

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

ORIGINATING SUMMONS NO.14 OF 2019

Nani Byram Javeri		.. Plaintiff
Vs.		
1. Jehangir A.C. Wadia		
2. Pesi A.C. Wadia (<i>Since Deceased</i>)		
<i>Through LR.:</i>		
2[A]. Laila Wadia		
3. Marina N. Jhaveri		
4. Rhoda M. Patel		
5. Shirin Dastur		
6. Shirin Nani Javeri		
7. Firdaus Khambata		
8. The Charity Commissioner, Mumbai		.. Defendants

ALONG WITH

INTERIM APPLICATION NO.1763 OF 2020

Jehangir A.C. Wadia		.. Applicant
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Dr. Virendra Tulzapurkar, Sr. Advocate, with Mr. Kunal Dwarkadas, Mr. Ranjit Shetty, Ms. Priyanka Shetty and Mr. Arjun Amin, i/by Argus Partners, for the Plaintiff.

Mr. Dinyar Madon, Sr. Advocate, with Mr. Chaitanya Chavan, Mr. Levi Rubens, Ms. Rashmi Salian and Ms. Krishna Patel, i/by L.R. & Associates, for Defendant No.1.

Mr. Nikhil Sakhardande, Sr. Advocate, with Mr. Prahlad Paranjape, Ms. Shubhra Swami and Ms. Druti Datar, for Defendant Nos.2 to 5.

Ms. Ankita Singhania, with Ms. Krusha Maheshwari, i/by ANB Legal, for Defendant Nos.6 and 7.

Mr. Kedar Dighe, AGP, for Defendant No.8.

CORAM : A. K. MENON, J.
RESERVED ON : 2ND DECEMBER, 2021.
PRONOUNCED ON : 17TH FEBRUARY 2022.

JUDGMENT :

1. By this Originating Summons, under Rule 238 of the Bombay High Court (Original Side) Rules, 1980, the plaintiff seeks determination of the following questions :-

- (a) *Whether the securities/monies held in Trust for Mary Wadia under Clause 16 of Amba Wadia's Will devolved absolutely on to Rutty Wadia, upon Mary Wadia's demise ?*
- (b) *Whether the securities/monies held in Trust for Mary Wadia under Clause 16 of Amba Wadia's Will formed part of the estate of Rutty Wadia and on the demise of Rutty Wadia to be distributed as per her probated Will ?*

2. The plaintiff is said to be surviving executor of the last Will and testament of one Rutty Cursetji Pestonji Wadia dated 25th June 2002. The plaintiff is also said to be a trustee of P.A. Hormarjee Charites along with defendant nos.6 and 7. Defendant nos.1 to 5 are the persons who may get a share in the estate of one Amba Wadia – mother of Rutty Wadia. Defendant no.6 is the wife of the plaintiff and also sued in her capacity as trustee of the P.A. Hormarjee Charites (*"the Trust"*). Defendant no.7 is also a trustee. Defendant no.8 is the Charity Commissioner impleaded as a formal party.

3. What the plaint essentially seeks is interpretation of Clause 16 of the

Will dated 25th February 1943 made by Amba Wadia. That Will was supplemented by Codicil dated 13th August 1944. Amba's Will was probated on 22nd October 1946. Ruty's Will dated 25th June 2002 was probated on 4th July 2018. According to the plaintiff, clause 16 of Amba's Will is required to be interpreted while dealing with the questions raised in this Originating Summons.

4. THE PARTIES :

- (a) Late Amba Wadia had four children viz. (i) Ardeshir Cursetji Wadia, (ii) Mary Wadia, (iii) Ruty Wadia and, (iv) Chandan Mistry. Of these children, Mary and Ruty were unmarried and died without leaving any issues.
- (b) Ardeshir Wadia had five children, namely, defendant nos.1 to 5 viz. (i) Jehangir, (ii) Pesi, (iii) Marina, (iv) Rhoda and, (v) Shirin.
- (c) Chandan Mistry had two children viz. (i) Rusi Ratanji Mistry and (ii) Shirin Nani Javeri (Defendant No.6). It is not in dispute that Rusi Mistry was not a beneficiary under Amba's Will. Rusy is therefore not a party. Shirin Zaveri is a beneficiary under the Will.
- (d) Amba Wadia, upon her demise on 2nd February 1946, was survived by her husband Cursetji Pestonji Wadia

and four children named above. All heirs of Amba Wadia, namely, her husband – Cursetji and four children, have since expired.

SUBMISSIONS OF COUNSEL

5. Dr. Tulzapurkar, learned Senior Advocate appearing on behalf of the plaintiff, has taken me through the provisions of the Will of Amba Wadia; in particular clause 16. He submits that on a fair reading of clause 16, upon the demise of Mary, the correct interpretation of clause 16 will result in all monies and securities vesting absolutely in Rutti, which properties would have to be administered according to Rutti's Will. Mary, it was submitted, had executed a Will dated 25th June 2002. She expired on 11th November 2002 without having any children or "remoter issue".

6. My attention has been drawn to the relevant clauses of the Will of Mary being clauses 5 and 6, which provide that after payment of her funeral expenses and all debts, she had bequeathed rest of the property to her sister Rutti. Furthermore, the rest of the Will was intended to come into effect only in the event of Rutti predeceasing Mary. As a matter of fact, Mary died before Rutti. According to Dr. Tulzapurkar, since Mary had no children or remoter issue, Rutti was constituted as sole beneficiary for the entire estate of Mary by virtue of clause 5 of Mary's Will, which came to be probated on 27th June 2018. Rutti expired on 21st December 2002, unmarried; thus, without children and without any remoter issue.

7. My attention was invited to clauses 5, 6 and 7(e) of Ruttty's Will, which provides that after paying of all debts, her property would be bequeathed to her sister Mary. Just as in Mary's Will, Ruttty's Will also provides that the rest of the Will would come into effect only if her sister Mary predeceased her. Vide clause 7(e), Ruttty's Will provided that residue of all properties stand bequeathed to Ruttty's niece – defendant no.6–the said Shirin and in the event of Shirin predecease Ruttty, to her child and to the trustees of the Trust. According to Dr. Tulzapurkar, upon Mary having predeceased Ruttty, clause 7(e) would come into operation and as such, Ruttty's residual estate would stand bequeathed to defendant no.6–Shirin and to the said trustees.

8. Dr. Tulzapurkar submitted that the plaintiff, as an executor of the Wills of Mary and Ruttty, had filed petitions for probate along with the co-executor, after which defendant no.1–Jehangir, son of Ardeshir, filed Caveats objecting to grant of probate to the Mary's Will and Ruttty's Will. Later, the Caveats came to be withdrawn upon parties arriving at a mutually acceptable arrangement. Defendant no.1–Jehangir also filed an affidavit unconditionally withdrawing the Caveat. Original defendant no.2–Pesi also withdrew the Caveat. Pesi expired on 7th August 2020, as a result of which defendant no.2(A), a resident of Italy, has now been joined in this Originating Summons. A suit came to be filed in this court being Suit No.879 of 2008 relating to immovable property called "The Mount". While the suit was later settled out of court, the plaintiff has filed an affidavit dated 1st April 2008 in Notice of

Motion No.1081 of 2008 in the said suit. In that affidavit, it is stated that as per the legal advice received, because Mary predeceased Ruty, the sums payable to Mary's share devolve upon Ruty and after her lifetime, upon sons and daughters of Ardeshir Wadia. According to Dr. Tulzapurkar, this was stated on affidavit on the basis of an understanding and legal advice received by the plaintiff at the material time. Defendant no.6 was also one of the executors of late Mary's Will. She has filed an affidavit in the same Notice of Motion. She also claims that this affidavit was based on her understanding and legal advice then given to her.

9. As a result of settlement, Suit No.879 of 2008, along with the Notice of Motion No.1081 of 2008, came to be withdrawn by defendant no.1. Dr. Tulzapurkar then submitted that the plaintiff had, meanwhile, engaged services of M/s. Warmond Trustees and Executors Pvt. Ltd. to seek assistance in distribution of assets under the Wills of Mary and Ruty. The said Warmond Trustees apparently advised the plaintiff that the statements made in the affidavit of the plaintiff in the notice of motion on interpretation of clause 16 of the Amba's Will appear to be incorrect and that upon proper interpretation of clause 16, the properties would devolve upon Ruty absolutely since Ruty was alive at the time of demise of Mary. According to the advice received by the plaintiff, the properties would devolve in accordance with the Ruty's Will, which in clause 7(e) had bequeathed her estate in two equal proportions to defendant no.6-Shirin and the trustees of

the Trust. Dr. Tulzapurkar contends that the plaintiff had, on the basis of this fresh advice, sought opinions from law firms. On interpretation of clause 16, the plaintiff now finds that there is a conflict in the plaintiff's understanding and that of Warmond Trustees. The plaintiff claims to have been advised that his earlier view that Mary's share would devolve on defendant nos.1 to 5 was incorrect and that the estate would devolve on Ruty absolutely. In view of this, the plaintiff seeks an interpretation from this court on the meaning and effect of clause 16 of Amba's Will. The plaintiff is interested in this since apart from his being a trustee of the Trust, the defendant no.6 – his wife would also be a beneficiary. Such interpretation could also affect defendant nos.1 to 7 and hence Dr. Tulzapurkar submits that upon legal advice, the plaintiff believes that defendant no.6-Shirin and the trustees would have to be held to be the beneficiaries. He therefore submits that clause 16 will enure for the benefit of Ruty, to be distributed in accordance with her Will, which has been duly probated.

10. Dr. Tulzapurkar has canvassed the plaintiff's interpretation of the provisions of the Will and in support, he has relied upon the decision in *Sudesh Kumar Vs. Moolchand*¹. He has also invited my attention to the order dated 4th September 2017 passed in Suit No.1932 of 2008, whereby Consent Minutes of Order dated 11th August 2017 was made an order of the court and the suit has been disposed in terms of the consent minutes. My attention is also invited to the Deed of Conveyance dated 4th September 2017 between the

1 *AIR 1969 Rajasthan 22*

plaintiff and co-executor Firoze Hormusji Bamboat and one Yezdi Bhagwagar as trustees and some other defendants, namely, Pesi, Russi and Shirin and one Sanjay Infraspace Pvt. Ltd. disposing the suit.

11. Mr. Madon appearing on behalf of defendant no.1 opposed the application. He submits that the application is frivolous and without any merit. He has relied upon the written statement filed on behalf of defendant no.1 dated 6th August 2019, in which the defendant no.1 has denied all contentions in the plaint. Mr. Madon submits that the plaintiff has not only come to court with unclean hands, but with dishonest intention inasmuch as he has consistently refused to divulge details of Mary's share set apart by operation of clause 16 of Amba's Will dated 25th February 1943. The 1st defendant is claiming to be one of the sole beneficiaries of clause 16. Mr. Madon submits that he is entitled to all information about the estate and share of about Rs.2 lakhs involved. He submits that the plaintiff has rejected several demands made by defendant no.1 to disclose the information. He relies upon his Advocate's letters regarding the share from the plaintiff dated 11th June 2019, 20th June 2019 and 15th July 2019 and demanding information, but the plaintiff has vide replies dated 1st July 2019 and 18th July 2019 declined to provide information claiming it to be irrelevant for the purposes of the present suit.

12. Mr. Madon submitted that the present originating summons is not maintainable; firstly, because the plaintiff has not filed proceedings as an

executor or an administrator of the estate of deceased Amba, nor as a trustee appointed under the Will of Amba or as a person claiming to be interested in the originating summons as creditor or legatee or beneficiary of the estate of the deceased or of the Trust created by Amba Wadia. According to Mr. Madon, the plaintiff has no locus to file the present proceedings. He has submitted that the true facts, which have not been set out, are as under.

13. According to Mr. Madon, defendant nos.1 to 6 are descendants of Amba, who was married to Cursetji. Amba had created a certain Trust and appointed trustees, but the plaintiff has refused to divulge the names of the present trustees allegedly for want of knowledge. Mr. Madon states that the defendants deny that the plaintiff is a trustee. He has also taken me through the contents of clause 16 and submits that the testatrix Amba intended to create a Trust in a sum of Rs.2 lakhs in favour of Mary and has set apart the amount or securities for an approximate market value of Rs.2 lakhs out of her estate during the lifetime of testatrix's husband – Cursetji. The income from this Trust fund was to be divided equally between Mary and Ruty. After Cursetji died, Mary would be entitled to the income and after her death, the funds were to be held in trust by Amba's trustees or Mary's children or remoter issue. In the event Mary left behind no children or issue or remoter issue, the funds would be held for Ruty for her lifetime and after her demise, for her children or remoter issue, if any. Since Ruty had expired without issues, the funds were held in trust for children of Ardeshir i.e. the present

defendant no.1s' father. Defendant no.3 had apparently no right to the funds since there was a specific prohibition in Amba's Codicil dated 13th August 1944. Hence, other heirs of Ardeshir, to the exclusion of defendant no.3-Marina, were entitled to the Trust funds. Cursetji expired in 1950. Ardeshir expired in 1984, leaving behind defendant no.2-Pesi and three daughters viz. defendant nos.3 to 5 and Jehangir-defendant no.1. Amba's daughter Chandan Mistry expired in 1999, leaving behind Shirin-defendant no.6 and Russi Mistry, who, as stated earlier, has not included. Mary expired on 11th November 2002, unmarried and without issues, but left behind her Will dated 25th June 2002. Ruty died on 21st December 2002, unmarried and without issues, but left behind Will of 25th June 2002.

14. According to Mr. Madon, the plaintiff is now seeking to resile from the earlier admission, which has been acted upon, and is now seeking to draw additional gains by filing the present suit and misinterpreting clause 16. He submits that the interpretation is incorrect and based on conjectures and surmises. According to Mr. Madon, merely because the plaintiff has now sought and obtained a different opinion, the court need not entertain the present Originating Summons. There is no cause of action that the plaintiff has disclosed to file the present proceedings. The Trust was for the benefit of Mary and her children. The property known as "The Mount" was bequeathed to Ruty. Clause 16 was clear, inasmuch as if Ruty and Mary died without leaving behind children or remoter issue, the trustees would held the funds

for the benefit of sons and daughters of Ardeshir, by which the son(s) would get double the share of each daughter. This interpretation has been accepted by the plaintiff and defendant no.6-Shirin in several legal proceedings and under legal advice. He submitted that even Rutty's Will makes it clear that she did not treat the funds as being specifically bequeathed to her. It was always considered as Trust property, to be divided between the children of Ardeshir. Mary's Will would also make it clear that the funds were not intended to be dealt with in the manner that the plaintiff now seeks to interpret. Mary and Rutty were to receive income during their lifetime and nothing beyond. Thus, it is evident from the Wills of Mary and Rutty that they never considered the Trust to be their personal property. Mary and Rutty could have passed on benefit to their own children or remoter issue; however this did not arise since neither of them had or left behind children or remoter issue. Therefore, Rutty had no right to deal with the funds under clause 16 in Amba's Will in the absence of children or remoter issue and it would therefore devolve on the children of Ardeshir.

15. Mr. Madon submitted that this amounts to approbation and reprobation after having benefited from an earlier interpretation and that is impermissible. He submitted that after 16 years since the earlier proceedings were settled and the parties had agreed to act accordingly, now the plaintiff seeks to resile from that position for the benefit of his wife – defendant no.6. According to Mr. Madon, quite apart from merits, the suit is also barred by

the law of limitation. The Will existed to the knowledge of the plaintiff since 2003 and hence the suit filed in the year 2019 is barred. Mr. Madon further submitted that the judgment of the Rajasthan High Court in *Sudesh Kumar (Supra)* is of no relevance, because the plaintiff in that case is a beneficiary. Furthermore, on a more basic aspect, Mr. Madon submitted that this court would have interpreted clause 16 only if this was a final proceeding but it is not.

16. Mr. Madon has also invited my attention to Exhibit-F in the present plaint, which is a copy of Testamentary Suit No.48 of 2003 in Testamentary Petition No.380 of 2003, and submitted that the plaintiff-Nani herein was the 2nd petitioner in that testamentary petition. In paragraph 8 of that petition, the petitioners had relied upon Schedule-III, to be the property held by the deceased as trustee for another not as a beneficiary or with general power to confer a beneficial interest. With reference to the schedule of assets annexed to the plaint herein, Mr. Madon invited my attention to the fact that it makes no reference to mother's Trust, as otherwise the plaintiff could have moved for a decree on admission. The Caveats were filed and withdrawn.

17. Mr. Madon invited the court to adopt Armchair Rule that on Mary's death, it was the life interest for Ruttu and if Ruttu did not leave behind children or remoter issues, the estate of late Amba Wadia would devolve on others. The plaintiff's interpretation now expects the court to add words to the

Will since the clause does not say that Ruttu should have predeceased Mary. Mr. Madon submitted that accepting the plaintiff's interpretation would mean that the court is required to add words. Mr. Madon further submitted that the plaintiff is now estopped since there is no challenge to the prior proceeding. The plaintiff had no challenge to the prior proceedings when out of court settlement was arrived at and all parties were then ad idem till the plaintiff now demonstrated greed. Mr. Madon therefore submitted that words cannot now be added to the Will and whenever the testatrix wished to use the word "predeceased", she did and the Will does not say that Ruttu should have predeceased Mary. It is therefore submitted that the Originating Summons be rejected and the plaintiff is required to file a suit. Mr. Madon has also relied upon the decisions of the Supreme Court in *Chaudhari Narpat Singh and Ors. Vs. Rani Chandra Kunwar, along with connected matter*², and *Nagubai Ammal & Ors. Vs. B. Shama Rao & Ors.*³ on the aspect of "onus probandi".

18. Defendant nos.2 to 5 represented by Mr. Sakhardande support defendant no.1's submissions. He therefore adopted the submissions of Mr. Madon to the extent relevant in respect of defendant nos.2 to 5. That leaves defendant no.6-wife of the plaintiff and defendant no.7-trustee of Hormarjee Charites Trust, who were represented by Ms. Singhania. Ms. Singhania supported the submissions of the plaintiff. She submitted that defendant nos.6 and 7 have filed independent written statements setting out factual aspects of

2 1906 SCC OnLine PC 26

3 1956 SCR 451

execution of Wills of Mary and Ruttu and the probates granted. Defendant no.6 has supported the plaintiff and has sought a decision on the originating summons interpreting clause 16 of the Will of Amba. Not surprisingly, save and except for paragraph 2 of the written statement of defendant no.7, is a reproduction of defendant no.6's written statement.

19. Ms. Singhania has relied upon a decision of the Full Bench of this court in the case of *Gadigeppa Bhimappa Meti Vs. Balangowda Bhimangowda*⁴ in support of her contention that no person can, by application of law of estoppel or by any rule of procedure, acquire or have assigned to him a status or legal capacity which the substantive law denies to him. She relied upon the observations of the court [*Per Beaumont, C.J.*] that it makes no difference whether the misrepresentation on which the estoppel is sought to be founded is made fraudulently or innocently. Under Indian Law, the problem is different from that under English Law. The court was dealing with the aspect of minority and the capacity to contract and reconcile under Section 11 of the Indian Contract Act and how under Indian Law of Contract, contract by a minor is void, whereas under English Law, it is voidable. She has also relied upon the observations of this court [*Per Lodha, J.*] in *Sudesh Kumar (Supra)*.

20. Defendant nos.2 to 4 have caused a written statement dated 1st August 2019 to be filed, in which they have denied the contentions in the plaint and

4 1931 The Bombay Law Reporter [Vol.XXXIII] 1313

reiterated that there is no ambiguity in construing clause 16 of Amba Wadia's Will inasmuch as upon demise of Mary and Ratty, without leaving children or remoter issues, the Trust property would devolve upon the children of Ardeshir. Reference is made to the petitioners' averments in Testamentary Petition Nos.379 of 2003 and 380 of 2003, in which the plaintiff admitted that Mary owned personal property only to the extent of Rs.95.46 lakhs and declared the remaining properties of the deceased to be Trust properties. Relying on the admission on behalf of the plaintiff, it is contended there is no case made out for this court to reconsider the effect of probate granted to the Wills of Mary and Ratty. There is no manner of doubt that the property held in Trust must go to defendant nos.1 to 5 and that is an aspect which is final and binding. The interest of defendant no.6, who is the wife of the plaintiff, was noticed by the court and she also have full knowledge of the admission of the plaintiff. Having secured probate and all the advantages in favour of defendant no.6, the plaintiff is acting in a self-serving manner to secure further benefits for his wife. Plaintiff is taking advantage of the demise of a co-executor Feroze Bamboat. This contention in the plaint is therefore denied. Defendant no.5 has also filed a written statement reiterating that there is no ambiguity in construing clause 16. In fact, the contents of the written statement of defendant no.5 appear almost identical to that of defendant nos.2 to 4.

21. Defendant no.6 has expectedly supported the plaintiff and seeks

interpretation of clause 16. Defendant no.7 likewise, an existing trustee, also supports the case of the plaintiff. Both the defendant nos.6 and 7 seek leave to file additional written statement. I may mention that the matter has since been argued at length, no such leave was sought and I had no occasion to consider anything beyond the submissions at the bar and contemplated in the pleadings.

22. In the case of *Gadigeppa B. Meti (Supra)*, the Full Bench of this court has held that rule of estoppel cannot preclude the court itself from taking cognizance of the true facts inasmuch as if the court is convinced that an interpretation was incorrect or required to be reconsidered, it cannot be prevented from doing so by operation of the principle of estoppel. Ms. Singhania has laid emphasis on this aspect by also contending that this view finds reiteration in the judgment of *Sudesh Kumar (Supra)*.

23. Mr. Madon has however countered this contention by stating that this judgment will not be of any assistance since the parties had acted upon the earlier understanding and after due deliberation and during pendency of the litigation and once having arrived at a decision and having obtained orders of the court and acted upon, including by the sale of the property known as "The Mount", and appropriation of large sum of money by defendant no.6, this is purely an afterthought. I am inclined to agree. In my view, it is necessary to consider at the outset whether interference called for by entertaining this originating summons.

CONCLUSION

24. In the course of submission, it is revealed that in February, 2008, the defendant no.1 had filed Suit No.879 of 2008 inter alia pleading that under clause 16, a sum of Rs.2 lakhs was invested for the benefit of daughters of Amba, namely, Mary, Ruty and their children, if any. Defendant no.1 filed a Notice of Motion, to which I have already made reference above. The plaintiff was impleaded as trustee and reiterated the stand of defendant no.6-his wife. In February 2016, defendant nos.3 and 5 filed yet another suit being Administration Suit No.290 of 2016 against defendant no.1 and others claiming as daughters of Ardeshir, to be entitled to have $1/7^{\text{th}}$ of the fund. In that suit, defendant no.6, the wife of the plaintiff herein, had filed an affidavit stating that she and Russi had no interest in the Trust fund of Rs.2 lakhs invested per clause 16 of the Will and that the same would devolve upon eligible children of Ardeshir. Even plaintiff is said to have filed a joint affidavit with co-trustees dated 30th April 2016, agreeing and acknowledging that the share in the fund would be divided by clause 16 and would be divided amongst the eligible children of Ardeshir. It is on this basis that defendant no.1 filed an affidavit dated 1st September 2017 and withdrew Caveat filed by him in both probate petitions and in respect of Wills of Mary and Ruty. Defendant no.1 reiterated his rights to the Trust fund and withdrawal of the Caveat was conditional upon reiteration of his claim to the Trust fund. The plaintiff had benefited from his interpretation of the Will and in particular clause 16 and after having accepted the said interpretation, now seeks to

interpret it differently to gain arid to the detriment of the defendants concerned.

25. Perusal of the plaint in Suit No.879 of 2008 reveals that it was filed by defendant no.1-Jehangir against trustees of Amba's Will, including plaintiff and defendant no.6 as also the other beneficiaries. The plaintiff in the said suit is defendant no.1 in the present suit. The prayers in the said suit inter alia sought (i) to remove defendant nos.1 to 3 from trusteeship, including the Trust constituted under clauses 10 and 16 of the Will of late Amba, and to appoint a fit and proper person/s to act as trustees with a consequent direction to defendant nos.1 to 3, which includes the present plaintiff-Nani Javeri; (ii) to handover trust papers and other related documents to the new trustees and for necessary consequential orders for vesting of assets in new Trust.

26. In paragraph 4 of the plaint in Suit No.879 of 2008, plaintiff-Jehangir (defendant no.1 in the present Originating Summons) had contended that the sum of Rs.2 lakhs has vested absolutely within the plaintiff and defendant nos.6, 8 and 9 being the children of Ardeshir (Pesi Wadia, Rhoda Patel and Shirin Dastur). The plaintiff's letter dated 3rd April 2003, which was annexed to the plaint in Suit No.879 of 2008, was also relied upon. In the letter dated 8th April 2003, which the defendant no.2-Nani addressed to the plaintiff-Jehangir, the plaintiff admits that late Amba Wadia had set aside Rs.2 lakhs in Trust for Mary and upon Mary's death, the Trust fund was to be divided

amongst sons and daughters of Ardeshir – the son of Amba, namely, defendant no.1-Jehangir and his brothers and sisters, absolutely. He disclaimed trusteeship and stated that he is not aware of the surviving trustees. He was a surviving trustee only in respect of the Trust created under clause 10 of the Will of Amba, namely, the Trust created in respect of the bungalow “The Mount”. Hence, he claimed he could not furnish any details of the corpus of the Trust fund under clause 16.

27. Furthermore, in Originating Summons No.171 of 2009, later numbered as Suit No.1932 of 2008, filed by the present defendant no.1-Jehangir, the prayers included the question for determination raised by the defendant no.1 herein (plaintiff in the Originating Summons No.171 of 2009). Some of the questions raised were as follows :-

- (a) *Whether the “residue”, as contemplated and dedicated to the “Settled Fund”, by the deceased Amba Wadia under clause 19 of the said Will, is limited to the portion of the deceased Amba Wadia’s estate (being the securities and investments expressly stipulated therein) remaining after disposing off / settling her other specified assets upon the other Trusts constituted under the clauses preceding clause 19, of the said Will ?*
- (b) *Whether the Testator/Settlor (i.e. the deceased Amba Wadia) has directed/intended that the Trust constituted under clause 19 is to operate in perpetuity and upon the happening of an uncertain event like the failure of any Trust/s constituted under the preceding clauses (i.e. clauses preceding clause 19) of the said Will, the assets of such failed Trust/s are to be dedicated to the Settled Fund ?*

- (c) *Whether clause 19(c) of the said Will would prevail in the event of there being any inconsistency between 19(c) and the preceding clause 19(a) and/or 19(b) of the said Will ?*
- (d) *Whether in view of the fact that the deceased Ms. Mary C.P. Wadia and deceased Ms. Rutty C.P. Wadia have no children or remoter issue, the deceased Ms. Mary C.P. Wadia and deceased Ms. Rutty C.P. Wadia's shares (i.e. combined $2/3^{\text{rd}}$ share) in the Settled Fund, have as per clause 19(c) of the said Will, vested within the children of Ardeshir Cursetji Wadia (being the plaintiff and his eligible siblings) in the manner stated therein ?*

28. All of these issues are seen to have been settled and the property known as "The Mount" was transferred to them and defendant no.1 and others were beneficiaries of the mother's Trust. The fact that the amount has been appropriated by them has been admitted in paragraph 6.7 of the present plaint, wherein the plaintiff-Nani admits that "The Mount" has since been settled out of court. Not only that, according to Mr. Madon, the plaintiff and defendant no.6 have even sold the property known as "The Mount" and defendant no.6 had received a sum of Rs.67.5 crores, after having acted upon the settlement. The plaintiff's attempt now is therefore after having taken the benefit of the settlement. Interpretation of the Will having found acceptance in the form of consent terms filed in Suit No.879 of 2008 would therefore effectively binds the parties.

29. The plaintiff's interpretation now propounded is an attempt to withdraw from the admissions made by the plaintiff and defendant no.6 in

the previous legal proceedings, the excuse being a different legal opinion that they now find convenient. In an affidavit-in-support filed by defendant no.6 dated 30th April 2019 in Suit No.290 of 2016, defendant no.6 has admitted the interpretation of clause 16 of the Amba's Will causing the Caveat to be withdrawn and consequently leading to the grant of probate. Therefore, the plaintiff and defendant no.6 have expressly consented to grant of probate and in my view, this is irreversible.

30. In *Sudesh Kumar (Supra)*, Dr. Tulzapurkar has placed reliance on paragraph 6 of that judgment, in which the court had occasion to consider the effect of a rent-note. The plaintiff has described the document as a rent-note and has stated that there was a relationship of landlord and tenant between the plaintiff and the defendant by virtue of reference to a rent-note. The plaintiff could not resile from that position taken in the plaint and the document must be considered to be a rent-note for the purposes of considering stamp-duty. The court however has negated this contention. While the plaint had described it as a rent-note, it is a matter of interpretation of the document, which is purely a question of law and that there cannot be estoppel in such matters. It is the contention of the learned Senior counsel that the plaintiff is not estopped by virtue of the probate having been granted. Dr. Tulzapurkar invited me to hold, as suggested in the illustration forming part of paragraph 6 of *Sudesh Kumar*, that if a document is in fact a Will, but if it has been wrongly described as a gift, it would not be correct to hold it to be a

gift merely on the ground of misdescription and the court will have to consider it independent of admissions as to the correct nature of the document. The plaintiff has therefore contended that it would not be appropriate to go by the earlier view, but it is necessary to consider the correct interpretation of clause 16 and there is no estoppel that operates against such an exercise.

31. At the hearing of the originating summons, the court is required to consider whether it is necessary to determine the questions raised without administration of an estate of the Trust, but the court is not bound to determine such a question if the court is of the opinion that it ought not to be determined by the originating summons. The Judge is vested with discretion to decide whether or not the subject matter of the Originating Summons can be properly disposed. If the court finds that it cannot be properly disposed by way of originating summons, the summons may be dismissed referring parties to a suit in the alternative. One aspect that requires to be considered is whether a period of limitation would apply in the instant case and if so, whether the application is barred.

32. In *Charu K. Mehta Vs. Lilavati Kirtilal Mehta Medical Trust & Ors.*⁵, a Division Bench of this court held that Section 80 of the Bombay Public Trusts Act, 1950 would apply and the originating summons would be barred by the

5 2013(1) Bom.C.R. 23

law of limitation. In the instant case, the parties have already adopted legal proceedings as they were advised and have acted upon the same. The purpose of issuing originating summons has also been dealt with in *Charu K. Mehta (Supra)* and the emphasis is on the fact that the issues raised in the originating summons can be determined without administration of the trust in the matter of rights or interest of the person claiming to be a beneficiary or ascertainment of any class of beneficiaries or in the matter of directing executors to do or abstain from doing any particular act. The Division Bench had occasion to consider Rules 238 to 260 of the Bombay High Court (Original Side) Rules, 1980 and observed that the procedure envisaged under the rules was intended to resolve questions of construction of deeds and documents and it would not involve the complicated enquiries into disputed questions of facts. This is an aspect, in my view, that has already been gone into by the parties. Testamentary petitions were filed inviting Caveats to be filed and post filing of Caveats, suits were registered and these suits have been settled on the basis of understanding between the parties. The plaintiff now seeks a second bite at cherry and belatedly as it is, as and by way of an afterthought. Parties to the lis have, under legal advice, adopted proceedings, settled those proceedings, appropriated properties and enjoyed the benefits thereof.

33. Rule 238, read with Rule 245, entitles the plaintiff to apply by way of originating summons. However, this application is also belated by reason of

the fact that the parties have already proceeded to institute proceedings converted to adversarial ones to consensually dispose then having arrived at a settlement, which, in my view, is not reversible. Once that is done, I am of the view that no case is made out for interference or exercise of my jurisdiction. Rule 246 clearly envisages the discretion vesting in this court and the court is not bound to determine any questions raised in the originating summons.

34. Quite apart from being barred by the limitation, as aforesaid, the various pleadings, to which Mr. Madon has made reference, clearly reveal the fact that the plaintiff had adopted a course of action so did the other parties, which now cannot be reversed. Having benefited from the same, I am of the view that the plaintiff cannot seek a determination by way of this originating summons. Merely because another view is possible, as sought to be suggested by the plaintiff upon being advised by a different set of professionals, does not entitle the plaintiff to reopen what is otherwise a binding conclusion, which assumes the character of admissions on both sides. Rule 255 of the Bombay High Court (Original Side) Rules, 1980 provides that if the Judge considers that the matters in respect of which relief is sought cannot conveniently and properly be disposed of on an Originating Summons, he may refuse to pass any order on the summons, may dismiss the same and refer the parties to a suit in the ordinary course. The defendants have contended that this is a fit case for rejection. I am in agreement.

35. In light of the view that I have taken, I am not required to answer the questions, which should have been raised at the appropriate time prior to the suits having been disposed and within a period of three years from the issue being raised. The plaintiff would therefore be required to file a suit within the period stipulated in law.

36. In the result, the Originating Summons does not call for any interpretation and hence I pass the following order :-

- (i) Originating Summons is dismissed.
- (ii) No costs.
- (iii) In view of dismissal of the Originating Summons, Interim Application No.1763 of 2020 does not survive and the same stands disposed as infructuous.

(A.K. MENON, J.)