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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
NOTICE OF MOTION NO. 157 OF 2014
IN
TESTAMENTARY SUIT NO. 75 OF 2014
IN
TESTAMENTARY PETITION NO. 109 OF 2012**

Dileep Balkrishna Nevatia	...Applicant
<i>In the matter between</i>	
Harish Brijmohan Loyalka & Anr.	...Plaintiffs
<i>Versus</i>	
Dileep Balkrishna Nevatia	...Defendant

Mr. Gaurav Joshi, Senior Advocate, with Ms. Dipti Panda, i/b
M/s. Pardiwala & Co., for the Plaintiffs.
Mr. Dileep Nevatia, Defendant in person.

CORAM: G.S. PATEL, J
DATED: 5th February 2015

ORAL JUDGMENT:

1. Mr. Nevatia, the Defendant is the Applicant in this Notice of Motion. He appears *pro se*. His Notice of Motion is, in my view, thoroughly misconceived. It seeks the dismissal of the suit. This is a contested testamentary suit for probate of a Will allegedly dated

17th June 2009 of the Defendant's mother, one Snehalata Nevatia ("Snehalata"). I use the word allegedly not because there is any as yet any factual or legal point in favour of Mr. Nevatia, but only because this matter is yet to reach final hearing and to be decided.

2. It is not in dispute that probate is sought not in respect of the original testamentary writing but a copy. That is the position as it obtains today. Mr. Nevatia points out that the Petition as originally filed did not make any reference to a copy of the will. The Petition said only that the Will had been handed in separately for being filed and kept in safe custody with the Prothonotary & Senior Master of this Court. The Petition was filed on 23rd September 2011. Several heirs were cited, including Mr. Nevatia. Before any of the citations were issued, by means of an affidavit or a praecipe dated 23rd April 2012, the probate Petitioners sought to amend the Petition. This amendment was allowed on 5th May 2012. Time was extended on 21st August 2012. The amendment was finally carried out on 24th August 2012.

3. The amendment was to correct the title and paragraph 3 of the Petition so that it was now a Petition for probate of a certified copy of the last Will of Snehalata Nevatia. Original paragraph 3 of the Petition was amended and it now said that a certified copy of the Will had been deposited in the Court. It also now included a new paragraph (b), which reads as follows:

"3(b). The Petitioners submit that the original Will referred to above is not traceable by the Petitioners. The Petitioners made full efforts to find the said Will but could not get the said Original Will. The Petitioners

further submit that the original Will is not destroyed and/or cancelled and further undertakes to this Hon'ble Court that they shall deposit the original Will as and when the same is found by them."

4. Mr. Nevatia's first submission is that this amendment could never have been allowed by an application by affidavit or praecipe. It had to be done by a Chamber Summons, and it matters not that at that time citations had not been served. This is a submission that needs to be stated to be rejected. For one thing, that order of amendment has attained finality. It was the amended Petition was served on the heirs cited, including Mr. Nevatia. He entered a Caveat and filed an affidavit in support. He has not till now opposed the petition on this ground. No appeal has been filed, nor has any application been made to recall that order. In any case, no such application is maintainable. It is altogether too technical a defence to have any substance whatsoever. Prior to service it was always open to the Petitioner to apply for an amendment. How and in what manner any amendment is to be allowed is always a discretion of a Court. Our rules of procedure are meant to aid justice, not to enslave it in chains.

5. Mr. Nevatia then submits that even in the amended Petition, there is no averment sufficient to comply with the provisions of Section 237 of the Indian Succession Act, 1925. That Section reads thus:

"237. Probate of copy or draft of lost Will. —
When a Will has been lost or mislaid since the
testator's death, or has been destroyed by wrong or accident and not by any act of the testator, and a copy

or the draft of the Will has been preserved, probate may be granted of such copy or draft, limited until the original or a properly authenticated copy of it is produced.”

6. From the portion emphasized above, it is clear that the Section applies to cases where a testamentary writing has been lost or mislaid since the testator’s demise. That is the first of the two possibilities contemplated in that Section. The second possibility (of destruction) admittedly has no application to this case. Mr. Nevatia’s submission is that there is no averment to say that the Will sought to be propounded has been lost or misplaced *since* Snehalata Nevatia’s death. This, he submits, is sufficient reason to dismiss the Petitioner at an interlocutory stage, and it matters not that the suit is today in the midst of a trial.

7. In support, Mr. Nevatia relies on the decision of a Division Bench of the Calcutta High Court in *Satya Charan Pal v Asutosh Pal*,¹ *Efari Dasya v Podei Dasya*² and an unreported decision of a learned Single Judge of this Court (V.C. Daga, J., as he then was) in *Gunvantrai S. Gupta v Gaurang Gunvantrai Gupta & Ors.*³ His submission is that absent the necessary averment, the petition must be dismissed summarily. Not one of these decisions is an authority for that proposition. Every one of them was at the conclusion of the trial, after evidence was taken. Mr. Nevatia states that this makes no difference and that no party should be asked to wait till the conclusion of the trial if the averment itself is missing. In the first

¹ AIR 1953 Calcutta 657

² AIR 1928 Calcutta 307

³ Testamentary Suit No. 48 of 1996 in Testamentary Petition No. 601 of 1996, decided on 22nd July 2008

place, as I have noted, none of these decisions say that as a matter of law a contested testamentary proceeding can be dismissed on a *prima facie* view taken at an interim stage, especially when the trial is ongoing. Secondly, and this I must say this since Mr. Nevatia insists, in my view the pleadings is more than sufficient. Sub-paragraph (b) of amended Paragraph 13 makes it clear in no uncertain terms that the loss or misplacing of Snehalata's Will was subsequent to her death. It is stated that the Will has not been destroyed or cancelled. The Petitioners did not and could not function as executors prior to Snehlata's death. Any statement of loss or misplacement of her Will by definition could, therefore, only be a statement that they could make after they became her executors, i.e., after her demise. No matter how strictly Mr. Nevatia want to read a statute, his fine-grained submissions must, I think, invariably yield to sound common sense. There is absolutely no other way to read paragraph 3(b) of the amended plaint. Any other interpretation would result in a rank absurdity and would amount to saying that the Petitioners, as executors, are seeking probate of a non-existent Will.

8. If there was any doubt about this situation, it is, I think, completely put to rest by the fact that the Will in question was a registered Will. Probate is not being sought of an ordinary photocopy of that Will (as was the case in the matter before Mr. Justice Daga). It is being sought in respect of a *certified* copy of a registered Will, which is a very different thing altogether. The source and provenance of the certified copy cannot be disputed.

9. The Petitioners have been careful to give an undertaking in the Petition itself that they will deposit the original Will if and when or as and when it is found. That is more than sufficient compliance with the requirements of Section 237 which says that the grant must be limited until the original or a properly authenticated copy of it is produced. In this case what produced is exactly such a properly authenticated copy.

10. Mr. Joshi, learned Senior Advocate for the Petitioners, point out that the Petition, as it is currently filed, does not necessarily fall under Section 237 but is properly brought under Section 276 of the Indian Succession Act, 1925. He relies on a decision of a learned Single Judge of the Delhi High Court in *Smt. Rajrani Sehgal v Dr. Parshottam Lal*.⁴ In paragraph 50 of that decision, Justice S. Duggal of the Delhi High Court dealt with what he called a technical objection that the original Will had not been filed with the Petition. He noted that, and this is important, the *evidence* showed that the original Will was not in Petitioner's possession, nor did he have access to it or even knowledge of the fact as to in whose possession it was. He did the next best thing, and applied for a certified copy to the Sub-Registrar's Office and produced that certified copy instead. Mr. Justice Duggal held that the Petition was misconceived and based on misreading of the provisions of law, and that an application for probate under Section 276 can be of the original Will or a certified copy from the Sub-Registrar's Office and these have to be treated on a par in view of the provisions of Section 62 of the Indian Succession Act, 1925. I am in most respectful agreement with the decision of Mr. Justice Duggal. I must also note that that

⁴ AIR 1992 Delhi 134

decision too came after the completion of evidence at the final hearing of the Suit. Mr. Joshi points out that this decision has been followed subsequently in *Bharat Bhushan Sisodia v State & Ors.*,⁵ and *Nand Lal v Vidya Devi & Ors.*⁶

11. There is a further obstacle in Mr. Nevatia's way. The petition is never a 'pleading' properly so-called. Indeed, and this is well settled, there is no *lis* in such a proceeding. The petitioner seeks no relief from the caveator/defendant. He only seeks an order *in rem*, which the defendant opposes. If Mr. Nevatia's plea is to be accepted, then it would necessarily mean that the petition would fail *even if not opposed by any person* as would, say, a suit for specific performance without the essential pleading as to readiness and willingness. Properly read, this petition makes it clear that, according to the Petitioners/Plaintiffs, Snehalata died leaving behind a will, one that was registered, but the original of which the Plaintiffs are now unable to trace, i.e., after she passed away. That is the necessary and inevitable import of the pleading, and I believe it is more than sufficient.

12. There is absolutely no substance to this Notice of Motion. It is only because Mr. Nevatia appears in person that I am not accompanying the dismissal of this Notice of Motion with an order of costs.

13. Whether this order being a final order on a Notice of Motion will or will not be determinative at the final hearing of the Suit on

⁵ AIR 2009 Delhi 21

⁶ 2009 (1) Shim L C 334

this question of law is for the Trial Court finally hearing the matter to decide. I express no view one way or the other. Mr. Nevatia's submission that this contention be kept open is expressly rejected especially since, before pronouncing this judgment in open Court, I gave him precisely this option of leaving this contention open to the final hearing on his withdrawing the Notice of Motion. He chose not to exercise that option.

14. The Notice of Motion is dismissed with no order as to costs.

(G. S. PATEL, J.)