

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

MISC.CIVIL APPLICATION NO. 329 OF 2019

Darius Rutton Kavasmaneck	...Applicant/Petitioner
vs.	
Maharukh Murad Oomrigar & Ors.	...Respondents

Mr.Snehal Shah with Ms.Priyanka Kothari a/w Mitesh Naik i/by H Dhru & Co. for Applicant.

Mr.Aniket Nair with Mr.Shrikant Pillai i/by Mustafa Motiwala for Respondent No.1.

Mr.Sunil Sen with Mrs.Manjiri S. Chitnis i/b. M/s.Chitnis & Co. for Respondent No.2.

Mr.Rohan Cama with Mr,Chirag Dave i/by Legasis Partners for Respondent No.3.

CORAM : BHARATI DANGRE, J.

RESERVED ON : 28 SEPTEMBER 2021

PRONOUNCED ON : 8 OCTOBER 2021

JUDGMENT :

1. By the present miscellaneous civil application filed under Section 24 of the CPC, the Petitioner seek transfer of Special Civil Suit No.837/2017 pending before the City Civil Court at Bombay to the High Court, with a prayer to try it along with Testamentary Suit No.135/2016, which is pending in this court.

2. Issue that arise for consideration in the application is: Whether the relief, as prayed for, can be granted by exercising the power Under Section 24 of the Code of Civil Procedure along with Rule 6 of Chapter I of

the Bombay High Court (Appellate Side) Rules, 1960.

The said question will have to be determined in the backdrop of the facts, which can be winnowed and briefly stated as under:

3. The Applicant before this court and Respondent Nos.1 and 2 are the progeny of Mrs.Jer & Mr.Rutton Manchershaw Kavasmaneck. Mr.Rutton M. predeceased Mrs.Jer, who expired on 29 November 2013. The proceedings revolve around a will executed by her on 22 December 2013 and it is the claim of the Applicant that he is a sole beneficiary and sole executor under the Will. The Applicant filed a petition for probate of the last will and testament of Mrs.Jer. The petition is numbered as Probate Petition No.660/2014. Respondent Nos.1 and 2 filed their respective caveat in the said proceedings on 24 May 2016 and 2 July 2016 raising their objection to the grant of probate and consequently, the aforesaid probate petition stood converted into a testamentary suit, numbered as Testamentary Suit No.135/2016.

The relief sought in the said suit is based on the premise that the deceased had left a writing, which is his last will and testament, and it was duly executed at Mumbai on 22 December 2012, under which the Applicant is a sole beneficiary and trustee and the sole executor in the will and testament and in such capacity, he is entitled for probate of the last will and testament of the deceased. Schedule I appended to the petition compile the property and credits which the deceased possessed or was entitled to at the time of her death. This included 2961 equity shares in her name issued by Respondent No.3, Gharda Chemicals Ltd., a company incorporated under the Companies Act and having its registered address in Bandra (West), Mumbai. Respondent No.3 is a company in which one

Dr.Gharda, brother of Mrs.Jer, is a majority shareholder and exercise control over the said company as its Chairman and Managing Director.

4. From the caveat filed by the Respondents opposing the grant of probate as claimed in the probate petition, the Applicant learned that the deceased had submitted a nomination form, being Form No.2B, to the Respondent No.3 company where she nominated her three children in whom the rights of transfer and/or amount payable in respect of the shares held in M/s.Gharda Chemicals Ltd., Bandra (West), will vest in the event of her death. The nomination form mention the Applicant and Respondent Nos.1 and 2 as nominee and the nomination dated 24 May 2011 signed by the deceased is executed in presence of two independent witnesses. Respondent Nos.1 and 2, therefore, stake a claim that the deceased intended to divide her estate equally between her three children.

5. In the wake of the said claim of Respondent Nos.1 and 2, calling in question the authenticity of the alleged last will and testament of the deceased dated 22 December 2012 in its entirety and posing a specific allegation that the Applicant had fraudulently, illegally and maliciously filed a petition for obtaining probate in order to deprive the objectors of their legitimate share in the estate of the deceased, the Applicant instituted a civil suit in the City Civil Court at Bombay on 10 March 2017. The cause of action is pleaded to have accrued when he learnt of the purported nomination dated 24 May 2011, on March 15, 2014 on receipt of a letter from Defendant No.3. In the said suit, the Plaintiff claimed the following reliefs:

“a. That this Hon’ble Court be pleased to declare that

the purported Nomination dated May 24, 2011 (Exhibit 'M' hereto) is illegal and/or bad in law and/or void ab-initio and/or liable to be cancelled and/or set aside;

- b. That this Hon'ble Court be pleased to pass a Decree of cancellation, cancelling the purported Nomination dated May 24, 2011 (Exhibit 'M' hereto);
- c. That this Hon'ble Court be pleased to direct the 3rd Defendant to cancel the registration of the purported Nomination dated May 24, 2011 (Exhibit 'M' hereto) from its records;
- d. That this Hon'ble Court be pleased to restrain the Defendants by themselves or through their servants and/or agents or in any manner whatsoever from giving effect to and/or acting upon or in pursuance of the purported Nomination dated May 24, 2011 being Exhibit 'M' hereto.”

6. The suit is numbered as S.C. Suit No.837/2017. The City Civil Court settled the issues in the said suit on 6 June 2018 and issue no.3 is framed as “Does the Plaintiff prove that the nomination form Exh.M to the plaint is illegal and bad in law?”

The said issue is the pivotal issue in the suit apart from the point of limitation and valuation of the suit, which would determine whether the Plaintiff is entitled for declaration as prayed for.

On the issue being framed, the Plaintiff filed his evidence affidavit along with the compilation of documents and the Defendants also filed their written statement before the City Civil Court at Mumbai. The suit

when fixed for cross-examination on 5 November 2019, the court commissioner was appointed. The suit could not proceed further since the application was moved by the Plaintiff therein praying for deferring the proceedings in the said suit until the final outcome of Testamentary Suit No.135/2016, which is pending before the High Court. The proceedings of the said suit, therefore, were adjourned and on behalf of the Applicant, it is sought to be canvassed that the court itself recorded that reliefs claimed in the said suit can be termed as ancillary reliefs and they can be claimed in Testamentary Suit No.135/2016, which is pending before the High Court and it is recorded that the Plaintiff's Advocate shall seek necessary instructions for withdrawing this suit with liberty to make amendments in the plaint of Testamentary Suit No.135/2016.

7. It is in this backdrop, the present application is filed with the reliefs as mentioned above.

I have heard learned Senior Counsel, Mr.Snehal Shah, for the Applicant, Senior Advocate Sunip Sen for Respondent No.2, Advocate Aniket Nair for Respondent No.1 and Advocate Rohan Cama for Respondent No.3.

Learned Senior Counsel, Mr.Shah, would urge that there is commonality in the two proceedings revolving around the validity and/or legality of the purported nomination and this emerges, since the grant of probate is resisted by relying upon the purported nomination which is challenged by the Applicant in the civil suit. It is argued that on the question of validity of the purported nomination, there will be common evidence, both documentary as well as oral, and to avoid repetition, it would be expedient in the interest of justice if the civil suit is brought to the High Court and is tried and disposed of along with the Testamentary

suit, which is already pending before this court. Learned Counsel would submit that Section 24 of the Code read with Rule 6 of the Bombay High Court (Appellate Side) Rules, 1960 empowers this court to withdraw any suit from any sub-ordinate court and try and dispose of the same on an application of any of the parties or on its own motion. It is argued and in order to avoid multiplicity of proceedings and to avoid conflicting decisions, the suits can be clubbed and apart from the fact that it would ensure speedy disposal, it will avoid repetition of evidence. It is also urged that this will cause no harm to the other side and since both the suits are filed by the Applicant and when he desires that they shall be clubbed and tried together, his application deserves a consideration.

Per contra, learned Senior Counsel, Mr.Sunit Sen, would urge and submit that the scope of the testamentary suit which is instituted in this court is distinct, when juxtaposed against the civil suit in which a declaration is sought to declare the nomination by the contested deceased in favour of three offsprings, as illegal and the lis cannot be with some gauntlet. It is submitted that the proceedings of probate are the proceedings *in rem* whereas the relief claimed in the civil suit is *in personem* and the probate proceedings are interim proceedings and though it may have some bearing on the suit but the outcome of the civil suit will not determine the grant of probate. It is asseverated that the two proceedings are independent and there is no commonality as claimed and the civil suit will determine whether the nomination is valid or not, in the backdrop of the issue framed by it where the Plaintiff will have to discharge the burden and adduce evidence to prove that the nomination in favour of all the three children is bad in law.

8. Mr.Rohan Cama appearing for Respondent No.3 seriously

objects to the reliefs sought in the MCA and submit that there is no commonality in the two proceedings as neither the parties are same nor the issues to be settled are common. Moreover, it is also submitted by Mr.Cama that the suit before the civil court has advanced to the stage of cross-examination of the Plaintiff and even the commissioner is appointed to collate the material, but the proceedings in the testamentary suit are at initial stage. Resultantly, the civil suit shall not be dragged along with the testamentary proceedings and as far as Respondent No.3 is concerned, it is bound by the nomination made by the deceased in favour of her three children. Relying upon the decision of the Division Bench of this court in the case of **Shakti Yezdani Vs. Jayanand Jayant Salgaonkar**¹, it is submitted that as far as this court is concerned, the issue has been settled to the effect that nomination does not override law in relation to testamentary or intestate succession and provisions regarding nominations are made with a view to ensure that the estate or the rights of the deceased shall be protected till legal representatives of the deceased take appropriate steps.

9. The Code of Civil Procedure contains provision for transfer of suits from one court to another and Section 24 recognises the power of transfer and withdrawal of suit which can be exercised by the High Court or by the District Court at any such stage and upon such power being exercised, the suit shall stand transferred or withdrawn and on its transfer, can be disposed of before tried by the court to which it is transferred. Power conferred under Section 24 is wide and it is settled law that the said power can be exercised to transfer suits which raise common questions of fact and law, having a substantial bearing on the decision of each of the cases, since it is obviously desirable that they shall be tried at the same

1 (2017) 1 Bom CR 319

place by the same court. When certain common questions of fact having a substantial bearing on the decision of both cases arise, in the interest of justice both the suits shall be tried together. Another contingency, when transfer is permitted, is when the facts of both the suits are so intertwined that the transfer may not be refused but the *sine qua non* for transfer of a suit by invoking the power under Section 24, is necessarily, when the parties and subject matter of the suit are one and the same.

10. The Hon'ble Apex Court in the case of **Indian Overseas Bank, Madras vs. Chemical Construction Company**² has held that the power of transfer has to be exercised with great caution and attentiveness and will always be exercised in the light of legitimate concern for justice. The principle underlying the exercise of power of transfer either under Section 24 or 25 of the Code of Civil Procedure shall necessarily be coupled with 'necessity of justice' and if the interest of justice can be better served by transferring the suits by exercising the power. The balance of convenience in favour of a party may be one of the factors which may demand exercise of the said power but it is not the only factor. Their Lordships of the Apex Court have observed as under:

"18. Although the exercise of this discretionary power can not be imprisoned within the straight-jacket of any cast-iron formula uniformly applicable to all situations, yet, certain broad propositions as to what may constitute a ground for transfer can be deduced from judicial decisions. One of them is that where two suits raising common questions of facts and laws between parties common to both the suits are pending in two different courts, it is generally in the interest of justice to transfer one of those suits to the other forum to be tried by the same Court, with consequent avoidance of multiplicity in

2 AIR 1979 SC 1514, (1979) 4 SCC 358

the trial of the same issues and the risk of conflicting decisions thereon. The instant case falls squarely within this category.”

In **Maneka Sanjay Gandhi vs. Rani Jethmalani**³, the Apex Court has observed as under:

“2. Assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini grievances. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is necessitous if the Court is to exercise its power of transfer.

This is the cardinal principle although the circumstances may be myriad and vary from case to case.”

The exercise of power to transfer when invoked shall ensure that the ends of justice are met on transfer of the suit. It is true that if more than one court has jurisdiction to try the suit, the plaintiff as a dominus litis has a right to choose the forum and the leave sought by the other side demanding transfer of the suit cannot be granted unless it is shown that the trial in the chosen forum will result in denial of justice. The discretion to transfer case from one court to another can be exercised only if it is considered expedient to meet the ends of justice. Necessity of the paramount consideration should be whether the transfer of the suit meet the ends of justice and in such a case even if it is likely to cause inconvenience, the same can be granted.

The Applicant’s plea for transfer of the case must, therefore, be

3 (1979) 4 SCC 167

tested on the said touchstone.

11. The subject matter and the scope of determination of the issues in the two distinct suits will also have to be adverted to. As far as the testamentary petition demanding probate is concerned, in the said proceedings, the court exercising testamentary jurisdiction is not concerned with title to the property but shall determine whether probate should be granted or not. The court would determine the question only upon the genuineness and deemed execution of the will. Determination of issue of title is alien to probate proceedings.

In **Ishwardeo Narain Singh vs. Kamta Devi**⁴, the Hon'ble Apex Court has succinctly formulated the principle governing the grant of probate in the following words "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 as to whether particular bequeath is good or bad is not within the purview of probate court. The probate proceedings shall be conducted by the probate court in the manner prescribed in the Succession Act and in no other ways and in the said proceedings, the court would do nothing more than to establish the factum of the Will and the legal character of the executor without deciding the question of title or existence of the property itself. The probate proceedings would merely enable administration of the estate of the deceased. The interpretation of a will relating to the right, title and interest of any person is beyond the domain of the probate court." This is the scope of

4 AIR 1954 SC 280

Testamentary Petition No.660/2014 instituted by the Applicant and which is pending before this court.

12. Conversely in the special civil suit instituted in the civil court, the Plaintiff/Applicant seeks a declaration that the purported nomination by his mother in respect of her shares in favour of her three children is illegal and/or bad in law *void ab initio* and relief is sought for its cancellation. The shares in possession of Mrs.Jer is only one of the properties mentioned in the will and the special civil suit encompass the nomination form dated 24 May 2011, nominating the Applicant and Respondent Nos.1 and 2 in respect of her shares in Respondent No.3. The Applicant/Plaintiff has pleaded that the said nomination is contrary to her will as by the will, his mother has bequeathed to him all the shares exclusively and consequently, the question of election in the alleged nomination does not arise. The Plaintiff has raised a suspicion about the said nomination and has pleaded that the nomination is false and fabricated. After much persuasion, the inspection of the said nomination form as well as the statutory registers was given to the Constituted Attorney of the Plaintiff in the office of Defendant No.3 and after much persuasion, a certified photocopy of the purported nomination form is handed over to him. The claim that the nomination form being forged, rests on a pleading to the effect that the nomination is claimed to have been lodged by Mrs.Jer with the third Defendant on 3 June 2011, but on that date, she was admitted in the B.D. Petit Parsee General Hospital and ergo, she could have never lodged the purported nomination. The Plaintiff has relied upon the copy of the bill issued by the said Hospital evidencing the fact that from 1 June 2011 to 6 June 2011, Mrs.Jer had been admitted to B.D. Petit Parsee General Hospital.

Another ground pleaded by the Plaintiff, is that the purported nomination is contrary to the provisions of Sections 109A of the Companies Act as in the light of the said provision, a nomination can only be made in favour of a “person” which contemplates a single individual and therefore, nomination cannot override the purport of Section 109A of the Companies Act, 1956. Further, it is pleaded that the execution by Mrs.Jer in presence of the two witnesses when the purported nomination was executed on 24 May 2011 was not known to Mrs.Jer and an averment is made to that effect that the purported nomination is fraudulent and has been fabricated by the Defendants in collusion with one another with a view to defeat the Plaintiff’s exclusive right in Mrs.Jer’s shares.

13. The pleadings in the said suit, justifying the declaration that the purported nomination is illegal, when carefully perused cast the burden of proving the said assertions on the Plaintiff. This burden can be discharged by adducing evidence either oral in nature or documentary evidence by entering into the witness box. The said proceedings seeking declaration are distinct from the claim in the testamentary petition where a probate is sought, which is merely restricted to the determination whether the will was executed by the testator by her own free will. This being the only ambit of the proceedings, the independent proceedings instituted by special civil suit seeking a declaration about the nomination qua one of the properties of the deceased, i.e. the share in Respondent No.3 cannot be determined together as the issues which would be settled in the two proceedings for its determination stand on distinct footing. The probate court, in any way, is not concerned with the questions relating to the property itself and cannot determine the issues in the special civil suit; as it would travel beyond the scope of the jurisdiction of the testamentary court

and it is better left to the jurisdiction of the civil court which would exercise its jurisdiction over the special civil suit to determine the validity of nomination by the deceased, which is alleged to be fraudulently procured.

14. The caution expressed by the Hon'ble Apex Court in case of **Indian Overseas Bank, Madras** (supra) that the court should not lightly change the forum and mere balance of convenience in favour of proceedings in another court shall not be a sure criterion justifying the transfer, prompt me to reject the application for the reasons recorded above. Pertinent to note that the parties to the said proceedings are also not common, since in the special civil suit, Respondent No.3, i.e. the company incorporated under the Companies Act, whose shares are alleged to have been bequeathed by the deceased Mrs.Jer either exclusively to the Plaintiff or as per the nomination form to all the three siblings and this aspect is of utter importance as the decision in the civil suit will determine the manner of allotment of shares of deceased Mrs.Jer. The company cannot be party to the probate proceedings and this is one additional ground on the commonality, in the nature of proceedings cannot be attracted. The stages at which the two proceedings stand as on today also dissuade me in not granting the application for transfer.

15. For the reasons recorded above, the application filed under Section 24 of the CPC cannot be entertained and is dismissed. Easy on costs.

(SMT. BHARATI DANGRE, J.)