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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
TESTAMENTARY SUIT NO. 2 OF 1983
IN
TESTAMENTARY PETITION NO. 95 OF 1982
WITH
NOTICE OF MOTION NO. 108 OF 2012
WITH
CHAMBER SUMMONS NO. 61 OF 2012

Dolly Dady Writer …Plaintiff
Versus
Khurshed Eruch Writer & Others …Defendants

TESTAMENTARY SUIT NO. 109 OF 2016
IN
TESTAMENTARY PETITION NO. 339 OF 2010
WITH
NOTICE OF MOTION NO. 97 OF 2009

Surendra Kashib ...Plaintiff
Versus
Dolly Dady Writer & Others ...Defendants

Mr. A. Amin, *with Mr. Niranjan Amin, i/b M/s. B. Amin & Co., for the Plaintiff in TS/2/1983 & Applicant in NMT/108/2012 &*

CST/61/2012.

Mr. S. Shah, *with Mr. Vinod Kothari, i/b Apex Law Partners, for Defendant No. 3 in TS/2/1983 & for the Plaintiff in TS/109/2016 & Applicant in NMT/97/2009.*

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

PC:-

1. This litigation has a history of over 30 years, and even today there seems no end in sight. The papers in the main file are in complete disarray. The registry and the Associate must immediately put them in order.

2. Ms. Dolly Dady Writer filed Testamentary Petition No. 95 of 1982. She sought probate of a copy of the last Will and Testament dated 16th April 1980 of her husband Dady Jahangir Writer. That probate Petition was opposed by four persons, *viz.*, one Surendra Kashib, his wife Mrs. Kashib, Mr. Khurshed Eruch Writer and his wife Prochy. The Petition was renumbered as Testamentary Suit No. 2 of 1983. Issues were framed. It seems that the Consent Terms were purported to be filed in Testamentary Suit No. 2 of 1983 and a Consent Order taken by which probate was granted to the Petitioner/Plaintiff, Dolly Dady Writer on 13th December 2001. Khurshed and Prochy Writer withdrew their caveats. This Grant was challenged on the ground *inter alia* that the Kashibs' consent was not obtained. That Grant was set aside. The Petition/Suit, therefore, remain pending, opposed by the Kashibs. Mrs. Kashib having died in the interregnum, the opposition today is only from

Mr. Kashib. In the meantime, the estate passed into the hands of the Plaintiff.

3. Surendra Kashib has filed a separate Testamentary Petition No. 339 of 2010 for Letters of Administration with Will annexed propounding an earlier Will dated 12th July 1979 of the same deceased.

4. Mrs. Dolly Dady Writer died on 3rd December 2010. This Petition was, therefore, held to have abated by an order dated 24th January 2012. There is a Notice of Motion No. 108 of 2012 filed by Mr. Kaikobad Dady Writer, Dolly Writer's son, seeking to set aside that order of abatement. He has also filed Chamber Summons No. 61 of 2012 seeking to be brought on record as the Plaintiff and conversion of the Probate Petition to one for Letters of Administration with Will annexed, *i.e.*, in respect of the Will dated 16th April 1980.

5. In the meantime, Mr. Surendra Kashib has also filed Notice of Motion No. 97 of 2009 in Writer's Petition and Suit *inter alia* seeking that the estate be brought back into Court. Naturally that Notice of Motion is also affected by the abatement order of 24th January 2012: if that suit abates, then Surendra Kashib's Notice of Motion does not survive. If that abatement is to be set aside, then Surendra Kashib's Notice of Motion must be restored as well.

6. This estate is now is some sort of litigation limbo: there is a pending petition by Mr. Kashib; Dolly Writer's Petition (propounding a later Will) is said to have abated, yet the estate has passed into her hands on account of a previous grant she obtained, one that was later set aside. There are pending applications on both sides. In my view, the best — indeed the only — course of action is to restore the competing litigations to some level of parity and take them to trial as soon as possible, so that the competing rights are finally and properly decided on merits.

7. To this end, I believe it would be appropriate to allow Kaikobad's Notice of Motion for setting aside the abatement and his Chamber Summons for amendment. In doing so, Kashib's Notice of Motion for return of the estate must also be restored to file.

8. Hence, the following order:

(a) The delay in seeking to set aside the abatement of Testamentary Suit No. 2 of 1983 is condoned.

(b) The order of abatement dated 24th January 2012 is recalled and set aside.

(c) Testamentary Suit No. 2 of 1983 is restored to file.

(d) The Amendment to Testamentary Suit No. 2 of 1983 is allowed. The Applicant in Chamber Summons No. 61 of 2012 is permitted to be impleaded as a party-Plaintiff. The Petition is permitted to be converted to one for Letters of Administration with Will annexed in respect of the Will dated 16th April 1980. Amendments to be carried out without need of reverification on or before 19th October 2016. A copy of the amended Petition is to be served on the Advocates for the Defendant (*i.e.*, the Advocates for Surendra Kashib). Since the amendments only substitute the Plaintiff and convert the petition into one for Letters of Administration with Will Annexed, there is no need for an additional Affidavit in Support of the Caveat by Surendra Kashib.

(e) The Defendant's Notice of Motion No. 97 of 2009 in Testamentary Suit No. 2 of 1983 is also restored to file. It will be taken up for hearing and final disposal separately. A further Affidavit in Reply is to be filed and served on or before 21st October 2016. Affidavit in Rejoinder, if any, to be filed and served on or before 25th November 2016. Notice of Motion No. 97 of 2009 to be listed for hearing and final disposal on 2nd December 2016;

(f) Issues have already been framed in Testamentary Suit No. 2 of 1983. That Suit will also be listed on 2nd December 2016 for directions as to trial.

(g) Since the Defendant's Testamentary Suit No. 109 of 2016 propounds an earlier Will, the trial of that Suit, notwithstanding any previous order of clubbing, will be taken up only after Testamentary Suit No. 2 of 1983 is decided.

9. Notice of Motion No. 108 of 2012 and Chamber Summons No. 61 of 2012 are disposed of in the aforesaid terms with no order as to costs.

(G. S. PATEL, J.)