**IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD**

**M.A. No.07 of 2012.**

Mrs. Geeta Narayana Shahani through
legal heir Raju Bhagwan Butaney ..... Appellant.

Vs.

Shyam Prem Shahani another ..... Respondents

Date of hearing 18.11.2021 and 24.12.2021.
Date of announcement: 10.01.2022.

Ms. Maryam advocate for the appellant.

Mr. Jawad Ahmed Qureshi advocate for respondents.

Mr. Naveed Musrat advocate for proposed intervener.

**JUDGMENT**

MUHAMMAD IQBAL KALHORO, J:- Appellant Mrs. Geeta Narayana Shahani filed a petition before learned 5th Addl. District Judge Hyderabad under Rule 342 of Sindh Civil Court Rules, Succession Act 1925 Chapter XVII and Bombay Regulation VIII of 1827 for grant of a letter for probate in respect of money, moveable/immoveable assets and property left by her deceased husband Narayana Kewal Ram Shahani, who expired on 30.11.2010 at Karachi, on account of his last Will and testament dated 17.07.2005 duly registered, whereby the deceased had purportedly bequeathed all his assets in favor of her being the sole executrix of his Will and in case of her death by same instrument in favour of Raju Bhagwan Butaney, her son. Along-with application description of property etc. was set-forth at annexure "A".

2. The application was allowed vide order dated 25.07.2011 and the letter of probate was ordered to be issued in favor of the appellant subject to furnishing a PR bond in the sum of Rs.190,000,000/-. However, later on, the appellant filed an application in the same proceedings seeking an amendment in the order dated 25.07.2011 on the ground that some other properties, needed to be included, were not cited in the original application.

This application was disposed of vide order dated 30.05.2012 and an addendum including all the properties not earlier mentioned in the probate letter was issued.

3. Subsequently, respondents filed an application under Section 263 of the Succession Act, 1925 seeking revocation of the probate in favor of appellant on the ground that they are legal heirs and owners of properties mentioned in the application for probate which the appellant deliberately did not disclose in her application and that on several properties dispute in respects of title of the testator between them and him was pending in civil litigation. This application was decided vide order dated 19.09.2012 whereby the earlier two orders passed on 25.07.2011 and 30.05.2012 in favor of appellant issuing probate in her favor have been recalled and the probate revoked.

4. Appellant has called into question the same order on the ground that learned trial Court has wrongly held that appellant was obliged to cite respondents as a party in the petition; has failed to appreciate that respondents being nephews of deceased are not his legal heirs and have no locus standi in the matter; has failed to appreciate the contents of Will setting out clearly that in case of death of the deceased, the appellant, his wife, would bequeath his properties, and in case of her death, her son Raju Bhagwan Butaney, who was adopted by him after marriage with appellant in the year 1985, will then be the sole executor of his Will; that interest of respondents in the property is adverse to the interest of deceased in the estate; a person who makes a claim independent of a Will or adverse to the testator and disputes his right to deal with the property has no locus standi to be objector to the probate proceedings within meaning of Section 263 of Succession Act, 1925; the court cannot enter into an enquiry and decide title of the parties; that non citation of respondents as party in the petition will not make probate liable to be revoked.

5. Learned counsel for the appellant has reiterated the aforesaid facts in her arguments and has relied upon the case law reported in AIR 1954 SC 280, 1955 AIR 566 (1955 SCR(2) 270), PLD 1970 Dacca 404 1993 SCC(2) 507, AIR 1991 Bom 148, 1990(3) BomCR 396, AIR 1954 SC 280, 2021 SCMR 391.

6. Learned counsel for respondents has besides making oral submissions submitted synopsis supporting the impugned order and relied upon the case law reported in A.I.R. 1959 PATNA 570 (V 46 C163), S B L R 2011 Sindh 1413, A.I.R., 1915 Calcutta 738(2), A.I.R 1959 PATNA 570(a), A.I.R. 1955 S.C. 566, 1989 MLD Karachi 3555, 1989 MLD Karachi 34, AIR 1969 Supreme Court 1147, PLD 1959 Dacca 474(b), PLD 1958 Lahore 33(c), A.I.R. 1926 Bombay 378, S. 89 of Succession Act, 1925, 1989 CLC 551, AIR Lahore High Court Page 532, AIR 1985 Patana 151(b) and 1921 23 BOMLR 482.

7. I have considered their submissions and perused the record including the case law cited at bar. As per record respondents filed application for revocation of probate on a number of grounds, *inter alia,* raising a claim over the bequeathed properties in the capacity of being legal heirs of testator who was their real uncle and had died issue less. But foremost among them is the ground of alleged fraud and misrepresentation involved in the Will. This ground has genesis in their claim that testator had never executed the Will, and he had never expressed anything about it in his life time. Neither the original Will has been produced in the court nor the attesting witness examined to verity its validity and genuineness, without which the probate could not have been granted. The Supreme Court of India in the citation reported as 1955 AIR 566, relied upon by leaned counsel for the appellate, has held that where the validity or genuineness of the will has not been challenged, it would serve no useful purpose to revoke the grant and to make the parties go through the mere formality of proving the will over again. This dictum basically conveys that where it is otherwise, and validity and genuineness of the will is under challenge, the grant can be revoked and the parties could be made to prove validity of the will first. In this case, as noted above, the validity of and genuineness of the will has been challenged.

8. Apparently, the properties left by testator are ancestral owned by forefathers of the testator and the respondents, and were not self-acquired by the former. The testator himself had got mutation of those properties in the record of rights in his name by probating the wills allegedly made in the years 1965 and 1976 respectively by the predecessor-in-interest who as stated above are forefathers of both the parties. It has been informed that respondents on gaining

knowledge about such mutation in favour of the testator challenged the same before relevant revenue authority, and which litigation is still pending between the parties. When his (testator) claim to be the sole surviving trustee of a private trust called Diwan Metharam Dharmada Trust created and settled by his grandfather Dayaram Gidumil in the year 1911 out of his ancestral properties and assets for charitable purpose, was questioned by the respondents in his life time claiming themselves to the trustees on the contrary, he filed a civil suit No.875 of 2005 against them seeking declaration of his title which is still pending and not decided in his favour.

9. Learned counsel for the appellate contended that properties involved in probate are different from the ones subject matter of the civil suit. But there is no proof vouching for her claim and be testament to this fact. The original will has not been produced and the Photostat copy available on record does not bear any mention of the properties. Along-with application for grant of probate a schedule of properties was attached and initially the grant in respect thereof was allowed. But after about one year another schedule of properties was filed and an amendment in the grant was sought. The fact whether the properties mentioned in both the schedules are ancestral and under litigation as alleged or were self-acquired by the testator has not been determined. Then on both the occasions i.e. original application and subsequent application seeking amendment in probate order, only the general public was made as respondent. And for service in a sindhy daily newspaper 'Ibrat' having a limited circulation the notice was published and on the basis thereof service was held good and probate was allowed. This whole process appears to be shabby not verifying the properties in the context as above on the one hand, and on the other not ensuring validity of service on the relevant parties.

10. Apart from such facts, in the arguments, learned counsel for respondents claimed, not denied by the other side, that the appellant after getting probate had started selling their ancestral properties and they came to know of the fact of probate only when she/he tried to sell the properties in their possession in regard to which the litigation was already pending. The proceedings for grant of probate are summary in nature; the court seized with such proceedings cannot go into intricate questions of facts and decide

the tittle of the parties. All the facts agitated by the parties in the proceedings filed for grant of probate cannot be determined being beyond the jurisdiction of the court holding such proceedings. And at the same time, such situation i.e. alleged sale of properties pending decision about tittle of the parties over the same cannot be countenanced. It will be highly inadvisable to let any party alter the status of the properties under dispute in ligation by alienating them and creating a third party interest thereon, as it will result into multiple ligation making the issue more complex to the detriment of the parties.

11. Learned counsel for appellant while relying upon a case reported in PLD 1970 Dacca 404 stated that where objector was claiming a paramount interest and challenging the title of the testator. He can in no sense be deemed to claim an interest in the estate of the deceased within meaning of section 263 of Succession Act. The probate court would not enter into a question of title and will be concerned with only proof of the will and if it was so proved the rightful claimant would obtain the grant. There is no cavil to the proposition that the court granting probate has to satisfy itself only to the extent of validity and genuineness of the will and testament and whether it has been validly executed in accordance with law plus whether at the time of such execution the testator had sound disposing mind. In this matter, however, the court while granting probate in favour of appellant vide two orders dated 25.07.2011 and 30.5.2012 conspicuously did not attend to these primary factors and by simply observing that there was no legal impediment for grant of probate granted the petition. Without asserting the basic questions of validity of the will and manner of its execution and the mental condition of the testator at the time of execution of the will, the trial court was not supposed to pass the said orders in a cursory manner and grant probate to the appellant. This approach definitely resulted in miscarriage of justice warranting interference on its own merits. And this opinion gets further strength from the fact that neither the original will was produced nor the attesting witness was examined in the proceedings. In such circumstances, the trial court ought to have attended to all aforesaid questions properly and extensively before making any decision in favour of the appellant.

12. Mrs. Geeta Shahani being widow of the testator had only limited interest in the estate left by him, called the widow's estate, lasting till her life time as per section 43 of Mulla Hindu Law, and after her death the estate of her late husband had to go to his next heirs called as reversioners, and not to her heirs. The testator in his civil suit 875/2005 in para no. 13 of the plaint has stated that he does not have a son of his own nor intends to introduce one from outside into the private trust established by his grandfather out of properties and assets of his forefathers which is continuing for a century. And in the list of prospective legal heirs to be joined as plaintiff in the event of his death has mentioned name of his wife Mrs. Geeta Shahani only. While the will, a copy of with is available at page 55 of the file, indicates that the testator had adopted him (Raju Bhagwan Butaney) in the year 1985. It is therefore surprising to note that the person who otherwise appointed him to be the sole executor of his will after death of his wife, has not even mentioned him to be his legal heir in the plaint firstly. And secondly he has clearly said in the plaint that he did not intend to introduce **any one** from outside into the matter has become the beneficiary of the assets left by him against his above express statement, *prima facie*, at the cost of interest of the respondents, apparently the reversioners.

13. Mrs. Geeta Shahani, wife of the testator, the sole executrix of the will, was the applicant in the proceedings for grant of probate filed on the basis of last will and testament of the testator. She has since died and her son from previous husband Raju Bhagwan Butaney has replaced her in the proceedings being her legal heir and claiming to be the sole executor of the will after her. He has otherwise no relation with the testator, whereas the respondents and the testator are sapinda i.e. have a common ancestor. As per para 4 of the will the testator has expressed that if his wife Geeta Shahani predeceased him (the testator), then only Raju Bhagwan Butaney, whom he had adopted his son in the year1985, would be the sole executor of the will. But here in the case, his wife did not predecease him (the testator) and he died before her. She being his widow had the limited interest in the estate left by him and had no authority to bequeath the same to her son as per section 43 of Mulla Hindu Law.

14. In such circumstances, and the discussion held herein above, the status of (appellant) Raju Bhagwan Butaney to be the sole executor of the will when his mother did not predecease the testator, the validity of the will and testament and whether it has been executed validly in accordance with law, are, *prima facie*, not without cloud, particularly when the will itself has been called into question by the respondents, and need to be determined in addition to the fall out of section 43 of Mulla Hindu Law in the facts and circumstance of the case.

13. Learned trial court while annulling the probate has attended to all material facts and circumstances of the case besides finding the earlier orders passed in favour of the appellant bad in terms of explanations (a) to (c) and illustrations (i) & (ii) of section 263 of the Succession Act, 1925. I see no reason in view of above discussion to interfere in the said findings. Resultantly, the appeal in hand is dismissed with no order as to cost along with all pending applications.

**JUDGE**