

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO.2704 OF 2016
IN
WRIT PETITION NO. 12251 OF 2015**

**Nandlal Devshi Mepa Malde
through POA holder**

Mr. Vithalbhai Patel

Vs.

New India CHS Ltd.

..Applicant

..Respondent

Mr. Akshay Patil i/b Mr. Satendra Kumar for the Applicant

**Mr. Vivek Walawalkar a/w Mr. Viraj Amin i/b B Amin & Co. for the
Respondent**

CORAM : R. M. SAVANT, J.

DATE : 1st FEBRUARY, 2017

P.C.

1 The above Civil Application has been filed for the following relief:

(b) That the executor of the deceased namely Vithalbhai D. Patel, pursuance to the will dated 30th July 2013, be kindly brought on record in place of deceased Nandlal Devshi Mepa Malde and the Applicant be kindly allowed to carry out amendment in the Petition.

2 The Applicant is the executor of the Will dated 30-7-2013 of the deceased Petitioner Mr. Nandlal Devshi Mepa Malde. In terms of the said Will the Applicant is entitled to prosecute the litigation against the Respondent Society. The Application for obtaining the probate of the Will has already been filed in this Court on 26-10-2016 being Petition No.1985 of 2016 and it seems that first notice has been issued in the said proceeding. The Learned Counsel

appearing on behalf of the Applicant places reliance on the judgment of the Apex Court in the matter of **FGP Limited. Vs. Saleh Hooseini Doctor & Anr.**¹ The said judgment of the Apex Court concerns Section 213 of the Indian Succession Act. In paragraph 52 of the said judgment it has been held by the Apex Court that even if the Will is not probated, it does not prevent the vesting of the property of the deceased on the executor / administrator and consequently any right of action to represent the estate of the executor can be initiated even before the grant of the probate. Hence the Apex Court has in terms recognised the right of an Executor to represent the estate of the testator.

3 On behalf of the Respondent the Learned Counsel Mr. Walavalkar would contend that the delay of about 88 days has not been explained by the Applicant in the above Civil Application. It is required to be noted that the Applicant was prosecuting the above Writ Petition as the power of attorney of the said Mr. Malde and upon the death of Mr. Malde now wants to bring himself on record in place of Mr. Malde on the basis of the said Will executed by the said Mr. Malde. For the purposes of filing the application, the Applicant had to obtain certain documents in which process some time might have been lost and therefore the delay of about 88 days in filing the above Civil Application. The said delay therefore cannot come in the way of the Applicant from prosecuting the instant Civil Application for bringing himself on record in

¹ (2009) 10 Supreme Court Cases 223

place of the deceased Mr. Malde. The objection raised on behalf of the Respondent can be said to be hyper technical.

4 The Learned Counsel Mr. Walawalkar also sought to make submission as regards the entitlement of the Applicant to prosecute the above Petition which is in respect of the membership of the Respondent society. In my view, it is not necessary for this Court to consider the said submission whilst considering an application for substituting the original Petitioner by the executor of his Will. The said submission can undoubtedly be urged on behalf of the Respondent at the hearing of the above Petition. The Civil Application is accordingly allowed. Resultantly the Applicant is allowed to bring himself on record in place of the original Petitioner Mr. Nandalal Devshi Mepa Malde. Amendment to be carried out within two weeks from date. List the Petition for admission on 22-2-2017.

5 The Civil Application is accordingly disposed of.

[R.M.SAVANT, J]