

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 16538 of 2017****FOR APPROVAL AND SIGNATURE:****HONOURABLE DR. JUSTICE ASHOKKUMAR C. JOSHI**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

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MAHENDRA HARILAL PAREKH & 1 other(s)

Versus

MEENABEN HIRENBHAI PAREKH

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Appearance:

MR PREMAL S RACHH(3297) for the Petitioner(s) No. 1,2

MR DHAVAL D VYAS(3225) for the Respondent(s) No. 1

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CORAM: HONOURABLE DR. JUSTICE ASHOKKUMAR C. JOSHI**Date : 16/03/2022****ORAL JUDGMENT**

1. The petitioners - original applicants have preferred this petition under Article 227 of the Constitution of India being aggrieved and dissatisfied with the order dated 13.07.2017 passed by the learned 13th Additional Senior Civil Judge, Rajkot in an application Exh. 13 filed under Order 6 Rule 17 of the Code of Civil Procedure, 1908 for amendment in Misc. Civil Application

No. 15 of 2015, which came to be rejected by the learned trial Judge.

2. The facts of the case in nutshell are that the petitioners are the original applicants and the respondent is the original objector in Civil Misc. Application No. 15 of 2015 filed by the petitioners. The deceased mother of the petitioners was the owner of certain movable and immovable properties, who had executed a Will dated 15.01.2013 in favour of the petitioners. After the death of the mother, the petitioners become the absolute owners of the properties. The petitioners, therefore, preferred the aforesaid application before the learned 13th Additional Senior Civil Judge, Rajkot for obtaining the Probate of the Will, wherein the learned trial Judge issued public notice inviting objections against the said application. The respondent filed objection, Exh. 8, against issuance of Probate in favour of the petitioners. It is further the case of the petitioners that they being beneficiaries, are required to apply for issuance of letter of administration instead of Probate and as soon as they came to know about their *bona fide* mistake, they preferred the application in question, at Exh. 13 under O.6 R.17 CPC on 14.06.2016 seeking amendment of Probate application, whereby, it was prayed to replace the word "Probate" by "Letter of Administration". The said application came to be rejected by the impugned order and hence this petition.

3. Heard, learned advocate Mr. Premal Rachh for the petitioners and learned advocate Mr. Dhaval D. Vyas for the respondent.

3.1 The learned advocate for the petitioners submitted that the order passed by the learned trial Judge rejecting the application Exh. 13 is unjust, contrary to the provisions of law, without

considering the evidence on records, unreasonable as also against the law laid down by the Apex Court in ***Shambhu Prasad Agarwal & Ors. v. Bhola Ram Agarwal, (2009) 9 SCC 714***. He submitted that the learned trial Judge has failed to take into consideration the ratio laid down in ***Shambhu Prasad Agarwal & Ors. (supra)*** in its proper perspective. He submitted that the learned trial Judge, while deciding the application for amendment, has rejected the same on highly technical ground.

3.2 The learned advocate for the petitioners further submitted that the petitioners have invoked the jurisdiction of this Court under Article 227 of the Constitution of India on the ground that the learned Civil Judge has erred in observing that the petitioners have mainly sought the amendment of replacing the word as “Letter of Administration with the copy of Will” instead of “Probate” and that too, only for filling up the lacuna of the probate application. He further submitted that the learned trial Judge has wrongly come to the conclusion that if the amendment, as sought for is granted, the very nature of the suit will be changed. The learned advocate for the petitioners submitted that by no stretch of imagination it can be said that such amendment would change the nature of the suit. It is submitted that the learned trial Judge has failed to appreciate the fact that the amendment of the Probate application, sought by the petitioners, is within the objects and scope of provisions of O.6 R.17 of the CPC, which deals with amendment of pleadings. He submitted that as per the settled legal position, any amendment, which are necessary for determining the real question in controversy between the parties, are required to be allowed and in the facts and circumstances of the present case, it becomes amply clear that the amendment, as sought for, is necessary to determine the real issue in question. It is also submitted by the

learned advocate for the petitioners that by amending the application as prayed for, no prejudice and/or any injustice and/or loss would be caused to the respondent.

3.3 Making such submissions, it is urged that this petition may be allowed and the amendment, as prayed for may be granted.

3.4 In support, the learned advocate for the petitioners has relied upon certain decisions. Relying on a decision of the Apex Court in **Shambhu Prasad Agarwal & Ors. v. Bhola Ram Agarwal - (2000) 9 SCC 714**, more particularly, paragraphs 5 and 6 thereof, he submitted that conversion of application of Probate into grant of Letter of Administration with copy of Will is permissible by way of amendment application under O.6 R.17 CPC. Further, citing the decision of the Division Bench of the Madras High Court in **Govind M. Asrani v. Jairam Asrani and Another, AIR 1963 (Madras) 456**, more particularly paragraphs 12, 13 and 14, he submitted that the learned trial Judge ought to have considered the fact that the proceedings taken out either for the grant of Probate or Letter of Administration with the Will annexed, are in the interest of the legatees and the question involved in such proceedings will be the same as also the object of Sections 222 and 232 of the Indian Succession Act are the same in nature. It is submitted that in paragraph 12 of the said decision, it has been observed that, *"where an executor applies for the issue of probate and also where a legatee or other person applies to the Court for the grant of letters of administration with the will annexed, the question to be decided will be the same, namely, whether the will is true, whether it was executed in accordance with law, there being the capacity in the testator to make the Will and no fraud or other infirmity attending the execution of the document. It is also a*

well accepted rule that whether it be an executor or administrator, the right or interest possessed by him in the properties of the testator is the same. Both have to administer them in accordance with the directions contained in the Will".

The learned advocate for the petitioners further referred to the decision of the Bombay High Court in **Smt. Vatsala Srinivasan Hindu, Inhabitant v. Narisimha Raghunathan since deceased and Smt. Shyamala Raghunathan Hindu, (2011) AIR (Bombay) 76** and submitted that in paragraph 18 of the said decision, the Court has taken the same view as taken by the Madras High Court in **Govind M. Asrani (supra)**.

4. *Per contra*, the learned advocate for the respondent has heavily resisted this petition and submitted that the reasons recorded by the learned trial Judge are absolutely correct and this Court may not interfere with the same in the petition filed by the petitioners under article 227 of the Constitution of India and the petition deserves no consideration and it is requested to be dismissed.

5. Regard being had to the submissions canvassed and having considering the impugned order dated 13.07.2017 so also, considering the material placed on record, as the facts go, the deceased, who was the mother of the petitioners, made a Will dated 15.01.20013 in favour of the petitioners herein for the movable and immovable properties belonged to her. The deceased died on 19.05.2013 and subsequently, the petitioners filed the Misc. Civil Application No. 15 of 2015 before the learned civil Court concerned at Rajkot for issuance of Probate. In the said application, the petitioners, by an application Exh. 13, sought amendment under O.6 R.17 CPC, to substitute the word "Probate" by "Letter of Administration with the copy of Will". The

said application came to be rejected by the learned trial Judge by the impugned order dated 13.07.2017 and hence, the grieved petitioners are before this Court.

5.1 In the said backdrop, if the provisions of Probate and Letter of Administration are referred to under the Indian Succession Act, 1925 (*herein after referred to as "the Act"*) the same are as under:

"222. Probate only to appointed executor. - (1) *Probate shall be granted only to an executor appointed by the Will.*

(2) The appointment may be expressed or by necessary implication.

232. Grant of administration of universal or residuary legatees. - When -

(a) the deceased has made a Will, but has not appointed an executor, or

(b) the deceased has appointed an executor who is legally incapable or refused to act, or who has died before the testator or before he has proved the Will, or

(c) the executor dies after having proved the will, but before he has administered all the estate of the deceased,

a universal or a residuary legatee may be admitted to prove the Will, and letters of administration with the Will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered."

5.2 Thus, from a bare reading of the aforesaid provisions, it is abundantly clear that by virtue of Section 222, Probate shall be granted only to an executor appointed by the Will and if the deceased has made a Will, but has not appointed an executor, letter of administration can be granted by virtue of Section 232(a) of the Act. Indisputably, in the case on hand the petitioners are

the executors of the Will and therefore, they are entitled to Probate as referred to herein above.

5.3 Much emphasis have been laid by the learned advocate for the petitioners on a decision of the Apex Court in ***Shambhu Prasad Agarwal & Ors. (supra)***. There cannot be any dispute as to the ratio laid down in the same, however, in the facts and circumstances of the case on hand, the same is not applicable, inasmuch as, in the case before the Apex Court, the executor had died and his heirs (the appellants therein), the legatees, had requested for substitution from “Probate” to the “Letter of Administration”, which came to be granted, whereas, in the case on hand, it is the executors who have urged so and hence, the said decision would be of no avail to the petitioners.

5.4 So far as the decisions in ***Govind M. Asrani and in Smt. Vatsala Srinivasan Hindu, Inhabitant (supra)***, are concerned, it has been observed by the Court (*Govind M. Asrani*) that *where an executor applies for the issue of probate and also where a legatee or other person applies to the Court for the grant of letters of administration with the will annexed, the question to be decided will be the same, namely, whether the will is true, whether it was executed in accordance with law, there being the capacity in the testator to make the Will and no fraud or other infirmity attending the execution of the document*. The question in the case on hand is not related to proving of the same and the procedure thereto, but the question which goes to the root is, as to for what the petitioners are entitled for in accordance with their status in the Will. As said earlier, the petitioners are the executors and hence, as per the provisions of the Act, they are entitled to Probate and hence, the aforesaid decisions also, would be of no help to the petitioners.

6. Thus, the learned trial Judge appears to have committed no error, much less an error apparent on the face of it, which requires interference at the hands of this Court under Article 227 of the Constitution of India.

7. In the backdrop as aforesaid, the petition fails and is dismissed accordingly. The impugned order dated 13.07.2017 passed by the learned 13th Additional Senior Civil Judge, Rajkot in application Exh. 13 filed under Order 6 Rule 17 of the Code of Civil Procedure, 1908 for amendment in Misc. Civil Application No. 15 of 2015 is confirmed. Rule is discharged. No order as to costs. Interim relief, if any, granted earlier, shall stand vacated forthwith.

[A. C. Joshi, J.]

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