
(2009) 07 BOM CK 0193

In the Bombay High Court

Case No : Misc. Petition No. 18 of 2001 in Testamentary Petition No. 936 of 1997 and Notice of Motion No. 51 of 2009

Dr. Dinshah Dhunjishah Gagrath

APPELLANT

Vs

Viloo Byramji Plumber and Another

RESPONDENT

Date of Decision : 03-07-2009

Acts Referred:

High Court (Original Side) Rules — Rule 399 , 400
Limitation Act, 1963 — Article 137, 17, 17(1)

Citation : (2009) 6 BomCR 128 : (2009) 111 BOMLR 3325

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : Shyam Mehta, Burges Colabawala and Sachin Kudalkar, instructed by, Madekar and Co, for the Appellant; O.J. Menezes, for the Respondent

Judgement

D.Y. Chandrachud, J.—The Petition has been instituted in order to seek the revocation or annulment of a grant of probate by this Court on 25th November, 1997.

2. Perin Gagrath who died on 31st January, 1987 had two children: the Petitioner who was her son, and Roshan, her daughter. The Second Respondent is Roshan's husband. On 14th January, 1984 a will was admittedly executed by Perin under which a life interest in her estate was created in favour of Roshan upon which the property was to devolve upon the Petitioner. A second will was admittedly executed by the deceased on 19th February, 1986 under which Perin bequeathed her entire estate to Roshan absolutely. This will was registered with the Subregistrar of assurances. The will which forms the subject matter of the dispute is alleged to have been executed by Perin on 21st January, 1987 under which a life interest was created in favour of Roshan after which the property would devolve upon the Second Respondent who was her husband. The First Respondent was purportedly appointed as executor and trustee of this will. According to the Petitioner, the alleged will of 21st January, 1987 was executed purportedly just 10 days before Perin died. Perin was hospitalized on 26th

January, 1987 and was alleged to be suffering from a brain tumor. Perin died on 31st January, 1987 leaving behind her, the Petitioner and Roshan as her only heirs. Her estate inter alia comprised of a residential flat - Flat No. 16, Best View Cooperative Housing Society Limited at Cumballa Hill, Mumbai and a share in certain immovable property at Mahabaleshwar. According to the Petitioner, Roshan had executed during her life time a will on 25th September, 1993 bequeathing her entire estate to the son and daughter of the Petitioner. This will was founded on the premise that the Roshan was the absolute owner of the property inherited by her from her mother. Roshan died on 9th January, 1994.

3. According to the Petitioner, the Second Respondent, on 9th March, 1994 attempted to transfer the residential flat to his name. Upon the refusal of the cooperative society, a dispute was filed by the Second Respondent in the Cooperative Court on 22nd June, 1994 against the society and the two children of the Petitioner seeking, inter alia, a declaration that the society should not take cognizance of the will executed by Roshan on 25th September, 1993 and a permanent injunction restraining the opponents from displacing the Second Respondent from the flat.

4. The circumstances in which these proceedings for the revocation of the probate came to be instituted are that on 16th October, 1997 the First Respondent filed a petition (Petition 836 of 1997) in this Court for probate of the purported will of Perin dated 21st January, 1987. The will which was set up by the Second Respondent conferred a life interest in the estate of Perin in favour of her daughter and after her life time the estate was to devolve on the Second Respondent. A grant of probate came to be issued by this Court on 21st November, 1997. The Petitioner instituted proceedings before this Court on 17th January, 2001 for the revocation of the probate. According to the Petitioner he was not served with the citation in the proceedings and it was on 15th January, 1998 that the Second Respondent had applied for amendment before the Cooperative Court for bringing on the record the fact that probate had been granted to him of the alleged will executed by Perin on 21st January, 1987. The Cooperative Court allowed the amendment on 22nd January, 1988 and it was on 12th March, 1988 that the amendment application and the amended disputes were served on the advocates for the Petitioner's two children by the Second Respondent. The Petitioner, therefore, set up the case that it was only thereafter that he had learnt of the grant of probate.

5. By a judgment and order dated 30th October, 2002 the Petition for revocation was dismissed by a Learned Single Judge of this Court. The Petitioner carried the matter in appeal. By a judgment dated 20th January, 2009 a Division Bench of this Court set aside the order of the Learned Single Judge and came to the conclusion that the Petitioner had not been served with the citation of the probate petition in accordance with the provisions of Rules 399 and 400 of the High Court (Original Side) Rules. The order of the Learned Single Judge was set aside on the ground that the citation was not properly served and the Petition

came to be remitted back to the Single Judge, leaving all other contentions of both the sides open. That is how the Petition has been placed for hearing and final disposal.

6. Counsel appearing on behalf of the Petitioner submitted that the only question which now survives is as to whether the Petition was instituted within the period of limitation or otherwise. If the Petition was so instituted within limitation, the grant of probate would have to be revoked since the Petitioner who has a caveatable interest in his capacity as a son of the deceased was admittedly not served with the citation.

7. Insofar as this contention is concerned, there can be no gainsaying the fact that the judgment of the Division Bench dated 20th January, 2009 has brought finality to the question as to whether the Petitioner had been served with the citation. The finding that has been arrived at by the Division Bench, which is conclusive inter parts, is that the Petitioner was not served with the citation. That being the position, the grant of probate would have to be revoked unless the Petition is held to be barred by limitation. The principal question which therefore arises is as to whether there was a delay on the part of the Petitioner in moving this Court. For the purpose of deciding the question of limitation, the Court will now have to proceed on the basis that (i) The Petitioner was not served with the citation when the proceedings for the grant of probate were initiated; and (ii) On 12th March, 1998 the Petitioner received a copy of the amendment application and the amended dispute when it was served on his children in the proceedings before the Cooperative Court by the Second Respondent. During the course of the proceedings Mr. Menezes, Counsel appearing on behalf of the Second Respondent has stated before the Court that the Second Respondent does not dispute the factual position that the Petitioner received a copy of the amended application and the amended dispute on 12th March, 1998. The Petitioner has treated the service of the aforesaid proceedings on his children as the date on which he obtained knowledge of the grant of probate. The Petition was admittedly filed within a period of three years from 12th March, 1998, since already noted, the Petition came to be lodged before this Court on 17th January, 2001. Article 137 of the Limitation Act provides that for any other application for which no other period of limitation is provided, the period of limitation would be three years and time would begin to run when the right to apply accrues.

8. However, it has been urged on behalf of the Second Respondent that as a matter of fact the Petitioner must be attributed with knowledge of the grant of probate by this Court even prior to 12th March, 1998. He urged that such an inference be drawn as an earlier petition for revocation filed by Perviz Batliwalla (the deceased brother's son's wife) and by Nergis Ghadiyali (the deceased sister) came to be dismissed on 23rd December, 1999. Reliance was sought to be placed on a judgment of Mr. Justice S.S. Nijjar (as he then was) in *Mrs. Perviz Sarosh Batliwalla and another Vs. Mrs. Viloo Plumber and another*, .

9. In order to consider the tenability of this submission a brief reference to the

judgment of Mr. Justice Nijjar in the aforesaid decision would be in order. In the case that arose before the Learned Judge it was sought to be urged on behalf of the Second Respondent that a person who can legally file a caveat against a probate can only maintain a petition for the revocation of the probate. In response to this, the Petitioners before the Court in those proceedings submitted that the Second Respondent had erroneously contended that the citation had been served on the only other legal heir viz. the Petitioner to the present proceedings. Mr. Justice Nijjar rejected the Petition for revocation holding that a challenge to the grant of probate can only lie at the instance of a person who has an interest in the estate. Neither of the two Petitioners who had moved before the Court on the previous occasion had a caveatable interest. It was in that context that the Petition came to be dismissed. The question as to whether the Petitioner herein had been served with the citation had not fallen for consideration in those proceedings since as a matter of fact that was an issue which was finally decided only by the Division Bench of this Court on 20th January, 2009. Mr. Justice Nijjar held that even assuming that the citation had not been served on the present Petitioner that would not give locus to the Petitioners before the Court in those proceedings since they did not have an interest of their own in the estate of the deceased. The Learned Judge, in a passing reference, observed that a proxy petition to that effect could not be maintained. Reliance has been placed on behalf of the Second Respondent on the use of the expression "proxy petition" to submit that this would indicate the view of the Learned Single Judge that it was the Petitioner herein who stood behind the earlier proceedings. The submission cannot be accepted for more than one reason. First and foremost the Petitioner herein was not a party to the earlier proceedings. Secondly, as was rightly submitted on behalf of the Petitioner by the learned Counsel, the filing of the earlier petition even if it was at the behest of the Petitioner would be of significance if the Petition was instituted before 12th March, 1998. As a matter of fact the earlier petition is numbered Misc. Petition 71 of 1999 and it will not prepone the accrual of the cause of action. Once it is conceded that the Petitioner was served with the amended application before the Cooperative Court on 12th March, 1998 and a disclosure about the grant of the probate has been made in the amended application, the period of three years must be counted from the date on which the Petitioner obtained knowledge of the grant of probate.

10. Another limb of the submissions on behalf of the Second Respondent was that a decision for the grant of probate operates in rem and that consequently a right to apply for the revocation of probate must relate back to the date of the grant of probate. This obviously, however, cannot be the situation in respect of a person with a caveatable interest who has not been served with a citation in the probate proceedings and who is kept in the dark until much later about the grant of probate. To hold otherwise would lead to a manifest miscarriage of justice because a person with a caveatable interest who is deliberately kept out of the proceedings for the grant of probate, by a failure to effect service of the citation

would be held to be debarred, upon the lapse of a period of three years from the date of the grant though he had no knowledge of the grant of the probate. But apart from the seriousness of the consequences, the right to apply for the purpose of Article 137 must be relatable to the date from which the person has knowledge of the grant which is obtained behind his back and which he now seeks to challenge. The judgment of Mr. Justice A.B. Palkar in *Ramesh Nivrutti Bhagwat Vs. Dr. Surendra Manohar Parakhe*, involved a situation where the Petitioner had no locus standi to apply for revocation of the grant because he had no interest in the estate of the deceased on intestacy. As a matter of fact Mr. Justice Palkar held that the Petitioners were not entitled to any citation in the probate proceedings before the Court in California having no caveatable interest. The judgment is therefore distinguishable. Another judgment which was cited was that of a Division Bench of the Punjab and Haryana High Court in *Hari Narain and Others Vs. Subhash Chander and Others*, Punjab And Haryana 211. That was a situation where on the date of the grant of probate, the Petitioner was minor. The Division Bench held that an application for revocation ought to have been filed within three years of the date on which the Petitioner attained majority. Both the judgments are therefore distinguishable.

11. Counsel appearing on behalf of the Petitioner adverted to the provisions of Section 17 of the Limitation Act. Sub-section (1) of Section 17 inter alia provides that where in the case of any suit or in an application for which a period of limitation is prescribed by the Act, where the knowledge of the right or title on which a suit or application is founded is concealed by fraud of any such person or where any document necessary to establish the right of the Plaintiff or the Applicant has been fraudulently concealed from him, the period of limitation shall not begin to run until the Plaintiff or the Applicant has discovered the fraud or mistake or could, with reasonable diligence, have discovered it. In *Pallav Sheth Vs. Custodian and Others*, , the Supreme Court while adverting to the provisions of Section 17 of the Limitation Act held that these provisions embody fundamental principles of justice and equity that a party should not be penalized for failing to adopt legal proceedings when the facts or material necessary for him to do so have been willfully concealed from him and that a party who has acted fraudulently should not gain the benefit of limitation running in his favour by virtue of such conduct.

12. The next ground on which the Petition for revocation has been opposed is that the Petitioner had made a relinquishment of his right, title and interest in favour of his sister, Roshan (the deceased spouse of the Second Respondent). The submission would not carry the case of the Second Respondent any further. For one thing in the Petition for the grant of probate the Petitioner was cited as an heir of the deceased and an effort was made to show that he was in fact served with the citation. All this exercise was evidently not necessary if the Petitioner had no caveatable interest at all. But that apart, it has been urged on behalf of the Petitioner that the letter dated 4th February, 1987 by which the Petitioner acknowledged the entitlement of Roshan to have the flat transferred to

her name was addressed after the will of Perin dated 19th February, 1986 under which the testatrix had bequeathed her property to Roshan who was her daughter. Perin died on 31st January, 1987 and it is the contention of the Petitioner that the letter dated 4th February, 1987 was written soon thereafter since the Petitioner as a matter of fact had no objection to the property of his mother devolving absolutely on Roshan under the will dated 19th February, 1986. The disputes between the parties have evidently come into existence upon the alleged will dated 21st January, 1987 under which, according to the Second Respondent, Roshan acquired only a life interest in her mother's interest after which it was the Second Respondent who would have interest in the property. For the purpose of these proceedings, it is not necessary or appropriate for the Court to make any final adjudication into the rival issues on the merits of the case which have been set up by the parties since these must await a full and final adjudication in the suit. It would therefore be necessary to clarify that the observations which have been made in this judgment are not intended to render any final adjudication on the merits of the rival contentions of the parties which will arise in the suit.

13. Finally, before concluding the proceedings, it would be necessary to advert to the defence of the Second Respondent that the Petition was filed by a Constituted Attorney who had not been duly authorized to lodge the Petition. It would appear from the record that the authorization for the filing of the Petition by a Constituted Attorney was a power of attorney dated 5th March, 1994. The contention of the Second Respondent is that the power of attorney dated 5th March, 1994 is relatable to the proceedings to be adopted with respect to the estate of Roshan and not of Perin. This issue, however, need not detain the Court any further since the Petitioner has filed an affidavit dated 18th March, 2002 adopting and reiterating all the submissions contained in the Petition and stating that all the contentions and averments contained in the Petition have been made by his Constituted Attorney with his consent. That apart, the Petitioner has already executed a power of attorney dated 13th December, 2001 authorizing the Constituted Attorney to represent him in the Petition for revocation. As held by the Supreme Court in *United Bank of India Vs. Naresh Kumar and others*, it is always open to the principal to ratify an action of his representative in signing the pleadings and that such a ratification can be expressed or implied. In the present case, there is a ratification by the Petitioner.

14. For the reasons which have been indicated in the judgment, the Petition for revocation would have to be held to be within the period of limitation. In view of the judgment of the Division Bench dated 20th January, 2009 holding that the Petitioner had not been served with the citation under Rules 399 and 400 of the High Court (Original Side) Rules, the grant of probate would have to be revoked and is accordingly revoked. The Petition is made absolute in terms of prayer Clause (a).

15. In view of the disposal of the Petition and having regard to the conclusions

which have been arrived at by the Court to the effect that the Petition was lodged within the period of limitation, Notice of Motion 51 of 2009 does not survive and is accordingly disposed of.

16. Since the Petitioner resides in the US, on the request of counsel appearing for the First and Second Respondents, counsel appearing for the Petitioner waives the service of the citation. Accordingly it has been agreed that the Petitioner would file his caveat within a period of eight weeks of the service of the Petition on the advocate for the Petitioner.

The Second Respondent shall surrender the original grant.