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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.26 OF 2011 IN
NOTICE OF MOTION NO.77 OF 2009 IN
TESTAMENTARY SUIT NO.74 OF 2007 IN
TESTATEMENTARY PETITION NO.871 OF 2007

Arvind Sitaram Iyer ...Appellant
vs.
U.Raghvendra Acharya and Ors. ...Respondents

Mr.Vaibhav Mehta i/b Vaibhav Mehta & Associates for the appellant
Mr.R.M.Nakhwa a/w Mr.Vasant Dhavan for the respondent Nos.1 and 2

CORAM : A.S.OKA, &
M.S.KARNIK,JJ.
DATE : NOVEMBER 21, 2016

ORAL JUDGMENT: (PER A.S.OKA,J.)

1 Notice for final disposal has been already issued. The appellant is the petitioner in the Testamentary Petition filed by him before the learned Single Judge for claiming Letters of Administration with the Will annexed of one Narhari Vasudev Baliga. The Will is executed on 1st July 1978. The petition was filed by the Appellant in his capacity of the Constituted Attorney of one Harindra S. Iyer. The case made out in the petition is that the said Harindra S. Iyer has been appointed as the sole Executor and Trustee of the Will dated 1st July 1978 (for short 'the said Will') of the said Narhari Vasudev Baliga. In the petition, there is an averment that the said Harindra S. Iyer is at

present residing in U.S.A and he has executed a Power of Attorney in favour of the present appellant. It is not in dispute that the said petition was filed by invoking section 241 of the Indian Succession Act,1925 (for short `the Succession Act'). A Caveat was filed by the present first and second respondents. An affidavit in support of the Caveat was filed by the first respondent on 4th October 2007 in which various contentions were raised. One of the contentions is that during his life time, the deceased Testator executed a Gift deed dated 26th June 1986 by which he had gifted the property subject matter of the said Will in favour of the respondent/Caveator. Various other objections were raised such as an objection based on Rule 375 of the Bombay High Court Original Side Rules. The issue of delay in filing the petition was also raised.

2 It appears that in view of filing of Caveat and affidavit in support thereof, the Testamentary Petition was numbered as a Testamentary suit.

3 A Notice of Motion being Notice of Motion No.77 of 2009 was taken out by the respondents for various prayers including the prayer for dismissal of the petition on the ground of non compliance with the provisions of Rules 194 and 395 of the High Court Original Side Rules. Another prayer was to dismiss the Testamentary petition on the ground that the Will set up by the appellant has been revoked by the Testator by a subsequent Will. A prayer was also

made for dismissing the Testamentary Petition by exercising power under Rule 11 of Order 7 of the Code of Civil Procedure,1908 as the same is not filed within the period of limitation prescribed by Article 137 of the Schedule to the Limitation Act,1963. The said Notice of Motion was opposed by the appellant by filing affidavit in reply. By the impugned order, the Testamentary Suit/petition filed by the appellant has been dismissed by the learned Single Judge on the ground of violation of Rule 394 of the High Court Original Side Rules, after recording a finding that the Constituted Attorney of the petitioner i.e the present appellant was not a resident within the State of Maharashtra as required by Rule 394. Only on this ground, the learned Single Judge proceeded to dismiss the suit.

4 The submission of the learned counsel for the appellant is that after the Testamentary Petition was converted into a suit, without framing issues, the suit could not have been dismissed in this fashion. He submitted that Rule 11 of Order VII of the said Code could not have been invoked to dismiss the suit on the ground of non compliance with Rule 394 of the High Court Original Side Rules.

5 The learned counsel for the first and second respondents invited our attention to the affidavit in support of the Notice of Motion No.77 of 2009 and in particular averments made therein in paragraph 5. He urged tat the present appellant is a non resident Indian and he is a citizen of U.S.A and there is

nothing on record to show that as required by Rule 394, the Appellant who is Constituted Attorney of the appellant resides within the State of Maharashtra. The learned counsel for the first and second respondents submitted that it will be an academic issue in the sense that the Testator has already gifted the property subject matter of the Will set up by the appellant to the Caveators. He submitted that there is a gross delay in filing the petition.

6 We have considered the submissions. It is not in dispute that the petition filed by the appellant is under section 241 of the Indian Succession Act,1925 which reads thus:

> "**241 Administration, with Will annexed, to attorney of absent executor -**
> When any executor is absent from the State in which application is made, and there is no executor within the State willing to act, letters of administration, with the Will annexed, may be granted to the attorney or agent of the absent executor, for the use and benefit of his principal, limited until he shall obtain probate or letters of administration granted to himself."

Such a petition is governed by Rule 394 of the Bombay High Court Original Side Rules which reads thus:

> “**394 Application by constituted attorney** - An application for letters of administration or succession certificate may be made by the constituted attorney of a person residing out of the State of Maharashtra, provided that such constituted attorney resides within the State and that such application is made through an Advocate entitled to practise in this Court.

7 Thus, requirement of Rule 394 is that the Constituted Attorney of the petitioner who invokes section 241 of the Succession Act must reside within the State of Maharashtra.

8 We have carefully perused the affidavit in support of the Caveat filed by the respondent. In the said affidavit in support, there is no specific contention raised that the present appellant (Constituted Attorney of the petitioner) is not residing within the State of Maharashtra. We must note here that as per Rule 403 of the High Court Original Side Rules, the Caveat filed by the respondent will have to be treated as a written statement. Not only that the said contention is not raised in the affidavit in support of the Caveat, even in the affidavit in support of the Notice of Motion, such a contention has not specifically raised. Paragraph 5 of the affidavit in support of the Notice of Motion No.77 of 2009 reads thus:

> “5 I say that as matter of record I

vehemently deny and dispute the correctness and accuracy of the petition and reply filed by the plaintiff. I say that the plaintiffs have filed the petition only with the malafide intention to harass the defendants respected Senior Citizens of this country as more particularly stated in the affidavit in support of Caveat as well as affidavit in support of the Notice of Motion. I say that defendants are carrying on business in the name and style of M/s.Sujata Enterprise. I say that defendants firm is a partnership firm duly registered under the Partnership Act, defendants crave leave to refer and rely upon the partnership deed and registration certificate in respect thereof."

9 In the reply filed by the appellant to the affidavit in support of the Notice of Motion in paragraph 8, this contention has been dealt with which reads thus:

"8 With reference to para 5 of the Affidavit-in-Support of the Notice of Motion taken out by the Defendants/Caveators, I deny that the said deceased did not have any disposable right over the said property as alleged. I deny that the petitioner/ original plaintiff does not have any right to file petition for Letters of Administration on the alleged ground that the Petitioner/original plaintiff is non-resident

> of India. I say that I am holding an Indian Passport. I vehemently deny that I am not a citizen of India and/or that I am a citizen of USA as alleged. I say that as a matter of fact presently I am holding Dual Nationality from the Government of USA and India as well. In view of the above, it is denied that I did not have any right to file Probate Petition on behalf of the petitioner/original plaintiff as his duly Constituted Attorney."

10 A contention has been raised in paragraph 8 of the rejoinder filed on behalf of the respondent that the appellant is a resident of U.S.A and he never permanently resided in the State of Maharashtra.

11 As stated earlier, in view of Rule 403 of the High Court Original Side Rules, the affidavit in support of the Caveat will have to be treated as written statement. In the written statement, there is no stand taken that the present appellant (Constituted Attorney of the petitioner in Testamentary Petition) is not residing within the State of Maharashtra.

12 Therefore, unless there is a foundation in the written statement, the factual contention that the appellant is not residing within the State of Maharashtra could not have been taken in the Notice of Motion for dismissal of the suit. Moreover, even assuming that such a contention was raised by way of affidavit in support of the Caveat, the decision on

the said factual aspect will need recording of evidence and the same cannot be decided on the basis of the affidavits. Suffice it to say that breach of Rule 394 is not pleaded in the affidavit in support of the Caveat. Therefore, the impugned order of the learned Single Judge holding that there is non compliance with the requirement of Rule 394 cannot be sustained at all.

13 We may note here that all other objections in the Notice of Motion No.77 of 2009 have been rejected by the learned Single Judge.

14 In our view, unless the contention that the appellant is not residing within the State is raised in the affidavit in support of the Caveat which is treated as a written statement to the Testamentary Suit and unless the same is established on evidence, a finding could not have been recorded by the learned Single Judge about breach of Rule 394 of the High Court Original Side Rules. To enable the Court to deal with the said contention an issue will have to be framed to that effect. As stated earlier, the suit/testamentary petition is dismissed only on the ground of non compliance with Rule 394 of the High Court Original Side Rules.

15 As far as the contention of the transfer of the assets subject matter of Will during the life time of Testator is concerned, it is well settled that in testamentary suit, the Court cannot decide the issue of title set up by the Testator in the

property subject matter of the Will and the said issue has to be decided by the regular Civil Court.

16 Subject to what is stated above, appeal deserves to be allowed. While we do so, we may record that we have not recorded any finding on the question whether there is a non compliance with Rule 394 of the High Court Original Side Rules.

17 Accordingly, we pass the following order:

(I) Subject to what is observed above, the impugned order dated 6th September 2010 is quashed and set aside and the Notice of Motion No.77 of 2009 stands dismissed;

(II) We make it clear that we have made no adjudication on the merits of the Testamentary suit and all contentions in that behalf are kept open;

(III) Appeal is allowed on above terms with no order as to costs.

(M.S.KARNIK,J.) (A.S.OKA,J.)