

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
 TESTAMENTARY AND INTESTATE JURISDICTION
 MISCELLANEOUS PETITION NO.137 OF 2017
 IN
 TESTAMENTARY PETITION NO.257 OF 1997

Framji Petit and another ... Petitioners

Vs.

Phiroze J. Katrak and others ... Respondents

Mr. Dinyar Madan, Senior Advocate a/w. Mr. Cyrus Ardhesir, Ms. Anya Jhunjhunwala, Mr. Aditya Marwal and Mr. Adarsh Pandey i/b. M. Mulla Associates for Petitioners.

Mr. Shanay Shah a/w. Mr. Apoorv Karekar and Ms. Devyani Deshmukh i/b. M/s. Solomon & Co. for Respondent No.2.

CORAM : MANISH PITALE, J.

Reserved on : 19TH JANUARY, 2024

Pronounced on: 24TH JANUARY, 2024

ORDER :

1. By this petition, the petitioners are seeking revocation of probate dated 07.02.1998 granted by this Court in respect of Will dated 08.09.1992 of late Mrs. Rodabeh Sawhny alias Rodabeh Sawhny (hereinafter referred to as the 'deceased'). The probate was granted upon Petition No.257 of 1997 being allowed by this Court.

2. The petitioners are grand-nephews of the deceased, who was a Parsi Zoroastrian. This Court had allowed the aforesaid petition bearing No.257 of 1997 filed for grant of probate of the aforesaid Will dated 08.09.1992. The petition was filed by three executors i.e. respondent No.1, Ms. Kety Mehta and Dinshaw Manockji Petit, the fourth Baronet, who was a nephew of the deceased and father of the petitioners.

3. According to the petitioners, they became aware about fraud having been played upon the deceased in respect of execution of the said

Will. They relied upon exchange of communications between the respondent No.1 i.e. one of the executors and the said other executor Ms. Kety Mehta in respect of their claim regarding fraud. They further claimed that the respondent No.1 as one of the executors had differences of opinion with the said Ms. Kety Mehta despite grant of probate in respect of the Will, as a result of which, there was a stalemate in implementation of the Will in its entirety, although some legacies under the said Will were distributed. According to the petitioners, it was only on 02.08.2017 when the respondent No.1 sent a written communication to them that as heirs of the deceased, they ought to approach this Court for appropriate orders, that the cause of action arose for them to file the present petition. The said communication dated 02.08.2017 was issued after Ms. Kety Mehta expired on 10.03.2016. According to the petitioners, in the light of the communications exchanged between the respondent No.1 and Ms. Kety Mehta, some of which were copied to the petitioners, a reference was made to the defective affidavit of the attesting witness Roshan Minocher Master i.e. respondent No.2 in the present petition. The petitioners found that while the affidavit of the attesting witness filed in Petition No.257 of 1997 for grant of probate stated that the deceased had executed the Will at Room No.455 of Taj Mahal Hotel, in fact the deceased, on that date, was in St. Elizabeth's Hospital at Malabar Hill at Mumbai. This rendered the affidavit defective, thereby demonstrating that the probate ought to be revoked.

4. Upon notice being issued on the present petition, all the four respondents were served. Respondent Nos.3 and 4 are the children of Dina Morange, who was a niece of the deceased and under the Will, Rs.5,00,000/- were bequeathed to her. Only respondent No.2 responded to the notice. She is represented by a counsel before this Court, who tendered an affidavit of respondent No.2 dated 16.10.2018, which was taken on record on 19.01.2024 when the petition was closed for orders.

5. Mr. Dinyar Madan, learned senior counsel appearing for the petitioners referred to the aforesaid affidavit dated 16.10.2018, tendered by the respondent No.2. He submitted that the respondent No.2 conceded to the fact that she had wrongly stated in her affidavit filed in the probate petition that the deceased had executed the Will in Room No.455, Taj Mahal Hotel, Mumbai, instead of stating that the deceased was at St. Elizabeth's Hospital, Malabar hill, Mumbai on 08.09.1992. He submitted that the aforesaid admission made in the affidavit sufficiently demonstrated that the affidavit filed by the very same person claiming to be an attesting witness to the Will in the probate petition was false and that on this ground alone, the probate deserved to be revoked. He further relied upon statements made in the present petition and the grounds raised therein to claim that the probate deserved to be revoked.

6. The learned senior counsel for the petitioners invited attention of this Court to the copies of the communications placed on record, exchanged between the respondent No.1 (one of the executors of the Will) and the said Ms. Kety Metha (another executor), copies of which were marked to the petitioners, as also communications addressed by the respondent No.1 to the petitioners. He submitted that a conjoint reading of the said documents clearly demonstrated the fraud committed on the deceased when the said Will was said to have been executed and the manner in which the probate was obtained.

7. It was further submitted that due to the respondent No.1 developing suspicion after the probate was granted, as regards the manner in which the other executor Ms. Kety Mehta had proceeded in the matter, while few legacies were distributed, as regards the major part of the Will, there was a stalemate. It was submitted that the records indicated that, as many as three draft Wills had been prepared, which appeared to be the basis of the said Will, of which probate was obtained. But, the attending circumstances indicated that neither the drafts nor the

said Will were actually prepared on the instructions of the deceased. On this basis, it was submitted that the probate deserved to be revoked.

8. Since the learned counsel for the respondent No.2 had specifically raised objection with regard to limitation by placing reliance upon judgement of the Supreme Court in the case of *Lynette Fernandes Vs. Gertie Mathias*, **(2018) 1 SCC 271**, the learned senior counsel appearing for the petitioners referred to Section 17 of the Limitation Act, 1963. He also referred to the approach adopted by the respondent No.1 i.e. one of the executors of the said will and eventually the stand taken by him in his letter dated 02.08.2017 addressed to the petitioners. It was submitted that when the respondent No.1, as the only surviving executor of the said Will, indicated that the petitioners would have to take appropriate steps to approach this Court, that a cause of action for filing the petition arose, and that therefore, limitation could not be a valid objection in respect of the present petition.

9. It was submitted that the material placed on record vividly indicated the murky backdrop and the actions of one of the executors Ms. Kety Metha, casting a serious doubt about the genuineness of the Will. It was submitted that the said aspect coupled with the defective and false affidavit of the attesting witness i.e. respondent No.2 sufficiently proved the grounds for revocation of the probate.

10. On the other hand, Mr. Shanay Shah, the learned counsel appearing for respondent No.2 submitted that even if the contents of the affidavit dated 16.10.2018 tendered on behalf of the respondent No.2 were to be taken into consideration, the original affidavit filed in the probate petition by the said respondent could not be said to be false. It was submitted that the respondent No.2 had candidly admitted that there was an inadvertent error on her part in not checking the statement made in the affidavit filed in the probate petition about execution of the Will at

Taj Mahal Hotel instead of St. Elizabeth's Hospital. It was submitted that in the affidavit tendered in the present petition, the respondent No.2 had categorically stated that the deceased was of sound and disposing mind, memory and understanding when the Will was executed on 08.09.1992 and that the deceased had indeed signed the Will in her presence. This was enough to indicate that the petitioners cannot be permitted to take advantage of an inadvertent error in the affidavit of respondent No.2 filed in the probate petition.

11. As regards the question of fraud and the alleged actions of Ms.Kety Mehta - one of the executors, it was submitted that the said facts were in the knowledge of the petitioners from as far back as on 14.03.2002, when the respondent No.1 had sent a letter to them indicating the same. It was further submitted that even petitioner No.1 had sent a letter dated 26.06.2002 to Ms. Kety Mehta asking for comments regarding the statements made by the respondent No.1. Ms.Kety Mehta had responded to the same by letter dated 09.07.2002. A letter dated 22.04.2002 addressed by the respondent No.2 to Ms. Kety Mehta was also available with the petitioners and yet they chose not to take any steps in the matter. Eventually, the present petition seeking revocation of probate was filed on 06.09.2017, demonstrating that it was hopelessly barred by limitation. Learned counsel for respondent No2 relied upon the aforesaid judgement of the Supreme Court in the case of **Lynette Fernandes Vs. Gertie Mathias** (*supra*), to contend that Article 137 of the Limitation Act applied and therefore, the petitioners were expected to file the present petition within three years of having first gained knowledge about the said fraud, even if Section 17 of the Limitation Act was to be applied.

12. The learned counsel appearing for respondent No.2 also referred to the judgement of Division Bench of this Court in the case of *Sonali Arvind Nadkarni Vs Snehalata Arvind Nadkarni*, **2018 SCC OnLine**

Bom 2346, to contend that in almost identical circumstances, this Court did not find that when the place where the Will was executed was wrongly stated in the affidavit of the attesting witness, the Will could be said to be suspicious. On this basis, the learned counsel for respondent No.2 submitted that the present petition deserved to be dismissed.

13. The rival contentions have to be considered on the basis of the material placed on record. This Court is required to examine as to whether the present petition was filed within limitation, applying Article 137 of the Limitation Act. This Court is also called upon to examine the effect of the affidavit of respondent No.2 as an attesting witness filed in the probate petition as compared to the affidavit now tendered in the present petition. The effect of the communications exchanged between the respondent No.1, Ms. Kety Mehta and the petitioners also deserves consideration.

14. As a testamentary court, being a court of conscience, this Court is required to render findings on the aforesaid aspects in this petition seeking revocation of the probate.

15. Since the question of limitation goes to the very root of the matter, it would be appropriate that the said question is considered first. The respondent No.2 has placed reliance on the said judgement of the Supreme Court in the case of **Lynette Fernandes Vs. Gertie Mathias** (*supra*). In the said judgement, the Supreme Court has held that the grant of probate by a competent court operates as a judgement in *rem* and once the probate is granted, it is given not only in respect of the parties to the proceedings, but against the world at large. It is further held that once granted, probate operates from the date of the grant and for the purposes of proceedings for revocation of probate, the said date is relevant. In the present case, the aspect of fraud clearly arises and therefore, Section 17 of the Limitation Act also becomes relevant. It

pertains to the effect of fraud or mistake. The said provision specifies that when an application is based upon fraud of the defendant or the respondent, the period of limitation does not begin to run until the applicant has discovered the fraud or mistake or could have discovered the same with the reasonable diligence. In the facts of the present case, the role of the defendant No.1, as one of the executors, also assumes significance while considering the question of limitation.

16. The record shows that the respondent No.1, for the first time, on 14.03.2002 wrote a letter and informed the petitioners about his doubts and fears concerning the said Will, particularly when closer scrutiny of the matter revealed that, while the attesting witness i.e. respondent No.2 in the affidavit filed before this Court claimed that the deceased executed the Will on 08.09.1992 at the Taj Mahal Hotel, the deceased was actually in St. Elizabeth's Hospital. Respondent No.1 as the executor informed the petitioners that he was acting under legal advice with a view to best protect the estate of the deceased. On 02.04.2002, the petitioner No.1 wrote a letter to the respondent No.1 to express his shock and a copy was marked to the third executor i.e. the father of the petitioner No.1. On 26.06.2002, the petitioner No.1 wrote a letter to the said Ms. Kety Mehta asking for explanation and clarification in the light of the information provided by the respondent No.1 with regard to the aforesaid circumstances, concerning the Will. Copy was marked to the respondent No.1 and the third executor i.e. the father of the petitioner No.1. On 09.07.2002, the said Ms. Kety Mehta wrote a letter to the petitioner No.1 refuting allegations made by the respondent No.1 and the petitioner No.1, further stating about her long standing relationship with the deceased. She further referred to a clarification given by the respondent No.2 i.e. the attesting witness with regard to the discrepancy about the place where the Will was executed. A copy of the letter dated 22.04.2002 sent by the respondent No.2 to the said Ms. Kety Mehta

containing her clarification was also sent along with the said letter.

17. On 02.08.2002, the respondent No.1 sent a letter to the petitioner No.1 expressing his surprise at the response of Ms. Kety Mehta. Along with the said letter, the respondent No.1 enclosed draft Wills that were in his possession. On 30.10.2002, the respondent No.1 wrote another letter to the petitioner No.1 and he referred to the draft Wills casting further shadow of doubt on the subject Will. He expressed his reservations about the response of Ms. Kety Mehta. Thereupon, the respondent No.1 stated that he had grave doubts as to whether Ms. Kety Mehta, as one of the co-executors, would be acting in a fair manner in relation to the administration of the estate of the deceased. He also expressed that he would be happy if Ms. Kety Mehta would give her no objection and thereafter the petitioner No.1 along with the petitioner No.2 could act as administrators. It is crucial that even till the said date, the respondent No.1 and the other executors continued to be the executors of the Will of the deceased.

18. Subsequently, the third executor i.e. the father of the petitioner expired. On 19.07.2011, the respondent No.1 addressed a letter to Ms.Kety Mehta indicating that there was sufficient material demonstrating fraud committed by her in respect of the Will of the deceased and he even referred to the evidence that could be presented before the Court, including draft Wills and other such material. It is relevant to note that the respondent No.1 was the chartered accountant of the deceased and that he was also closely associated with the deceased. In the said letter, the respondent No.1 also indicated to the said Ms. Kety Mehta that a particular counsel would appear on his behalf before this Court for setting aside the probate, which according to him, was granted in fraudulent circumstances. The tenor of this letter indicates that the respondent No.1 had still not abdicated his role and responsibility as the executor and he indicated to the petitioners, to

whom copy of the said letter was marked, that he would be taking necessary steps in the matter.

19. It was only in the letter dated 02.08.2017, after the death of Ms.Kety Mehta on 10.03.2016, that the respondent No.1 stated that the petitioners ought to take necessary steps by approaching this Court for revocation of the probate, particularly because the petitioners were the heirs of the deceased. It is crucial that in the said letter, the respondent No.1 asserted that, despite the aforesaid affairs indicating fraud pertaining to the said Will of the deceased, he had not renounced his executorship as the said Ms. Kety Mehta would have been left in the sole charge and administration of the estate of the deceased. This aspect is crucial in the facts and circumstances of the present case. Respondent No.1 had been all along acting in a manner which indicated that, as one of the executors, he himself had taken steps to confront the co-executor Ms. Kety Mehta with regard to the fraudulent circumstances pertaining to the Will and the defective affidavit of the respondent No.2 i.e. the attesting witness. He continued to take steps in that regard, as a consequence of which, there was a stalemate with regard to the said Will despite its probate, indicating that the cause of action for the petitioners arose only after the respondent No.1 specifically wrote to the petitioners on 02.08.2017 to take necessary steps in the matter. Imminent threat arose at this stage, and therefore, this Court is inclined to hold that the present petition being filed immediately thereafter on 06.09.2017 was within the period of limitation. This Court is, therefore, of the opinion that the present petition cannot be held to be barred by limitation. The objection raised in that regard on behalf of the respondent No.2, who only claims to be an attesting witness, is rejected.

20. The next issue for consideration is the effect of the affidavit dated 16.10.2018 of the respondent No.2 placed before this Court in the present petition. In paragraph 6 of the affidavit, the respondent No.2 has

clearly conceded to the fact that the statement made in her affidavit dated 14.03.1997 about the place where the Will dated 08.09.1992 was executed, was not correct. It is specifically conceded that while the deceased was in St. Elizabeth's Hospital at Malabar Hill in Mumbai when the Will was signed and executed in the presence of the respondent No.2 on 08.09.1992, the affidavit dated 14.03.1997 stated the place as 'Room No.455, Taj Mahal Hotel, Mumbai'. Although the respondent No.2 has admitted the said incorrect statement and she has apologized for the inadvertent error, this aspect does go to the root of the matter. The deceased being in St. Elizabeth's Hospital at the time of purported execution of the Will casts a serious doubt about the claim of the respondent No.2 that she was present as an attesting witness when the said Will was executed. Even if in the said affidavit dated 16.10.2018, the respondent No.2 has reiterated that according to her, the deceased was of sound and disposing mind, memory and understanding at the time of execution of the Will, the admitted false statement with regard to the place of execution of the Will does create serious doubt in the matter.

21. Reliance placed on behalf of the respondent No.2 on the judgement of the Division Bench of this Court in the case of **Sonali Arvind Nadkarni Vs Snehalata Arvind Nadkarni** (*supra*) cannot be of any avail, for the reason that this Court took a view in the facts of the said case with regard to the genuineness of the Will. The aspect of suspicious circumstances has to be appreciated in the facts of individual case and no two cases can be said to be similar. In this context, the material that has come on record of the present petition assumes great significance. It is also relevant to note that the respondent No.2 merely claims to be an attesting witness to the Will, while the only surviving executor of the Will i.e. the respondent No.1 has not even appeared before this Court to oppose the prayers made in the present petition.

22. In fact the letters / communications placed on record and the entire material placed before this Court indicates that the respondent No.1, as one of the executors, himself, had taken steps to stall the implementation of the Will in its entirety. In fact, only some of the legacies were distributed and thereafter, the respondent No.1 started confronting Ms. Kety Mehta regarding the circumstances that came to light, including the false statement made in the affidavit of the respondent No.2 i.e. the attesting witness. The contents of the letters / communications exchanged between the parties from 14.03.2002 onwards, bring to the fore glaring circumstances, including the assertion of the respondent No.1 that the deceased had suffered partial paralysis in the year 1983 and that, she was suffering from *dementia* as also serious mental and physical incapacity. These aspects are said to have continued till her death. Apart from this, the respondent No.1, as one of the executors, found that there were as many as three draft Wills of the deceased prepared either in the office of the law firm with whom the said Ms. Kety Mehta was associated or at the Bombay House (Head Office of the Tata Group of Companies). In either case, the said Will may not have been drafted at the instance of the deceased herself. This is a very serious aspect of the matter. The petition contains details in respect of the draft Wills as compared to the subject Will in paragraphs 31 and 32, which do give rise to suspicion and sufficient material to support the prayers of the petitioners for revocation of the probate. Detailed grounds have been raised in paragraph 40 on behalf of the petitioners while seeking revocation. The respondent No.1 i.e. the only surviving executor has chosen not to appear before this Court and there is no opposition on his behalf to the statements made in the petition as also the prayers made therein. Therefore, there is sufficient material for this Court to hold in favour of the petitioners and to issue a direction to revoke the probate granted in respect of the said Will.

23. This Court specifically invited attention of the learned senior counsel appearing for the petitioners in respect of the legacies already distributed as stated in paragraph 15 of the petition. The learned senior counsel, on instructions, made a statement that the petitioners would return all the legacies that were distributed in their favour. The statements made in the petition, which have not been contradicted by any of the respondents, show that Rs.5,00,000/- were disbursed to Dina Morange (now deceased), who was the mother of respondent Nos.3 and 4. Therefore, the said respondents will also have to return the said amount. The amount of Rs.2,00,000/- disbursed to charity i.e. Bombay Society for Prevention of Cruelty to Animals ought not to be affected even if this Court is inclined to allow the present petition.

24. In view of the above, the petition is allowed. The probate dated 07.02.1998 granted by this Court in respect of Will dated 08.09.1992 of the deceased is revoked.

25. The petitioners are directed to deposit the amount of Rs.10,00,000/- disbursed in their favour within four weeks with the Prothonotary and Senior Master of this Court. Similarly, respondent Nos.3 and 4 shall also deposit the amount of Rs.5,00,000/- disbursed in favour of their predecessor Dina Morange within four weeks from today with the Prothonotary and Senior Master of this Court. The amount shall be invested as per standard practice.

26. The probate petition i.e. Testamentary Petition No.257 of 1997 is revived. The petitioners are free to take appropriate steps in the matter, including filing caveats, if they are so advised.

27. The petition stands disposed of in above terms.

(MANISH PITALE, J.)