

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

INTERIM APPLICATION NO.1592 OF 2026
IN
TESTAMENTARY SUIT NO. 26 OF 2011
IN
TESTAMENTARY PETITION NO. 1162 OF 2010

Sunil Ijjatrai Shah, Age 63 years,
Hindu Inhabitant of Mumbai,
residing 72-75, Tej Kiran,
3rd Floor, 2nd Dadi Seth,
X Lane, Babulnath,
Mumbai – 400 007

...Applicant/
Org. Caveator/
Defendant

IN THE MATTER BETWEEN :

Bina Samir Telivala
Hindu Inhabitant of Mumbai,
residing at 72-75, Tej Kiran,
3rd Floor, 2nd Dadi Seth,
X Lane, Babulnath,
Mumbai – 400 007

... Plaintiff/
Org. Petitioner

Versus

Sunil Ijjatrai Shah, Age 63 years,
Hindu Inhabitant of Mumbai,
residing 72-75, Tej Kiran,
3rd Floor, 2nd Dadi Seth,
X Lane, Babulnath,
Mumbai – 400 007

And

M. Shantilal & Co. 30, C.P. Tank Road,
Mumbai – 400 004

... Defendant/
Caveator

*Ms. Anita Castelino a/w Ms. Laxmi Jenkins, Ms. Meenaz Merchant,
Ms. Sayali Shinde, Mr. Kiran Bhalerao i/b Mr. Haresh Ganatra for the
Applicant/Org. Caveator/Defendant*

Mr. E. A. Sasi a/w Mr. Tejas Shinde for the Respondent/Org. Plaintiff

CORAM : SHARMILA U. DESHMUKH, J.
RESERVED ON : MAY 6, 2026
PRONOUNCED ON : MAY 8, 2026

ORDER :

1. The Interim Application has been preferred seeking rejection of the Testamentary Petition on the ground of non compliance with the provisions of Indian Succession Act, 1925 and Rules framed by this Court in exercise of testamentary and intestate jurisdiction.
2. The Application pleads that the Testamentary Petition was filed on 15th October, 2010 and after 15 years, the affidavit of evidence of one attesting witness is sought to be filed by the Plaintiff which has been taken on record in violation of Rule 375 of the Bombay High Court (Original Side) Rules. It is stated that there were several objections raised by the Testamentary Department after the lodging of the Testamentary Petition in the year 2010, which till date have not been removed and despite thereof the Testamentary Petition has been numbered and Citation was issued on 27th December, 2010. There was no affidavit of attesting witness filed with the Testamentary Petition and at the time of evidence, the affidavit of evidence of attesting witness was filed.
3. In the reply affidavit, it was contended that the Testamentary Petition was filed on 15th October, 2010 and was finally numbered on 29th October, 2010 and Citation was issued on 27th December, 2010

which was served upon the Respondent on 11th January, 2011. The Caveat was filed on 21st January, 2011 and affidavit in support of Caveat was filed on 28th January, 2011. It is contended that on 30th March, 2011, the vakalatnama was filed of present Advocate along with No objection of previous advocate and thereafter affidavits of two attesting witnesses affirmed on 3rd June, 2011 came to be filed, however, were not served by inadvertence. In February, 2015, as vakalatnama was not traceable on record, fresh vakalatnama was obtained and filed in February, 2015. Praecipe dated 16th March, 2018 was filed for listing the matter pursuant to which the matter was listed on 28th March, 2018. As citation was issued, the Petitioner was under the belief that all office objections save the affidavit of attesting witness for which undertaking was given seems to have been removed and as per the undertaking subsequent to service of Citation, the two affidavits of attesting witnesses came to be affirmed and filed. During inspection carried out on 24th March, 2026, it was noticed that amendment was permitted to be carried out by order dated 2nd December, 2010 on praecipe dated 24th November, 2010 and the inspection did not reveal the praecipe and order of 2nd December, 2010 on record. There are certain files which are missing as the cover page of the first file shows entry "A" to "E", which is wrongly written as "A" + "E".

4. The rejoinder affidavit denies the contentions of reply affidavit and reiterates the stand in the Interim Application.

5. Ms. Anita Castelino, learned counsel appearing for the Applicant submits that the filing of the affidavit of attesting witness is a mandatory requirement under Section 280 and Section 281 of the Indian Succession Act. She submits that under Rule 375 of the Bombay High Court (Original Side) Rules, 1980, the application for Letters of Administration where the deceased has left a Will, mandates for the Petition to be accompanied by affidavit of the attesting witnesses. She submits that despite the mandatory provisions, the Testamentary Petition which was filed in the year 2010, was not accompanied by the affidavit of the attesting witness. She submits that by reason of use of the word "shall" in Rule 375, the consequence of the affidavit of the attesting witness not being annexed to the Testamentary Petition will necessarily lead to dismissal of the Petition. She would further submit that under Rule 435, all Testamentary Petitions, in which the grant of certificates has not been issued owing to non-prosecution of the petitions within one year of the petitions being filed, shall be treated as disposed of and no action shall be taken on such petitions, unless an order is obtained giving permission to the petitioner to proceed with the petition already filed. She submits that in the present case, for non-removal of the office objections, the matter was listed for

dismissal, however, no steps have been taken by the petitioner and the petition should be dismissed under Rule 435. She would further point out the pleadings in the reply affidavit and would submit that despite the absence of affidavit of attesting witness and non removal of objections, the Testamentary Petition came to be numbered. She would tender the case status from the Court's website to contend that the Petition was listed for dismissal on 5th July, 2012. She submits that the filing of the affidavit of evidence in lieu of examination in chief by the attesting witness does not amount to compliance with the Rules. She would further point out Rule 986 of the High Court Rules and Order 6 Rule 15 of Code of Civil Procedure ('CPC') to contend that the Petition deserves to be dismissed. In support she relies upon the following decisions:

(i) Cipla Ltd. vs. Assistant Commissioner of Income-tax & Anr.¹

(ii) Khub Chand & Ors. vs. State of Rajasthan & Ors.²

(iii) Savitri Devi Kabra vs. Kiran Gaurishankar Jhawar & Ors.³

(iv) T. Arivandandam vs. T. V. Satyapal & Anr.⁴

6. Mr. Sasi, learned Counsel for the Respondent/original Petitioner has taken this Court through the affidavit in reply and would contend

¹ 2016 SCC OnLine Bom 5242

² 1966 SCC OnLine SC 113

³ 2016 SCC OnLine Bom 12524

⁴ (1977) 4 SCC 467

that despite the filing of vakalatnama in the year 2011, the same was not traceable and hence it had to be refiled in the year 2015. He would submit that similarly, the affidavit of attesting witness which was affirmed in the year 2011 though filed has been misplaced. He submits that as undertaking was given to file the vakalatnama citation was issued and the Petition was converted into Suit pursuant to the filing of the Caveat. He submits that as per the procedure once the Petition is converted into Suit, the Petition remain static and could not be rejected under Rule 435 of the Rules.

7. I have considered the submissions and perused the records of the Testamentary Petition.

8. The Interim Application has been preferred in the year 2026 though the Caveat has been filed in the year 2011. On 25th February 2026, the attesting witness PW-1 was administered oath and further evidence was recorded. The Will came to be marked in evidence and the Court Commissioner is appointed for conducting the cross-examination. At this stage, the present application is moved for dismissing the Testamentary Petition firstly for non filing of the affidavit of attesting witness along with the Testamentary Petition and secondly on the ground that due to non prosecution of the Petition for one year, the Petition stands disposed of and without order of Court the Petition cannot be proceeded.

9. The Testamentary Petition was filed on 12th October, 2010 and the index of the Petition mentions the affidavit of attesting witnesses viz Dr. Kiran Gandhi and Girish Shah. Perusal of the record indicates that there is no affidavit of attesting witnesses annexed to the Petition. It is not necessary for this Court to go into a fact finding inquiry as to whether the files are missing for the reason that non-filing of affidavit of attesting witness cannot lead to dismissal of Petition as discussed hereinafter.

10. Section 281 of Succession Act provides that where the application is for probate, the Petition shall also be verified by at least one of the witnesses to the Will (when procurable) in the manner or to the effect following therein as regards the verification. There is no provision in Succession Act providing for dismissal of the Petition for non-verification of the Petition by the attesting witness. The connection between the provisions of CPC and the Succession Act can be traced to Section 268 of Succession Act which provides that the proceedings in relation to grant of probate and letters of administration shall, save as hereinafter otherwise provided, be regulated by the CPC. Ms. Castelino has drawn attention of this Court to Order VI Rule 15 of CPC which governs the verification of pleadings and provides that every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved

to the satisfaction of the Court to be acquainted with the facts of the case.

11. Section 281 of Succession Act and Order VI Rule 15 of CPC use the expression “shall”, which according to Ms. Castelino, is mandatory in nature. Whether non verification or defective verification is an irregularity or an illegality is the question. The Hon’ble Apex Court in the case of **Vidyawati Gupta & Ors. vs. Bhakti Hari Nayak and Ors.**⁵ held that:

“**50.** The intention of the legislature in bringing about the various amendments in CPC w.e.f. 1-7-2002 was to eliminate the procedural delays in the disposal of civil matters. The amendments effected to Section 26, Order 4 and Order 6 Rule 15, are also geared to achieve such object, but being procedural in nature, they are directory in nature and non-compliance therewith would not automatically render the plaint *non est*, as has been held by the Division Bench of the Calcutta High Court.”

12. Considering the above position under CPC, and keeping in mind the connection by virtue of Section 268 of Succession Act, as the provisions are held to be directory, it is clear that non verification of probate Petition by an attesting witness cannot result in dismissal of the Petition. The issue as to dismissal of Testamentary Petition for non filing of the affidavit of attesting witness along with the Testamentary Petition is no longer *res integra* and has been settled by Hon’ble

⁵ (2006) 2 SCC 777

Division Bench of this Court in **Pralhad Ganpat Salgar vs Sunil Dilip**

Kakod⁶, holding as under:

“10. The view taken by the learned single judge that section [281](#) is not mandatory, is correct. For reference Section 281 of the Indian Succession Act is reproduced as under:-

281. Verification of Petition for probate, by one witness to the Will.- Where the application is for probate, the Petition shall also be verified by at least one of the witnesses to the Will (when procurable) in the manner or to the effect following, namely :

"I (C.D.), one of the witnesses to the last Will and testament of the testator mentioned in the above petition, declare that I was present and saw the said testator affix his signature (or mark) thereto (or that the said testator acknowledged the writing annexed to the above petition to be his last will and testament in my presence.)"

11. Section 281 of the Succession Act, states a verification has to be made at least by one of the attesting witness to the Will when procurable. Legislature has placed the words "when procurable" in brackets as an emphasis. Thus this section cannot be held as mandatory for the reason that there are various contingencies which can arise if the attesting witness is not available. Such as if he had died before filing of the application for probate. The word shall employed this provision has to be read as directory, since it has to be read with when procurable. We may also quote Rule 384 of the Bombay High Court (Original Side) Rules, which reads as under:-

"R. 384. In the absence of attesting witness, other evidence to be produced. - If it is not possible to file an affidavit of any of the attesting witnesses, an affidavit of some other person, if any, who may have been present at the execution of the Will shall be filed, but if no affidavit of any such person can be filed, evidence on affidavit shall be produced of that fact and of the handwriting of the deceased and attesting witnesses, and also of any circumstances which may raise a presumption in favour of due execution."

12. Considering the provisions of Section 281 of the Indian Succession Act and Rule 374(c) of the Bombay High Court

6 2019 SCC OnLine Bom 66

(Original Side) Rules, we are of the considered opinion that the Probate Petition cannot be dismissed at the threshold without trial merely on the non-submission of affidavits of the attesting witnesses along with the Probate Petition.”

13. Similar view has been taken by the Hon’ble Madhya Pradesh High Court in the case of **Jamunabai & Ors. vs. Surendrakumar & Anr.**⁷, as under:

“30. The intention of the Legislature behind enacting Section 281 very clear. It is expected that forged Wills which have been attested by such persons who are not to be found may not be brought before the Court. The intention behind Section 281 to be seen from its own language. According to Section 281 a petition should also be verified by at least one of the witnesses. The effect of non-observance of the conditions laid under Section 281 are not given under the Indian Succession Act. The use of the word ‘shall’ under these circumstances would not mean mandatory resulting in the dismissal of the petition for grant of probate but in fact it only means that the petition should be verified by one witness if he is available.”.

14. The position is settled by the decision of this Hon’ble Court that the provisions of Section 281 are directory and not mandatory. Non compliance with the filing of the affidavit of attesting witness can be cured at the later stage and the Petition cannot be dismissed on that ground. Coming to the Rules framed by this Court in its exercise of testamentary and intestate jurisdiction, Rule 375 governs the filing of the application for Letters of Administration where the deceased has

⁷ 1995 SCC OnLine MP 78

left a Will. Upon my reading of Rule 375, the Rule provides for necessary accompaniments to the Petition and absence of any of the accompaniments will result in non issuance of grant and cannot result in dismissal of the Petition itself particularly when the issuance of grant is interdicted by filing of caveat. Rule 384 provides for filing of other evidence, in absence of attesting witness. The Rules framed are in consonance with the statutory requirements of proof of Will and even in the absence of affidavit of attesting witness, other evidence can be produced by the Petitioner. Rule 375 has to be read in context of the statutory requirements of proof of Will and when so read, the use of the word "shall" occurring in Rule 375 cannot be construed as mandatory when the Will can be proved by producing other evidence.

15. One of the contentions raised by Ms. Castelino was in respect of numbering of the Petition despite the non removal of the office objections. The Rules do not provide for the procedure to be followed for numbering of the Testamentary Petition or removal of objections etc. The Testamentary Department Office Manual prepared on 27th August, 2018 for internal functioning of the Testamentary Department provides that upon receipt of requisite Court Fees as per Memo, the Testamentary Department shall keep the said requisite Court fees along with Memo in proper safe custody under lock and key of Section Officer and the Department shall finally number the Testamentary

Petition. The practice Manual has stopped the practice of issuance of First Notice and Final Notice and the procedure prescribed was that the Testamentary Registrar shall verify the contents of the Petition and issue directions which will primarily include issuance of Citations, furnishing Administration Bond, filing of affidavit of one of the attesting witness to the Will, if not filed. The practice as of date is of numbering of the Testamentary Petition upon receipt of requisite Court Fees and thereafter issuance of directions by the Testamentary Registrar.

16. Of course, the Office Manual is prepared on 27th August, 2018, much subsequent to the filing of the Testamentary Petition in the year 2010, however, there is no practice brought to the notice of this Court that without removal of the objections, the Testamentary Petition could not have been numbered. In any event, the non removal of the office objections was raised as a ground in the context of Rule 435/ Rule 986 providing for disposal of the petitions for non prosecution/non-removal of office objections. In the present case, the grant of Letters of Administration was interdicted by filing of Caveat in the year 2011 itself. The Petition came to be converted into Suit and therefore there was no question of then proceeding with the Petition for grant. The issue of non prosecution of the Petition will not arise as the Petition was converted into Suit.

17. Upon caveat being filed, Rule 403 provides for the Petition to be treated as plaint and affidavit to be treated as written statement and procedure in such Suit shall be nearly according to procedure applicable to Civil Suits. The status of the Petition as of date is that of Suit and no provision or Rule is demonstrated for dismissal of the Suit without trial. Reliance on the case status to show that the Petition was listed for rejection under Rule 435 in the year 2012 does not assist the Applicant as the case status is of the Testamentary Petition, whereas the Petition was converted into Suit in the year 2011 itself.

18. Dealing with the decisions relied upon by Ms. Castelino, the decision of **Savitri Devi Kabra** (supra) has no relevance in the present case.

19. The decision of **T. Arivandandam vs T.V. Satyapal & Anr.** (supra), was rendered in the context of Order VII Rule 11 of CPC. There is no quarrel with the proposition laid down in the context of Order VII Rule 11 of CPC, however, the decision has no applicability to the present case.

20. In **Cipla Ltd.** (supra), this Court was concerned with the issue of maintainability of the cross objection as the Income Tax Appeal was rejected for non removal of office objections. It in this context that the observations were made as regards dismissal of the Appeal for non

removal of office objections. The decision is clearly distinguishable on facts.

21. The decision of *Khub Chand & Others vs State of Rajasthan* (supra) was cited to support the case that the word “shall” indicates that the provision is mandatory. As discussed above, the Hon’ble Division Bench of this Court has taken a view that the word “shall” appearing in Section 281 is directory and not mandatory.

22. As of today, the affidavit of attesting witness has been filed on record. I am, therefore, not inclined to accept the submission that even when the proceedings are converted into Suit and the affidavit of the attesting witness is placed on record by way of evidence, the Testamentary Petition should be dismissed in light of the discussion above.

23. Resultantly, the Application fails and stands dismissed.

[SHARMILA U. DESHMUKH, J.]