
(2014) 04 BOM CK 0264

In the Bombay High Court

Case No : Miscellaneous Petition No. 85 of 2012 in Petition No. 214 of 1994

Uma Vithal Jhaveri and Others

APPELLANT

Vs

Nikhil Vithal Jhaveri

RESPONDENT

Date of Decision : 29-04-2014

Acts Referred:

Limitation Act, 1963 — Section 17
Succession Act, 1925 — Section 263

Citation : (2014) 04 BOM CK 0264

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : Soma Singh, a/w. Subro Dev, instructed by Vivek Sharma, Advocates for the Appellant; Subhasree Chatterjee, i/b. Manilal Kher Ambalal & Co, Advocates for the Respondent

Judgement

R.D. Dhanuka, J.—By this petition, petitioners seek that the probate granted by this court on 30th December, 1996 in Probate Petition No. 214 of 1994 of the deceased Vithal Shyamdas Jhaveri be revoked. Respondent at the outset raised issue of limitation in filing this Misc. Petition. Some of the relevant facts for the purpose of deciding issue of limitation raised by the petitioners are as under :-

2. The respondent is claiming to be the sole executor viz. in the Will and testament dated 12th October, 1992. Respondent had filed a petition bearing Petition No. 214 of 1994 in this court inter alia praying for the last Will and Testament of the said deceased. It is case of the petitioner no.1 that petitioner no.1 is a daughter of the said deceased and petitioner no.2 is the widow of the said deceased. Mr. Akhil Vithal Jhaveri is claiming to be son of the said deceased. It is the case of the petitioners that though the petitioners were the legal heirs of the said deceased, the citation was not served upon the petitioners and without service of citation, the respondent has obtained probate in respect of the Will and Testament of the deceased dated 12th October, 1992.

3. Learned counsel appearing for the respondent invited my attention to the

letter dated 16th November, 2000 which was addressed by the advocate of the respondent to the advocate of the petitioners in response to the notice dated 7th November, 2000. The respondent in the said letter informed the petitioners through their advocate that the said deceased Mr. Vithal Shyamdas Jhaveri expired in Mumbai 10th December, 1992 leaving behind a Will in respect whereof the probate had already been granted by this court. The respondent denied the allegations made by the petitioners in their advocates' letter dated 7th November, 2000.

4. Learned counsel appearing for the petitioners invited my attention to the letter dated 20th December, 2000 addressed by the advocate of the petitioners to the advocate of the respondent in reply to the letter dated 16th November, 2000. In the said letter the petitioner reiterated what was stated in the notice of 7th November, 2000 and stated that denial of the statements made in the said notice of 7th November, 2000 in the letter dated 16th November, 2000 were false, mischievous and fraudulent. By the said letter, the petitioners called upon the advocate of the respondent to furnish a copy of the probated Will alongwith papers and proceedings in the matter thereof. It is case of the petitioners that inspite of the said letter dated 20th December, 2000, the respondent did not furnish any copy of the probated Will to the petitioners.

5. Learned counsel appearing for the petitioners also tendered a copy of the letter dated 29th July, 2011 addressed to the advocate of the respondent by the advocate of the petitioners alleging that the petitioners were not aware of any purported Will and by letter dated 20th December, 2000 had called upon the respondent to furnish a copy of the purported probated Will alongwith papers and proceedings relating to the matter, however, the respondent had failed to provide a copy of the purported Will and/or papers and proceedings in the matter. It is stated in the letter that one of the petitioners thereafter instructed the advocate to search for papers and proceedings in respect of the probate.

6. It is stated that since no details were available, no such alleged probate could be traced. It is further stated that Mrs. Uma Jhaveri, the daughter of the said deceased and Mrs. Meena Jhaveri, widow of the said deceased thereafter visited India in July 2004 and made enquiries with the siblings of the respondent about the purported proceedings and purported Will. It is alleged that the siblings of the respondent informed the petitioners that they had no knowledge and were not aware of any purported Will left by the said deceased. The advocate of the petitioners thereafter made further enquiries and tried to trace the papers but could not be traced. The petitioners called upon the respondent to furnish copy of the probate within a period of one week from the date of the said letter and threatened to initiate appropriate legal proceedings in case of failure. Both these two letters which are tendered across the bar are not annexed to the miscellaneous petition. Though the learned counsel appearing for the respondent raised objection against the petitioners' tendering these two documents across the bar, I would deal with the said documents in this judgment.

7. Learned counsel appearing for the respondent invited my attention to the order and judgment delivered by the Division Bench of this court in case of *Nina Agarwalla Vs. Ashok Gupta and Others*, in support of the plea that the petition for revocation of probate not having been filed within three years from the date of grant of probate by this court, such petition under section 263 of Indian Succession Act, 1925 is barred by law of limitation. Learned counsel placed reliance on paragraphs 12 and 13 of the said judgment which read thus :-

12. We have considered the submission. A grant of probate operates in rem and is good against all world. It is well settled that grant of a probate by a Competent Court is a Judgment in Rem which is not only binding upon the parties to the probate proceeding but also binding on the whole world. Therefore, the order granting a probate, is conclusive evidence as to the execution and validity of the Will till such a grant of probate is revoked. Therefore, the probate granted almost 38 years ago cannot be revoked unless the requirement of Section 263 of the Indian Succession Act, 1925 are satisfied/justified. The case of the Appellant is that this Court should in terms of Section 263 of the Indian Succession Act, 1925 revoke the probate as the proceedings leading to the grant of the probate were defective in substance in as much as the citation required to be served were not served upon her in accordance with Rules 399 and 400 of the Bombay High Court (Original Side) Rules before the grant of the Probate. This submission is completely negated by the finding of fact recorded in the impugned order that in the original record of the probate proceedings in the Testamentary department called for by her, shows the hand written record of service of citation on the next of kin on 12 May, 1971 as well as affixing the citation on the notice board on 20 April, 1971. Reference in a joint affidavit of service filed on 12 May, 1971 is also found in the hand written record in the testamentary department of the Court.

12. 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 of the Limitation Act in proceedings for revocation of probate.

8. Learned counsel appearing on behalf of the petitioners on the other hand made an attempt to distinguish the judgment of the Division Bench in case of *Nina Agarwalla (supra)* on the ground that though the petitioners were the legal heirs of the said deceased, citation was not served upon the petitioners and thus the grant obtained by the respondent without service of citation was in violation of rule 399 and 340 of Bombay High Court (Original Side) Rules and such grant being defective, it is liable to be set aside under section 263 of Indian succession Act, 1925.

9. Learned counsel also placed reliance on the judgment of Punjab High Court in case of *Pritam Dass Vs. Nand Ram*, and in particular paragraph (4) thereof in support of her submission that grant of probate without service of citation on the legal heirs is illegal and is liable to be revoked under section 263 of the Indian Succession Act, 1925.

10. Learned counsel also placed reliance on the judgment of the Madras High Court in case of *Mrs. T. Ponnalagi Vs. RM. Ramachandran, RM. Sabarathinam and RM. Subbiah*, in support of the plea that the proceedings seeking letters of administration are defective due to non-impleadment of necessary parties and non service of citation.

11. Learned counsel also submits that in any event, in view of the fraud having been committed by the respondent by not serving the citation upon the legal heirs of the said deceased, in view of section 17 of the Limitation Act, 1963, the petitioner is entitled to file petition under section 263 from the date of knowledge of such fraud.

12. A perusal of the Miscellaneous Petition indicates that there are no grounds raised by the petitioners alleging fraud on the part of the respondent or about the knowledge of the Will and probate granted by this court. A perusal of the petition however clearly indicates that the petitioners themselves have annexed a copy of the letter dated 16th November, 2000 which was in reply to the petitioners' advocates' notice dated 7th November, 2000 which clearly indicates that the respondent had informed the petitioners' advocate as far back as on 16th November, 2000 about the Will and Testament of the said deceased and that the probate had already been granted by this court in respect of such Will and Testament. It is clear that the petitioners did not take any steps inspite of such information received from the respondent's advocate as far back as on 16th November, 2000. Be that as it may, in my view section 263 of Indian Succession Act, 1925 will have to be read with Article 137 of Limitation Act, 1963. The question of considering the grounds raised in petition under section 263 will arise only if such petition is filed within time as prescribed under Article 137 of Schedule I of Limitation Act, 1963 which in my view is applicable to a petition for revocation of probate and/or letters of administration. The division bench of this court has held that an order passed by this court granting probate on letters of administration is an order in rem and limitation would commence from the date of grant of probate.

13. This court in case of Adil Phiroze Makhania vs. Dilip Gordhandas Gondalia in a judgment delivered today in Misc. Petition No. 29 of 2014 has considered similar situation where citation was not served upon the petitioners who were claiming to be the legal heirs of the deceased. The petitioners were however fully aware of the Will and the probate granted by this court in favour of the respondent. This court has after adverting to the judgment of the Division Bench in case of Nina Agarwalla (supra) has held that the limitation for filing petition under section 263 of Indian Succession Act, 1925 would commence from the date of grant of probate or letters of administration by this court. In any event, even if there are any allegations of fraud, the question arose before this court is whether with due diligence, the petitioners could have derived the knowledge of alleged fraud. If the petitioners have not taken any steps to verify whether any Will was executed and/or probate was granted by this court or not inspite of the receipt of receipt of the letter from the advocate of the respondent as far back as on 16th November, 2000, limitation would not be extended on the ground of alleged fraud. Paragraphs 29 and 30 of the judgment of this court in case of Adil Phiroze Makhania (supra) which are relevant and squarely applies to the facts of this case read as under :-

29. In my view the order passed in probate petition granting probate is order in rem. Petitioner was fully aware of the will, filing of petition and the probate granted by this court much prior to three years of filing of this petition for revocation of probate. Division Bench of this court in the case of Nina Agarwal (supra) and learned Single Judge of this court in the case of Lydia Agnes Rodrigues (supra) have held that article 137 of the Limitation Act applies to the proceedings for revocation of probate filed under section 263 of Indian Succession Act, 1925. The learned Single Judge has also held that time to file such petition would commence from the date on which the probate was granted by this court. It is held that the issuance of grant by this court would be a deemed notice. In my view a party who could have discovered by due diligence about the fraud alleged to have been committed by the respondents, then deemed knowledge would be attributed to such party and he cannot be allowed to extend the period of limitation by merely claiming that he had no knowledge.

30. A perusal of the record clearly indicates that the petitioner had knowledge of the will and the probate granted by this court much prior to three years of filing this petition. The petitioner filed affidavit in rejoinder after this court had heard the parties substantially. In view of ad interim order passed by this court on 29th July, 2013, respondents proceeded with the arguments without seeking any leave to file sur-rejoinder and proceeded on the basis of denials. In any event, a perusal of the rejoinder in which the petitioner has placed reliance on the alleged Form 8, indicates that the petitioner has annexed a photocopy of alleged Form 8 alleged to have been issued by Parsi General Hospital. A perusal of the photocopy of the said Form 8 indicates that the date of death of Ms. Shirin J. Choksy mentioned is 13th June, 2006. the date of the report mentioned therein is 13th June, 2010. The case of the petitioner is that the said medical certificate

was counter signed by the said deceased testator in the year 2000 acknowledging the receipt of the dead body of Ms. Shirin J. Choksy.

14. I am respectfully bound by the judgment of the Division Bench in case of Nina Agarwalla (supra). I do not propose to take any different view than the view taken by this court in case of Adil Phiroze Makhania (supra).

15. In so far as judgment of Madras High Court in case of Ms.T.Ponnalagi (supra) and Pritam Dass (supra) by the learned counsel appearing for the petitioners are concerned, in view of the fact that the petition is not filed within the limitation prescribed for filing a petition under Article 137 of Limitation Act, 1963, this court need not go into the issues whether grounds available for revocation of grant of probate or letters of administration under section 263 are made out or not. Both the judgments thus relied upon by the learned counsel are of no assistance to the petitioners.

16. In so far as letters dated 20th December, 2000 and 29th July, 2000 though not annexed to the petition which letters were addressed by the petitioners' advocate to the respondent's advocate calling upon them to furnish copy of the probated Will is concerned, in my view such letters by which the petitioners have asked for copy of the Will would not extend period of limitation. Petitioners derived knowledge about such Will and grant of probate after receipt of the letter dated 16th November, 2000. After writing letter on 20th December, 2000, the petitioners addressed another letter after ten years for demanding copy of Will and probate. The petitioners however did not take any steps to apply for revocation of the probate granted by this court. In my view the correspondence would not extend period of limitation. Both these letters relied upon by the learned counsel appearing for the petitioners thus would not extend period of limitation.

17. Testamentary proceedings are proceedings in rem. Issuance of grant by this Court would also be a deemed notice. Supreme Court in case of Smt. Dilboo (Dead) by Lrs. and Others Vs. Smt. Dhanraji (Dead) and Others, has held that where a fact could be discovered by due diligence by the plaintiff, then deemed knowledge would be attributed to the plaintiff because a party cannot be allowed to extend the period of limitation by merely claiming that he had no knowledge. In my view, the petitioners cannot just simply take an excuse of lack of knowledge of the alleged fraud without taking any reasonable steps or acting with reasonable diligence to ascertain such facts. In my view, the petitioners would have deemed knowledge of filing of such petition by the executor and issuance of grant by this Court. Limitation in this case thus would commence on the date of issuance of grant by this Court which was in the year 1996 and would not commence on 29th July, 2011 when the last letter was addressed by the petitioners for demanding copy of probate or proceedings.

18. In my view, the petition is barred by law of limitation and is accordingly rejected. No order as to costs.