

Shephali

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
INTERIM APPLICATION NO. 1 OF 2020
IN
REVIEW PETITION (L) NO. 6 OF 2019
WITH
REVIEW PETITION N (L) NO. 6 OF 2019
IN
TESTAMENTARY SUIT NO. 61 OF 2009**

Mahesh Kishnchand Aidasani

...Petitioner

Versus

Prakash Sunderdas Aswani

...Respondent

Mr UJ Makhija, *with Ms Preeti Shah & Mr Santosh Jadhv, i/b Preeti Shah, for hte Petitioner/Applicant.*

Mr Shanay Shah, *i/b Sapna Raichure, for the Respondent.*

CORAM: G.S. PATEL, J.

DATED: 24th February 2020

PC:-

INTERIM APPLICATION NO. 1 OF 2020:

1. Heard.

2. The delay of 16 days in filing the Review Petition is condoned.
3. Interim Application No. 1 of 2020 is disposed of. No costs.

REVIEW PETITION (L) NO. 6 OF 2019:

4. Heard Mr Makhija in support of the Review Petition and Mr Shah for the Respondent.
5. A review is sought of part of my judgment and order dated 16th July 2019.
6. I was at that time considering a Testamentary Suit filed by the present Respondent, Prakash Aswani. The Defendant was Mahesh Aidasani, the present Review Petitioner. He had filed his own Testamentary Petition, converted into a Testamentary Suit.
7. I took the view that if Prakash's Testamentary Suit succeeded, Mahesh's Testamentary Suit was bound to fail. I also held that the converse was not necessarily true. In other words, even if Prakash failed in his Testamentary Suit, all that would happen was that Mahesh would have to fully prosecute his Testamentary Suit, which Prakash and others were contesting. An entirely conceivable result was that both Testamentary Suits might finally fail.
8. This is only by way of background. In paragraph 67 of the judgment, I said:

“67. In view of this order, Testamentary Suit No. 61 of 2009 filed by Aidasani for probate to the February 2006 Will fails. I have made a separate order today on that Testamentary Suit.”

9. Thereafter, Mahesh carried the matter in appeal. Being a First Appeal it was, naturally, admitted. The appellate order of 3rd September 2019 stayed the implementation of the judgment and decree. Parties were set at liberty to obtain any workable order regarding the subject property.

10. Mr Makhija's submission is limited. He says that while the judgment decreeing the operation of Prakash's Testamentary Suit has been stayed, there is no stay either from this Court or from the Appellate Court in regard to the dismissal of Mahesh's Testamentary Suit No. 61 of 2009. This, he says, prejudices Mahesh. In the current state of affairs, if Mahesh's appeal succeeds, and Prakash's Testamentary Suit is dismissed, Mahesh will have no proceeding left to prosecute, in view of my dismissal of it.

11. I believe this is entirely correct. If the Appeal filed by Mahesh succeeds and, consequently, Prakash's Testamentary Suit is dismissed, obviously, Mahesh's Testamentary Suit will have to proceed with a full contest.

12. In fact, I had passed a separate order at page 49 on 16th July 2019 in Mahesh's Testamentary Suit No. 61 of 2009 dismissing Mahesh's suit.

13. There is clearly an error on the face of the record in not staying the order dismissing Mahesh's suit. Hence, this order.

14. Prayer clause (a) of the Review Petition reads thus:

“(a) that this Hon'ble Court be pleased to review and set aside the Order dated 16th July 2019, uploaded on 6th August 2019, and restore Testamentary Suit No. 61 of 2009 to file.”

15. I believe the second portion is somewhat unhappily phrased. All that is required is to say that the order holding that Mahesh's Testamentary Suit No. 61 of 2009 fails (para 67 of the judgment) and the separate order at page 49 on 16th July 2019 dismissing Mahesh's suit are stayed pending the final decision of the Appeal Court in Appeal (L) No. 415 of 2019. I am making it clear that there is no question of 'restoring' Mahesh's Testamentary Suit. Only the orders dismissing it are stayed.

16. Although I have made this order in review, I am quite clear that I could have made the same order even on an application presented for speaking to the minutes.

17. The Review Petition is made absolute, but only in these terms.

(G. S. PATEL, J)