

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL (LODGING) NO. 486 OF 2015
IN
NOTICE OF MOTION NO. 64 OF 2014
IN
TESTAMENTARY SUIT NO. 15 OF 2007
IN
TESTAMENTARY PETITION NO. 888 OF 2006
WITH
NOTICE OF MOTION (LODGING) NO. 1522 OF 2015
IN
APPEAL (LODGING) NO. 486 OF 2015**

1. Reena Sanjay Minz,
aged about 51 years, Indian Inhabitant,
presently at 602, Arihant Building CHS Ltd.,
Yeshwant Nagar, Vakola,
Santacruz (East), Mumbai – 400 055

2. Siraj Mohammed Yusuf,
aged about 49 years, Indian Inhabitant,
presently at 54, Sagar Tarang,
Bhulabhai Desai Road,
Mumbai – 400 026

...Appellants/Applicants

Versus

Jigna Jay Kantawala,
adult, aged about 36 years,
Indian Inhabitant, residing at
1501/1502, D-Wing, Ashoka Garden,
Tokersi Jivraj Road, Sewri,
Mumbai – 400 015

...Respondent

Mr. Bhavesh Parmar I/b Mr. Vijay Prakash Yadav for the Appellants/Applicants

Mr. Vivek Kantawala with Mr. Amey Patil I/b M/s. Vivek Kantawala & Co. for
the Respondent

CORAM : V. M. KANADE &
DR.SHALINI PHANSALKAR-JOSHI, JJ.
MONDAY, 23rd NOVEMBER, 2015

ORDER (Per V. M. Kanade, J.) :

1. The appellants are aggrieved by an order passed by the learned Single Judge dated 9th June, 2015. By the said order, the learned Single Judge was pleased to recall order dated 3rd April, 2013 after condoning the delay caused in filing the Notice of Motion by the respondent and directed that the name of the respondent may also be shown as a joint executor of the Will dated 28th June, 2004.

2. Brief facts are that one Nitinkumar Madhavji Rangwala executed a Will dated 28th June, 2004 in which four persons were shown as executors. The respondent Jigna Jay Kantawala was one of the four executors. The appellants were other executors of the Will. There is a chequered history to this litigation. Initially, a probate petition was filed by the appellants including the name of the respondent herein. However, his name was deleted. After order dated 21st June, 2012 was passed, it was directed that the notice be issued to the respondent herein. A notice was

served with a citation and she was called upon either to accept or to renounce executorship. The respondent did respond to the said notice. It was contended, however, that since the reply was not in appropriate/proper form, it amounted to renunciation of executorship. The Court, therefore, directed that the respondent should appear in Court personally or through a lawyer. Accordingly, the respondent appeared in the Court on 26th November, 2012. She made a statement before the Court that she accepted the executorship. A direction was given by the Court directing the appellants herein to join her as co-petitioner to administer the estate jointly with the petitioners/appellants herein. However, apparently, the appellants herein who were the petitioners in the probate petition did not take any steps to add her as a petitioner.

3. Again on the next date, i.e. on 3rd December, 2012, the respondent was present in the Court. As she had not verified the petition, she was directed not to act as an executrix. The order of 10th January, 2013, in para 5, *interalia*, records that :

“5. The petitioners shall amend the probate petition with all necessary amendments accordingly.

Both the aforesaid executors shall re-verify the probate petition. The petition shall proceed for the grant of the probate to all the 4 executors.”

4. According to the respondent, since the appellants were the petitioners, it was their duty to take steps to re-amend the petition and therefore delay in re-verification was caused by the appellants herein.

5. The learned Single Judge, however, by her order dated 3rd April, 2013 held that since the direction given on 10th January, 2013 has not been complied, the petition was directed to be proceeded with, without respondent being added as co-petitioner. The learned Single Judge therefore was pleased to allow the Notice of Motion taken out by the respondent and directed that the name of the respondent be added as a joint executor of the Will.

6. Shri Parmar, learned Counsel appearing on behalf of the appellants submitted that the learned Single Judge could not have set-aside the order passed by the learned Single Judge dated 3rd April, 2013 since it amounted to review of the said order. It is submitted that the remedy which

was available to the respondent was either to file a review petition seeking review of the order dated 3rd April, 2013 or file a Letters Patent Appeal. It is submitted that on this count alone, the order passed by the learned Single Judge is liable to be set aside. He has relied on the judgments in the cases of *Cine Exhibition Private Ltd. v. Collector, District Gwalior & Ors.*¹; *Monnet Ispat & Energy Ltd. v. Jan Chetna & Ors.*²; *State of Panjab v. Darshan Singh*³; *Dwaraka Das v. State of M.P. & Anr.*⁴ and *Vikramjit Singh v. State of Madhya Pradesh*⁵.

7. The learned Counsel appearing on behalf of the respondent on the other hand has filed compilation of the orders passed by the Single Judge from time to time. He submitted that the appellants being the petitioners, alone could have added the respondent as a co-petitioner as directed by the Court. The delay was caused by the appellants and not by the respondent. He has invited our attention to all the orders that have been passed by the learned Single Judge in the said petition from time to time.

1 (2013) 2 SCC 698

2 (2013) 10 SCC 574

3 AIR 2003 SC 4179

4 (1993) 3 SCC 500

5 1992 Supp (3) SCC 62

8. In our view, submission made by the learned Counsel for the appellants is without any substance. The learned Single Judge after having directed the appellants herein to add the respondent as co-petitioner, could not have recalled the order. It is not in dispute that the respondent is one of the four executors named in the Will. Admittedly, she has not renounced her executorship. She has remained present in the Court from time to time. The contention of the appellants' Counsel that she is deemed to have renounced her executorship was rightly rejected by the learned Single Judge, since the record indicates that at no point of time, she had renounced her executorship. On the other hand, she has remained present whenever she was called upon by the Court and also has given reply to the citation, though not in appropriate form, that she wanted to continue to be the executor of the Will. The testator intended that the respondent should be one of the executors of the Will. It is obvious that the appellants did not want her name to be included as an executor. This is evident from the fact that initially though the appellants had added her as the petitioner in the petition, later on, they deleted her name. Thereafter, though the Court had directed the appellants to add the respondent as a co-petitioner, this direction was not followed. The appellants being the petitioners in probate

petition, have not carried out the amendment in the petition and without their consent, the respondent could not have on her own, amended the petition or re-verified the petition.

9. We are of the view that therefore no case is made out by the appellants for setting aside the order of the learned Single Judge. There cannot be any dispute regarding the ratio of the judgments on which reliance is placed by the Counsel for the appellants, however, in our opinion, the ratio of the said judgments will not apply to the facts of the present case. The contention of the appellants that the respondent could have filed appeal against the order dated 3rd April, 2013 or filed a review petition is without any substance. Since the respondent was not arrayed as a party petitioner in the main petition, she could not have filed an independent appeal and therefore, in our view, under these circumstances, she had no other option but to file a Notice of Motion.

10. The ratio of the Judgment, therefore, will not apply to the facts of the present case. Appeal, therefore, is dismissed. Interim order stands vacated.

11. In view of dismissal of the appeal, nothing survives for consideration in Notice of Motion (Lodging) No. 1522 of 2015. The same is accordingly disposed of.

DR. SHALINI PHANSALKAR-JOSHI, J.

V. M. KANADE, J.