

(2017) 11 BOM CK 0150

In the Bombay High Court

Case No : 32 of 2017 WITH NOTICE of MOTION NO 57 of 2017

Kusum Chandrakant Shankardas, & Ors.

APPELLANT

Vs

Rajeshri Chandrakant Shankardas, & Ors.

RESPONDENT

Date of Decision : 01-11-2017

Acts Referred:

[Succession Act, 1925](#), [Section 390](#), [Section 383\(b\)](#) - Provisions with respect to certificates under Bombay Regulation 8 of 1827 - Revocation of certificate
[Hindu Marriage Act](#)

Citation : (2017) 11 BOM CK 0150

Hon'ble Judges : S.C. Gupte

Bench : SINGLE BENCH

Advocate : Aseem Naphade, A.P. Singh, Rohini Dandekar

Judgement

1. This Misc. Petition seeks revocation of a Legal Heirship Certificate granted under Section 2 of the Bombay Regulation VIII of 1827, in favour of the respondents herein.

2. Petitioner no.1 claims to be the widow of the deceased Chandrakant Shantaram Shankardas, while petitioner nos.2 and 3 claim to be the daughters of the deceased through petitioner no.1. The respondents were applicants for heirship certificate in Misc. Petition No.160 of 2015. Respondent no.1 claims to be the wife of the deceased and respondent nos.2 to 4 claim to be his daughters through respondent no.1. The deceased was a retired army officer who died intestate on 14th August, 2013.

3. The facts of the present case may be briefly noted as follows: In or about 1969, the marriage of respondent no.1 and the deceased was solemnized at Malvan. It is the case of the petitioners that in the year 1982, respondent no.1 deserted the deceased, ever since when the deceased and respondent no.1 were living separately. It is claimed that eventually, in or about 1983, there was a customary divorce between the deceased and respondent no.1. It is the case of

the petitioners that on 25th May, 1984, the deceased married petitioner no.1 as per Hindu rites and ceremonies. It is claimed that not only did respondent no.1 not object to the marriage, but she herself made arrangements for the same. On 10th November, 1986 and 7th August, 1993, petitioner nos.2 and 3 were, respectively, born from the wedlock between the deceased and petitioner no.1. It is the case of the petitioners that they were living with the deceased in the tenement which was being redeveloped through Slum Rehabilitation Authority ("SRA", for short). Pending such redevelopment, on or about 14th August, 2013, the deceased passed away. It is the case of the petitioners that petitioner no.1 started receiving monthly compensation of Rs.14,000/- from the developer M/s.Surana Constructions, and continued to do so till about March 2016. Around March 2016, the petitioners learnt, on an application under Right to Information Act, that the respondents had obtained legal heirship certificate in respect of their alleged heirship of the deceased through Misc. Application No.160 of 2015. The petitioners also learnt that based on the legal heirship certificate, the Collector had added the name of respondent no.1 in Annexure-II in respect of the redevelopment project. The petitioners raised an objection before the SRA, concerning inclusion of the name of respondent no.1 in Annexure-II. The objection was rejected by SRA. In the premises, the present petition for revocation of the legal heirship certificate is moved by the petitioners before this Court.

4. The record of the case reveals that Misc. Petition No.160 of 2015, under Section 2 of Bombay Regulation VIII of 1827, was moved before this Court on 10th September, 2015, in pursuance of a requisition by SRA to that effect. It also appears that the misc. petition moved by the respondents herein does not refer to either the desertion or customary divorce between respondent no.1 and the deceased or the marriage of the deceased to petitioner no.1 or birth of petitioner nos.2 and 3 out of the second wedlock. The misc. petition, on the other hand, claims the respondents to be the only heirs and next of kin of the deceased in accordance with law. It also appears that this Court, vide order dated 14th December, 2015, dispensed with the proclamation and, thereafter, on January 2016, made the petition absolute and directed issuance of heirship certificate in favour of the respondents.

5. The basis of the present revocation application is that, firstly, the proceedings to obtain the heirship certificate were defective in substance, inasmuch as the mandatory requirement of a proclamation was dispensed with and, secondly, the certificate itself was obtained fraudulently by making of false suggestions and concealment from the Court of material facts. It is submitted that the desertion and customary divorce between the deceased and respondent no.1 as well as the marriage between the deceased and petitioner no.1 and birth of two daughters, i.e. petitioner nos.2 and 3, from out of that wedlock, are matters which are actively concealed from the Court whilst obtaining the heirship certificate. It is submitted that there is a false suggestion deliberately and knowingly made in the original application for heirship certificate that the respondents were the only

heirs and next of kin of the deceased.

6. Learned counsel for the petitioners, at the hearing of the present misc. petition, does not press for recognition of the right of petitioner no.1 as legal heir of the deceased, since there was admittedly no formal divorce as between the deceased and respondent no.1 (his first wife) in accordance with the provisions of the Hindu Marriage Act. Learned counsel, however, relying on the provisions of Section 16 of the Hindu Marriage Act, submits that even assuming the marriage between the deceased and petitioner no.1 herein to be void on account of spouse of the deceased husband being living at the time of the marriage, the children of the marriage are still treated as legitimate and their rights as legal heirs and next of kin of the deceased, cannot be denied to them.

7. A legal heirship certificate was issued in the present case under the provisions of Bombay Regulation VIII of 1827. The regulation (Section 2 thereof) inter-alia provides that if any heir is desirous of having his right formally recognized by the Court, the judge, on an application of such heir, shall issue a proclamation in the form contained in Appendix - A to the Regulation, inviting all persons, who dispute the right of the applicant, to appear in the Court and submit their objections, and if, no sufficient objection is offered to the application, the judge shall proceed to receive proof of the right of the applicant and upon being satisfied, grant a certificate of heirship to the applicant. It is also to be noted that by virtue of Section 390 of the Indian Succession Act, 1925, various provisions contained in Part-X of that Act concerning succession certificates including Section 383 of that Act are made applicable, so far as may be, to the heirship certificates granted under Bombay Regulation VIII of 1827. Section 383 of the Succession Act provides for revocation of any succession certificate granted under Part-X , inter-alia in a case where (i) the proceedings to obtain such certificate were defective in substance [clause (a)] or (ii) the certificate was obtained fraudulently by making a false suggestion or by concealment from the Court of something material to the case [clause (b)]. The argument of learned counsel for the petitioners in the present case is, firstly, that since issuance of proclamation is an essential condition for accepting the claim of heirship and issue a heirship certificate and that condition was not followed in the present case, the proceedings to obtain the heirship certificate can be said to be defective in substance. It is secondly submitted that inasmuch as there is a fraudulent suggestion on the part of the respondents herein whilst obtaining the heirship certificate that they were the only legal heirs and next of kin to the deceased, as also an active concealment of the fact of the second marriage of the deceased with petitioner no.1 and birth of two daughters (petitioner nos.2 and 3) from out of that wedlock, the heirship certificate is liable to be revoked.

8. It is pertinent to note that as far as clause (a) of Section 383 is concerned, a case must be made out that the proceedings were defective in substance. The petitioners claim that since the proclamation was mandatory under the provisions of Section 2 of Bombay Regulation VIII of 1827, issuance of heirship certificate in

the present case was defective for want of such proclamation. It is pertinent to note in this behalf that the proclamation was dispensed with by an express order of the Court. If the misc. petition for heirship certificate was pressed before the Court, without issuing the proclamation as per the dispensation granted by the Court, the proceedings cannot be said to be defective in substance. It is another matter if without seeking any dispensation the heirship certificate was applied for without such proclamation. In such case, the proceedings would be defective in substance. So long as the order of the Court providing for dispensation of the proclamation stands and is not set aside, it is not for any party to claim that proceedings to obtain heirship certificate without a proclamation suffer from any defect in substance. There is, accordingly, no merit in the first objection raised by the petitioner.

9. Clause (b) of Section 383 deals with a case where the heirship certificate is obtained fraudulently by making of a false suggestion or by concealment from the Court of something material to the case. "Fraud" itself implies suggestion of a fact by one who does not believe it to be true or an active concealment of a fact by one having knowledge or belief of the fact. In either case, therefore, for seeking revocation of a certificate granted under Part-X of the Indian Succession Act, or a heirship certificate granted under Section 2 of Bombay Regulation VIII of 1827, the applicant for revocation must make out three ingredients; firstly, it needs to be shown that there is a false suggestion or concealment of a material particular in the application for heirship certificate; secondly, such suggestion or concealment must be shown to have been made knowingly, that is to say, by someone who does not believe the suggestion to be true or who has the knowledge or belief of the fact concealed; thirdly, there should be no other consideration affecting the maintainability of the application for revocation, for example, bar of limitation or equitable considerations affecting the applicant's right to seek revocation.

10. Let us now consider whether these three ingredients are made out in the present case. Insofar as the falsehood of the suggestion or concealment of the material facts is concerned, there is ample material on record to show that the deceased subsequently married petitioner no.1 and two daughters (petitioner nos.2 and 3) were born to him out of that wedlock. The petitioners have relied on the marriage card as well as birth certificates of petitioner nos.2 and 3 issued by the Municipal Corporation Greater Mumbai as also other identity proofs such as Aadhar Card, Pan Card and Bank accounts as also voter ID Card and Smart Card issued to the deceased as a retired Army personal, in this behalf. There is overwhelming material on record to show that the deceased married petitioner no.1 in the year 1984 and petitioner nos.2 and 3 were born out of this wedlock. Even if the marriage of the deceased with petitioner no.1 were to be treated as void under the provisions of Section 11 of the Hindu Marriage Act by reason of the earlier spouse of the deceased, namely, respondent no.1, being living on the date of the second marriage, the heirship of petitioner nos.2 and 3 as daughters of the deceased cannot be denied. As provided by Section 16 of the Hindu

marriage Act, notwithstanding that the marriage is null and void under Section 11, any child of such marriage, who would have been legitimate, if the marriage had been valid, shall be legitimate. This is so even if there is a decree of nullity granted in respect of that marriage under the Act or the marriage is held to be void otherwise than on a petition under the Act. The statement made in the original misc. petition for heirship certificate that the respondents herein were the only legal heirs and next of kin of the deceased, can thus be said to be plainly false. By the same token, there is also concealment of a material fact, namely, that there were two daughters of the deceased born out of the second wedlock, who were living on the date of the application for heirship certificate.

11. The next question to be considered is whether this concealment is said to be an active concealment by a person having knowledge or belief of the fact or the false suggestion is made by a person who does not believe the same to be true. At the very outset, in this behalf, it must be noted that petitioner no.1 and respondent no.1 are real sisters. It is inherently improbable that respondent no.1 would be ignorant of the fact that her real sister was living with her deceased husband and two daughters were born to her from him. Besides, it is important to note that in the face of elaborate assertions of the petitioners in their misc. petition that the deceased married petitioner no.1 on 25th May, 1984 and the two were living together from 1985 till the time of his death and petitioner nos.2 and 3 were born out of that wedlock on 10th November, 1986 and 1983, backed by voluminous record in proof of such assertions, all that one finds in the respondents' reply to the misc. petition is a bare denial of the relevant paragraphs as a whole (paragraphs 7,8, 9, 10, 11 and 12 of the misc. petition), by a one liner that the respondents deny and do not admit the contents thereof and put the petitioners to the strict proof. The third important circumstance in this behalf to be noted is that not only had the deceased himself executed an affidavit on 21st September, 2004, for including the names of the petitioners herein as his legal heirs in the records of his employer, by asserting his marriage with petitioner no.1 and birth of his two daughters, namely, petitioner nos.2 and 3, there is also an affidavit by respondent no.1 herself testifying to the correctness of the affidavit of the deceased. Though the respondents contest the factum as well as the affirmation of the aforesaid two affidavits, in the face of the voluminous evidence referred to above and in the face of the rival pleadings of the parties in the misc. petition, by a preponderance of probabilities, the making of the affidavits is clearly believable. In the face of this evidence, the respondents, and particularly respondent no.1, who was the applicant in the original misc. petition for heirship certificate, can certainly be fastened with the knowledge of the marriage between the deceased and petitioner no.1 and, at any rate, the birth of petitioner nos.2 and 3 out of the said wedlock. The second ingredient of clause (b) is accordingly made out.

12. Insofar as other considerations are concerned, the only objections raised by the respondents to the present application for revocation are on the ground, firstly, that the petitioners herein did not at any time apply for any succession or

heirship certificate, and, secondly, the petitioners have encroached upon and forcibly occupied some other properties of the deceased. None of the objections is material or germane from the point of view of the present revocation application. There is no compulsion for any legal heir of a deceased predecessor to either apply for a succession certificate or a heirship certificate. In fact, as required by Section 2 of Bombay Regulation VIII of 1982, it is only when the heir is desirous of having his right formally recognized by a Court that he needs to apply to the Judge for a heirship certificate. Forcible possession or occupation of the property of the deceased is, by its very nature, neither here nor there insofar as the present revocation application is concerned.

13. The petitioners, accordingly, have made out a clear case under Section 390 read with Section 383 (b) of the Indian Succession Act, 1925. The heirship certificate issued in the present case is, in the premises, liable to be revoked. Accordingly, the petition is allowed in terms of prayer clause (a). No order as to costs.

14. The parties, however, will be at liberty to apply for heirship certificate in future jointly in favour of the respondents and petitioner nos.2 and 3.

15. Since the main petition itself is disposed of by the present order, the Notice of Motion does not survive and the same is also disposed of.

16. Learned counsel for the respondents applies for stay of this order. Since the present order is passed after fully hearing the parties and also reserving liberty to apply for a heirship certificate afresh, the prayer is rejected. In the facts of the case, the respondents cannot be allowed to claim as sole heirs of the deceased to the exclusion of petitioner nos.2 and 3 even for a limited period.