dik

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

Dhanappa I. Koshti
Digitally signed by Dhanappa I. Koshti
Date: 2021.01.11 17:32:46 +0530

TESTAMENTARY PETITION NO. 1967 OF 2018

Malti Parmanand Chatpar ... Deceased

Puran Jethanand Jattani ... Petitioner

Mr. Shyam Kapadia a/w Mrs. Nafisa Khandeparkar i/b AZB & Partners for the Petitioner.

CORAM : B.P. COLABAWALLA, J.
DATE : 8th JANUARY, 2021

P.C. :

1 The Present matter is moved for directions.

2 In this matter, earlier a caveat was filed by one Mrs Juthica Lalit Jhangiani who is the niece of the deceased. By an order dated 14th October, 2020, this Court set aside the caveat and further directed the office of the Prothonotary and Senior Master to process the grant for probate of the last Will and Testament of the deceased Malti Parmanand Chatpar, if it was otherwise found in order.

3 Pursuant to said order the above Testamentary Petition was listed before the Testamentary Registrar on 21st December, 2020 when the Registrar raised the objection that the said last Will and Testament dated 11.11.2008, has only been signed by the deceased and not by the attesting witnesses. Further, the Registrar also observed that the attesting witnesses to the Will were present at the time of registration of the Will of the deceased and which was on the same date of its execution, i.e. 11th November, 2008. According to the Testamentary Department, considering that both the attesting witnesses had not signed on the Will, the same was not valid as per Section 63(c) of the Indian Succession Act, 1925 (for short the "**Act**") and hence asked the petitioner to comply with the above objection. It is, in these circumstances, that the present matter has been moved before the Court.

4 Mr. Kapadia, the learned advocate appearing on behalf of the petitioner submitted that the objection taken by the Testamentary Department is a highly technical one and cannot defeat the Will executed by the deceased. He brought to my attention that the last Will and Testament of the deceased was

executed on 11.11.2008 and on the same day it was registered with the Joint Sub-Registrar, Mumbai City Division-1. He submitted that both the witnesses, namely, Mahendra Tulsidas Jattani and Mrs. Bhavna Mahendra Jattani have filed their affidavits dated 4th January, 2021 wherein they have clearly stated that on 11th November, 2008 they were present together with the deceased at Old Customs House Building, Shahid Bhagat Singh Road, Horniman Circle, Fort, Mumbai 400 023 when both of them did then and there see the deceased set and subscribe her name at the foot of the testamentary paper in English language and character and which is marked as Exh "B" to the petition. It is thereafter stated in the affidavit that on the same day, i.e. 11th November, 2008, both the deponents did at the request of the said deceased and in her presence and in the presence of each other set and subscribe their respective names, signatures and thumb impression on the registration page bearing their photographs as witnesses. However, these two attesting witnesses, namely, Mahendra Jattani and Mrs. Bhavani Jattani inadvertently did not sign as witnesses at the foot of the testamentary paper being the Last Will and Testament of the deceased though their names were printed therein. Mr. Kapadia submitted that the deponents

have clearly stated on oath that the names, the signatures and the thumb impression of the deceased subscribed at the foot of the testamentary paper are of the party executing the same and is in the proper handwriting of the deceased. They have further stated on oath that they have subscribed their names, signatures and thumb impression on the registration page bearing their photographs and which is annexed to the last Will and Testament of the deceased. It is also stated that the deceased's last Will is executed and registered on 11th November, 2008 and the deponents were present with the deceased throughout and the witnesses witnessed the registration of the last Will of the deceased. He submitted that both these affidavits, therefore, clearly establish that Mr. Mahendra Jattani and Mrs. Bhavani Jattani were the attesting witnesses and merely because their signatures do not appear on the Will but on the registration page, would not, in any way, invalidate Will of the deceased. In support of his argument, Mr. Kapadia relied upon a decision of Karnataka High Court in the case of **Chinna Narasimhalu Vs Kurubara Basappa & Anr. (1982 SCC OnLine Kar. 276)** and submitted that the facts in that case were almost identical to the facts of the present case and here also the Court took the same view that was

canvassed by him.

5 Mr. Kapadia also relied upon a decision of a Division Bench of this Court in the case of **Vishnu Ramkrishna and Ors Vs. Nathu Vithal and Ors. (1948 SCC OnLine Bom 97)** and submitted that while dealing with a matter concerning a Will, the Court must approach the problem as a Court of Conscience. It is for the Court to be satisfied whether the document put forward is the last Will and Testament of the deceased. If the Court finds that the wishes of the testatrix are likely to be defeated or thwarted merely by reason of some technicality, I, as a Court of Conscience should not permit such things to happen. He submitted that the mere fact that the propounder of the Will was negligent or even grossly negligent in not complying with the requirements of Section 63 of the Act and proving the Will as they ought to have, the same should not deter the Court from calling for the necessary evidence in order to satisfy itself whether the Will was duly executed or not. He submitted that in the present case, the evidence given by the two attesting witnesses clearly satisfy this test, and therefore, the Testamentary Department be directed to accept these affidavits and thereafter process the petition for

grant of probate.

6 I have heard Mr. Kapadia at some length and have perused the papers and proceedings in the present petition. I have carefully gone through the affidavits of the attesting witnesses, namely, Mahendra Jattani and Mrs. Bhavna Jattani, both dated 4th January, 2021. On perusing these affidavits, it is quite clear that both these deponents were very much present at the time when the Will was executed by the deceased. In fact, the said Will is registered and their signatures appear on the registration page along with their photographs as witnesses, which forms part of the last Will and Testament of the deceased. I am in full agreement with Mr. Kapadia that merely because the attesting witnesses have not signed on the Will itself, and therefore, to hold that the Will is invalid, is a hyper-technical approach. From these affidavits it is quite clear that the said two deponents, namely, Mr. Mahendra Jattani and Mrs. Bhavani Jattani are the attesting witnesses. They have categorically stated that they have seen the deceased execute the Will dated 11.11.2008 in front of them and they have also signed on the registration page when the Will was presented for registration.

This being the case, I do not think that the objections taken by the Testamentary Department on this score is well founded.

7 In this regard, I find that the reliance placed by Mr. Kapadia on the judgment of the Division Bench of this Court in the case of Vishnu Ramkrishna (supra) is apposite and would squarely apply to the facts and circumstances of the present case. Paragraph 15 of this decision reads thus :-

> "*15. The next question that we have to consider is what order we should make in view of this finding of ours. Mr. Dharap strenuously argues that the duty of propounding the will was on the defendants. Although all the attesting witnesses were available to them they chose only to call one and they should not be given an opportunity to make up the lacuna in the record by leading further evidence. We are dealing with the case of a will and we must approach the problem as a Court of Conscience. It is for us to be satisfied whether the document put forward is the last will and testament of Gangabai. If we find that the wishes of the testatrix are likely to be defeated or thwarted merely by reason of want of some technicality, we as a Court of Conscience would not permit such a thing to happen. We have not beard Mr. Dharap on the other point; but assuming that Gangabai had a sound and disposing mind and that she wanted to dispose of her property as she in fact has done, the mere fact that the propounders of the will were negligent and grossly negligent- in not complying with the requirements of S. 63 and proving the will as they ought to have, should not deter us from calling for the necessary evidence in order to satisfy ourselves whether the will was duly executed or not. In this case, there is an*

additional consideration why we should exercise our powers under O.41, R.27. One of the legatees, as we have pointed out earlier, under the will is charity, and if the will is held not be proved, charity would be defeated. Therefore, this is clearly a case where the Court would require additional evidence which is available in order to satisfy itself and satisfy its conscience whether in fact the will was duly executed or not. We, therefore, reverse the finding of the learned Judge as to the due execution of the will and send back this case for the learned Judge to give a proper finding after considering not only the evidence already led and which forms part of the record, but also considering such other evidence as the defendants may lead on the question of the due execution of the will. Such evidence must be confined to the three attesting witnesses who are available and have so far not been called. Under certain eventualities it may be open to the defendants to call evidence beyond these three attesting witnesses. As pointed out in "Mortimer on Probate" (P.268):

> *"If an attesting witness called by a party propounding the will gives evidence against the will, such party may cross-examine him, and may call evidence to disprove such of the facts stated by the witness as are material to the issue, and to prove that he has made statements inconsistent with his evidence, although he denies having made such statements, and is not a hostile but merely an adverse witness; for such a witness is not the witness of either party, but of the Court."*

(Emphasis Supplied)

8 From this decision, it is quite clear that when the Court is dealing with a Will, the Court must approach it as a Court of Conscience. It is for the Court to be satisfied that the document put forward is the last Will and Testament of the deceased and if the

Court finds that the wishes of the deceased are likely to be defeated or thwarted merely by reason of some technicality, this Court, as a Court of Conscience, would not permit such things to happen. In the facts of the present case also, I find that the objection taken is a highly technical one considering that the attesting witnesses have filed their affidavits stating that they were very much present at the time when the deceased executed the Will in the office of the Joint Sub-Registrar on 11th November, 2008 and have even signed as witnesses on the registration page. I therefore find that the objection taken by the Testamentary Department that the signatures of the attesting witnesses do not appear on the Will and hence is invalid, is a hyper-technical one. In these circumstances, the Testamentary Department is directed to take these affidavits into consideration for the purpose of processing the petition for the grant of probate and grant the same, if it is otherwise found in order.

9 This order shall be digitally signed by the Private Secretory /Personal Assistant of this Court. All concerned shall act on production by fax or e-mail of a digitally signed copy of this order.

(B.P. COLABAWALLA, J.)