

**(2004) 02 BOM CK 0076**

**In the Bombay High Court**

**Case No :** Notice of Motion No. 1481 of 2001 and Suit No. 2063 of 2000

Ratansi Morarji (P.) Ltd.

APPELLANT

Vs

Kirti D. Morarji

RESPONDENT

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**Date of Decision :** 27-02-2004

**Acts Referred:**

Companies Act, 1956 — Section 625

**Citation :** (2004) 5 BomCR 800 : (2004) 55 SCL 310

**Hon'ble Judges :** D.K. Deshmukh, J

**Bench :** Single Bench

**Advocate :** Janak Dwarkadas, for the Appellant; Hitesh Jani, for the Respondent

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**Judgement**

D.K. Deshmukh, J.—This notice of motion has been taken out by the Applicants/ original Defendants for a direction to the original Plaintiff to pay damages in the amount of Rs. 18,37,579 with interest.

2. The facts (that are necessary and material for deciding this notice of motion) as set out in the affidavit filed in support of the motion are:

(i) One Manibai R. Morarji (hereinafter referred to as "the deceased" was during her lifetime the owner of, inter alia, 182 shares in the Applicant /company.

(ii) The deceased died sometime in May, 1968, leaving a will dated 1st July, 1961;

(iii) In the said will, the deceased did not make any provision whatsoever either with regard to the said 182 shares or with regard to her residuary estate. The said 182 shares would, therefore, have devolved on her heirs as if in intestacy;

(iv) One of the executors of her will, her son, Pratapsinh Morarji, filed a Petition in this Court, being Testamentary Petition being No. 233 of 1969 in order to obtain probate of the said will. The original will being in Gujarati, the said Pratapsinh Morarji annexed to the probate petition, an official translation of the will dated 17th December, 1968, duly authenticated by the Prothonotary and Senior Master of this Court, Clause 8 of the said official translation of the will is

as under:

"Subject to the above-mentioned Clause 6, I direct that out of the shares of Dharamsi Morarji Chemical Co. Ltd. that may remain in my name, 150 shares shall be given to my grand daughter Chi. Ben Avantika Pratapsinh Morarji and another 150 shares shall be given to Chi. Bhai Arvind son of my daughter-in-law Malikabai, and in the very same manner 150 shares shall be given to my grand-daughter Chi. Ben Jamini Dhairyasinh Morarji and further 150 shares shall be given to my grandson Chi. Bhai Kirti Dhairyasinh Morarji. And I direct that if, after distributing 600 shares in all in this manner, there remain any shares of the said company in my name then subject to Clause 6 hereinabove, the remaining shares shall be divided into three parts and distributed among Chi. Ben Avantika, Chi. Ben Jamini and Chi. Bhai Kirti in equal shares."

(v) Significantly, the said Pratapsinh Morarji was at the material time, the Chairman of the Applicant Company. Being aware of the fact that the said 182 shares did not form part of the will, and would therefore devolve on the heirs as if on intestacy, the said Pratapsinh Morarji did not take any steps in his lifetime to have the said 182 shares transmitted to the names of the executors of the will;

(vi) The said Pratapsinh Morarji died sometime in May, 1978;

(vii) In the meantime, the said Pratapsinh Morarji as well as the Respondent as also other members of the Ratansi Morarji Group who were then the owners of 53 per cent of the shareholding of the company, along with the Trivedi Group which then held 30 per cent of the shareholding of the company sold their entire holding to the Applicant No. 2 and her daughter, the 3rd Applicant. On and from that date the Applicant No. 2 and the Applicant No. 3 came to hold and control about 88 per cent of the issued and paid-up capital of the Applicant company, the balance 12 per cent being the said 182 shares which had remained to be administered and therefore continued to stand in the name of the deceased.

(viii) From 1979, i.e., when the Applicant No. 3 and the Applicant No. 2 took control of the company, till about 1996, the fortunes of the company underwent a dramatic improvement. At the time, the Ratansi Morarji Group sold its stake to the Applicants, the company was not doing well and showed no prospectus of a turnaround. However, on account of the hard work and resources pooled in by the Applicant Nos. 2 and 3, there was a complete turnaround in the fortunes of the company and its subsidiary. It is significant to note that the net sales of MDS Switchgears Ltd., the subsidiary of the company, increased from 86.79 lakhs in 1978-79 to Rs. 5121.93 lakhs in 1995-1996 and the net profits rose from Rs. 1,93 lakhs in 1978-79 to Rs. 443.38 lakhs in 1995-96.

(ix) In the meantime, in order to augment the company's resources two rights issues were held respectively in 1986 and 1996. After the said rights issues, the Applicant Nos. 2 and 3 came to hold and control approximately 99.6 per cent of the issued subscribed and paid-up capital of the company.

(x) In or about 1996, the Company sold its stake in its subsidiary, the said MDS Switchgears Ltd. for a total consideration of Rs. 26 crores. In order to derive the benefit of Section 54EA of the Income Tax Act, part of the sale proceeds amounting to approximately Rs. 17 crores was invested for a period of 3 years with DSP Merrill Lynch Mutual Fund. The said 3 years period was to expire in May, 2000;

(xi) Upon learning that a large sum of money, i.e., Rs. 17 crores was due to be received by the company in May, 2000, the Respondent devised a strategy to stake a claim to a substantial portion of the said funds. This was on the strength of the said 182 shares which continued to remain in the name of the deceased and in respect of which no steps had been taken by the executors or heirs of the deceased for the past 31 years;

According to the Applicants the modus operandi adopted by the Respondents/ Original Plaintiff was dishonest and they rely on following circumstances to say that

(a) The Respondent filed a Petition in this Hon'ble Court being Testamentary Petition No. 589 of 1999, to have the estate administered in accordance with the will on the footing that the same had been left un-administered by the executors. Letters of administration were sought by the Respondent on the principle of *de bones non*;

(b) There were disputes between the Respondent/original Plaintiff and the heirs of the deceased, in particular one Arvind Morarji;

(c) The Respondent was fully aware of the fact that the said 182 shares standing in the name of the deceased were not covered by the will and therefore, would have to be administered on the basis of intestate succession. In order to do so the Respondent would have had to file appropriate proceedings which he could do only by firstly, admitting that the said 182 shares did not form part of the will and/or testate succession and secondly, and more importantly, by joining all the heirs of the said deceased, including the said Arvind Morarji as parties to the Petition;

(d) Being aware of this position, and in order to avoid joining the other heirs, the Plaintiff chose to file a Testamentary Petition for Letters of Administration. In this petition, deliberately, the Plaintiff annexed a purported official English translation dated 17th December, 1998 of the Will of the deceased. This purported official translation is actually a copy of the official translation annexed to the probate petition filed by Pratapsinh Morarji, albeit with the deliberate omission of the words appearing in body type in Clause 8 of the Will:

"Subject to the above-mentioned Clause 5(6), I direct that out of the shares of Dharamsi Morarji Chemical Co. Ltd. that may remain in my name, 150 shares shall be given to my grand daughter Chi. Ben Avantika Pratapsinh Morarji and another 150 shares shall be given to Chi. Bhai Arvind son of my daughter-in-law,

Malikabai, and in the very same manner 150 shares shall be given to my granddaughter Chi. Ben Jamini Dhairyasinh Morarji and further 150 shares shall be given to my grand-son Chi. Bhai Kirti Dhairyasinh Morarji. And I direct that if, after distributing 600 shares in all in this manner, there remain any shares of the said company in my name then subject to Clause 6 hereinabove, the remaining shares shall be divided into three parts and distributed among Chi. Ben Avantika, Chi. Ben Jamini and Chi. Bhai Kirti in equal shares."

(e) The fact that this purported translation is not a genuine translation and is in fact fabricated is evident from the fact that the Respondent has tried to pass the same off as being an official translation carried out by one S.S. Trivedi, the Chief Translator, Bombay High Court. It is inconceivable that the said S.S. Trivedi who had carried out the original genuine translation on the 17th December, 1968 (and which was annexed to Pratapsinh Morarji's petition for probate of the will could have carried out the said translation on 17th December, 1998 annexed to the Plaintiff's petition, since the said S.S. Trivedi retired some time in 1991;

(f) Relying upon these documents and without joining the other heirs of the deceased to the petition, the Plaintiff succeeded in obtaining an ex parte order on 4th November, 1999 granting him Letters of Administration based on the aforesaid purported will of the deceased. The Defendants/Applicants crave leave to refer to the papers and proceedings and the order dated 4th November, 1999 passed in the said petition of Letters of Administration, when produced.

(g) In order to further the dishonest game plan, the Respondent, thereafter, succeeded in having the said 182 shares transmitted to his own name on the strength of a copy of the order dated 4th November, 1999 which the Plaintiff promptly forwarded to the Applicant company. The transmission was effected by the Applicant company on Or about 13th April, 2000 in good faith on the strength of the said order and being completely unaware of the fraud sought to be perpetrated by the Respondent;

(h) The Respondent thereafter waited until 10th May, 2000 to file the above suit at a time when the court was on summer vacation and virtually on the eve of the maturity date of the said 17 crores worth of stated securities. By giving a short notice of about 2 days, the Respondent applied for an ad interim order during the vacation, inter alia, to restrain the holding of the AGM of the Applicant company, which included the passing and adoption of accounts and declaration of dividend, and for other interim reliefs including appointing of the Court Receiver as a Receiver in Respondent of the shares issued pursuant to the rights issues of 1986 and 1996. In the said suit, the Respondent deliberately annexed a deliberately forged and fabricated copy of the Will of the deceased in which the portions highlighted in bold letters in Clause 8 as set out hereafter were deliberately omitted:--

"Subject to the above-mentioned Clause 5(6), I direct that out of the shares of Dharamsi Morarji Chemical Co. Limited that may remain in my name, 150 shares

shall be given to my grand daughter Chi. Ben Avantika Pratapsinh Morarji and another 150 shares shall be give to Chi. Bhai Arvind son of my daughter-in-law Malikabai, and in the very same manner 150 shares shall be given to my granddaughter Chi. Ben Jamini Dhairyasinh Morarji and further 150 shares shall be given to my grand-son Chi. Bhai Kirti Dhairyasinh Morarji. And I direct that if, after distributing 600 shares in all in this manner, there remain any shares of the said company in my name then subject to Clause 6 hereinabove, the remaining shares shall be divided into three parts and distributed among Chi. Ben Avantika, Chi. Ben Jamini and Chi. Bhai Kirti in equal shares."

(i) Further in Annexure "A" to the Plaint, which is purportedly a family tree meant to contain a list of the heirs of the deceased, the Respondent deliberately omitted therefrom, the names of Arvind Morarji and several other heirs;

(j) On the basis of the said dishonest representations, through fraud and deceit the Respondent was able to obtain an ad interim consent order on 11th May, 2000.

(k) Although in the affidavit in reply to the Notice of Motion filed by the Respondent in the above suit, the Applicants did contend that the said 182 shares did not form part of the Will and the said shares would therefore have to devolve on the heirs directly in accordance with intestate succession, the Applicants were not aware of the fraudulent design of the Respondent and his fabrication of documents. The Applicants became aware of the same only when in the course of the hearing of the said Notice of Motion on 15th February, 2001, the learned Single Judge called for the papers of both the Testamentary Petitions, namely the petition for probate filed by Pratapsinh Morarji and the Petition filed by the Respondent for Letters of Administration, in order to find out what if any, was the real intend and desire of the deceased in respect of the said 182 shares and to examine whether the same formed part of the Will of the deceased or not. Upon examining a copy of the original Will in Gujarati as also the two translations in English, the Applicants discovered the true position and thus brought this to the notice of this Hon"ble Court The Respondent, fraud having been thus exposed was left with no other option but to unconditionally apply for withdrawal of the about suit.

(xiii) It is submitted that at the time of passing of the ad interim order on 11th May, 2000, the Applicants had no opportunity of examining any of the aforementioned documents except those that were annexed to the Plaint, and had in good faith, on the representation of the Respondent that he had properly obtained authority in respect of the said 182 shares agreed to the passing of the said ad interim order. It was only much later, in the aforesaid manner that the fraud played by the Respondent on this Court and the Applicants came to light. The Applicants say that the Applicants have suffered grave loss, damage and prejudice on account of the aforesaid proceedings. The Applicants submit that the Applicants have had to incur huge legal costs in defending what has turned out to be a fraudulent case based on fabricated documents, in addition to

financial loss on account of a sum of Rs. 61,10,000 being required to be kept in fixed deposit instead of being invested in other higher return yielding investments, for instance in units of a debt funds. The Applicants submit that it is well settled that where a party obtains an injunction fraudulently or on insufficient grounds, he is liable to compensate the Defendants for the injury, loss or damage caused by the said injunction. The Applicants submit that it is mandatory for a party who obtains an injunction to give an undertaking to pay damages to the party against whom the injunction is passed. The Applicants submit that the Plaintiff is deemed to have given such an undertaking and in any event, the same has not been waived/excluded by an order of this Hon"ble Court. The same is therefore liable to be enforced by the Applicants. In the circumstances, the Applicants submit that the Plaintiff is liable to compensate the Applicants in respect of the expenses, loss, damage and prejudice suffered by them.

3. Applicants/original Defendants claim an amount of Rs. 15,42,750 towards Counsel fees and Rs. 2,94,829 towards damages on account of loss of income. The Respondent/original Plaintiff, though served with this Notice of Motion and the affidavit filed in support of the motion, has not filed any affidavit controverting the averments made in the affidavit filed in support of this Notice of Motion. Therefore, in the absence of any denial, the averments made in the affidavit filed in support of the Notice of Motion, will have to be accepted at their face value.

4. The learned Counsel appearing for the Defendants/Applicants relies on the judgment of the learned Single Judge of this Court in Aviat Chemicals (P.) Ltd. v. Jagmohansingh Arora [Judge's Summons No. 244 of 1999 dated 24-1-2000], in support of their claim that as the claim made by the Plaintiff in the suit which has been withdrawn was fraudulent, the Defendants are entitled to damages. The learned Counsel also relies on the judgment of the learned Single Judge of this court in the case of Haji Abdul Rehman Haji Mahomed Kadwani v. Munjibhai Khatao & Co. 1925 BLR 1077. It may also be pointed out here that while permitting the Plaintiff to withdraw the suit as also the Notice of Motion, the Court has not made any order in relation to costs. On behalf of the Defendant relying on the judgment of this Court in the case of Khimchand v. Sobhagchand 1925 BLR 242, it is submitted that the Defendant would be entitled to the costs of the suit as also the Notice of Motion. There were some submissions made before me in relation to the provisions in the Original Side Rules relating to the computation of the costs. It was urged that those provisions have become out-dated and therefore the Court ignoring those provisions should make an order for payment of costs to the Defendant as incurred by the Defendant. However, in the present proceedings validity of the provisions of the Rules regulating computation of cost has not been challenged and therefore, in my opinion, it will not be appropriate for me to say anything about the validity of those provisions. However, it is obvious that as the Plaintiff has withdrawn the suit as also the Notice of Motion, the Plaintiff would be liable to pay costs incurred by the

Defendant.

5. As the averments made in the affidavit filed in support of the motion are uncontroverted ,it is obvious that the Plaintiff had made a false claim in the suit and had secured an order from the court which operated against the Defendants and on realising that the dishonesty of the Plaintiff is likely to be revealed, the suit and the notice of motion were withdrawn.

6. After having heard the learned Counsel appearing for the original Defendants/Applicants at length, in my opinion, it cannot be disputed that if the Plaintiff files a false claim before the Court and obtains certain order which adversely affects the interest of the Defendant, the Defendant would be entitled to damages. The Defendants in the present case have claimed damages as per particulars given by them. However, what is the actual amount of damages will have to be inquired into and for that purpose, in my opinion, the matter will have to be referred to the Commissioner. In the result, therefore, this notice of motion is disposed of in following terms:--

(I) It is held that the original Plaintiff is liable to pay damages to the Defendants/Applicants.

(II) The matter is referred to the Commissioner for determination of the amount of damages.

(III) The parties shall appear before the Commissioner and produce material on the basis of which the Commissioner shall compute the amount of damages suffered by the parties.

(IV) The report of the Commissioner be placed before the court for further orders.