



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

50 CRA NO. 165 OF 2024

SHOBHA RAMDAS SHELAR AND OTHERS
VERSUS
KACHARU MAHADU MISAL AND ANOTHER

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Advocate for the Petitioner : Ms. Pooja V. Langhe h/f Mr. Vijay R. Langhe

Advocate for Respondent No. 1 : Mr. Kolse Patil Madhukar Gajanan

A.G.P. for Respondent no. 2 : Mrs. M.N. Ghanekar

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CORAM : SHAILESH P. BRAHME, J.

DATE : 02.12.2025

PER COURT :

Heard both sides finally.

2. The applicants are challenging the judgment and order dated 04.10.2023 passed in Misc. Civil Appeal No. 25/2023 as well as order dated 27.11.2021 revoking the probate issued in favour of the applicants.

3. The applicants are real sisters and respondent no. 1 is their brother. They are heirs of Laxmibai Misal. Their real brother Chandrabhan and Dadarao could not contest and they are not in picture. Laxmibai had executed a will on 09.02.2012 bequeathing suit lands to the applicants. They secured probate on 04.10.2014.

4. Respondent no. 1 had preferred First Appeal No. 3226/2016 challenging Trial Court's order issuing probate to the applicants. By order dated 27.07.2018, learned Single Judge permitted to withdraw the appeal with liberty to approach trial Court and the delay consumed was directed to be considered for entertaining the proceedings before the appropriate Court. Accordingly Misc. Application No. 873/2018 was instituted by respondent no. 1 on 28.08.2018 and the probate issued in favour of the applicants was

revoked. Being aggrieved, Misc. Civil Appeal No. 25/2023 was filed. It was dismissed by the impugned judgment and order.

5. The learned counsel for the applicants submits that without applying for condonation of inordinate delay, proceedings for revocation was filed. It was entertained by the learned Judge, which is an error of jurisdiction. The applicants had not caused appearance before the Trial Court and the appearance of fake person was shown. No opportunity was given to the applicants to contest the proceeding. It is further submitted that the parties are litigating in Civil Court in the form of Regular Civil Suit No. 53/2012 as well as Regular Civil Suit No. 190/2009. A settlement out of court was arrived at, in pursuance of which the applicant did not prosecute Regular Civil Suit No. 53/2012, which was dismissed in default. Whereas, respondent no. 1 fraudulently proceeded with his suit. The proceedings of revocation is governed by Article 137 of the Limitation Act. Reliance is placed on judgment in the matter of **Haripada Roy Vs. Subhash Chander Rewari; 2014(2) Mh.L.J. 234.**

6. The submissions of the applicants are repealed by learned counsel Mr. Kolse Patil for respondent no. 1. Reliance is placed on the affidavit in reply to corroborate the submissions. It is submitted that probate was obtained by the applicants fraudulently and suppressing material facts. It was not disclosed that the suits were pending. It is further submitted that Article 137 of the Limitation Act is not applicable and the proceedings for revocations are continuous one. No limitation would be attracted. It is further submitted that the conduct of the applicants is objectionable. They are not cooperating with the Trial Court in Regular Civil Suit No. 190/2009 and on the basis of bogus probate they have created revenue record. It is further submitted that it is suppressed by the applicants that respondent no. 1 is in possession of the suit lands.

7. Reliance is placed on the judgments of the coordinate bench in the

matters of (1) in **RE: Ganpati Vinayak Achwal; (2015) 2 All MR 285, (2) Meghmala and others Vs. G. Narsimha Reddy and others; (2010) AIR (SCW) 5281 and (3) Manibhai Amaidas Patel and anr. Vs. Dayabhai Amaidas; (2005) 12 SCC 154.**

8. I have gone through the judgments under challenge. Undisputed facts are as follows:

- (a) Relationship between the parties.
- (b) Execution of will by Laxmibai on 09.02.2012.
- (c) Probate secured by applicants on 04.10.2014 in MARJI No. 165/2014.
- (d) Order dated 27.07.2018 passed in First Appeal No. 3226/2016
- (e) Filing of Misc. Appln. NO. 873/2018 on 28.08.2018 for revocation of the probate under Section 263 of the Indian Succession Act.

9. The applicants had secured probate on 04.10.2014, which was assailed by respondent no. 1 in First Appeal No. 3226/2016. This Court permitted respondent no. 1 to withdraw the appeal with liberty to prosecute remedy as permissible in law and the time consumed was directed to be considered by the appropriate Court. The order does not imply that any direction was issued by the High Court to condone the delay or the application was directed to be entertained dispensing with law of limitation. The observations of the Lower Appellate Court in para no. 11 that the proceedings before the Trial Court was filed within one month from the orders of the High Court and therefore it was condoned, is perverse. It was never purport of the order passed by the High Court in the first appeal.

10. Misc. Appln. No. 873/2018 was filed on 28.08.2018. No separate application was filed for condonation of delay nor any prayer was made in the application to that effect. The learned counsel for the applicants has referred the judgment of the coordinate bench in the matter of **Haripada Roy**

Vs. Subhash Chander Rewari; 2014(2) Mh.L.J. 234, to bolster that Article 137 of the Limitation Act would be applicable. The ratio laid down in the judgment is squarely applicable to the case at hand. It is relevant to refer paragraph no.8, which is as follows:

“8. Learned counsel submits that probate was granted on 10th May, 2006 whereas the petition has been filed after seven years for revocation. It is submitted that Article 137 of the Schedule I of the Limitation Act would apply. Since application for revocation of probate has been filed after three years, petition itself would be barred by law of limitation. Learned counsel placed reliance on the judgment of the Division Bench of this Court in case of **Nina Agarwalla vs. Ashok Gupta** delivered on 10th May, 2013 in Appeal (L) No. 180 of 2013 and Appeal (L) No. 181 of 2013 [reported in 2013(4) Mh.L.J. 464] and in particular paragraph 13 of the said judgment. Paragraph 13 of the said judgment reads thus:-

13. The Appellant has not been able to show any evidence to establish that the citation was not served upon her. We find it difficult to accept on her mere statement that the citation was not served upon her, particularly in view of the records of the testamentary department of the Court and the fact that probate was granted more than 38 years ago. So far as the decisions of the Supreme Court in the matter of **Kunvarjeet Singh (supra)** is concerned, the same dealt with the issue of grant of probate and not with revocation of probate. In any case, in the facts of the present case in the absence of the Appellant being able to show that citations were not served upon her and she was kept in dark about the Will dated 28 March, 1964, the provision of section 263 of Indian Succession Act, 1925 is not satisfied. Moreover, one must keep in mind that a grant of probate by a Competent Court operates as a judgment in rem and

once the probate to the Will is granted, then the said probated Will is good not only in respect of the parties to the proceedings, but against the whole world. Therefore, if the probate is granted, the same operates in rem and time runs from the date of the grant of the probate for purposes of limitation under Article 137 of the Limitation Act in proceedings for revocation of probate.”

11. The learned counsel for the respondent has relied on the judgment of coordinate bench in reference of **Ganpati Achwal (supra)**. In that case, the application for heirship certificate was submitted before the Trial Court and in the absence of any contest, suo-moto it was held to be barred by Article 137 of the Limitation Act. Being aggrieved by the decision, the matter was directly carried to High Court. It is incomprehensible as to how the matter was carried to High Court when statutory remedy of appeal was available.

12. I have gone through paragraph no 8 and 9 of the judgment. It *inter alia* relies upon the judgments. In the present case, we are concern with the limitation for proceedings of revocation. The judgment of the division bench in the matter of **Nina Agarwalla Vs. Ashok Gupta; (2013) 4 Mh.L.J. 464**, was relied by learned Single Judge in the matter of **Haripada (supra)**. It is difficult to countenance that the law of limitation is not applicable to the proceedings. I have my reservations about the judgment cited by the respondent.

13. There was considerable delay in applying for revocation of the probate. A proper application or prayer to that effect ought to have been made by respondent no. 1. In the absence of condonation of delay, the competent Court does not got jurisdiction to adjudicate upon the merits of the matter. I am fortified in my view by relying on the judgment delivered by Justice B.R. Gavai in the matter of **Madhao s/o Somaji Sarode Vs. Jotiba Dhyani Upasak Shikshan Sanstha; 2004(3) Mh.L.J. 1078**. It would be apposite to rely upon following paragraphs:

“12. That takes us to the next question as to whether the approach of the learned Tribunal in deciding the matter on merits when he had come to the conclusion that the appeal was liable to be rejected on the ground of it being filed beyond limitation was a right one. In this respect, it may be useful to refer the judgment of the Full Bench of the Gujarat High Court in the case of **Municipal Corporation of Ahmedabad vs. Voltas Limited and etc. (cited supra)**. In para 7 of the said judgment, Justice Y. B. Bhatt, delivering the main judgment has observed thus:-

"The next contention raised by the learned counsel for the applicant is to the effect that the merits of the substantive matter, in respect of which the delay is sought to be condoned, must be examined, and where it is found that the substantive matter is good on merits, any and all delay in filing the substantive matter must be condoned, even if the delay is not satisfactorily explained. In substance, therefore, the contention is to the effect that the merits of the substantive matter is the sole criterion, or at the very least a predominant factor, to be borne in mind by the Court while considering the application for condoning delay. To our mind, this submission puts the cart before the horse. The substantive matter in respect of which delay is sought to be condoned has no existence in law, so far as the Court is concerned, until the delay is condoned. In fact, until the delay is condoned the Court cannot take cognizance of the merits or otherwise of the substantive matter. In this limited context, the application for condonation of delay

create a jurisdictional barrier against the consideration of the substantive matter on merits."

13. Justice M. B. Shah (as he then was) concurring with the main judgment delivered by Justice Bhatt, has observed thus :

"Further, the contention that the delay is required to be condoned on the ground that the applicant has a good case on merits or that the merits of the matter should be considered as a predominant factor for condonation of delay requires to be rejected. Delay is condoned if sufficient cause for delay is shown. But that would not mean that for deciding the application for condonation of delay, merits should be decided. If the merits are decided for condoning delay, it would be against the provisions of section 3 of the Limitation Act, 1963, section 3, inter alia, specifically provides that every suit instituted, appeal preferred and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence. Section 3 of the Limitation Act is mandatory and is based on well recognised principles of equity. This bar is subject to the provision of sections 4 to 24 of the Limitation Act."

14. In view of the judgment referred above, I am of the considered view that order passed by the Trial Court which is confirmed by the Lower Appellate Court is without jurisdiction. Those are liable to be quashed and set aside.

15. (a) Civil Revision Application is allowed.

(b) Order dated 27.11.2021 passed by the Trial Court in MARJI 873/2018 and the judgment and order dated 04.10.2023 passed in Misc. Civil Appeal No. 25/2023 by District Judge-1 Aurangabad are quashed and set aside.

(c) Needless to state that order passed on 04.10.2014 in Misc. Appln. No. 165/014 shall stand restored.

(d) It would be open for the respondent to undertake the proceedings for revocation by filing appropriate application for condonation of delay.

(SHAILESH P. BRAHME, J.)

mkd/-