

Ashwini

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO. 569 OF 2019
IN
MISCELLANEOUS PETITION NO. 7 OF 2019
IN
TESTAMENTARY PETITION NO. 558 OF 2016

KAMAL PRASAD,
Age 69 years, residing at Dehradun Club,
Ugra Sen Road, Dehradun – 248001.

...Petitioner

~ VERSUS ~

KUMUD VAIDYA,
Age 64 years, Residing at 3rd Floor, 251,
Suraj, Walkeshwar Road, Mumbai- 400 006.

...Respondents

ASHWINI
HULGOJI
GAJAKOSH

Digitally signed
by ASHWINI
HULGOJI
GAJAKOSH
Date: 2023.03.20
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WITH
INTERIM APPLICATION NO. 2821 OF 2021
IN
NOTICE OF MOTION NO. 1 OF 2020
IN
APPEAL NO. 569 OF 2019
IN

MISCELLANEOUS PETITION NO. 7 OF 2019
IN
TESTAMENTARY PETITION NO. 558 OF 2016

KUMUD VAIDYA,
Age 66 years, Occupation : Housewife,
residing at 3rd Floor, 251, Suraj,
Walkeshwar Road, Mumbai – 400 006.

IN THE MATTER BETWEEN

KAMAL PRASAD,
Age 71 years, residing at Dehradun Club,
Ugra Sen Road, Dehradun – 248 001.

**...Applicant/
Orig. Respondent**

**...Orig. Applicant/
Appellant/
Orig. Petitioner**

~ VERSUS ~

KUMUD VAIDYA,
Age 65 years, Occupation : Housewife,
residing at 3rd Floor, 251, Suraj,
Walkeshwar Road, Mumbai- 400 006.

...Orig. Respondent

WITH
INTERIM APPLICATION (L) NO. 5445 OF 2020
IN
NOTICE OF MOTION NO. 1 OF 2020
IN
APPEAL NO. 569 OF 2019
IN
MISCELLANEOUS PETITION NO. 7 OF 2019

IN
TESTAMENTARY PETITION NO. 558 OF 2016

KUMUD VAIDYA,
Aged 64 years, Occupation : Housewife,
residing at 3rd Floor, 251, Suraj,
Walkeshwar Road, Mumbai – 400 006.

**...Applicant/
Orig. Respondent**

IN THE MATTER BETWEEN

KAMAL PRASAD,
Age 69 years, residing at Dehradun Club,
Ugra Sen Road, Dehradun – 248001.

**...Orig. Applicant/
Appellant/
Orig. Petitioner**

~ VERSUS ~

KUMUD VAIDYA,
Age 64 years, Occupation : Housewife,
residing at 3rd Floor, 251, Suraj,
Walkeshwar Road, Mumbai- 400 006.

...Orig. Respondent

WITH
INTERIM APPLICATION (L) NO. 26640 OF 2021

IN
NOTICE OF MOTION NO. 1 OF 2020

IN
APPEAL NO. 569 OF 2019

IN
MISCELLANEOUS PETITION NO. 7 OF 2019

IN

TESTAMENTARY PETITION NO. 558 OF 2016

KUMUD VAIDYA,

Age 66 years, Occupation : Housewife,
residing at 3rd Floor, 251, Suraj,
Walkeshwar Road, Mumbai – 400 006.

**...Applicant/
Orig. Respondent**

IN THE MATTER BETWEEN

KAMAL PRASAD,

Age 71 years, residing at Dehradun Club,
Ugra Sen Road, Dehradun – 248 001.

**...Orig. Applicant/
Appellant/
Orig. Petitioner**

~ VERSUS ~

KUMUD VAIDYA,

Age 66 years, Occupation : Housewife,
residing at 3rd Floor, 251, Suraj,
Walkeshwar Road, Mumbai- 400 006.

...Orig. Respondent

WITH

INTERIM APPLICATION (L) NO. 26642 OF 2021

IN

NOTICE OF MOTION NO. 1 OF 2020

IN

APPEAL NO. 569 OF 2019

IN

MISCELLANEOUS PETITION NO. 7 OF 2019

IN

TESTAMENTARY PETITION NO. 558 OF 2016

KUMUD VAIDYA,
Age 66 years, Occupation : Housewife,
residing at 3rd Floor, 251, Suraj,
Walkeshwar Road, Mumbai – 400 006.

**...Applicant/
Orig. Respondent**

IN THE MATTER BETWEEN

KAMAL PRASAD,
Age 71 years, residing at Dehradun Club,
Ugra Sen Road, Dehradun – 248001.

**...Orig. Applicant/
Appellant/
Orig. Petitioner**

~ VERSUS ~

KUMUD VAIDYA,
Age 66 years, Occupation : Housewife,
residing at 3rd Floor, 251, Suraj,
Walkeshwar Road, Mumbai- 400 006.

...Orig. Respondent

WITH

INTERIM APPLICATION (L) NO. 30032 OF 2022

IN

APPEAL NO. 569 OF 2019

IN

MISCELLANEOUS PETITION NO. 7 OF 2019

IN

TESTAMENTARY PETITION NO. 558 OF 2016

SANTOSH AGGARWAL,
aged about 48 years,
S/o. Late Shri Panna Lal Agarwal, Resident
of 16, ChabulKhon, Dibrugarh, Assam – 786
001.
Through his General Power of Attorney Mr
Dhanjit Kalita, aged about 36 years, S/o

**...Applicant/
Intervenor**

Late Shri Ratnesh Kalita
R/o Rupeta Town, Barpeta, Assam,
Presently residing at Patel Nagar, Dehradun
– 248 001, Uttarakhand.

IN THE MATTER BETWEEN

KAMAL PRASAD,
aged about 73 years, Residing at Dehradun
Club, Ugra Sen Road, Dehradun – 248 001.

...Appellant

~ VERSUS ~

KUMUD VAIDYA,
Age 67 years, Residing at 251, Suraj
Apartments, Malabar Hills, Walkeshwar
Road, Mumbai- 400 006.

...Respondent

APPEARANCES

FOR THE PETITIONER **Mr Anoshak Davar, with Manan**
Verma, Rushabh Sheth &
Rupesh Mandhare, i/b Vijaya
Ingule.

FOR RESPONDENT **Dr Birendra Saraf, Senior**
Advocate, with Yash
Mommaya, Shivani Khanwilkar
& Anuj Savla, i/b DSK Legal.

CORAM : G.S.Patel &
Gauri Godse, JJ.

DATED : 16th November 2022

ORAL JUDGMENT (Per GS Patel J):-

1. This is an unfortunate dispute between brother and sister. Both are senior citizens, in their 70s. Kamal Prasad is the brother. Kumud Vaidya is his sister. They are the children of one Pushpakumari Devi. The Appeal challenges an order of 5th April 2019 of a learned Single Judge. This was made in a Miscellaneous Petition No. 7 of 2019 under Section 263 of the Indian Succession Act. Kamal sought revocation of Letters of Administration granted by the High Court to Kumud in an apparently uncontested Testamentary Petition No. 558 of 2016. The learned single Judge dismissed Kamal's Miscellaneous Petition for revocation of the grant.

2. In her Testamentary Petition, Kumud sought Letters of Administration with Will and Codicil attached in respect of the estate of Rajkumari Devi, her mother's sister (her maternal aunt's). Rajkumari died on 24th October 2015. Kumud claimed Rajkumari left a Will dated 25th August 2015 and a Codicil dated 15th September 2015. Neither testamentary writing appointed an executor. Rajkumari was unmarried. Her parents died before her. Rajkumari and Pushpakumari had two brothers, Chandra Bahadur Singh and Padam Bahadur Singh. Both Pushpakumari (the parties' mother) and the two brothers died before Rajkumari. Pushpakumari died on 11th April 2010, Chandra Bahadur Singh in 2001 and Padam Bahadur Singh in 1969. Thus, Kumud claim that she and her brother Kamal were the only legal heirs of the deceased maternal aunt Rajkumari. Kumud filed the Petition on 29th March 2016. The only persons named as heirs were herself and Kamal.

3. In her lifetime, Pushpakumari filed proceedings before the Civil Judge Senior Division, Dehradun for various reliefs about some properties. In 2007, Rajkumari and Pushpakumari filed another suit before the Additional District Judge, Dehradun against Hindustan Petroleum Corporation Limited. There was a separate dispute regarding the estate of the parties' mother, Pushpakumari. Both sides propounded a separate Will for her. The present controversy does not pertain to that.

4. What is of interest is the case of Kamal Prasad regarding his whereabouts from the year 2009 onwards. We find from the record that Kamal has said that since 2009 he was facing criminal proceedings by various parties. The ordinary home of the family was in Dehradun. However, because of these criminal proceedings, Kamal was away from Dehradun at different times. Kamal claims that he visited Rajkumari in 2014, and that Kumud persuaded Rajkumari to move to Mumbai. Kamal claims that he visited Rajkumari in Mumbai in June 2014. Kamal claims that between October 2015 and January 2018, on account of these criminal proceedings filed by the third parties, Kamal was "staying either at Chandigarh, Karnal, Shimla or Delhi". This is so noted in paragraph 6 of the impugned order at page 25.

5. The only point canvassed before us in this Appeal is that the Revocation Petition ought to have been allowed because Kumud obtained Letters of Administration without proper service of the citation. That is the whole of the dispute. According to Mr Davar for the Appellant, Kumud made no attempt to serve Kamal at his

‘last known place of residence’, although she knew where that was. She obtained an order of substituted service on an incorrect representation and then effected service by publication at a place where Kamal was not staying at the relevant time, and which Kumud also knew.

6. In Kumud’s Testamentary Petition, there is an Affidavit of Service of 6th June 2016 saying that a duplicate of the citation and copy of the Petition were sent on instructions of Kumud’s Advocate to Kamal at an address at Gurgaon, Haryana by registered post acknowledgement due. The packet came back unserved with the remark “incomplete address”. Then Kumud filed a Chamber Order No. 291 of 2016 for leave to serve the citation by publication in the *Indian Express* in English and the *Navbharat Times* in Hindi, both newspapers with circulation in Delhi and Gurgaon. On this, the Prothonotary and Senior Master made an order on 21st June 2016.

7. The record indicates that Kamal had some knowledge of the Will in question. There are references to a Contempt Petition before the Supreme Court and to compromise orders and filings before the local Courts in Dehradun. This is not the basis of Mr Davar’s attack on the impugned judgment. We will proceed on the basis, and which we believe to be correct, that knowledge of a Will is no substitute for service of a citation. To this extent, Mr Davar is correct. A citation in a Testamentary Petition is meant to give the person served notice that somebody is seeking rights or making a claim regarding the testamentary instrument or estate in question. A citation is needed even if there is no testamentary instrument but only a claim to the

estate. That a person entitled to be served with a citation knows of the existence of a testamentary instrument is not knowledge of the fact that the testamentary petitioner has filed proceedings for a grant under that testamentary instrument. The reason is self-evident. In a petition for Letters of Administration for instance, and leaving aside all questions of a testamentary writing, a person served with a citation may well enter a Caveat saying that the petitioner is not appropriate person to whom Letters of Administration should be granted or, alternatively, that if Letters of Administration are to be granted, they ought to more properly be granted to the petitioner and the answering respondent both. The service of a citation in a petition claiming under a testamentary instrument does more than bring to light the mere existence of the testamentary writing. It tells the person being given notice that the petitioner is seeking to prove that writing in its solemn form: either Probate or Letters of Administration with Will Annexed.

8. We accept as a correct proposition that substituted service is not the normal mode of service but is an exception to the usual rule of service. As a general principle, leave to serve by publication, i.e., by substituted service is not to be granted for the asking. But when Mr Davar contends that such leave must be accompanied by judgment or by detailed reasons or something approaching this standard, we believe he is entirely wrong. It is enough for an applicant seeking an order of substituted service to show that service by the regular mode could not be effected and to seek therefore leave to serve by an alternative mode, viz., publication. On such an application, the Court may do any number of things. It may direct a fresh attempt. Nowadays we may give leave to serve by

courier or even by email. But an order of substituted service upon failure of an attempt at regular service is certainly not something that requires a reasoned decision. It is an administrative or ministerial order. This is also the reason why on the Original Side these orders — which are not purely judicial orders — can be delegated and are delegated to the Registry. A judicial power, one that decides rights, cannot be delegated.

9. For these reasons, we do not propose to spend time in this Appeal discussing whether Kamal did or did not know about the Will. Our only task is to see whether the decision of the learned Single Judge was incorrect to the extent that it holds that substituted service was correctly permitted and was correctly and appropriately effected. If it was, then the Appeal must fail. If not, the Appeal must succeed.

10. Letters of Administration were issued on 29th August 2016. Of course, Kamal says that he learnt of this grant only much later, on 5th March 2018. He then filed his revocation Petition on 5th May 2018.

11. The learned Single Judge was taken through a large volume of material, the essence of which was to establish that between October 2015 and January 2018, on his own showing, Kamal was not in Dehradun but was unpredictably and with no fixed schedule, and possibly no fixed address moving between Chandigarh, Karnal, Shimla or Delhi. We are not concerned with the reasons for his being constantly on the move; we make no observations regarding

his motivations. Kamal's Advocate pointed out to the learned Judge that Kumud knew that Kamal was not resident in Dehradun. This is why the packet was sent to Gurgaon. It was argued before the learned Single Judge, and before us, that Kumud had Kamal's telephone number and could have asked for his address. It was also argued that the order of substituted service mischievously sought publication in Delhi, Gurgaon and Haryana when Kumud knew that Kamal was not at any of those places.

12. In reply, Dr Saraf pointed out to the learned Single Judge as he does today that to this day nobody knows where Kamal lives. The Revocation Petition gives his address at the Dehradun Club at Ugra Sen Road. This is hardly a residential address and is certainly cannot be a permanent residential address. Dr Saraf also points out that there was a reason to send the packet to the address in Gurgaon (from where it was returned unserved). Dr Saraf pointed out that in an Affidavit in Rejoinder there was a letter issued by a company called Unitech Limited addressed to Kamal at the Dehradun address. It said that that the rent cheque enclosed with that letter was towards the monthly rent of the unit leased to one IBM Daksh in a complex at Gurgaon. This is the basis for Dr Saraf's contention that at no point between 2015–2019 did Kamal have a fixed or known address at which he could be served. This is all a little mysterious, because wherever the bailiff went (or might have tried to go), Kamal was not there. A fair amount of time seems to have been consumed before the learned Single Judge on the question of knowledge of the Will, but as we have said, that is of little consequence when it comes to a question of service.

13. The learned Single Judge correctly identified the question for consideration in paragraph 55 which is reproduced below from pages 51 to 52.

“55. The question that arises for consideration of this Court is whether the respondent was justified in issuing citation upon the petitioner by publication in the newspapers in the city in which the petitioner lastly resided and which was the last known address of the petitioner known to the respondent on record or not or whether the petitioner was not served with citation and thus the grant of Letters of Administration issued by this Court on 29th August 2016 in favour of the respondent deserves to be set aside on the ground of non service of citation upon the Petitioner.”

14. Then in paragraph 57 the learned Single Judge considered whether Kumud had taken proper steps to effect service. The learned Single Judge noted that there were proceedings in 2004 in the Civil Court at Dehradun. This Suit was compromised, and it mentioned Rajkumari's Will. The record also indicates that Kamal objected to the compromise application. What is significant is that there is a reference in these proceedings, and which is also before us, not just to knowledge of the Will but also knowledge of the grant: Kamal knew about the grant Kumud obtained at least in October 2017, if not earlier. For these reasons, the learned Single Judge disbelieved Kamal's case of being 'unaware' of the Will and of the grant of Letters of Administration. He was also disbelieved on the question of when he came to learn of the Will and the Letters of Administration.

15. But for our purposes, what is important is the finding regarding Kamal's incessant peripateticism and his many addresses. The learned Single Judge found, and we see no reason to disagree, that Kamal's residence was unknown. He was constantly shifting addresses. Kamal himself says so. He claims to have returned to Dehradun in February 2018 and taken up residence at the Dehradun Club. In paragraph 64, the learned Single Judge held unequivocally that this averment was false, misleading, and contrary to the record.

16. The learned Single Judge then assessed whether the documents that Kumud produced showed the steps she took to serve Kamal with the citation. The learned single Judge noticed that Kumud initially gave Kamal's address at Dehradun. He was not then at Dehradun, and the citation was sought to be served at the place where he was believed to be at the relevant time, in Gurgaon. That citation was returned unserved. Hence leave was sought for service by publication. The learned Single Judge noted in paragraph 66 that it was Kamal's own case that he was in Delhi and the two newspapers in which publication was allowed circulated in Delhi as well.

17. The finding in paragraph 67 is critical. The learned Single Judge held that Kamal himself did not give any address at Chandigarh, Karnal, Shimla or Delhi, even in the Revocation Petition, with proof of address at any of these places. He said his last known address was 'at Uttarakhand'. Conveniently, Kamal did not give an exact address at which he could have been served even there. In paragraph 78, the learned Single Judge noted that Kamal was

keeping away from Dehradun because of criminal proceedings, and, doing so *without disclosing the current address in the present proceedings*. Kamal could not be allowed to urge that Kumud was bound to serve him at every one of the many addresses that Kamal chose temporarily to adopt. The learned Single Judge noted that Kamal had not produced any proof of an existing address when citation was attempted to be served on him personally. This is a critical finding. It had to be shown that at the time of the attempted service in Gurgaon, Kumud knew that Kamal was staying at a fixed address elsewhere. Kamal had to show proof of that other address. We have even now no such proof. All that we hear from Mr Davar is that Kamal ought to have been served somewhere — perhaps anywhere — but not by publication. Where was he to be served? we asked. The answer was ‘wherever his last known address was’. Again, we asked, ‘Where might that be?’ The answer to this was to say ‘wherever Kumud believed it to be.’ This is no answer.

18. But this is the only reason we are asked to interfere with the well-considered decision of the learned Single Judge. We are asked to hold that the law requires a testamentary petitioner to engage in some sort of scouting around the country to find the heir who is doing everything in his power *not* to be found. We are reminded of that famous sentence from intellectual property law, that no Court should be so astute as to deny that a party is not doing something that he is evidently straining every nerve to do.¹ Kamal was doing everything in his power not to be found. In this, he was possibly more successful than he imagines, for Kumud could not find him.

1 *Slazenger & Sons v Feltham & Co*, (1889) 6 RPC 531.

And not having found him, she did the only thing the Court allows her to do, which was to seek leave to serve him by substituted service.

19. We find no merit in the Appeal. The Appeal is dismissed. All pending applications, if any, are disposed of as infructuous, including the intervention application. Any dispute as to title to any property in the estate must be in a civil proceeding and is unaffected by the testamentary proceedings.

20. Mr Davar asks for to continue a stay on disposal of properties. We decline to continue the stay. All interim and ad-interim orders, if any, stand vacated forthwith.

21. All Affidavits in Reply in the interlocutory proceedings to be filed in the Registry.

22. We regret the inadvertent delay in uploading this judgment, which occurred because of a mix up in the digital transcriptions of the order.

(Gauri Godse, J)

(G. S. Patel, J)