

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

SUIT NO. 39 OF 1989

Xavier Hillary Geoffrey Almeida
(Since deceased) & Greta Magdalena Almeida ...Plaintiff
Vs.
Rui F. Rodrigues and Ors. ...Defendants

**WITH
INTERIM APPLICATION (L) NO. 22506 OF 2023
IN
SUIT NO. 39 OF 1989
WITH
INTERIM APPLICATION NO. 584 OF 2021
IN
SUIT NO. 39 OF 1989
WITH
EXECUTION APPLICATION NO. 271 OF 2021
IN
SUIT NO. 39 OF 1989
WITH
NOTICE OF MOTION NO. 77 OF 2008
IN
SUIT NO. 39 OF 1989**

Mr. Piyush Raheja i/b. Mr. Dinesh P. Guchiya, for the Plaintiff.
Mr. Saeed Aktar with Mr. Rehan Ansari and Aqsa Kazi, for the
Defendant Nos.1 (a) to 1 (f).

**CORAM : MANISH PITALE, J.
DATE : 15 JANUARY 2024**

P.C.

INTERIM APPLICATION NO. 584 OF 2021

. By this application, the applicants are seeking amendment of the proceedings as per schedule annexed to the application. Apart from this, they are seeking an order of setting aside of abatement and condonation of delay.

2. As per proposed amendment, the applicants are seeking conversion of the original probate petition into a petition for grant of letters of administration with Will, deletion of the name of the original plaintiff and the names of the applicants to be shown as the plaintiffs. The applicants are also seeking amendment to the pleadings as specified in the schedule.

3. The learned counsel for the defendant Nos.1(a) to 1(f) has tendered an affidavit-in-reply and he submits that the said defendants are opposing the prayers made in the present application.

4. The probate petition was originally filed by the two executors who were also beneficiaries under the subject Will and they were parents of the applicants. It is undisputed that the father of the applicants i.e. plaintiff No.1 expired and in that light, the proceedings were pursued by only their mother i.e.

plaintiff No.2.

5. During the pendency of the proceedings, which reached the stage of final hearing, on 21/5/2020, the mother of the applicants i.e. the surviving plaintiff also expired. As she was one of the executors and pursuing the probate proceedings, since she expired, the applicants have moved the present application seeking amendment, particularly for conversion of the probate proceedings into a petition for grant of letters of administration with Will annexed.

6. In support of the prayers made in the present application, the learned counsel appearing for the applicants has invited attention of this Court to Sections 104, 232 and 233 of the Indian Succession Act, 1925 (hereinafter referred to as Succession Act.). He submits that on a conjoint reading of the aforesaid provisions, it is abundantly clear that the applicants are entitled to pursue the proceedings upon being permitted to convert the same into proceedings for grant of letters of administration with Will annexed. It is submitted that the applicants are entitled to prove the Will in accordance with law and that therefore, the present application deserves to be allowed.

7. The learned counsel for the applicants has placed reliance on judgment of the Supreme Court in the case of *Vatsala*

*Srinivasan Vs. Shyamala Raghunathan*¹ and judgment of the Division Bench of this Court in the case of *Haresh Chetan Thadani Vs. Komal Suresh Chainani and Ors.*². While relying upon the said judgment in the case of *Haresh Chetan Thadani Vs. Komal Suresh Chainani and Ors. (supra)*, the learned counsel for the applicants has specifically invited attention of this Court to the observation made therein that attention of the Division Bench of this Court in the case of *Thirty Sam Shroff Vs. Shiraz Byramji Anklesaria*³ was not invited to an earlier judgment of the Supreme court in the case of *Shambhu Prasad Agarwal Vs. Bhola Ram Agarwal*⁴. In the said judgment of the Supreme Court, it was held that in a case where a party was entitled to file a petition for grant of letters of administration, a petition for probate ought not to be dismissed on any technical ground. This aspect was highlighted, for the reason that the defendants in the present case are seeking to rely upon the said judgment of the Division Bench of this Court in the case of *Thirty Sam Shroff Vs. Shiraz Byramji Anklesaria (supra)* while opposing the prayer in the present application. On this basis, it is submitted that the application deserves to be allowed.

8. On the other hand, learned counsel appearing for the defendants relied upon the contents of the aforesaid reply

1(2016) 13 SCC 253

2.2015 SCC Online Bom. 868

3 AIR 2007 Bom 103

4(2000) 9 SCC 714

affidavit, which is taken on record. He submits that in the present case, the judgment of the Supreme Court on which the applicants are seeking to place reliance only indicates that the position of law accrues to the benefit of legatees and not persons who claim to be representatives. It is submitted that in the present case, both the executors have expired and hence, there is no question of any surviving proceedings for the applicants to approach this Court, as the suit arising from the probate petition cannot be treated as a general suit under the provisions of Code of Civil Procedure, 1908 (CPC). Reliance is specifically placed on Division Bench judgment of this Court in the case of *Thirty Sam Shroff Vs. Shiraz Byramji Anklesaria (supra)*. This Court has considered the rival submissions in the backdrop of the aforementioned provisions of the Succession Act and the judgments brought to the notice of this Court.

9. Section 104 of the Succession Act makes it clear that the legatee has a vested interest from the day of the death of the testator. It is further specified that if the legatee dies without receiving vested interest of the legacy, it shall pass to his representatives. The aforesaid provision read with Section 232 and 233 of the Succession Act, indicates that there is substance in the contentions raised on behalf of the applicants.

10. Section 232 of the Succession Act, inter alia, provides that when the deceased has appointed an executor and the executor dies before the Will is proved, a residuary legatee can be admitted to prove the Will and letters of administration with the Will annexed can be granted to him of the whole estate, or of so much thereof as may be unadministered. Section 233 of the Succession Act, further provides that when a residuary legatee having beneficial interest survives the testator, but dies before the estate has been fully administered, his representatives have the same right to administration with the Will annexed as such residuary legatee.

11. A conjoint reading of Sections 104, 232 and 233 of the Succession Act, would abundantly make it clear that the prayers made on behalf of the applicants herein can be favourably considered. The aforesaid position is further supported by the judgment of the Supreme Court in the case of *Vatsala Srinivasan Vs. Shyamala Raghunathan (supra)*, wherein the Supreme Court referred to three judgments of the Madras High Court, Karnataka High Court and the Gujarat High Court to affirm the position of law as is being canvassed on behalf of the applicants before this Court.

12. There is no substance in the contention raised on behalf of the defendants that the said position of law may accrue to the

benefit of the legatees and not applicants, who claim to be only representatives. This Court is of the opinion that reading Sections 232 and 233 of the Succession Act, together gives a complete answer to the objection raised on behalf of the defendants. In fact, the Supreme Court in the aforesaid judgment, categorically held that the essence of proceedings in both the probate proceedings and proceedings for letters of administration is the same and it relates to genuineness and authenticity of the Will. Reliance placed on judgment of the Division Bench of this Court in the case of *Thirty Sam Shroff Vs. Shiraz Byramji Anklesaria (supra)* on the part of the defendants is misplaced for the reason that the said position of law is no longer good law in the light of aforementioned judgments of the Supreme Court. Apart from this, in the aforesaid judgment of the Division Bench of this Court in the case of *Haresh Chetan Thadani Vs. Komal Suresh Chainani and Ors. (supra)*, it was specifically observed that the observations made in the judgment of the Division Bench in the case of *Thirty Sam Shroff Vs. Shiraz Byramji Anklesaria (supra)* were in ignorance of an earlier judgment of the Supreme Court in the case of *Shambhu Prasad Agarwal Vs. Bhola Ram Agarwal (supra)*, wherein it was held that where a party is entitled to file a petition for letters of administration, petition for probate should not be dismissed only on highly technical ground.

13. In view of the above, this Court is convinced that the prayers made in the present petition can be granted. The material on record shows that the surviving plaintiff died during the Covid 19 Pandemic and therefore, the delay in moving the present application can be condoned. In view of the above, the application is allowed in terms of prayer clauses (a), (b) and (c). Amendment be carried out within three weeks from today.

INTERIM APPLICATION (L) NO. 22506 OF 2023

. This is an application seeking to bring on record legal representatives of defendant No.2 who expired on 12/9/2022.

2. The learned counsel for the applicants submits that the packets sent for service of notice on the proposed legal representatives of defendant No.2 have returned back. Let the affidavit alongwith relevant documents be placed on record in that regard. In that light, learned counsel for the applicants seeks permission to serve the proposed legal representatives of the defendant No.2 by substituted service through publication.

3. In the interest of justice, the aforesaid prayer made on behalf of the applicants is granted. The proposed legal representatives of the defendant No.2 be served by way of substituted service through publication. The notice be published

in the English daily (Free Press Journal) having wide circulation in Mumbai. The returnable date on the notice shall be shown as 16/2/2024. The applicants shall place on record an affidavit alongwith proof of publication within three weeks from today.

4. List the application for further consideration on 16/2/2024.

MANISH PITALE, J.