

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL (L) NO. 96 OF 2018
IN
MISC.PETITION IN T.& I.J. NO. 49 OF 2016

Omprakash Changoiwala And Anr. ...Appellants
Versus
Vishal Usha Kejriwal ...Respondent

WITH
NOTICE OF MOTION (APPEAL) (L) NO. 176 OF 2018

Mr.Sanjeev Gorwadkar, Senior Advocate i/b.Ms.Swati Sagvekar, for the Appellants.

Ms.Veena Thadani with Mr.Vishal Thadani, Ms.Aska B. and Ms.Chaitali Gosavi, for the Respondent.

**CORAM : NARESH H.PATIL AND
G.S.KULKARNI, JJ.**

DATE : 16 MARCH 2018

P.C. :

1. Heard finally by consent of the parties.
2. The learned Counsel appearing for the appellants submits that a miscellaneous petition for revocation of grant of probate, has been filed by the respondent and the appellants have filed a detailed reply. Case law was cited in support of the proposition. A preliminary issue on limitation was raised by filing an application. Learned Counsel for the appellants submits that specific issue of limitation ought to be addressed and as it has not been, the matter be remanded to the learned Judge for a fresh consideration.

3. The learned Counsel appearing for the respondent submits that fraud was played upon the respondent. After obtaining probate, the appellant started creating third party rights and interest in the suit properties. As the respondent raised an issue of fraud, restrictions of limitation prescribed under Article 137 of the Limitation Act are not applicable to the plea. The learned Counsel at one stage extended consent and submitted that in case matter is remanded back, then the respondent would place necessary material on record and would argue out their case on the issues raised by the appellant herein.

4. We have perused the record and considered the submissions advanced by the Counsel appearing for the contesting parties. The learned Counsel appearing for the appellants placed reliance on judgments of Apex Court namely (i) ***Secretary to Govt.of India & Ors. Vs. Shivram Mahadu Gaikwad***¹ and (ii) ***Mrs.Lynette Fernandes Vs. Mrs.Gertie Mathias Since Deceased by Lrs.***²

5. The learned Counsel appearing for the appellants has raised the issue of limitation which according to the Counsel was specifically raised and addressed by the appellant before the learned Single Judge. Both learned Counsel appearing for the parties fairly submit that they may lead necessary evidence and place material on

1 1995 Supp.(3) SCC 231

2 Civil Appeal No.2933 of 2010, Order Dt.8.11.2017

record in support of their respective contentions. Taking into consideration the aforestated pleas and the submissions advanced, we are of the view that in the facts the matter needs to be remanded back to the learned Single Judge for allowing the parties to address the issue of limitation specifically.

6. It is clarified that we are not disturbing the direction issued by the learned Single Judge in respect of deposit of original grant in Court by restraining the appellants herein, the said order would continue to operate till the decision on the issue of limitation by the learned Single Judge which was raised in a Miscellaneous Petition No.49/2016.

7. The directions given by the Court by an order dated 9 February 2018 in Testamentary Suit No.17 of 2018 directing the appellants to submit evidence affidavit, would stand stayed till the issue stated above gets decided.

8. In view of aforesaid orders and directions, the appeal is partly allowed. No costs.

(G.S.KULKARNI, J.)

(NARESH H.PATIL,J.)