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REPORTABLE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

TESTAMENTARY AND INTESTATE JURISDICTION

NOTICE OF MOTION NO. 74 OF 2015

IN

TESTAMENTARY SUIT NO. 14 OF 2004

IN

TESTAMENTARY PETITION NO. 80 OF 2004

Vasant Narayan Sardal …Plaintiff
Versus
Ashita Tham & Ors …Defendants

AND

NOTICE OF MOTION (L) NO. 85 OF 2018

IN

TESTAMENTARY SUIT NO. 14 OF 2004

IN

TESTAMENTARY PETITION NO. 80 OF 2004

Vasant Narayan Sardal …Plaintiff
Versus
Ashita Tham & Anr …Defendants
And
Pooja Kabir Bedi ...Additional Defendant

AND

NOTICE OF MOTION (L) NO. 689 OF 2018

IN

SUIT NO. 4060 OF 2003

Ashita Tham & Ors ...Plaintiffs
Versus
Priyam Jhaveri & Ors ...Defendants

Ms Ankita Singhania, *i/b Kalpesh Nansi, for Plaintiff No. 1, Vasant Narayan Sardal.*
Mr Jehangir Jeejeebhoy, *i/b Balasaheb Deshmukh, for Plaintiff No. 2, Behram Ardeshir.*
Mr Shailesh Shah, Senior Advocate, *with Archit Jayakar & Trupti Khadse, i/b Jayakar & partners for the Defendants/Applicants in NMSL/85/2018.*
Ms Siddhi Doshi, *i/b Bilawala & Co.*

CORAM: G.S. PATEL, J
DATED: 3rd May 2018

PC:-

1. In my order of 9th April 2018 I set out at some considerable length factual background to the matter, the question that arises and the applications that were then pending before me. Since that order of 9th April 2018 is fairly comprehensive, I will not restate the facts once again. That order should be read with this one, and will be treated as incorporated in this order for the purposes of the factual background and the identification of the issues.

2. However, the position has marginally altered since. For, Notice of Motion (L) No. 101 of 2018 filed by Ashita, Monica and

Pooja for removal of Vasant Sardal, was allowed to be withdrawn on 25th April 2018.

3. What remains is this. There is first of all Notice of Motion No. 74 of 2015 filed by Vasant Narayan Sardal (**"Sardal"**) for recalling the order passed by Dr DY Chandrachud J (as he then was) on 30th July 2009 reinstating Behram Ardeshir (**"Ardeshir"**) as an executor after his renunciation. In view of the order that I propose to pass today removing Sardal as an executor — my reasons follow — Mr Jeejeebhoy for Ardeshir states that Ardeshir will not continue and does not desire to continue as an executor. Ardeshir is present in Court. This will render Sardal's Notice of Motion No. 74 of 2015 infructuous. That Notice of Motion sought a reversion to a prior state of affairs where Ardeshir had renounced executorship and Sardal continued alone.

4. In any case, I believe Sardal's application would have had to be allowed even otherwise because the order of 30th July 2009 does not note Section 230 of the Indian Succession Act 1925 ("**ISA**") which reads thus:

> "**230. Form and effect of renunciation of executorship**. — The renunciation may be made orally in the presence of the Judge, or by a writing signed by the person renouncing, **and <u>when made</u> shall preclude him from ever thereafter applying for probate of the Will appointing him executor**.
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> (*Emphasis added*)

5. This places a complete and total prohibition on an executor who has made a renouncement from ever thereafter seeking probate, i.e fulfilling his primary duty as an executor. Indeed, the emphasis is on the words "when made" (as opposed to 'when accepted') and the words "from ever thereafter applying for probate". There is no ambiguity about these words at all. The reliance in the decision of 30th July 2009 on the decision of Rangnekar J in *In Re: Manchersha Pestonji*[1] was, in my view, inapt. The reason is plain. Rangnekar J was not concerned with the reinstatement of an *executor* who had renounced. He was concerned with the reinstatement of an administrator, a very different thing. The argument before Rangnekar J was that an administrator and an executor stood at par. Rangnekar J did notice Section 230 of the Indian Succession Act 1925, but held that this had no application to an administrator, always someone appointed by a Court. This is to be carefully distinguished from the role of an executor who is never appointed by a Court but always only by a testamentary instrument. This is in fact the rationale for Section 230, and this why there is no corresponding section in regard to an administrator.

6. In fact, *In Re: Manchersha Pestonji* is actually against the proposition that was advanced on 30th July 2009. It said that an administrator could be re-appointed; it did not say that an executor could — that would have been in the teeth of Section 230 and entirely wrong. Thus, *In Re: Manchersha Pestonji* could not have been invoked in support of the very proposition it rejected or, at any rate, did not accept. The order of 30th July 2009 is, therefore, not the correct position in law.

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1 65 ILR 172 (Bom).

7. The irrevocability of an executor's renunciation is not to be taken lightly. It is the conscious giving up (hence, 'renunciation') of a very solemn charge in the nature of a duty of an entrustment; and this is a special conferment on a named individual by a person now dead. An executor's heirs cannot succeed to his position. He, and he alone, can occupy that position. For this reason, there is no 'deemed' or 'implied' renunciation.[2] It must be in writing, or it must be to the Court.[3]

8. The executor (or administrator) of a deceased is his legal representative. The property of the deceased vests in him as such.[4] No right as an executor is established unless probate is granted.[5] Probate can only be granted to an executor named as such in the Will, and no one else, though the appointment may be express or implied.[6] Probate, when granted, establishes the Will from the death

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2 See: *In the goods of Manick Lal Seal,* ILR (1908) 35 Cal 156; *Venkataramier v A Govindarayalier*, AIR 1926 Mad 605; *In Re Lakhshmi Shanker & Anr*, AIR 1941 Oudh 293 (FB) (approving *Venkataramier*); *Samir Chandra Das v Bibhas Chandra Das & Anr*, (2010) 6 SCC 432, approving *Manick Lal Seal* and *Venkataramier*, but not noticing *Lakhshmi Shanker* (Oudh FB); *Reena Sanjay Minz & Anr v Jigna Jay Kantawala*, order dated 9th June 2015 in Notice of Motion No. 64 of 2014 in Testamentary Suit No. 15 of 2007, following Lakhshmi Shanker and Samir Chandra Das — appeal dismissed: *Reena Sanjay Minz & Ors v Jigna Jay Kantawala*, 2016 (4) Bom CR 642; *Krishnanand Arvind Velinker v Kamalini Arvind Velinker & Ors*, Order dated 19th October 2015 in Chamber Summons No. 95 of 2015 in Testamentary Suit No. 89 of 2014; following *Lakhshmi Shanker* and *Samir Chandra Das*;

3 ISA, Section 230.

4 ISA, Section 211.

5 ISA, Section 213.

6 ISA, Section 222.

of the testator and validates all intermediate acts of the executor as such.[7]

9. An executor is a confidante of choice of the testator. Once he renounces this most solemn trust, the renunciation is irrevocable and irreversible. He cannot be allowed re-entry. He cannot renounce or recant his renunciation. Otherwise, executors will constantly step in and out of probate proceedings. If executors constantly renounce executorship and then renounce their renunciation, the inevitable result is uncertainty, confusion and chaos in the administration of the estate in terms of the Will. This is not what the law contemplates as the duties of an executor at all.

10. Thus, independent of Mr Jeejeebhoy's statement today about Ardeshir's willingness to step aside, as a matter of law it would have to be held that Ardeshir is not entitled to function or serve as an executor having once renounced it.

11. This leaves the question of what, if anything, is to be done with Sardal. He was appointed by the deceased, Bipin Gupta. There are two distinct limbs to this aspect of the matter. First, the question of whether Sardal should be removed for demonstrated and proven misconduct. That enquiry centres around this: that he quite unlawfully purported to enter into Consent Terms with Ashita, Monica and Pooja contrary to the terms of Bipin Gupta's Will that appointed him as an executor. He sought to transact with the three ladies in regard to the immovable property at Firdaus, Marine Drive

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7 ISA, Section 226.

and known as the Norman Guest House. Those Consent Terms of 22nd November 2005 in the Testamentary Suit, on which an order was made on 22nd February 2006, and in the Administration Suit, on which an order was made on 24th April 2006, are themselves (i.e. the Consent Terms) of very dubious legality and tenability. In this order I propose to set them aside both in the Testamentary Suit and in the Administration Suit.

12. In addition, and this is also not disputed, although Bipin Gupta said that no part of his estate was to go to his three sisters (Pooja is the daughter of a predeceased sister), Sardal has actually transacted with them in respect of a flat at Mahim. This he could not have done either.

13. The Consent Terms were structured in a way that contemplated receipt of money, presumably cash, from the landlord for surrender of tenancy rights of the Marine Drive flat at Firdaus . The Consent Terms proposed the sharing of this unlawful bounty (even if lawful under the Rent Act 1999, it is questionable and certainly unlawful under the terms of the Will) between Sardal and the three ladies. Interestingly, the Consent Terms do not mention that a half share would come to Bipin Gupta's estate. They only name Sardal personally.

14. Even if Sardal had been capable of administering the estate, I would have held that this was sufficient ground to justify his removal. But this is how Section 301 of the ISA reads:

> "**301. Removal of executor or administrator and provision for successor**.— The High Court may, **on application made to it**, suspend, remove or discharge any private executor or administrator and provide for the succession of another person to the office of any such executor or administrator who may cease to hold office, and the vesting in such successor of any property belonging to the estate."
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> (*Emphasis added*)

15. Clearly the section speaks of an application for removal being made to the High Court. But what does this mean exactly? Can this ever mean that the hands of a Court of equity and a Court of conscience are so utterly tied that the Court is reduced to a helpless bystander as the executor of a Will that gives to charity, and of which there is no beneficiary can seek removal of the executor, plays ducks and drakes with the estate; deals with it contrary to the terms of the Will that appointed him in the first place; and is generally unaccountable for his actions? Where there is such a Will, one that gives to public causes, I do not believe that this Court's jurisdiction can ever be said to end at being a silent spectator. Whenever a Court in the performance of its duties sees wrong being done, it will step in. For, the primary task of a Court is to prevent a wrong from being done, and, if already done, to correct it, not to allow unlawfulness, illegality and injustice to run their polluted course. To allow that is unthinkable. It is a betrayal and abdication of any judge's oath of office and judicial duty. I do not think there is anything in the ISA that says that a Court is to be sidelined and become a hapless, mute witness and nothing more. After all when a Will is sought to be probated the result is an order in *rem*. It is global

in reach. This makes it all the more incumbent on a Court to intervene and not sit idly by when there is demonstrated illegality or unlawfulness writ on the face of record. Therefore, in a situation like this — where there is no named legatee who can seek removal of an errant executor — the Court can and will step in as a guardian and custodian of the interest that devolves in that Will.

16. I do not believe I actually need to say any of this in the context of Sardal or even to return this finding, although I believe I could and there would be some justification for it. Sardal is 82 years old. He is clearly in failing health. He is hardly able to hear. His comprehension of what is happening in this Court is so poor that it might as well not exist. He is in no condition to administer the estate. He is in no condition to understand the implications of a removal for cause as opposed to a renunciation which requires no justification. His mind completely appears to be dominated by his son, Anil Sardal, one of the attesting witnesses to the Will. This is apparent from what he himself has said before me not once but repeatedly. He first said he would need to consult his son about the flat. That is not his concern at all. He then said that he would do that which his son suggested or required. His son has no role to play in all of this.

17. I heard this matter for some time at 3.00 pm Sardal was not able to hear me in otherwise quiet court room, one that is not especially large. I kept the matter back till 5.00 pm to pass this order. Before pronouncing this order I once again asked him what he proposed to do in the matter. In the meantime, Ms Singhania, with all her limitations of instructions, attempted several times to speak

with him and to take instructions from him. She was unable to get an intelligible response from him. This was most apparent. In the little that he has been able to say to me, not once has Sardal mentioned Bipin Gupta or the interest of the estate. His only words are about his son and nothing and nobody else.

18. He also quite clearly said that whatever he was doing was for his son. That should end any further discussion.

19. I would be grossly remiss in my duties if I allowed Sardal to continue as an executor in his present condition. To allow him to do so only exposes him to further charges, responsibilities and duties which he is clearly unable to bear or discharge.

20. Simply on the ground of physical and mental incapacity Sardal must be removed at once. His acts as an executor are being directed entirely by his son and this is plainly apparent from what has transpired in Court before me.

21. Notice of Motion No. 74 of 2015 seeking a recall of the order of 30th July 2009 reinstating Ardeshir is dismissed on facts, although its reasoning is not the correct position in law for the reasons discussed earlier.

22. Vasant Narayan Sardal is removed as an executor but in consideration of his age and health, I will, for the foregoing observations notwithstanding, direct that this removal has to be read on account of his infirmity and advanced years and his demonstrable

incapacity to discharge the duties required of an executor appointed under a Will.

23. The reason why I have at all gone through the question of legality of the transactions and the Consent Terms is because of the relief sought in Notice of Motion (L) No. 85 of 2018. Here, the Consent Terms filed in Testamentary Suit No. 14 of 2004 are sought to be set aside.

24. For the reasons that I have set out above, Notice of Motion (L) No. 85 of 2018 will have to be allowed. Those Consent Terms were, on the face of it, not such as could have been taken in a Testamentary Suit pending probate. They were directly contrary to the terms of the Will. Very often even probate proceedings are compromised but where in that compromise probate is accepted what then follows is a family arrangement not inconsistent with the grant or with the title that has passed through grant. In the present case, there was no possibility of any such family arrangement or compromise following on the grant of probate because that probate completely excluded the surviving members of the family.[8]

25. Thus, the Consent Terms in Testamentary Suit No. 14 of 2004 are set aside, and the order of 22nd February 2006 is recalled. Testamentary Suit No. 14 of 2004 is restored to file along with Caveats filed therein. I will separately frame issues and pass directions in the Testamentary Suit. Notice of Motion (L) No. 85 of 2018 is made absolute. No costs.

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8 *Chandrabhai K Bhoir & Ors v Krishna Arjun Bhoir & Ors*, (2009) 2 SCC 315.

26. For these reasons too, Notice of Motion (L) No. 689 of 2018 in administration Suit No. 4060 of 2003 must succeed. The Consent Terms of February 2006 in Suit No. 4060 of 2003 are set aside. The order of 24th April 2006 taking those Consent Terms on record is recalled. The administration Suit is restored to file. Notice of Motion (L) No. 689 of 2018 is made absolute in terms of prayer clauses (a) and (b). No costs.

27. What remains, therefore, is to appoint an Officer of this Court in place and stead of the Plaintiffs in Testamentary Suit No. 14 of 2004 and to allow him or her to convert the Suit to one for Letters of Administration with Will annexed since an Officer of this Court obviously cannot seek probate. The role of this Officer will necessarily have to be limited. The attesting witnesses will have to be summoned. Their evidence, on which I will issue separate directions, is to be taken directly in Court and not on Affidavit. I appoint Mr Ketan Trivedi, the Commissioner for Taking Accounts, to be substituted as the Plaintiff in the Testamentary Suit. He will carry out the necessary amendments to the Plaint and the Petition without need of reverification.

28. All three Notice of Motions are disposed of in these terms. No costs.

29. All funds that belong to the estate of Bipin Gupta and that are in the hands of Sardal will be deposited with the Prothonotary and Senior Master of this Court within four weeks from today. Mr

Ardeshir, who is present in Court, says that no part of the estate of Bipin Gupta is with him. The statement is noted.

30. It seems that at some point when Sardal was younger and nimbler, and for some reason being assisted by Ardeshir, they gave instructions to M/s Bilawala & Co., then the Advocates engaged. In the course of this, M/s. Bilawala & Co. were entrusted with several documents and items. When disputes arose, M/s. Bilawala & Co., unsure of who was actually responsible for the estate, did not return the documents and items. Mr Ayaz Bilawala on the last occasion confirmed that the firm does indeed have these articles and I am today shown a list of inventory, which is taken on record and marked "I-1" for identification with today's date. A copy of this list will be given to the Advocates for the Defendants and to Mr Ketan Trivedi. For the present, M/s. Bilawala & Co., will retain the items in this list pending further directions. Mr Trivedi will initially examine these files and documents that are with M/s. Bilawala & Co. He should not summon them all at one time. He will make a separate report of what these files show.

31. The Defendants will also file and serve an Affidavit on or before 15th June 2018 setting out what part of the estate has passed to their hands and how they have dealt with it. Further directions will then follow, if necessary, for bringing back to Court those portions of the estate, or their value.

32. Throughout the afternoon till this order is completed, Mr Vasant Narayan Sardal and his son Anil Sardal have been present in Court.

33. All rights and contentions of the Defendants are kept open in regard to all claims that they may have in respect of the estate of the deceased, the acts of the executors in that context. Any applications that may be made for protective orders will then be adjudicated on their own merits.

(G. S. PATEL, J)