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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
MISCELLANEOUS PETITION NO. 63 OF 2010
IN
TESTAMENTARY PETITION NO. 566 OF 2008

Martin Borchert & Anr ...Petitioners
Versus
Arzan Khambatta & Anr ...Respondents

WITH
CHAMBER SUMMONS NO. 44 OF 2018
IN
TESTAMENTARY PETITION NO. 566 OF 2008

Arzan Khambatta & Anr ...Applicants
Versus
Martin Borchert & Anr ...Respondents

Mr Haresh Jagtiani, Senior Advocate, *with Vandana Mehta, Royden Fernandes, Sonali mishra & Siddhesh Bhole, for the Petitioners in MPT/63/2010.*
Mr Aditya Chitale, *with Priyanka Ribeiro & Avinash Belge, i/b MNSQ Legal, for the Respondents in MPT/63/2010 & for the Applicants in CST/44/2018.*

CORAM: G.S. PATEL, J
DATED: 6th April 2018

PC:-

1. This Miscellaneous Petition is under Section 301 of the Indian Succession Act, 1925 for removal of the two Respondents as executors. It was disposed of by an order dated 18th April 2011. An appeal was allowed on 4th August 2011. The order was set aside by consent, and the Miscellaneous Petition was remanded for hearing *de novo*.

2. In light of subsequent developments, it is, in my view, unnecessary to enter into the larger controversy. Both sides are agreed that, in view of the intervening orders, and with one set of directions today, the Miscellaneous Petition can be disposed of without a more detailed consideration on merits. The reason is this: the principal cause for seeking removal was that, according to the petitioners, the executors had failed to pay out their legacies and bequests. This has now been done, for the most part, with an exception that I will note, and therefore nothing of consequence survives in the petition.

3. One Ursula Dara Mistry ("**Ursula**") made a Will dated 7th February 2004 and a Codicil dated 29th November 2004. The Respondents, Arzan Khambatta ("**Khambatta**") and Rajendra Kishanrao Shinde ("**Shinde**"), were appointed Executors. Ursula died on 21st June 2007. The two Respondents took probate to both testamentary writings on 21st November 2009. The estate was partly distributed. The 1st Petitioner, Martin Borchert ("**Martin**"), is Ursula's brother. The 2nd Petitioner ("**Bernhard**") is Martin's son. Martin is a German citizen and lives overseas. There is no dispute that, under Clause 21, Martin is the residuary legatee under Ursula's Will.

4. The Petitioners say that full amounts due to them, and comprised in Ursula's estate, have not been paid over to Martin, and that only a partial distribution has been made.

5. In May 2015, the schedule to the Probate Petition and the grant itself were amended to add additional assets. A series of orders then followed. These include an order dated 22nd July 2016 directing the liquidation of certain assets, the realization of investment instruments as also periodic payouts to the Petitioners. At that time, the Respondents had the estate accounts maintained by M/s. Sharad Dalal & Co.

6. Ursula owned Flat No. 14/C and a Garage in IL Palazzo, Little Gibbs Road, Mumbai 400 006. She sold this flat in her lifetime for Rs. 2.25 crores and invested the sale proceeds in different instruments. These earned interest and periodic dividends or interest payouts during her lifetime. The sale expenses themselves were about Rs. 20,000/-. Taxes on capital gains were assessed at about Rs. 20 lakhs. On her death, an amount of Rs. 2.04 crores was thus available for distribution. Of this, Rs. 1.25 crores was placed in Rural Electrification Bonds and the remaining Rs. 80 lakhs was invested in or through Standard Chartered Bank.

7. At the time of my order dated 16th September 2016, I noted that, according to the Respondents, an amount of Rs. 2,06,26,470/- was shown due to the Petitioners; of Rs. 1,93,77,412/- had allegedly been paid by the Respondents; and that only about Rs. 12.5 lakhs was yet due. I found the statement or certificate provided by the Respondents at that time to be incomplete. I sought more explanations, including *inter alia* as to the deployment of the remaining investment of Rs. 80 lakhs in the Standard Chartered Bank. There was then some controversy about intermingling of funds; I noted this as well. Ultimately, on the basis that M/s. Sharad Dalal & Co. were not appointed by the Court, and to avoid all controversy in regard to that firm, I directed that all the papers be retrieved from them and brought into Court, so that a neutral Court-appointed accountant could examine the state of affairs.

8. On 24th March 2017, KR Shriram J addressed two principal questions in his order of that day. The first was about this: the Respondents questioned the conduct of Martin's Constituted Attorney, one Mrs Rashmi Mansukhani ("**Ms Mansukhani**"). In paragraphs 3(xiii) and 3(xiv) of his Affidavit dated 23rd February 2017 (at pages 441 to 443 of the record), Shinde, for himself and on behalf of Khambatta, doubted whether Martin and Bernhard had received any part of what had been paid out until then. The two paragraphs contain an unmistakable allegation against Ms Mansukhani; and this was the first time it came to be made. Shriram J noted that Mr Jagtiani for the Petitioners had agreed to file an affidavit by Martin personally.

9. As it happens, Martin responded to Shinde's accusations. He filed a personal affidavit dated 28 March 2017 (pages 461 to 472). In this, his anger is palpable. He reaffirms his confidence and trust in Ms Mansukhani, and he said in paragraph 4 at page 462 that he had received whatever had been released. He claimed — and I will turn to this immediately next — that an amount of Rs. 1,14,61,984/- was yet due to him. There is nothing more that need to be done in this regard, or indeed that can be done, once Martin has reaffirmed his trust in Ms Mansukhani and ratified her actions; except perhaps this: that it was no business of the Respondents, *qua* executors, to raise such doubts in the first place. They were charged, and charged only, with the duty to distribute Ursula's estate. If one of her chosen beneficiaries chose to appoint a Constituted Attorney, that was his prerogative; and once the distribution was made to that Constituted Attorney, the two Respondents carried no further liability or responsibility. In any case, the issue does not survive.

10. The second direction by KR Shriram J was to appoint M/s Shah Gupta & Company ("**SG Co**") to go through the records and make a report on the question whether the Petitioners had been "overpaid or underpaid and to what extent". Both parties were directed to appear before that firm.

11. SG Co made a report dated 30th November 2017. It notes, first, that parties appeared before the firm, or responded to it, on at least eight occasions between 15th May 2017 and 27th July 2017. I have seen this report. It takes into account all relevant factors. It quite correctly takes Ursula's date of death, 21st June 2007, as the relevant marker because it is on that date that her legacies began to operate. SG Co's report is necessarily subject to certain caveats based on the information available, but it notes that Martin is a residuary legatee. Paragraph 27 of this quite excellent and comprehensive report sets out a series of questions formulated, and which, according to that firm, arose during the course of the Court-mandated task. These questions are accurate. The responses are measured and careful. There is no hypothetical assumption that has been made to inflate any amount. SG Co concluded, quite correctly in my view, that (i) any investment Ursula made from the sale proceeds of the Il Palazzo flat and garage and remaining undistributed; (ii) all interest and income on such investments; (iii) further investments of all and any redemptions or sales of investments; and (iv) all interest, income and further interest and income, were required to be paid out to Martin as Ursula's residuary legatee; *unless* it was shown that any of these amounts had been actually paid out to Martin. SG Co noted that Martin was paid in tranches. In short, SG Co concluded that Martin was entitled to everything that could legitimately be said to be comprised in Ursula's estate, including all accretions by dividend, interest or investment income, *less* any amounts actually paid. This included cash balances, post office deposits, pension, etc. SG Co opined that as of the date of that report an amount of Rs. 1,14,42,241/- was — and is — yet payable to the Petitioners in addition to an amount of Rs. 2,24,85,929/- already paid. There is, in this report, an extremely useful breakdown after paragraph 28 at pages 14 and 15. Here, we see the sale of the flat, the capital gains taxes paid, the total capital gains accrued and received, a summation of the amounts in various bank accounts, amounts due from the Life Insurance Corporation and various investments in Post Office savings, amounts due against redemption of mutual funds and so on. Of course, by this time, previous orders had already taken effect for the purposes of realization of some portions of this estate. Then there is a summary of income accrued on the investments of the net sale proceeds.

12. The matter should have ended at this. What the Respondents did thereafter is, in my view, utterly remarkable. On their own, unbidden and without even attempting to seek leave of this Court, they appointed another consultancy firm, M/s. BY & Associates ("**BY Associates**"), with the mandate of more or less sitting in appeal over, or reviewing, SG Co's report. This is entirely impermissible. A court may appoint a commissioner for a local investigation or for such other purpose it thinks fit. A party may seek leave to file exceptions to that report; and those exceptions must be tenable. What no party may do, however, is to commission a rival report, and especially not one with a solitary purpose — to sit in judgment over a report commissioned by the court itself. Having regard to the manner, nature, frequency and circumstances in which various orders were passed and the quite unambiguous terms of Shriram J's order, this act of the Respondents is alone sufficient to warrant their immediate removal as Executors. These two gentlemen owed a duty of fidelity not only to the estate and its beneficiaries but to the Court that granted them probate. It was not for them to act in a unilateral fashion like this.

13. Of the report by BY Associates, the less said the better. This report is so thoroughly illogical, so riddled with inconsistencies, so full of contradictions and so utterly bereft of logic that it is not worth the cost of the paper on which it is printed. A single solitary instance will suffice. In paragraph 13 at page 482, this firm says:

> "13. In the circumstances above, it would be appropriate to apportion the income between the Petitioner and the Estate taking the date of death i.e 21st June 2007 as the cut-off date. For eg.: In case of income received from investment of sale proceeds of the flat, the income for the period from date of investment to 21/06/2007 (i.e. date of death)will be attributable to the Testatrix and the income for the period 22/06/2007 onwards will be attributable to the Petitioner. Thus, the Executors will not be liable for the income attributable to the Testatrix which was in her control during her lifetime."

14. I have absolutely no idea what, if anything, this is supposed to mean. There can be no question of "apportionment" of income between "the Petitioner" (meaning Martin) and this thing called "the Estate". The Petitioner is entitled to the estate. It is as simple as that. There is no dichotomy between the two. Yet BY Associates would have it that these are two differing 'entitlements', or something along those lines. If, as this report suggests, there is some income that must remain with "the Estate", then the report fails to explain to whom this "Estate" belongs if not Martin. Surely it cannot be suggested that these two Respondents, with their time-limited duty, will continue to hold the fund in this "Estate" till the last syllable of recorded time. The executors can have no use of it, or for it. They have no entitlement or legal right to it. They cannot use it. Yet, according to BY Associates, this fund in the 'Estate' cannot go to Martin. By Associates tells us, for instance, that a capital gain for a period from June 2005 to June 2007 (this is the actual capital gain and not the tax on that capital gain) of Rs. 19,53,290/- is attributable 'to the Testatrix' and, therefore, must be 'apportioned to the estate'. There is a similar statement for dividend for the period from June 2005 to June 2007 in the amount of Rs. 17,08,040/-. This defies common sense. If the amounts were not used by Ursula in her lifetime, they formed part of her estate and they had to be distributed according to the dictates of her Will and Codicil, i.e., paid out to Martin, the residuary legatee she named.

15. Mr Jagtiani for the Petitioners says this is self-serving report. because it seeks to cover up a substantial amount that has been paid out by the Respondents in defending these legal proceedings over the last seven years. If that is its only purpose, then no such report was ever necessary. A simple request across the Bar would have served the purpose far better. Nobody begrudges reasonable professional fees; Mr Jagtiani in fairness has not even attempted to address this aspect of the matter and quite rightly so. He has simply left it to the Court.

16. By an order dated 26th February 2018, I noted that an amount of Rs. 58,76,215/- was agreed to be paid by the Respondents to the Petitioners. This was done. SG Co's report notes that Rs. 1,14,42,241/- is payable to the Petitioners. Thus, roughly half of that was paid out under 26th February 2018 order. The rest, it appears, seems to have been used up in paying legal fees.

17. While this may present Mr Jagtiani with something of a dilemma, I do not think that I am prepared to make an order that the

Respondents should be required to bring back to the estate the amount that they have legitimately paid out to their legal representatives over the last several years. I say this because throughout I have not found the approach of Counsel then appearing, or of Mr Chitale who is still on record, to be anything other than cooperative. There may have been differences of opinion or approach, or matters of reconciliation of accounts, but certainly the Respondents cannot be faulted in their choice of legal representation. I do believe that the Respondents' own conduct leaves much to be desired; but this cannot be used to suggest that they should be expected to bear legal fees personally. We must let matters rest at that. Mr Jagtiani's clients will be at liberty to take such steps as are available to them in law regarding the shortfall as yet unpaid.

18. Mr Chitale states that there is an amount of about Rs. 3 lakhs in the estate bank account being maintained by the Respondents and an amount of Rs. 4,08,000/- has recently been received. He agrees that the Respondents will within a period of two weeks from today close out the estate bank account and pay the entire amount at the foot of that account to Mr Jagtiani's clients, including the additional amount that has come in. Any remaining investment instruments yet pending redemption or realization will be made over to the 1st Petitioner within that period.

19. As far as the relief for revocation is concerned, this is now infructuous. The distribution the Petitioners sought when they came to Court may safely now be said to have been achieved;

subject, of course, to the liberty to Mr Jagtiani, should his clients think it fit, to pursue the shortfall.

20. The only other question that remains is an interpretation of Clause 12 of the Will. This is how it reads:

> "12. I own another separate immovable property at Agarsure, Alibaug bearing Survey No. 146, Hissa No. 3 and Survey No. 146, Hissa No. 6, on which I have intended to establish a Centre devoted to spread of knowledge of Indian culture, yoga, sustainable living, organic vegetable growing, healing arts and forestry. I direct my executors to assign to a private charitable trust to be created and formed in the name of "Dara Mistry's Green World" both the said immovable properties situated at Agarsure, Alibaug. If the said Trust is not created in my lifetime, I direct my Executors and Trustees after my death that in that event they should appoint and nominate the first Trustees of the said Trust, the following persons.:
>
> **Carmel Mistry**
>
> **Fahroukh Dudhmal**
>
> **Feruzan Khambatta**
>
> **Ferzin Khambatta**
>
> **Arzan Khambatta**
>
> **Tinaz Rotnem**
>
> **Firooze Bomi Pavri** and
>
> my nephew **Bernhard Dara Borchert** to be the Beneficiary of the Trust who could live on the said properties and manage the Trust properties and make a living therefrom. **<u>If the trust is not formed then my brother Martin Borchert will administer the benefits on behalf of</u>**

Bernhard Dara Borchert and operate the accounts of Dara Mistry's Green World singly and without being responsible to any other beneficiary under this Will."

(*Emphasis added*)

21. The Respondents submit that under this clause a Trust was brought into existence, if not in *praesenti*, i.e. as on the date of the Will, then at least on 21st June 2007, the date of Ursula's death. It is, therefore, their submission that some of the estate (the immovable properties in Alibaug) were to fall into the corpus of that Trust fund.

22. Mr Jagtiani submits in response, and I think quite correctly, that the clause itself does not bring into existence any Trust. It directs the Executors and Trustees at best to *endeavour* to set up a Trust, but — as the emphasized portion shows — fully contemplates a situation where such a Trust is not formed at all. This is evident from the last sentence of the clause which says "*that should the Trust not be formed then Petitioner No. 1, Martin, is to administer the benefits on behalf of Petitioner No. 2 and he is to do so without being responsible to any other beneficiary under that Will*". The question, therefore, of a Trust being brought into existence by Clause 12 on its own cannot and does not arise. But does the clause require the Respondents to establish such a Trust? The intrinsic evidence in the clause would indicate not. It seems to suggest that Ursula planned to create it herself *inter vivos*. She never did; that much is accepted. Had she done so, with that Trust created — and leaving aside the inherent contradiction or impossibility of a 'private charitable trust' — what the Executors were to then do was to assign the Alibag properties to that trust, and to nominate and appoint the persons named as trustees. The phrase used is:

> I direct my executors to assign to a private charitable trust to be created and formed

The phrase is *not*:

> I direct my executors to assign to a private charitable trust to be created and formed ***by my Executors...***

We cannot add words to a clause to give it a totally different meaning, let alone to introduce a patent contradiction; and this is precisely what results if I am to read the clause as the Respondents would have me do. For, in that situation, the latter phrase — "*if the trust is not formed*" — would be entirely otiose. There would simply be no situation in which that trust *would not be formed* if it was for the executors to form it. Further, if they were indeed to form it, we are not told within what time; or, if they failed to do so for years together, whether the last, default phrase would operate, and from when. The only manner to rationalize this is to hold that Ursula intended to form the trust in her lifetime; and, in her Will, proceeded on the basis that she would do so; but yet made careful provision for what was to happen if, for whatever reason, she could not or did not form that trust while she was alive. There is, therefore, no question of the executors ever being charged with the duty to set up any such trust.

23. If the Respondents have registered any trust or set up a private trust, and which they say they have done by the Deed of 2nd August 2010, a copy of which is at page 157, then it is for them to take necessary steps under the Indian Trusts Act to have that trust dissolved. In any case *prima facie* that trust does not seem to conform to the requirements of Clause 12. That trust does not have any claim, right, title or interest in any part of Ursula's estate, and it never did. The Alibag lands are not to be moved to that trust.

24. Chamber Summons No. 44 of 2018 filed by the Respondents seeks liberty to draw on the estate funds to settle the bill of Rs. 2,36,000/- raised by M/s. BY & Associates. That prayer is rejected. There will be no such payment. The Respondents must bear those costs themselves. There is an amount due as property tax in respect of Alibaug property with some penalty. The tax will be paid up to date before closing the Estate Bank Account. Martin will be entitled to the remainder after payment of all taxes and other statutory dues. Prayer (a) of the Chamber Summons is rejected and prayer (b) is allowed to the extent stated above.

25. The Miscellaneous Petition and the Chamber Summons are both disposed of in these terms. There will be no order as to costs.

26. I must express my gratitude to Mr Chitale for the Respondents and Mr Jagtiani for the Petitioners for their assistance in the matter.

(G. S. PATEL, J)