

Shephali

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
NOTICE OF MOTION NO.60 OF 2016
IN
CHAMBER SUMMONS NO.64 OF 2015
IN
TESTAMENTARY SUIT NO.100 OF 1998
IN
TESTAMENTARY PETITION NO.861 OF 1998**

Smt. Jyoti Nitin Thakkar	...Petitioner
<i>Versus</i>	
Mr. Pravinchandra Tamji Thakkar	...Defendant

Mr. Raj Patel, *with S.Y. Mulani and Dileep Satale i/b. M/s. Mulani & Co. for the Applicant.*
Mr. R.R. Varma, *with S.K. Chaurasia for the original Applicants.*

CORAM: G.S. PATEL, J
DATED: 7th April 2016

PC:-

1. The Notice of Motion seeks that my order 23rd June 2015 be vacated and set aside. Prayer (a) of this Motion is unacceptable in the way in which it is framed. It seeks effectively a declaration that my order is:

"ab initio void, non est, vitiated by the Applicants fraud."

This is not how prayers in this Court are to be worded in relation to any order of this Court, irrespective of who the Judge is. I could understand if the prayer was that the order ought to be recalled or vacated on account of a demonstration of some wrongdoing by the Applicant. But to say that it is "ab initio void, nonest" etc is unacceptably and grossly improper. It is also plainly wrong in law.

2. Be that as it may, on merits there is absolutely no case made out. I will assume for the moment that the Original Applicant, Kirit Thakkar (to avoid confusion, hereafter simply "Kirit") was aware of previous dismissals of the Testamentary Suit filed by the Original Plaintiff ("Jyoti"). That would make no difference. I have set out the reasons in my order of 23rd June 2015. It may be necessary to explain these briefly again since Mr. Patel appearing for Jyoti has, despite taking time to confer with his client, being told to press this Notice of Motion.

3. One Manikbhai Ramji Thakkar died on 26th September 1997. Jyoti, the Plaintiff in the Suit, and Kirit the Original Applicant were two of his children. There was also another son Pravinchandra.

4. Manikbhai supposedly left a Will dated 12th January 1997. Jyoti was named as an executor of the Will. She was also one of the heirs and a legatee. Kirit was another legatee. Jyoti filed a probate Petition No.861 of 1998 seeking probate to Manikbhai's Will. The other brother Praveenchandra entered a Caveat. Jyoti's Petition was renumbered as Suit No.100 of 1998. Kirit remained outside this. He

says he was never served with a citation although he is an heir, was required to be cited and was a named legatee.

5. On 8th December 2009, Jyoti's Suit was dismissed for default. The order was corrected on 19th January 2010. Jyoti was given liberty to file and move an appropriate application for restoration of her dismissed suit. She never did. Consequently the order of dismissal of the Testamentary Suit No.100 of 1998 stood. Along with the suit, the original Testamentary Petition No.861 of 1998 also stood dismissed.

6. Now Kirit filed Chamber Summons No.64 of 2015 seeking leave to restore *Jyoti's* Suit and Petition and to recall the order of dismissal for default of 8th December 2009. He said that he wanted, as a beneficiary and legatee, to propound that very Will of Manikbhai of which Jyoti herself had sought probate. He said he would seek substitution as a Plaintiff and conversion of the Suit into one for Letters of Administration with Will annexed.

7. In all this, I could understand Praveen, the original Defendant, opposing an application by either Jyoti or Kirit, or both. But there was never a question of either Jyoti or Kirit opposing each other. Both sought the same thing. Both sought to prove the same Will; Jyoti in her original Testamentary Petition for probate and Kirit in this application seeking substitution and conversion of that Petition to an action for Letters of Administration with Will annexed. Neither can possibly oppose proof of the Will. Both have accepted it and sought that it be proved in its solemn form.

8. On 23rd June 2015 I allowed Kirit's Chamber Summons. I set aside the order of 8th December 2009. I restored Jyoti's Testamentary Suit and Petition. Kirit has filed another Chamber Summons for substitution and amendment. This is pending.

9. Now Jyoti has filed what I can only described as a thoroughly misconceived Notice of Motion seeking that my order of 23rd June 2015 be set aside and that the order of dismissal of her own Petition for default be restored. In other words Jyoti now files a Notice of Motion seeking the reinstatement of an order dismissing her own Petition. I do understand that we live in strange and disturbing times but this borders on the utterly bizarre. I have yet to hear of a litigant coming to Court and filing a Motion seeking a dismissal of her own Petition or the reinstatement of an order that dismissed that Petition and was set aside. I actually asked Mr. Patel if he wished to withdraw the Petition itself. I would have probably had to allow that because it is, after all, still Jyoti's suit; she is even today the Plaintiff/Petitioner; and Kirit is yet to be substituted as Plaintiff and the suit is yet to be allowed to be amended to one for Letters of Administration with Will Annexed. Mr. Patel sought instructions. The ones he apparently received were to press this Notice of Motion. I can think of no reason at all to allow such a Notice of Motion.

10. Mr. Patel has done what he could, given the limitations, but even his considerable forensic skills cannot possibly answer the answerable.

11. The Notice of Motion is dismissed. There will be no order as to costs.

(G. S. PATEL, J.)