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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
NOTICE OF MOTION NO. 119 OF 2018
IN
TESTAMENTARY SUIT NO. 38 OF 2007
IN
TESTAMENTARY PETITION NO. 554 OF 2006**

Mahesh K Aidasani	...Applicant
<i>In the matter between</i>	
Prakash S Aswani	...Plaintiff
<i>Versus</i>	
Mahesh K Aidasani	...Defendant

**Mr SN Vaishnawa, with Ms Nupur J Mukherjee, i/b M/s NN
Vaishnawa & Company, for the Plaintiff.
Mr UJ Makhija, i/b Preeti Shah, for the Applicant/Defendant.**

**CORAM: G.S. PATEL, J
DATED: 13th June 2018**

PC:-

1. This is an application by the Defendant seeking an order to take on record an additional compilation of documents dated 20th April 2018, and to recall two of the Plaintiff's witnesses, the Plaintiff himself and one Dhiman P Poladia, for further cross-examination. Mr Poladia has passed away, so that question no longer survives.

2. The background is this. The Defendant (“**Aidasani**”), is not an heir of the deceased Pushpa Thakurdas Aswani (“**Pushpa**”). She died on 4th May 2006. Aidasani says that Pushpa made a Will of 8th February 2006 in which she left her entire estate to the Sadhu Vaswani Mission and appointed Aidasani as the Executor of that February 2006 Will. Aidasani filed a Testamentary Petition seeking Probate of that Will. This is being contested by Pushpa’s heirs. It is pending trial as Testamentary Suit No. 61 of 2009.

3. The reason that Suit cannot be taken up immediately is because the Plaintiff in the present Suit (“**Aswani**”) has propounded a later Will of 18th April 2006, one made a little more than two months after the Will propounded by Aidasani. The Will Aswani propounds is the later in point of time. It is being contested by Aidasani, the Executor appointed under the previous Will. A question of his standing or locus (specifically, whether Aidasani has a ‘caveatable interest’) has been raised in the present Testamentary Suit No. 38 of 2007, which is actually part-heard, the trial having been completed. Indeed, the final hearing had begun when an application came to be made, at first orally, on behalf of Aidasani to take further documents into evidence. In my understanding of the law in this regard, this could not have been done except with the consent of the Plaintiff, Aswani. Mr Vaishnawa for Aswani had no instructions to consent and therefore in my order of 23rd April 2018 I said this:

1. Although the final hearing has commenced, Mr Makhija on behalf of the Defendant requests that I make note of certain documents that he has put together in a

compilation. A copy of this compilation has been given to Mr Vaishnawa in advance.

2. I am not concerned with what this compilation contains and I will, therefore, not comment on it. It is no part of the trial record before me today. In a contested Testamentary Suit, as in every other contested suit, I can look only to the pleadings, the issues framed, orders of the Court, testimony both on Affidavit and in cross-examination, and documents marked in evidence. I may in addition accept written notes of arguments and compilation of authorities, but that is where it ends. That is all, and that is the whole of it. An additional compilation of potentially evidentiary material is not something that can be accepted like this. I can make no reference to it, hear no submissions on it and base no part of my final decision on it.

3. It is for Mr Makhija to decide in consultation with the Defendant whether the Defendant wants to make an application to re-open the trial to lead further evidence. If those are indeed the instructions then a formal application would be necessary. Whether this can or should be done, the questions of delays and costs and other matters must be considered. Mr Vaishnawa will have to be heard on all of this, especially since both sides closed their cases in 2016, and the matter is now at the stage of final hearing. Hence, any such application will have to be decided on its own merits.

4. Mr Makhija requests a slightly longer time saying that it will not be possible to obtain instructions before the Court closes for the summer recess. The application, if any, is to be filed and served by 31st May 2018.

4. This is the factual context in which this application comes to be made. There is an Affidavit in Reply. Mr Makhija has proceeded with his application on the basis of a denial of the allegations in the Affidavit in Reply.

5. What precisely is the nature of this application? I have already set out the prayer. But it is, in my view, vital to set out what the Affidavit in Support of this Notice of Motion says. Paragraphs 3 to 5 read thus:

3. I say that on 19th April 2018, photocopies of papers and proceedings relating to Suit No. 2073 of 2006 filed in the Hon'ble Bombay City Civil Court on 2nd May 2006 by the deceased, Pushpa Thakurdas Aswani, against one Janak Lekhraj Aswani, were handed over to my Advocate in this Hon'ble Court by said Janak Lekhraj Aswani. Together with a letter dated 21st April 2018 addressed to the Advocates for the Plaintiff, my Advocate forwarded a copy of an Additional Compilation of Documents dated 20th April 2018 comprising of copies of the photocopies of the papers and proceedings relating to the said Bombay City Civil Court Suit No. 2073 of 2006 handed over to her by the said Janak Lekhraj Aswani and which are sought to be refereed to and relied upon by me in the Suit. Hereto annexed and marked Exhibit 'A' is a copy of the said letter dated 21st April 2018 along with the acknowledgement of service endorsed. However the Additional Compilation of Documents dated 20th April 2018 was not taken on record by the Learned Judge of this Hon'ble Court when the matter next reached hearing without a proper Application for that purpose.

4. I say that the present Notice of Motion is, therefore, taken out for Directions to take the Additional Compilation

of Documents dated 20th April 2018 of the Defendant on record, to recall two of the Plaintiff's witnesses, viz. The Plaintiff himself and Dhimant P Poladia, for their further Cross Examination and for Leave to lead such further evidence as may be required in respect of the documents contained in the said Additional Compilation of Documents.

5. I say that the Plaintiff is guilty of gross suppression, and has intentionally made false or incorrect statement on oath in order to mislead and misguide this Hon'ble Court only with a view to persuade this Hon'ble Court to pass orders in favour of the Plaintiff and against Defendant. I say that the Plaintiff is fully aware of the above mentioned Bombay City Civil Court Suit No. 2073 of 2006 but intentionally did not disclose and wilfully suppressed the same from this Hon'ble Court with ulterior motives. I, therefore, say that the Plaintiff has come to this Hon'ble Court with unclean hands.

6. Now this is interesting, but not for the reasons Mr Makhija submits. It is interesting not for what it says, but, more importantly, for what it does *not* say. I will attempt to put this in some sort of perspective. As we can see, the suggestion is that on 19th April 2018 Aidasani was in my Court, or at least in the High Court. On that day Janak Lekhraj Aswani ("**Janak**"), one of the deceased testator's heirs, just happened to be here as well. Why, when and for what purpose we are not told. Janak also just happened to have with him a complete set of the papers in a City Civil Court Suit No. 2073 of 2006, one unrelated, at least so far as he was concerned, with any proceedings in this Court. Aidasani does not tell us how he knew Janak, or how Janak knew him. Aidasani's Affidavit does not say why, of all the court rooms in all the world Janak had to walk into

mine. To this Affidavit in Support there is no copy of the documents attached, but I will let that pass because Mr Makhija says — quite correctly — that a copy of the compilation was sent to the other side with request to accept it as evidence. The entire edifice of the case is that just two days before she died, Pushpa was moved by a sense of disenchantment with one of her heirs (Janak) to bring a Suit through her constituted attorney in the City Civil Court. This submission asks me to presume rather more than I am prepared to do. It demands that I accept that whatever it is stated by Pushpa against Janak is true; and I am also asked to accept that that Janak agrees that the allegations against him are true — because, after all, it is Janak who gave this document to Aidasani.

7. There is an even more interesting convolution to this. In the Will that Aidasani propounds, Janak is substantially cut out except for a relatively minor bequest of about Rs.2 lakhs. In the Will Aswani propounds, Janak is named as an heir and stands to get considerably more if that Will receives Probate. I will attempt a translation of what exactly Aidasani says Janak is saying: “that I, Janak Lekhraj Aswani, support probate being granted of a Will that cuts me out to a substantial extent except for Rs.2 lakhs, instead of a Will that grants me considerably more and specifically names me.” This makes no sense at all. What this therefore requires is far more of an explanation from Aidasani and from Janak. At the very least, the present application ought to have been supported by an Affidavit from Janak, if indeed Janak and Aidasani are now on such intimate terms.

8. There is another aspect to this. It was this very Janak Aswani who filed a Caveat opposing Prakash Aswani's Petition for Probate of the later Will. But Janak then withdrew that Caveat. This is noted in an order passed by DK Deshmukh J on 1st March 2007. The withdrawal of that Caveat necessarily implies Janak's acceptance of the correctness and validity of the later Will. It makes no difference if Janak has in parallel, either before or after, consented to the Petition filed by Aidasani for Probate of the earlier Will. Once Janak withdrew his Caveat opposing the grant of Probate of the later Will, the consequence in law was that Janak accepted the later Will. He cannot, by means of this backdoor entry, attempt to revive his Caveat withdrawn 11 years ago in March 2007.

9. The final problem is with admission of the document into evidence in the first place. What is sought to be marked in evidence is a Court proceeding to which the Plaintiff Aswani is not a party and of which he has no personal knowledge. The Plaint was filed by the deceased's constituted attorney. At a minimum, an attempt should have been made to contact that person and perhaps even get a supporting Affidavit. Aidasani has not made a single move in that direction. What is sought to be led in evidence is the copy that Janak provided Aidasani. As far as I can tell nobody has a certified copy. Mr Makhija points out that Aidasani through his Advocate attempted to get certified copy, but this was refused on the ground that that Aidasani is not a party to that City Civil Court Suit. Again this leaves much to be desired. There is indeed a procedural rule (even on the High Court Original Side) which says that the certified copies are to be given only to those who are parties to that litigation. What is not pointed out is that there is also a rule that says that a

certified copy may be given to a person who is not a party to the litigation, provided the application is supported by an Affidavit explaining why a certified copy is required by a person or entity who is an outsider to the litigation. That apart, an application could have been made to this Court to direct the City Court registry to provide a certified copy of the proceedings in that suit. Even that was not done.

10. In any case Janak Aswani, a person who seems to be conveniently present at opportune moments, was certainly a party to that Suit. If he could materialize to make delivery of an ordinary copy of the Plaint to Aidasani, and there was this beautiful friendship between them, surely Janak Aswani could just as well have obtained a certified copy from the City Civil Court.

11. The admission of the document *simpliciter*, sans explanation, seriously prejudices the trial. Mr Vaishnawa would be left with no one to cross-examine on the plaint and the proceedings in the City Civil Court suit. Mr Makhija faintly attempted an argument that Mr Vaishnawa could call the deceased's Constituted Attorney or Janak if he so desired. That is an inversion of what is needed — it is not Mr Vaishnawa who seeks to introduce the document. Then Mr Makhija submitted that he would summon either or both Janak and the deceased's Constituted Attorney if the Court wanted. The Court does not want anything. I refuse to enter into the arena or to participate in directing what evidence a party should or should not bring forward. It is for Aidasani to round up the usual witnesses. It is for him to follow the legally mandated course to prove a document. It is not open to Aidasani to submit that at this very late stage —

trial complete and final hearing begun — just because he says so some document should be taken in evidence; that the other side should be compelled to consent to the admission into evidence of that document; and that Aidasani's own conduct, explanations and the delay are all inconsequential. This Application seeks to reopen evidence long closed on grounds I believe are wholly insufficient and insufficiently explained.

12. This application requires me to presume (i) that what is said in that Suit filed by Pushpa Aswani is correct; (ii) that Janak, who opposed the Suit, now accepts the correctness of what was said against him; (iii) that the cause of action is automatically of relevance because the parties to the Suit are Pushpa and Janak (perhaps amongst others) (iv) that the manner in which Aidasani came by this document, and when, is of no consequence; (v) that there is no obligation on Aidasani's part to commit to calling Janak or the constituted attorney of the deceased to make any supporting Affidavit let alone leading evidence; (vi) that the inconsistency in the story about Janak's flip-flops are to be ignored.

13. Mr Makhija drew my attention to the Affidavit in Reply and said that the contents of the Suit have also been addressed. I do not think it is fair reading of the reply. The reply was filed by Prakash Sundardas Aswani, the Plaintiff. The Suit was filed against Janak Lekhraj Aswani, another heir. The Plaintiff has deposed to certain factual situations regarding the deceased and her family members. Obviously the Plaintiff could not depose to the correctness or otherwise of what either Pushpa or Janak said. From this, it cannot be presumed that the Plaintiff or another filing in that Suit are

relevant. Indeed Plaintiff has said quite correctly that he is unaware of any of this, and that he was actually away in Darjeeling and elsewhere at that time. Further, when one is considering the proof of Will in its solemn form evidence such as this 4show very little. What Aidasani presumes to do is to say that the suit filed against one heir is evidence of the testator's disenchantment with all her relatives. That is yet another presumption that I am asked to make or will be asked to make in the very near future.

14. I think altogether far too many presumptions are demanded of me. There is far too little by way of justification to this application.

15. There is also no answer to Mr Vaishnawa's submission that ordering the admission into evidence of this document with nothing further will seriously prejudice the Plaintiff. Even if evidence is led, the Plaintiff is prejudiced, for he will be forced to cross-examine Janak, a person who was once a party to this litigation but chose to withdraw and is therefore now attempting to revive his opposition in this indirect fashion; and the Constituted Attorney of the deceased who has no nexus with the present litigation. All this, Mr Vaishnawa says, is in pursuit of something that is at best tangential and, in his submission, entirely irrelevant. Even if the *fact* of the suit having been filed by Pushpa against Janak is established, that proves nothing; it does not dislodge the Will being propounded, the one that is later in time. It does not even establish that Pushpa was sufficiently moved to exclude any of her heirs, or even Janak. The suit was apparently filed just two days before Pushpa died. Aidasani's Will, leaving almost everything to the Sadhu Vaswani Mission is of February 2006. The Will Aswani propounds, under

which the bequest to the Mission is superseded, and the estate is divided between relatives — including Janak, to an extent far more substantial than the previous Will — is of April 2006. A suit of May 2006 is thus of no relevance. It might have been relevant had the deceased *thereafter* made a Will cutting out her heirs again; but this is nobody's case. It is also inexplicable, he submits, that Janak should now support a Will that gives him less rather than a later Will that gives him far more. There is, therefore, he submits a complete lack of *bona fides* in this application, and there is more to what has passed between Aidasani and Janak than meets the eye. I believe Mr Vaishanava is correct in every single one of these submissions. There is simply no answer to any of them.

16. The Notice of Motion is dismissed. There will be, as an exceptional case, no order as to costs.

17. The Suit itself is already part heard. I will not stay the hearing of the Suit. I presently have one other part heard matter. It is already listed as part-heard for hearing and final disposal tomorrow. The present matter is therefore to be listed as part-heard to follow the previous part-heard matter. The Associate will list the matters accordingly.

(G. S. PATEL, J)