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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY & INTESTATE JURISDICTION
MISCELLANEOUS PETITION NO. 75 OF 2015
IN
TESTAMENTARY PETITION NO. 310 OF 2012**

Mohamed Obedulla Chinoy & 4 Others	...Petitioners
<i>Versus</i>	
Yunus Kasam Namakwala	...Respondent

Mr. D.J. Khambata, Senior Advocate, with Ms. Ankita Singhania,
i/b M/s. Bachubhai Munim & Co., for the Petitioner.
None for the Respondent.

CORAM: G.S. PATEL, J
DATED: 28th July 2016

PC:-

1. The Respondent (“**Namakwala**”) was absent on 22nd July 2016. On that day, I noted that, on the previous occasion (29th June 2016), he had discharged his Advocates and counsel. I afforded Namakwala a final opportunity, and adjourned the Miscellaneous Petition to today. I specifically noted in the order of 22nd July 2016 that in his absence today, I would proceed with the Miscellaneous Petition, and would not adjourn the matter any further. If he did appear, I would take up the Miscellaneous Ptn for framing issues, for reasons previously noted.

2. I also directed M/s. Bachubhai Munim & Co, on record for for the Petitioners, to give notice to Namakwala accompanied by a copy of the order of 22nd July 2016. They have done so. Mr. Khambata places before me an Affidavit dated 28th July 2016 of Mr. Sagar Subhash Shirke. This shows that Mr. Shirke attempted to serve M/s Bachubhia Munim & Co's notice with its enclosure (a copy of the order dated 22nd July 2016) not once but four times. Details are set out in paragraphs 1 to 4 of the Affidavit. These show that at every turn Namakwala avoided service for one reason or the other. In paragraph 5, Mr. Shirke says that the notice and accompanying order have been sent by registered post acknowledgement due but the acknowledgement card has not yet been returned. Mr. Khambata says that since the time the Affidavit was affirmed, the Petitioners have traced the notice's delivery status online. This shows that delivery was attempted. Namakwala's door was locked but an intimation was served. I do not think the Petitioners can be expected to do more.

3. Apart from anything else, my order of 22nd July 2016 itself makes matters sufficiently clear. That order was uploaded, and, therefore, publicly available, from 26th July 2016 onwards. Namakwala has had sufficient time and notice.

4. In fact, the previous orders show that so long as Namakwala thought he could continue to make a claim in respect of a vast number of immovable properties, he put up a vigorous opposition to this Miscellaneous Petition. He engaged three Advocates, two of them Counsel of considerable standing. Earlier, he had also engaged a Senior Counsel, Mr. Nitin Thakkar. Now, finding that his

opposition to this Petition and his claim to the immovable properties have not worked or succeeded as he perhaps once imagined they might, he has quite simply taken himself off the scene altogether. He did this in two stages, first by discharging his Advocate and Counsel and then by evading service. On the latter aspect, i.e., Namakwala's discharge of his lawyers, this only happened because I did not allow Mr. Tejas Vora to make a statement on Namakwala's behalf consenting to an order in the Miscellaneous Petition without clear written instructions. I thought it prudent to allow Mr. Vora time to obtain those instructions. It was only then that, on the next date, 29th June 2016, Mr. Vora was compelled to say that he did not in fact have that authority; and, indeed, that both he and his co-Counsel, Mr. Mishra, as also their attorney had been asked by Namakwala to return their briefs. I have little doubt that this discharge of his Advocates, who have all appeared for him for a very long time, was a deliberate ploy on Namakwala's part. He possibly imagines that now that he is 'unrepresented' he will at some stage be able to claim that any order passed in this Miscellaneous Petition is '*ex parte*', 'without hearing him', 'giving him an adequate opportunity' or some such. Anticipating just this, I directed M/s Bachubhai Munim & Co to give him notice; and, in addition, to serve him with a copy of my order of 22nd July 2016. Namakwala has deliberately avoided and evaded service. If he imagines that he can turn this to his advantage at any time, he is wrong. Every step has been taken to ensure that he has full notice not only of scheduled dates but, too, of the likely consequences of his non-appearance. I refuse to indulge Namakwala any further. Such consequences as follow are entirely the responsibility of Namakwala and no one else.

5. The reasons for Namakwala's *volte face*, his initial appearance and now his complete disappearance, are not far too seek. All of this turns on just one central aspect of this entire dispute: Namakwala's claim to being the heir and legatee under a Will he propounded of one Suleman Hajee Mohamed Chinoy ("**Bhiwandi Suleman Chinoy**"). Namakwala says that Bhiwandi Suleman Chinoy was his uncle.

6. There is a vast tract of land at Kole Kalyan that stands in the name of one Suleman Chinoy. Namakwala says that this is his uncle, Bhiwandi Suleman Chinoy. Mr. Khambata says not; and that all this land belongs to his clients' ancestor, also Suleman Haji Mohammed Chinoy, one who never lived in Bhiwandi but held large properties in different places, including those at Kole Kalyan and also a building known as Chinoy Mansions at Bombay (therefore, "**Bombay Suleman Chinoy**"). The 1st Petitioner is the son of Bombay Suleman Chinoy. At one point, when he was still represented by lawyers, Namakwala urged that this was a case of 'mistaken identity'. Mr. Khambata says it is nothing of the sort, and that Namakwala's attempt is nothing more than an attempt at a land grab; and a demonstrably fraudulent and inept attempt at that.

7. Namakwala sought to establish his 'credentials' — viz., his kinship to Bhiwandi Suleman Chinoy who he claimed was his 'uncle' — on the basis of two decidedly peculiar documents. Both are death certificates, ostensibly of Suleman Chinoy, both issued by the Bhiwandi Nizampur City Municipal Council ("**BNCMC**"). The first of these is at Exhibit "R" at page 124 of the Miscellaneous Petition. Namakwala's uncle, Bhiwandi Suleman Chinoy,

supposedly died on 17th March 1982 in Bhiwandi. The document at page 124 shows a date of registration of 18th February **2013**. On the face of the document, to the left of that date is so-called registration No. 2013-346. Namakwala also relied on another death certificate. This is to be found at page 134 of the present Miscellaneous Petition. It is altogether different from the death certificate at page 124. It has a totally different date of registration, 11th August 2006. It is written in Devnagari. It bears a completely different registration number to the left which seems to be 1215 of 11th August 2006.

8. Neither of these documents is convincing. The Petitioners took up this matter under the Right to Information Act, 2005 and made an application dated 15th January 2014 to the BNCCMC in relation to these so-called death certificates. Not surprisingly, this application was stone-walled. The Petitioners appealed. That appeal was first heard on 2nd May 2014. At that time, an officer of the BNCCMC told the Appellate Authority that the relevant birth and deaths register and the documents relating to Namakwala's applications were missing. The Appellate Authority ordered a further search was ordered. On 23rd May 2014, that appeal was disposed of on the basis that the details were unavailable with the BNCCMC. About a month later on 21st June 2014, the BNCCMC informed the Petitioners' representatives that *no* documents relating to the death of *any* Suleman Hajee Mohamed Chinoy were available with that Corporation.

9. Mr. Khambata points out that under the Registration of Birth and Deaths Act, 1969, any such registration of a birth or a death must be made within a period of one year from the date of

occurrence. Section 13(iii) provides that delayed registration may be registered only on an order made by a Magistrate of the First Class or a Presidency Magistrate after verifying the occurrence of birth and death and on payment of the appropriate fee. Obviously, this means that the act of registration for a death must be preceded by a Magistrate's order where a registration is delayed for more than a year. What the Section postulates is some sort of judicial enquiry or the application of a judicially trained mind to the veracity of the claim. Before the Magistrate, the applicant on a late application must necessarily explain the delay; and must further submit sufficient information, data and documentation to establish the factum of the birth or death.

10. In this case, Namakwala clearly claims that his uncle, Bhiwandi Suleman Chinoy, from whom Namakwala claims descent, died in 1982. One registration certificate is of 2006 and the other is of 2013. Neither has an accompanying order of a Magistrate. There is also the determinative aspect of the issuing authority, the BNCMC admittedly having no record at all of the issuance of either of these two death certificates. There can be only one conclusion, and it is inevitable: neither of these certificates is valid in law.

11. Once these two certificates are held to be invalid, the entire substratum of Namakwala's case disappears. For, absent these two certificates, we do not know that there ever lived a Suleman Chinoy in Bhiwandi or that Namakwala was his nephew or that he died in 1982.

12. The reason is clear. The 1st Petitioner is the son of Bombay Suleman Chinoy. He was born in 1898 and died on 30th November 1978 (well before the so-called Bhiwandi Suelman Chinoy's alleged death in 1982), and his death was registered on 7th December 1978. The Petitioners filed Testamentary Petition No. 948 of 1979 for Letters of Administration with Will Annexed to Bombay Suleman Chinoy's Will dated 27th July 1949. That is yet pending.

13. There is a detailed history of Bombay Suleman Chinoy's family and property holdings in this Miscellaneous Petition. Testamentary Petition No. 948 of 1979 does not show the Kole Kalyan lands because the Petitioners believed these to have been acquired in Bombay Suleman Chinoy's lifetime. The acquisition is irrelevant. Even if they are acquired, there may well be a question of compensation or solatium, to which only the true owner is entitled. However, as paragraph 4(B)(c) of the Miscellaneous Petition shows, the Petitioners are obviously in a position to demonstrate that it is their ancestor, Bombay Suleman Chinoy, who owned and held these lands and of whose estate these lands now form a part. It was Bombay Suleman Chinoy who held the leases, conveyances and other documents and submitted these for registration. The Petitioners only learned of Namakwala's claim in 2013 when they found that there was an attempt to transfer these Kole Kalyan lands to his name.

14. Even during the time he engaged more than adequate legal representation, Namakwala filed no Affidavit in Reply to the Miscellaneous Petition.

15. It seems quite clear that Namakwala mounted his claim in his probate petition on a completely fraudulent basis. He obtained that probate on the basis of these two utterly false death certificates. I do not see how this is a case of mistaken identity at all. There seems to be so mistake about what Namakwala attempted to do, and why, having failed in that attempt, he has now ceased appearing in this Court.

16. This Petition will have to be allowed. It is made absolute in terms of prayer clause (a). The probate granted to Namakwala on 31st March 2012 in Testamentary Petition No. 310 of 2012 is revoked.

17. List Testamentary Petition No. 310 of 2012 for directions on 18th August 2016.

18. I am making it clear that in the facts of this case, if Namakwala (the Petitioner in Testamentary Petition No. 310 of 2012) appears on that day, I will permit Mr. Khambata's clients to enter a Caveat. Theirs is a defence that does not merely disclose a caveatable interest but goes to the root of the maintainability of Namakwala's probate petition. Namakwala attempted to get hold of the Kole Kalyan properties by putting up a petition based on two death certificates that I have found to be invalid as a matter of law. This is not a question of a title dispute being decided in a probate proceeding. This is question of whether or not there ever existed the Bhiwandi Suleman Chinoy and, therefore, absent any valid death certificate, whether Namakwala can ever prove the existence of that

testator himself, leave alone proof of that alleged testator's will. I am not prepared to accept that a probate court's jurisdiction is so shackled that such an enquiry is impermissible; after all, there is, and this is settled law, the question of the judicial conscience being satisfied in matter of proof of a Will. I do not believe that the two death certificates Namakwala uses to establish the identity of Bhiwandi Suleman Chinoy would pass muster anywhere.

19. Of course, if Namakwala does not appear on that day, Testamentary Petition No. 310 of 2012 filed by him will be peremptorily dismissed for non-prosecution.

(G. S. PATEL, J.)