

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
TESTAMENTARY PETITION NO. 4502 OF 2024

Riddhish Sharad Trivedi ...Petitioner

Devendra Kumari Sharad Trivedi ...Deceased

WITH
TESTAMENTARY PETITION NO. 1300 OF 2012

Mr. Naushad Engineer, Senior Advocate a/w Jyoti Badgujar i/by Lakdawala and
Company for the Petitioner.

CORAM : ARIF S. DOCTOR, J.

DATE : 13TH FEBRUARY, 2025

P.C.:-

1. The present Petition is on board for seeking dispensation with an
office requisition dated 17th December, 2024, which reads thus:

*"1. Perused a certified copy of an affidavit of attesting witness, namely
ASHWIN B. MANKODI, which is uploaded on the portal. This attesting
witness does not speak about the Testatrix as required by Paragraph No. 5 of
the Form of 102 (i.e. affidavit of attesting Witnesses as per Rule 374 and 374
of the Bombay High Court (O.S.) Rules, 1980). Therefore, petitioner to take
steps and comply."*

2. Mr. Engineer, Learned Senior Counsel appearing on behalf of the Petitioner points out that the affidavit of attesting witness is to prove due execution of the Will in terms of Section 63(c) of the Indian Succession Act, 1925. He points out that therefore all that the affidavit of attesting witness has to set out is to prove due execution in accordance with Section 63(c) and nothing more. Learned Counsel then invited my attention to a judgment of this Court dated 23rd March, 2016 in the case of ***Jitendra Singh Rajendra Singh Kushwaha & Ors. Vs. Sursh Rajendra Singh Kushwaha*** (Testamentary Suit No.97 of 2011), where this Court had occasioned to comment upon to 374 and Form 101 and 102 of the Bombay High Court (Original Side) Rules. This Court has in the said judgment observed as follows:

“70. A word about the evidence Affidavits and the Affidavits of the attesting witness accompanying such Petitions. Rule 374(c) says that a probate petition must be accompanied by the Affidavit of an attesting witness, if available, in Form 101 of the Bombay High Court (Original Side) Rules. That form is materially incorrect. It says in sub-clause (3) that both attesting witnesses were present at the same time and saw the testator sign the will in their presence and that they did, in his presence, and in each other’s, all being present at the same time, ‘set and subscribe’ their respective names and signatures at the foot of the testamentary paper as witnesses thereto. The Form suggests that this simultaneous presence of both witnesses is a requirement of law. It is not. Section 63(c) does not require both witnesses to be present at the same time. To the contrary, it specifically says that:

it shall not be necessary that more than one witness be present at the same time

71. The wording of Form 102 to the O.S. Rules cannot possibly supplant the substantive law in Section 63(c), nor can it add a restriction, limitation or requirement that is not to be found in that Section. What if both witnesses were not present at the same time? This would still be perfectly in accordance with Section 63(c), but not in accordance with Form 102. It can hardly be suggested that non-conformity with that Form, despite conformity with the substantive statutory provision, would defeat a petition for Probate or Letters of Administration With Will Annexed. To the extent that Form 102 insists on a statement not to be mandated by Section 63(c), it is incorrect and contrary to law; and Rules 374(c) and 375(c) of the High Court (O.S.) Rules are also incorrect and contrary to law to the extent that they demand Affidavits in conformity with Form 102. Interestingly, Rules 374 and 375 say that the petition is to be in Form 97 "with such variations as the circumstances of each case may require", but this qualification is missing in reference to Form 102. The Form shall have to be read as being a template, and as permitting such variations or modifications as may be necessary."

3. Having due regard to the submissions made as also the observations in the aforesaid judgments, I have no hesitation in dispensing with the aforesaid requisition. The requirement of an attesting witness having to depose to the fact that the testator was in a sound and disposing state of mind is not required under Section 63 and therefore an affidavit absent such averments is not an affidavit which is to be disregarded on this ground.

4. Hence, aforesaid requisition is dispensed with. Office to proceed with the matter in accordance with law.

(ARIF S. DOCTOR, J.)