

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
NOTICE OF MOTION NO.61 OF 2017
IN
MISCELLANEOUS PETITION NO.62 OF 2009
IN
PETITION NO.819 OF 2002

Indresh Shamsunder Advani ... Applicant

In the matter between
Karishma Suresh Mahtani ... Petitioner
Vs.
Indresh Shamsunder Advani and another ... Respondents

Mr. Rajeev Ravi a/w. Mr. Shadab Peerzade i/b. Munir Merchant for
Applicant / Respondent No.1.
Ms Anita Castellino a/w. Mr. Vikas K. Singh i/b. Lambay and Co. for
Petitioner.
Mr. Uday M. Mahajan i/b. M/s. Divekar and Co. for Respondent No.2.

CORAM : R. G. KETKAR, J.
DATE : SEPTEMBER 08, 2017

P.C. :

Heard Mr. Ravi, learned Counsel for the applicant, Ms Castellino,
learned Counsel for the petitioner and Mr. Mahajan, learned Counsel for
the respondent No.2 at length.

2. By this Motion, applicant (respondent No.1 in Miscellaneous
Petition No.62 of 2009) has inter alia prayed for rejection of the
Miscellaneous Petition No.62 of 2009 filed by Karishma Suresh
Mahtani, hereinafter referred to as 'petitioner', under Order VII, Rule
11(a) and (d) read with Section 151 of the Code of Civil Procedure,
1908 (for short 'C.P.C.') and consequently for dismissal of the
Miscellaneous Petition No.62 of 2009. Applicant, hereinafter referred to
as 'respondent No.1', has also prayed for stay of further proceedings in

Miscellaneous Petition No.62 of 2009.

3. In support of this Motion, Mr. Ravi submitted that Miscellaneous Petition, as framed by the petitioner, is not maintainable in law and is an abuse of the process of law in as much as it does not disclose a cause of action for the reliefs as claimed in terms of Order VII, Rule 11(a). Even otherwise, a perusal of the averments and the statements made in the Petition shows that the Petition is barred by law in terms of Order VII, Rule 11(d) of C.P.C.

4. Mr. Ravi has taken me through the assertions made in the Miscellaneous Petition. In paragraph 1, it is asserted that petitioner is the daughter of Shamsunder Tarachand Advani (for short 'deceased') who died on 02.06.2001 leaving behind his Will dated 12.05.2001. In paragraph 2, it is asserted that respondent No.1 is a son of the deceased, who was granted the Letters of Administration with the Will annexed on 10.04.2003 by this Court in Petition No.819 of 2002 in respect of the properties of the deceased. In paragraph 3, it is asserted that at the time of the demise of the deceased, he was survived by his widow Ms Kalawanti S. Advani, petitioner and his mother Ms Gopi Tarachand Advani. In paragraph 4, it is asserted that under the Will dated 12.05.2001, the deceased bequeathed all his properties, movable and immovable in favour of the respondent No.1 and the petitioner equally. His widow Kalawanti was given life interest in the property Garden View and nothing was bequeathed to his mother Gopi. In paragraph 5, it is asserted that on 03.12.2002, respondent No.1 filed Petition for Letters of Administration with the Will annexed being Petition No.819 of 2002. The petitioner filed a consent affidavit dated 05.12.2002 inter alia consenting to the grant of Letters of Administration in favour of the respondent No.1 without service of any citation upon the petitioner. In

paragraph 6, it is asserted that petitioner resides in Lagos, Nigeria and also she has executed a General Power of Attorney in favour of her mother Kalawanti on 22.08.2002. In paragraph 7, it is asserted that on 10.04.2003, the Letters of Administration is granted in favour of the respondent No.1. However, pursuant thereto, on a Caveat filed by Gopi, the Letters of Administration with the Will annexed was revoked and converted to T.I.&J. Suit No.4 of 2004. On 07.08.2006, consent terms were entered into between the parties thereto and in view thereof, the Caveat was withdrawn and the Suit was disposed of by an order dated 24.08.2006.

5. In paragraphs 8, 12 and 16, it was asserted thus,

“8. The petitioner states that the respondent filed an affidavit on 26.04.2008 in the Hon'ble High Court, Bombay in Company Petition No.141 of 1989 in OLR No.94 / 08 wherein he relied upon the petitioners two affidavits dated 24th August 2006 and affidavit dated 14.9.2006 signed through her Constituted Attorney Smt. Kalawanti inter alia relinquishing releasing and surrendering all right, title and interest of any nature whatsoever in respect of the 4500 shares of M/s. Hong Kong Investment Co. Pvt. Ltd. which were falling in her share as a bequest under the Will dated 12th May 2001. The petitioner states that she never had any intention or desire to relinquish release or surrender her right in respect of the said shares and that she had never authorized any one to sign such affidavit on her behalf and state that such affidavits are false and fabricated and bogus and not admitted by her.

It is pertinent to note that on 24th August 2006, when the first Affidavit was allegedly signed on her behalf, the petitioner was in Mumbai admitted in Jaslok Hospital, undergoing a surgery and therefore, taking advantage of her position, the Affidavit came to be signed and filed.

Hereto annexed and marked “Exhibit-D and Exhibit-E” are copies of the said Affidavits allegedly signed on her behalf dated 24.8.2006 and 14.9.2006.

12. By a letter dated 27th October 2008, Smt. Kalawanti Advani replied to Petitioner's letter dated 18th October 2008 and apologized to the petitioner and informed that since the petitioner was in the hospital on 24.8.2006 and undergoing surgery, she was tensed and worried about the petitioner's

health and taking undue advantage of the situation, the respondent fraudulently obtained her signature on the said affidavit and that she had no knowledge about the contents of the Affidavit and that she saw the Affidavits dated 24.8.2006 and 14.9.2006 for the first time when the respondent filed his affidavit on 26.4.2008 in the High Court of Bombay in the liquidator's report. Hereto annexed and marked "Exhibit-G" is a copy of the letter dated 27th October 2008.

16. The petitioner respectfully submits that the petitioner has not received her full / complete share in the said estate. The respondent has resorted to fabricating documents / writings and induced the Hon'ble Court in passing orders for amending the Schedule and is erroneously representing himself to be the sole owner of the said estate and collecting all the benefits therefrom without accounting for the same. The petitioner respectfully submits that fraud vitiates all proceedings, which the petitioner has established as against the respondent."

6. Mr. Ravi submitted that petitioner has not challenged the consent terms as also has suppressed existence of Memorandum of Understanding dated 24.08.2006 executed by her through her Constituted Attorney i.e. respondent No.2 whereby she relinquished, released and surrendered all her right, title and interest of any nature whatsoever in respect of the 4500 shares of Hongkong Investments Co. Pvt. Ltd. (in liquidation) held by the deceased in her favour. He further submitted that Miscellaneous Petition is instituted invoking Section 263(b) of the Indian Succession Act, 1925 (for short 'Act'). However, the petitioner has not challenged the Will dated 12.05.2001 executed by the deceased. He further submitted that this Court cannot go into the issue of title. He has taken me through the consent terms filed by the parties and in particular clauses 12, 13, 14 as also the affidavit made by Kalawanti as Constituted Attorney of the petitioner dated 24.08.2006, and in particular paragraphs 5 to 8 thereof. In paragraph 6, it was stated that in the Schedule of Assets mentioned in the Letters of Administration with Will annexed, the movable assets being 4500 shares in M/s. Hongkong Investment Co. Pvt. Ltd. (in liquidation) were not added. In

paragraphs 7, it is stated that she being one of the legal heirs pray that the Schedule of Assets mentioned in the Letters of Administration with Will annexed be modified so as to include the same to the Schedule of Assets of the deceased. In paragraph 8, it is stated that she also relinquished, released, surrendered all her right, title, interest of any nature whatsoever in respect of the 4500 shares of M/s. Hongkong Investments Pvt. Ltd. (in liquidation) held by the deceased in favour of the plaintiff (respondent No.1). Similar affidavit was made by Kalwanti as Constituted Attorney of the petitioner on 14.09.2006.

7. Mr. Ravi submitted that the Court of Probate is only concerned with the question as to whether the document put forward as the last will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution, the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the Probate Court. In support of this submission, he relied upon the decision of the Apex Court in the case of *Ishwardeo Narain Singh Vs. Kamta Devi*, AIR 1954 SC 280, and in particular paragraph 2 thereof. He also relied upon the decision of the Apex Court in the case of *T. Arivandandam Vs. T. V. Satyapal*, AIR 1977 SC 2421 to contend that if on a meaningful – not formal – reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, the trial Court should exercise its power under Order VII, Rule 11 of C.P.C. taking care to see that the ground mentioned therein is fulfilled. And, if clear drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order X of C.P.C. An activist Judge is the answer to irresponsible law suits.

8. Mr. Ravi further submitted that the trial Court should exercise

powers under Order VII, Rule 11 of C.P.C. at any stage of the Suit before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. In support of this submission, he relied upon the decision of the Apex Court in ***Saleem Bhai Vs. State of Maharashtra***, AIR 2003 SC 759, and in particular paragraph 9 thereof. He further submitted that by consent, the parties cannot confer the jurisdiction of the Court. In support of this submission, he relied upon the decision of the Apex Court in ***Chiranjilal Shrilal Goenka (decd) through LRs Vs. Jasjit Singh***, 1993 (2) SCC 507, and in particular paragraph 17 thereof.

9. He further submitted that admittedly, Memorandum of Understanding dated 24.08.2006 is not challenged by the petitioner and the Miscellaneous Petition suffers from gross delay and laches and is barred by law in terms of Order VII, Rule 11(d) of C.P.C. He further submitted that even otherwise, this Court, being a Testamentary Court, cannot go into the question of title and therefore, has no jurisdiction to entertain and try the Miscellaneous Petition.

10. On the other hand, Ms Castellino submitted that no case is made out for rejecting the Miscellaneous Petition under Order VII, rule 11(a) and (d) of C.P.C. She has taken me through the affidavit in reply filed on behalf of the petitioner opposing the Notice of Motion as also paragraphs 8, 12 and 16 of the Miscellaneous Petition. She has also invited my attention to the order dated 12.01.2011 passed by this Court (Coram : Smt. Roshan Dalvi, J.) and in particular paragraphs 2 and thereof. She submitted that in paragraph 3, this Court observed that facts referred in paragraph 2 thereof will have to be proved in oral evidence. On 22.07.2011, this Court also framed issues and in particular issue No.1 requires the petitioner to prove that respondent No.1 had

fraudulently obtained affidavits on behalf of the petitioner. She submitted that Miscellaneous Petition is instituted by invoking Section 263(b) of the Act. She submitted that petitioner has alleged that the first respondent had relied upon petitioner's two affidavits dated 24.08.2006 and 14.09.2006 signed through her Constituted Attorney, Kalawanti in Company Petition No.141 of 1989 in OLR No.94 of 2008 inter alia relinquishing, releasing and surrendering all her right, title and interest of any nature whatsoever in respect of the 4500 shares of M/s. Hon Kong Investments Co. Pvt. Ltd. Petitioner never had any intention or desire to relinquish, release or surrender her right in respect of the said shares. She had never authorized any one to sign such affidavits on her behalf. Such affidavits are false and fabricated and not admitted by her. In paragraph 12, reference is also made to the letter dated 27.10.2008 given in reply by Kalawanti to the petitioner's letter dated 18.10.2008. In other words, she submitted that the first respondent obtained signatures of Kalawanti fraudulently on the affidavits and that she had no knowledge about contents of the affidavits. The affidavits dated 24.08.2006 and 14.09.2006 were seen by her for the first time in this Court when respondent No.1 filed his affidavit on 26.04.2008 in this Court in the liquidator's report. She, therefore, submitted that no case is made out for granting any reliefs in the Motion. Mr. Mahajan adopts the submissions of Ms Castellino. He has taken me through the affidavit of respondent No.2 dated 19.04.2017. He submitted that petitioner's evidence is over. Petitioner's other witness has filed affidavit in examination in chief.

11. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the present Motion is taken out by the first respondent under Order VII, Rule 11(a) and (d) of C.P.C. The said

provisions read thus,

“11. Rejection of plaint. - The plaint shall be rejected in the following cases:-

- (a) where it does not disclose a cause of action;
- (b) & (c) ...
- (d) where the suit appears from the statement in the plaint to be barred by any law;”

12. In the case of **Saleem Bhai** (*supra*), the Apex Court has observed in paragraph 9 as under:

“A perusal of Order VII, Rule 11 of C.P.C. makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. For the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order VII of C.P.C., the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage.”

13. In the present case, I have already extracted paragraphs 8, 12 and 16 of the Petition. In view thereof, it cannot be said that any case is made out for rejection of the Miscellaneous Petition on the ground that it does not disclose any cause of action or that it is barred by law, namely it is barred by law of limitation and that this Court has no jurisdiction to entertain and try the Petition, as contemplated by Order VII, Rule 11 (d) of C.P.C. It is settled principle of law that the Testamentary Court is only concerned with the question as to whether the document put forward as the last will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution, the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the Probate Court. Apart from that, it is also settled principle of law that issue of title cannot be adjudicated by the Testamentary Court. In the present case, petitioner has alleged that the first respondent has played fraud by obtaining the Letters of Administration. The petition is filed

under Section 263(b) of the Act. Obviously, this Court has jurisdiction to entertain and try the Petition. Hence, I do not find any merit in the submissions of Mr. Ravi. The decisions relied by him do not advance the case of the respondent No.1. Hence, the Motion fails and the same is dismissed.

14. At this stage, Mr. Ravi orally applies for stay of this order for a period of two weeks from today.

15. In view thereof, notwithstanding dismissal of the Motion, this order shall remain stayed for a period of two weeks from today. Order accordingly.

(R. G. KETKAR, J.)

Minal Parab