

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 678 OF 2017**

Shri Haroon Ebrahim, son of late Mohammed Ebrahim, 64 years, business, married, Indian National, Resident of 1st Floor, Magnum Chambers, V. V. Dempo Marg, Near St. Inez Church, Panaji, Goa, through its duly constituted Attorney, Mr. Ebrahim Haroon, son of Haroon Ebrahim, 31 years, business, married, Indian National, Resident of First Floor, Magnum Chambers, V. V. Dempo Marg, St. Inez, Panaji, Goa.

.... Petitioner

Versus

1. Ajit Sukhija, son of late Chamanlal Sukhija, major of age, resident of House No. 165, Campal, Panaji-Goa.
2. Mrs. Guida Minocheri, daughter of Mr. Trindade D'Silva, major of age, married, resident of 3A, Kakkad House, "A" wind, SIR V. Thakersey Marg, Opp. Liberty Cinema, Mumbai - 400 020.
3. Mr. Khodaram J. Minocheri, husband of Mrs. Guida Minocheri, major of age, resident of 3A, Kakkad House, "A" wind, SIR V. Thakersey Marg, Opp. Liberty Cinema, Mumbai - 400 020.
4. Mrs. Ondulia Rolanda Vales D'Silva, alias Rolanda Vales D'Silva alias Ondulia Rolanda Vales alias Ondulia Rolanda Vales Silva alias Rolanda Vales, widow of Mr. Trindade D'Silva, major of age, resident of 7 Marine House, New Marine Lines, Mumbai - 400 020.

5. Mrs. Sandra D'Silva Mahomed, daughter of Mr. Trindade D'Silva, wife of late Dr. Adam Mohomed, major of age, married, resident of Sub 1, lot 834, Albersvilla Port Shepstone, RSA, South Africa.
6. Mr. Edgar Francisco Dias Valles, son of Edgar Francisco Da Purificacao Valles, major of age, resident of Avenida Da Republic, 97 R/C 1050-190, Lisboa, Portugal.
7. Miss Maria Filomena Fernandes, major of age, unmarried, resident of House No. E-346, opposite Bazilios Gym, St. Inez, Panaji, Goa.

.... Respondents

Shri S.S. Kantak, Senior Advocate with Mr. A. Kamat, Advocate for the Petitioner.

Shri S.D. Lotlikar, Senior Advocate with Ms. Aditi Naik, Advocate for the Respondent No. 1.

Shri Sudin Usgaonkar, Senior Advocate with Ms. Tanvi Kamat Ghanekar, Advocate for the Respondent No. 6.

CORAM:- C. V. BHADANG, J.

RESERVED ON: 20th November, 2017

PRONOUNCED ON: 27th November, 2017

JUDGMENT:

On 07.08.2017, a notice for final disposal was issued.

Accordingly, the petition is being disposed of finally.

2. The challenge in this petition, under Article 227 of the Constitution of India, is to the order dated 08.02.2017,

passed by the learned Senior Civil Judge at Panaji in Special Civil Suit No. 58/2008/A. By the impugned order, an application filed by the petitioner (defendant no. 5), for stay of the suit under Section 10 of the Code of Civil Procedure (CPC, for short), has been dismissed.

3. The facts necessary for the disposal of the petition may be stated thus:-

That, respondent no. 1-Ajit Sukhija (plaintiff before the Trial Court) has filed two suits, namely, Special Civil Suit No. 54/2007/B and Special Civil Suit No. 58/2008/A, which are pending before the Trial Court at Panaji. In order to appreciate the controversy involved in this petition, it would be necessary to set out the details of the suits as under:

<u>SCS No. 58/2008</u>		<u>SCS No. 54/2007</u>	
<u>Plaintiff</u>	<u>Defendants</u>	<u>Plaintiff</u>	<u>Defendants</u>
Mr.Ajit Sukhija, Son of late Dr. [Col].Chamanlal Sukhija, Major of age, Resident of House no. 165, Campal, Panaji.	1.Mrs.Guida Minocheri, Daughter of Mr. Trindade D'Silva, Aged 57 years, married, Resident of 3A, Kakkad House, "A" Wing, SIR V. THAKERSEY MARG, Opp. Liberty Cinema, Mumbai - 400 020. 2. Mr. Khodaram J. Minocheri, Husband of Mrs. Guida Monicheri, the defendant no.1, aged 54 years, Resident of 3A, Kakkad House, "A" Wing, SIR V. THAKERSEY MARG, Opp. Liberty Cinema,	Mr. Ajit Sukhija, Son of late Colonel (Dr.) Chamanlal Sukhija, Major, residing at House No. 165, Campal, Panaji, Goa.	1. Mr. Edgar Francisco Valles, major, son of late Edgar Valles Portuguese National, having his office at Av. Da Republica, Portugal. 2. Miss Filomena Fernandes,major, residing at House No.E-346, Morgado, St. Inez, Panaji, Goa, Indian National. 3. Mrs. Guida Da Silva, Major, resident of 7 Marina House, New Marine Lines, Mumbai, Indian National.

	Mumbai - 400 020. 3. Mrs. Ondulia Rolanda Vales D'Silva alias Rolanda Vales D'Silva alias Ondulia Rolanda Vales alias Ondulia Rolanda Vales Silva alias Rolanda Vales, widow of Mr. Trindade D'Silva, aged 90 years, resident of 7 Marina House, New Marina Lines, Mumbai - 400 020. 4. Mrs. Sandra D'Silva Mahomed, daughter of Mr. Trindade D'Silva, wife of late Dr. Adam Mohamed, aged 54 years, married, resident of Sub 1, Lot 834, Albersvilla Port Shepstone, RSA, South Africa. 5. Mr. Haroon Ibrahim, Son of late Ibrahim Mohamed, Age 55 years, Residing at Panaji, c/o M/s Magnum Constructions, Magnum Chambers, V.V. Dempo Marg, St. Inez, Panaji. 6. Mr. Edgar Francisco Dias Vales, Son of Edgar Francisco da Purificacao Vales, Aged 54 years, Resident of Avenida Da Republic, "97 R/C 1050-190, Lisboa, Portugal. 7. Miss Maria Filomena Fernandes, Aged 67 years, unmarried, Resident at House No.E-346, Opposite Bazilio's Gym, St. Inez, Panaji-Goa.		4. Dr. Maria Lilia de Sequeira Sukhija, major, married, wife of plaintiff, residing at House no.165, Campal, Panaji, Goa, Indian National. 5. Ms. Rajni Porob, major, r/o H.No.E-346, Morgado, St. Inez, Panaji, Goa. 6. Mr. Chandrakant Pissurlenkar, major, resident of Dwarka Ram Nivas, Khadpabandh, Ponda, Goa.
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<u>Relief</u>	<u>Relief</u>
(a) For a declaration that the power of attorney dated 31/8/2005 is null and void and all acts, if any, done by the defendants no.1, 6 and 7 on the strength of the said power of attorney, are null and void and shall not produce any legal effects, as far as the properties and assets and reights of the deceased Ms. Augusta Iria Vales; (b) For a declaration that the sale deed dated 16/2/2006, to the extent that it purports to dispose off the plot no.C-1 and plot no.C-3, in which late Ms. Augusta Iria Vales had undivided half shares, is null and void; (c) For a consequential direction, for cancellation of the said deed of sale dated 16/2/2006, from the records of the office of the Registrar of Ilhas at Panaji in so far as it pertains to LOTE No.C-1 and C-3, described in paragraphs 9 and 11 of the plaint; (d) For an order directing the defendants 1 to restore possession of the plots, being LOTE NO.C-1 and LOTE NO. C-3, to the plaintiff, to be held by him for the beneficiaries and legal representatives of Ms. Augusta Iria Vales; (e) For a direction, restraining the defendant no.5 from carrying on any construction activity in any plots, described in paragraphs 9 and 10 of the plaint; (f) For a permanent injunction, restraining the defendant no.5 from creating third party rights in favour of any person whatsoever in respect of the plots C-1 and C-3 more particularly described in paragraphs 9 and 10 of the plaint; (g) For a temporary injunction in terms of the prayer clause (vi) above. (h) For costs.	(a) That the Will dated 22/8/2005 be declared null and void; (b) For a permanent injunction restraining the defendant no.1 from in any manner deriving any benefit under the said Will dated 22/8/2005 or otherwise laying any claim to any part of the estate left behind by Augusta Iria Valles on the strength of the Will dated 22/8/205 or creating any third party rights or dealing with in any manner whatsoever with any of the assets belonging to late Augusta Iria Valles. (c) For temporary injunction in terms of prayer clause (b) above; (d) For ex-parte temporary injunction in terms of prayer (c) above. (e) For costs.

SPECIAL CIVIL SUIT NO. 54/2007:

4. The respondent no. 1 (plaintiff) and the defendant

no. 1-Mr. Edgar Valles are nephews of late Ms. Augusta Iria Valles, who was a spinster and died on 01.05.2007. Now deceased, Augusta Valles happened to be the sister of the plaintiff's mother, as also the sister of the father of the defendant no. 1-Edgar Valles. Defendant no. 2 is said to be the godchild of Augusta Valles and was residing with her for more than 50 years. Defendant no. 3 is the niece of late Augusta Valles. Defendant no. 4, who is a Doctor by profession is the wife of the plaintiff. Defendant no. 5 was working as a maid servant, till the date of demise of Augusta Valles. The defendant nos. 1 to 5 are beneficiaries of a Will, purportedly executed by late Augusta Valles on 22.08.2005.

The material case made out in the plaint is that on account of old age and accidental injuries, Augusta Valles was not in a disposing state of mind and the purported Will, which was prepared on the basis of the draft submitted by defendant no. 6 (who was an employee of the office of the Civil & Sub-Registrar at Panaji), is null and void.

SPECIAL CIVIL SUIT NO. 58/2008:

5. The respondent no. 1 (plaintiff), claims that the Power of Attorney, purportedly executed by late Augusta Valles on 31.08.2005, in favour of the defendant nos. 1, 6 and 7, is null

and void and for a declaration that the sale deed dated 16.02.2006, executed by the defendant nos. 1, 6 and 7, on the strength of the said Power of Attorney, to the extent it purports to dispose of plot nos. C-1 and C-3 (in which Augusta Valles had undivided half share), is null and void and for cancellation of the above sale deed. The respondent no. 1 has made out a case in para 24 of the plaint that the Power of Attorney and the consequent sale deed is vitiated by fraud, coercion and undue influence and also on the ground that at the time, when the signature of late Augusta was obtained on the Power of Attorney, she was not in a disposing state of mind and was unable to understand the nature of the document, on account of her old age, serious health complications and due to an accidental fall, which she had suffered in the month of September 2004.

6. The Trial Court framed issues in both the suits. It is not necessary to set out all the issues framed. Suffice it to mention that issue no. 3 (in Special Civil Suit No. 54/2007) is whether, the plaintiff proves that the Will is void, as the mental and physical condition of the testatrix was such that, she was unable to make out the nature of the documents she was signing.

Insofar as Special Civil Suit No. 58/2008 is concerned, issue no. 5 is whether, the defendants prove that the plaintiff has no locus standi to file the suit.

7. Undisputedly, Special Civil Suit No. 54/2007 has substantially progressed and is at the fag end of the trial. The evidence in Special Civil Suit No. 58/2008 is yet to begin.

8. The petitioner, who is the defendant no. 5 in Special Civil Suit No. 58/2008, filed an application for keeping the suit in abeyance on 18.03.2016, followed by an application under Section 10 of CPC on 16.08.2016. It was contended that the parties in both the suits were same and/or claiming through the same parties as that in Special Civil Suit No. 54/2007 and are litigating under the same title. The suits are relating to the same subject matter. It was contended that the issues involved in Special Civil Suit No. 58/2008 are directly related to the earlier suit. It was contended that the suit is illegal and ought to have been stayed in view of the observations by this Court by order dated 13.06.2014 passed in Appeal from Order No. 47/2011. That was an appeal against the order of grant of temporary injunction, in which, this Court has observed thus, in para 10 of the order:-

“In such circumstances, I find that unless and until the Will is declared as null and void, the question of going into the correctness of the disputed sale deed at the instance of the appellant would not arise.”

9. It was contended that in the circumstances, the suit is liable to be stayed. The application was opposed on behalf of the respondent no. 1, on the ground that the requirements of Section 10 of CPC are not satisfied and no case for stay of the suit is made out.

10. The learned Trial Court in the impugned order found that all the parties in the suit are not the same. The question whether, any of them are claiming through the defendants, is a question of fact, which will have to be decided at the time of trial. It was found that the reliefs claimed in the two suits are different and the validity of the Power of Attorney is not the issue in the earlier suit “although the ground on which the Will and the Power of Attorney challenged is the same”. However, in the opinion of the learned Trial Court, even if the earlier suit is disposed, it will not affect the subsequent suit. In short, according to the Trial Court, the judgment in the earlier suit will not operate as *res judicata* in the subsequent suit. In that view of the matter, the application came to be dismissed.

11. I have heard Shri Kantak, the learned Senior Counsel for the petitioner, Shri Lotlikar, the learned Senior Counsel for the respondent no. 1 and Shri Usgaonkar, the learned Senior Counsel for the respondent no. 6. With the assistance of the learned Counsel for the parties, I have gone through the record.

12. It is submitted by Shri Kantak, the learned Senior Counsel for the petitioner that there is a common issue of the mental condition and the disposing state of mind of late Augusta, involved in both the suits, as the Will as well as the Power of Attorney are challenged, on the ground that, at the time of their purported execution, Augusta was not in a disposing state of mind. Secondly, it is submitted that, as held by this Court, in Appeal from Order No. 47/2001, unless and until the Will is declared as null and void, the question of going into the correctness of the sale deed, at the instance of the respondent no. 1, would not arise. He, therefore, submits that the decision in the earlier suit, would have a bearing on the locus standi of the respondent no. 1 in the second suit. In short, it is contended that if, the validity of the Will is upheld, the plaintiff will not be able to maintain the second suit. It is submitted that the learned Trial Court was in error in finding that the decision in the earlier suit will not operate as *res*

judicata in the subsequent suit.

The learned Senior Counsel has relied upon two decisions of the Calcutta High Court in the case of **Amrita Bazar Patrika Private Ltd. & Others Vs. Jayanta Sengupta & Others**, (judgment dated 29.07.2009 passed in G.A. No. 119/2007 and C.S. No. 311/2006) and in the case of **Naila Samreen Shahab Vs. Smt. Kanan Mukherjee & Others**, (judgment dated 22.06.2011 passed in C.O. No. 3668/2010). It is submitted that in addition to Section 10 of CPC, the Court has also power under Section 151 of CPC to stay the suit, in an appropriate case. The learned Senior Counsel has pointed out that initially, an application for keeping the suit in abeyance was filed, which has not been decided.

13. On the contrary, Shri Lotlikar, the learned Senior Counsel has supported the impugned order. It is submitted that the learned Trial Court has rightly applied the test, namely, the decision in the earlier suit, operating as *res judicata*, as a necessary condition for the stay of the subsequent suit, which is not satisfied in this case. It is submitted that parties in the two suits are also not identical, although, both the suits are initiated by the respondent no. 1. The issue in the earlier suit is of validity of the Will, while the issue in the subsequent suit is of

the validity of the Power of Attorney and the sale deed. It is submitted that the learned Trial Court has meticulously appreciated the facts in the context of Section 10 of CPC and has rightly come to the conclusion that no case for stay of the suit is made out and the impugned order does not call for any interference.

14. I have carefully considered the rival circumstances and the submissions made.

15. It is not in dispute that the subject matter of both the suits, is same. Insofar as the parties are concerned, the respondent no. 1 is the plaintiff in both the suits. Defendant no. 1-Mrs. Gaida Minocheri in Special Civil Suit No. 58/2008, is defendant no. 3 in Special Civil Suit No. 54/2007, while the defendant no. 6-Mr. Edgar Valles in Special Civil Suit No. 58/2008 is the defendant no. 1 in Special Civil Suit No. 54/2007. These are some of the defendants, who are common. Respondent no. 1 is challenging the disposition of the property of late Augusta, on the ground that she was not in a disposing state of mind, on account of her age, illness and the accidental injuries. Thus, although, in the previous suit, the Will, is the subject matter of challenge and in the subsequent suit, it is the

Power of Attorney, which is the subject matter of challenge, the ground for challenge is same or similar. It would be significant to note that while, the Will is purportedly executed on 22.08.2005, the Power of Attorney is shown to have been executed on 31.08.2005 i.e. both the documents are shown to have been executed in a short span of about a week and thus, the mental condition of Augusta, during this period, would be a common issue in both the suits.

16. The Calcutta High Court in the case of **Amrita Bazar Patrika Private Ltd.** (supra) has *inter alia* held that “same parties” as used in Section 10 of CPC means the parties between whom the matter substantially in issue has arisen and has to be decided. It has been held that complete identity of the parties is not required. What is required is the matter in issue in the earlier suit, is also “directly and substantially”, an issue in the succeeding suit. In the present case, it is the mental condition of late Augusta during August 2005. That apart, this Court while deciding Appeal from Order No. 47/2011 has also held that unless and until the Will is declared null and void (which is subject matter of challenge in the earlier suit), the question of going into the correctness of the disputed sale deed “will not arise”. The Trial Court after noticing the

observation of this Court has also found that the ground on which the Power of Attorney and the Will are challenged, is the same. In the face of such a finding, it would not be permissible to say that even if, the earlier suit is disposed of, it will not affect the subsequent suit. The learned Trial Court in the concluding part of the impugned order has observed that at the most, a case can be made out for joint trial, as one issue in both the suits is common. If this be so, in my considered view, a case for stay is made out.

17. In the result, the following order is passed:-

ORDER

- (a) The petition is allowed.
- (b) The impugned order dated 08.02.2017, is hereby set aside.
- (c) The application under Section 10 of CPC, is allowed as prayed.
- (d) Rule is made absolute in the aforesaid terms, with no order as to costs.

C. V. BHADANG, J.