made in paragraph 20 of the said judgment. But, in the said case, the observations in respect of fraud and false suggestions were made in the backdrop that the petitioner therein obtained LOA without will by suppressing the will left behind by the deceased. On facts the present case is different and therefore, reliance placed on the said Judgment is completely misplaced.

29. As regards the orders passed by the Division Bench of this Court in the previous round of litigation, suffice it to say that several grounds were considered while deciding the application filed on behalf of the petitioner for certified copies of the record of the testamentary suit. It is a different matter that certain

grounds sought to be agitated in the present petition also find mention in the appeals filed on the behalf of the petitioner. In any case the division bench of this Court, reserved liberty for the petitioner to file the present petition under Section 263 of the Succession Act.

30. Therefore, this Court has considered the present petition on merits. But, for the reasons noted hereinabove, it is found that the petitioner has not been able to make out any grounds under Section 263 of the Succession Act to seek revocation of the grant.

31. In view of the above, the petition is dismissed. It is clarified that the dismissal of the present petition will not be come in the way of the petitioner agitating his grievance in accordance with law, before the Court of Principal Senior Civil Judge, Mandvi-Kachchh in Special Civil Case No.195 of 2018. Needless to say that the said clarification would also apply to Suit no.944 of 2019 pending before the City Civil Court at Bombay.

MANISH PITALE, J.