

(2017) 03 BOM CK 0005

In the Bombay High Court

Case No : Notice Of Motion No. 178 of 2016 in Testamenary Suit No. 235 of 2015 in Testamenary Petition No. 3 of 2015

Gurbir Shivdev Singh

APPELLANT

Vs

Naresh Nathulal Pal

RESPONDENT

Date of Decision : 08-03-2017

Acts Referred:

Hindu Succession Act, 1956 — Section 15, Section 16, Section 8, Section 9

Citation : (2017) 3 BCR 382

Hon'ble Judges : K.R. Shriram, J.

Bench : Single Bench

Advocate : Mr. Kurup Shivaji, Advocate, for the Plaintiffs/Petitioners; Ms. Pooja Khandeparkar a/w Ms. Asfiya Cutchi and Ms. Mahtab Alam i/b K.K. Associates, for the Defendants

Final Decision : Dismissed

Judgement

K.R. Shriram, J.—This Notice of Motion is taken out by the caveators for, (a) dismissal of the Petition/rejection of the Petition under Order 7, Rule 11 of the Civil Procedure Code as no right or interest whatsoever accrues to the Petitioners to seek relief in respect of the grant of the above Petition No.3 of 2015 and (b) the applicants are also praying for initiation of perjury proceedings against the petitioners.

2. The prayer clause (a) is split into two parts, i.e., (i) dismiss the Petition as no right or interest whatsoever accrues to the petitioners or (ii) reject the Petition under Order 7, Rule 11 of the Code of Civil Procedure 1908. Mr. Kurup for the petitioners submitted that this being a testamentary Petition, the question of Order 7, Rule 11 does not arise and Hindu Succession Act is a code by itself and Code of Civil Procedure does not apply.

I am not going into part (ii) of Mr. Kurup's submission because I am disposing of this Motion on part (i) itself. I am dismissing the Suit for reasons as mentioned below.

3. One Ms. Urvashi Chhabda, a female, died on 09.11.2014 in Mumbai. At the time of her death the deceased had a fixed place of abode at Malbar Hill, Mumbai. The petitioners are the maternal uncle (petitioner No.1) and maternal aunts (petitioner No. 2 and 3) of the deceased. In paragraph 4 of the Petition, it is stated that the deceased left as her surviving heirs and next-of-kins, as per schedule II under Section 8 r/w Section 9 of the Hindu Succession Act, only three persons viz; the three petitioners herein. It is also stated that the mother of the deceased and the father of the deceased, predeceased the deceased. It is also stated that the deceased was the only child of her parents and was a spinster at the time of her death and had no other legal heirs from her paternal side, save and except the legal heirs from the maternal side (the petitioners) as mentioned herein above. The petitioners have accordingly sought grant of letters of administration without will in favour of the petitioners with respect to the property of the deceased.

4. The applicants herein are the first cousins of the deceased from her paternal side. The father of the deceased one Late Balkrishna Ladhamal Chhabda had a brother Late Surjitlal Ladhamal Chhabda and the applicants are the two daughters of the said Late Surjitlal Ladhamal Chhabda. In reply to the Notice of Motion the petitioners do not deny the relationship of the applicants to the deceased but according to the petitioners the applicants are not legal heirs of the deceased as per section 8 r/w section 9 of the Hindu Succession Act, 1956 (the said Act). After the Petition was filed the applicants entered caveats. After the caveats were entered Petition was converted into Suit and issues were framed on 17.02.2016.

5. On 07.07.2016, an order came to be passed in which paragraphs 4 and 5 read as under :"

"4. Accordingly, the following additional issue is framed:

"Whether the Defendants prove that the Petition as filed is not maintainable?"

5. I am making it clear that at this stage I am leaving open all rights and contentions of both sides and specifically granting liberty to both the Plaintiffs and the Defendants to file such or further applications as they may think fit."

In the meanwhile, as the petitioners have already filed affidavit in lieu of examination in chief, the petitioners were granted liberty to file further affidavit in lieu of examination in chief.

6. Mr. Kurup, counsel for the petitioners, states that since issues have been already framed, this is a matter which has to go through a trial to determine who is entitled to what and therefore, this Notice of Motion should be dismissed.

7. Ms. Khandeparkar, per contra, submits this Court was pleased to frame an additional issue as to whether the defendants prove that the Petition as filed is not maintainable and while framing the additional issue, also specifically granted liberty to file such or further applications as they think fit and this Notice of

Motion has been taken out pursuant to the liberty granted by this Court and the parties need not go through an arduous trial to decide whether the Petition is maintainable. I am in agreement with Ms. Khandeparkar. I am also of the view that if an issue can be decided without going through a trial or having to lead evidence, the Court can go ahead and give a finding on that. If based on the finding, the plaintiffs get non suited, the plaintiffs have to live with that. In my view, this Notice of Motion raises a pure question of law and no evidence is required.

8. It is the plaintiffs case that they are the sole legal heirs of the deceased as provided under Section 8 and Section 9 of the said Act. The plaintiffs have made false statement in the Petition, it should be noted, that the deceased had no legal heirs from her paternal side. I am saying it is a false statement because it is not the case of the plaintiffs that though there are legal heirs of the deceased from the paternal side still those legal heirs are not entitled to and only the petitioners are entitled to all the property to the exclusion of the legal heirs of the paternal side.

9. The entire Petition is based on incorrect premise that Sections 8 and 9 of the Hindu Succession Act 1956 applies. Section 8 and Section 9 read as under :"

"8. General rules of succession in the case of males.- The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter-

(a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;

(b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;

(c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and

(d) lastly, if there is no agnate, then upon the cognates of the deceased.

9. Order of succession among heirs in the Schedule.- Among the heirs specified in the Schedule, those in class I shall take simultaneously and to the exclusion of all other heirs; those in the first entry in class II shall be preferred to those in the second entry; those in the second entry shall be preferred to those in the third entry; and so on in succession."

Therefore, Sections 8 and 9 applies only to "a male Hindu dying intestate".

10. The deceased is a female Hindu who had died intestate. In the case of a female Hindu dying intestate, it is Sections 15 and 16 of the Hindu Succession Act 1956 that will apply, which read as under:

"15. General rules of succession in the case of female Hindus.-

(1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16,-

- (a) firstly, upon the sons and daughters (including the children of any predeceased son or daughter) and the husband;
- (b) secondly, upon the heirs of the husband;
- (c) thirdly, upon the mother and father;
- (d) fourthly, upon the heirs of the father; and
- (e) lastly, upon the heirs of the mother.

(2) Notwithstanding anything contained in subsection

(1),-

(a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in subsection

(1) in the order specified therein, but upon the heirs of the father; and

(b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in subsection

(1) in the order specified therein, but upon the heirs of the husband.

16. Order of succession and manner of distribution among heirs of a female Hindu.-The order of succession among the heirs referred to in section 15 shall be, and the distribution of the intestates property among those heirs shall take place according to the following rules, namely:- Rule 1.-Among the heirs specified in subsection (1) of section 15, those in one entry shall be preferred to those in any succeeding entry and those included in the same entry shall take simultaneously.

Rule 2.-If any son or daughter of the intestate had predeceased the intestate leaving his or her own children alive at the time of the intestate's death, the children of such son or daughter shall take between them the share which such son or daughter would have taken if living at the intestate's death.

Rule 3.-The devolution of the property of the intestate on the heirs referred to in clauses (b), (d) and (e) of subsection

(1) and in subsection

(2) to section 15 shall be in the same order and according to the same rules as would have applied if the property had been the father's or the mother's or the husband's as the case may be, and such person had died intestate in respect thereof immediately after the intestate's death."

11. In the affidavit in lieu of examination in chief filed on behalf of the plaintiffs

by one Madhuri Kisan Motwani, i.e., Petitioner No.2, the petitioner No.2 has made reference to a family tree. In annexure "A" to the list of documents relied upon by the petitioners is the family tree. In the family tree, it is admitted that the applicants in this Notice of Motion are the daughters of Late Surjitlal Ladhamal Chhabda who was the brother of Late Balkrishna Ladhamal Chhabda and the deceased was the daughter of Balkrishna Ladhamal Chhabda. Therefore, the plaintiffs admit, after caveat was entered, that the applicants herein are the legal heirs from the paternal side of the deceased. In the said affidavit of evidence it is also stated in paragraph 4 that:-

".... Further, sections 15 and 16 of Hindu Succession Act, states that any property inherited by female Hindu shall devolve in the absence of any son or daughter including children predeceased son or daughter not upon the other heirs referred to in subsection (1) in the order specified therein but upon the heirs of the father."

12. Therefore, the plaintiffs themselves admit that the applicants under Sections 15 and 16 of the said Act will be the legal heirs of the deceased. of course, according to the petitioners it is Sections 8 and 9 which is applicable and not Sections 15 and 16 of the Act, which is incorrect.

13. Section 15 expressly provides property of a female Hindu dying intestate shall devolve according to the rules set out in Section 16. Since the deceased is a female, Section 15 is applicable to the case in hand and not Section 8. Section 15 also lists the five categories upon whom the estate will devolve, according to the rules set out in Section 16.

Section 16, Rule 1 states the order of Succession and the distribution of the intestate property among the heirs referred to in Section 15 shall be among the heirs specified in Subsection 1 of Section 15, those in one entry shall be preferred to those in any succeeding entry and those included in the same entry shall take simultaneously. The applicants herein fall in clause (d) of Section 15 Sub-Section 1, whereas the plaintiffs fall under clause (e) of Section 15 Sub-Section 1. Therefore, as per Rule 1 of Section 16, the applicants who are heirs of the father of the deceased, shall be preferred to the petitioners.

14. Paragraphs 5, 6 and 7 of the judgment of the Apex Court in T. Arivandandam v. T.V. Satyapal and another (1977) 4SCC 467 , in which His Lordship Hon'ble Mr. Justice V.R. Krishna Iyer, as he then was, in his inimitable style has held that the Court should shoot down irresponsible law suits and bogus litigations. Paragraphs 5, 6 and 7 reads as under :

"5. We have not the slightest hesitation in condemning the petitioner for the gross abuse of the process of the court repeatedly and unrepentantly resorted to. From the statement of the facts found in the judgment of the High Court, it is perfectly plain that the suit now, pending before the First Munsif's Court, Bangalore, is a flagrant misuse of the mercies of the law in receiving plaints. The learned Munsif must remember that if on a meaning full not formal reading of

the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Or. VII r. 1 1 C.P.C. taking care to see that the ground mentioned therein is fulfilled. And, if clever, drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order 10 C.P.C. An activist Judge is the answer to irresponsible law suits. The trial court would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage. The Penal Code is also resourceful enough to meet such men, (Cr. XI) and must be triggered against them. In this case, the learned Judge to his cost realised what George Bernard Shaw remarked on the assassination of Mahatma Gandhi "It is dangerous to be too good."

6. The trial court in this case will remind itself of Section 35A C.P.C. and take deterrent action if it is satisfied that the litigation was inspired by vexatious motives and altogether groundless. In any view, that suit has no survival value and should be disposed of forthwith after giving an immediate hearing to the parties concerned.

7. We regret the infliction of the ordeal upon the learned Judge of the High Court by a callous party. We more than regret the circumstance that the party concerned has been able to prevail upon one lawyer or the other to present to the court a case which was disingenuous or worse. It may be a valuable contribution to the cause of justice if counsel screen wholly fraudulent and frivolous litigation refusing to be beguiled by dubious clients. And remembering that an advocate is an officer of justice he owes it to society not to collaborate in shady actions. The Bar Council of India, we hope will activate this obligation. We are constrained to make these observations and hope that the cooperation of the Bar will be readily forthcoming to the Bench for spending judicial time on worthwhile disputes and avoiding the distraction of sham litigation such as the one we are disposing of. Another moral of this unrighteous chain litigation is the gullible grant of ex parte orders tempts gamblers in litigation into easy courts. A judge who succumbs to ex parte pressure in unmerited cases helps devalue the judicial process. We must appreciate Shri Ramasesh for his young candour and correct advocacy."

15. The Apex Court, in *I.T.C. Ltd. v. Debts Recovery Appellate Tribunal and Ors.* (1998) 2SCC 70, has held, relying upon *T. Arivandandam* (supra), that the Court should consider whether real cause of action has been set out in the plaint or something purely illusory has been stated and clever drafting creating illusions of cause of action are not permitted in law and a clear right to sue be shown in the plaint. Paragraphs 16 and 27 of the said judgment read as under :

"16. The question is whether a real cause of action has been set out in the plaint or something purely illusory has been stated with a view to get out of Order 7, Rule 11 C.P.C. Clever drafting creating illusions of cause of action are not permitted in law and a clear right to sue should be shown in the plaint. (See *T. Arivandandam v. T.V. Satyapal.*)

27. As stated above non-movement of goods by the seller could be due to a variety of tenable or untenable reasons, the seller may be in breach of the contract but that by itself does not permit a plaintiff to use the word ""fraud"" in the plaint and get over any objections that may be raised by way of filing an application under Order 7, Rule 11 CPC. As pointed out by Krishna Iyer,J. in T.Arivandandam's case, the ritual of repeating a word or creation of an illusion in the plaint can certainly be unravelled and exposed by the Court while dealing with an application under Order 7, Rule 11 (a). Inasmuch as the mere allegation of drawal of monies without movement of goods does not amount to a cause of action based on "fraud", the Bank cannot take shelter under the words "fraud" or "misrepresentation" used in the plaint. "

16. In my view, the way the Petition has been drafted, the petitioners have attempted to play a fraud on this Court by deliberately stating that Sections 8 and 9 are applicable to the matter in hand when Section 8 is very clear that it applies only to male Hindu dying intestate. The plaintiffs have created an illusion, I will not say by clever drafting but by dishonest drafting, to get out of the fact that if the plaintiffs had stated section 15 of the said Act was applicable, the plaintiffs were out. They will have no case. If the plaintiffs had come under Section 15, the petitioners would not have been entitled to any part of the estate. The plaintiffs had also made a false statement in the plaint, as stated earlier, that there were no heirs of the deceased from her paternal side, knowing it to be a false statement. It is a positive statement. If the plaintiffs were not aware whether the deceased had anyone from paternal side the plaintiffs would have so stated. They have not.

17. The Apex Court and this Court have on many occasions stated that if a party comes to the Court with unclean hands, which in this case the plaintiffs have, the party should be dealt with very strongly and substantial costs also should be imposed on the parties. The conduct of the plaintiffs intend to impede and prejudice the administration of justice. Judiciary is the bedrock and handmaid of orderly life and civilized society. In M/s. Sciemed Overseas Inc. v. BOC India Ltd. & Ors.2016 AII SCR 370 , the Apex Court has lamented about the unhealthy trend in filing of affidavits which are not truthful. Para 2 of the said judgment reads as under :

"2. A global search of cases pertaining to the filing of a false affidavit indicates that the number of such cases that are reported has shown an alarming increase in the last fifteen years as compared to the number of such cases prior to that. This is illustrative of the malaise that is slowly but surely creeping in. This "trend" is certainly an unhealthy one that should be strongly discouraged, well before the filing of false affidavits gets to be treated as a routine and normal affair."

18. Justice Kuldeep Singh (as he then was) in S.P. Chengalvaraya Naidu (Dead) by LRs. v. Jagannath (Dead) by LRs. and Ors.1994) 1 SCC 1, in paragraph 5 observed :

"5We are constrained to say that more often than not, process of the court is being abused. Property grabbers, tax evaders, bank loan dodgers and other unscrupulous persons from all walks of life find the court process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, whose case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation."

In *Oswal Fats and Oils Limited v. Additional Commissioner (Administration), Bareilly Division, Bareilly and Ors.* (2010) 4 SCC 728 the Apex Court followed the same principle that if a person is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the Court not only has the right but a duty to deny relief to such person. In *Dalip Singh v. State of Uttar Pradesh & Ors.* (2010) 2 SCC 114, the Court bemoaned that a new creed of litigants have cropped up who do not have any respect for truth and they shamelessly resort to falsehood and unethical means for achieving their goals. Such a litigant who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief.

19. In my view the petitioners have done the same, i.e., approach the Court with dishonest averments to pollute the pure stream of justice. For this reason and also as Section 8 r/w Section 9 of the said Act is not applicable and Section 15 r/w Section 16 of the said Act is applicable, the deceased being a female Hindu and under Section 15 r/w Section 16 it is the defendants who will be preferred to the plaintiffs, the issue as raised by this Court on 07.07.2016 is answered in the affirmative. The Petition (suit) as filed is not maintainable. Notice of Motion disposed accordingly. The Suit stands dismissed with costs.

20. Plaintiffs to pay a sum of Rs.2,00,000/as cost to the applicants in the Notice of Motion and also donate sum of Rs.3,00,000/to the Army Welfare Fund (battle casualties). These amounts to be paid within four weeks.