

ORDER BELOW EX. 32 IN C.M.A. NO. 34 OF 2015.

1. The applicants have filed this application to revoke the order passed in C.M.A. No. 26/1993 dated 18/6/10 under provisions of Sec. 263 of the Indian Succession Act.

The opponents have filed this application under O.7, R. 11 of C.P.C. stating that earlier vide Ex.18, the application under O.7, R.13 was filed which was rejected and an application Ex.16 by the opponents Nos. 4, 5 to delete them which was allowed by this court and against that order, the applicants have filed a Sp.C.A. No. 5194/16 before the Hon'ble High Court, which was rejected. The opponents contend that C.M.A. No.26/93 was allowed on 18/6/10 and the applicants have filed present application to revoke the said order on 21/5/15, so, it is time barred as under the provisions of Limitation Act, such application can be filed within a period of 30 days from the date of order, therefore, present application is liable to be rejected under the provisions of O.7, R.11(d) of C.P.C. The opponents further contend that the provisions of Sec. 263 of the Indian Succession Act are not applicable to present application and the Hon'ble Court has rightly passed the order in C.M.A. No. 26/93 after hearing the parties. The opponents further contend that after the death of Prafullbhai on 27/2/03, the applicants being his legal heirs have filed the present application after a period of 12 years, hence, it is time barred. The opponents further contend that the present application is relating to partition of the properties consequently, the applicants can file a application for partition and in this regard, R.C.S. No. 33/2015 is filed which was dismissed by this court and on the same subject matter, the present application cannot be sustainable at law and prayed to reject main application under the provisions of O.7, R. 11 of C.P.C.

2. The applicants have filed their objection against present application at Ex. 33, wherein they submit that present application is not maintainable at law, they admit the facts of para 1 and partly admit the facts of para 2 of this application and further submit that they have filed main application against the order passed in C.M.A. No. 26/93, in which the opponents have, misleading the Hon'ble Court, obtained the order. The applicants further submits that they reside at Jamnagar and on

3/11/2014, they came to know about the order of Original C.M.A. No. 26/93 that keeping the Hon'ble Court in dark and making false representation before the Hon'ble Court, the opponents have got the probate certificate in C.M.A. No. 26/93. The applicants further submits that as soon as they came to know that a big house was sold to Mr. Jamnadas Raichura and a house situated in Lal Bungalow area was sold in very less amount, the applicants have filed R.C.S. No.33/15 against the opponents, which was dismissed on technical grounds under O.7, R.11 of C.P.C. and immediately they have filed present C.M.A. No.34/15, so, this application is within time under the provisions of Art. 137. The applicants further submit that there is no question for appeal against C.A.M. No. 26/93 for them, it is applicable to only Nishaben Babulal and so far as they have concern, the opponents have falsely obtained the probate certificate from the Hon'ble Court. The applicants further submit referring C.M.A. No.26/93 that after demise of Mr. Praful Babulal Thakrar, the opponents have stated C.M.A. No. 26/93 vide Ex. 62, that the consents of heirs of deceased Mr. Prafull Babulal will be produced before the Hon'ble Court, and thus, playing mischief, the opponents have removed the name of Mr. Prafull Babulal from the category of applicants and the opponents Nos.1 to 3 have obtained probate on their names and in this regard, the limitation starts when the applicants come to know about the facts 3/11/2014. Thus, under the above circumstance, the provisions of O.7, R.11 are not applicable to the opponents and present main application is not barred by limitation. The applicants further submit that applicant No.1 is widow wife and the applicant No. 2 is the son of late Mr. Prafull Babulal, the suit properties are ancestral property, thus, in light of Succession Act, they have their respective rights in the ancestral properties of Mr. Babulal Savji Thakrar. The applicants further submit that they have also filed an ad-interim injunction application Ex. 5 relating to the properties of decd. Mr. Babulal Savji Thakrar, the hearing on their part is completed and said application is pending for hearing on the part of the opponents before this Hon'ble Court and ultimately, the applicants have prayed to dismiss the present application Ex. 32 with cost.

3. I have heard learned advocates of both the sides on factual and legal aspects. Both learned advocates have argued out according to their respective applications.

4. It is required to go through the whole record to decide this application. It is a matter of fact that applicants have filed this C.M.A. No. 34/15 to revoke the order passed in C.M.A. No. 26/93 under the provisions of Sec. 263 of the Indian Succession Act. The applicants have produced the documentary evidences.

5. Mark 4/1 is a xerox copy of Will executed by Babulal Savji alias Chatrabhuj Savji Thakrar in respect of his properties on 18/2/88 wherein it is mentioned that the deceased has four sons including Mr. Prafulchandra, husband and father of applicant No. 1 & 2. Mark 4/2 & Mark 4/3 are xerox copies of death certificates of Mr. Chatrabhuj @ Babulal and Mr. Prafull Babulal @ Chatrabhuj Thakrar. Mark 4/4 is a xerox copy of consent letter dated 14/12/07 in C.M.A. No. 26/93 executed by Mr. Maheshkumar, Subhash and Jagdish wherein it is also mentioned that applicant No. 4 i.e. Mr. Prafullbhai is passed away on 27/2/03, the consent letters of heirs of him would be produced, this application Mark 4/4 is for the removal of the name of Mr. Prafullbhai Chatrabhuj, consequently, this court has ordered to delete the name of Mr. Prafullbhai.

6. Mark 4/5 is a judgement of C.M.A. No. 26/93 passed on the names of the executors of Will on 18/06/2010 and then Mark 4/6 is a xerox copy of Registered Sale Deed.

7. Mark 19/1 is a true copy of plaint of R.C.S. No. 33/15. Ex. 28 is a xerox copy of Sp.C.A. No. 5194/16 filed by the applicants against the opponents before the Hon'ble High Court, in which the Hon'ble High Court has ordered "*It is hereby accordingly ordered that interim relief granted earlier by this Hon'ble Court be and is hereby continued till then.*"

8. The learned advocate Mr. S.D. Jokhia has filed application at Ex. 29, with the order of the Hon'ble High Court passed in said application on 1-2-2017 stating that the opponents have filed an application Ex.16

to delete the opponents Nos.4 & 5 from present C.M.A. No.34/15 which was disposed off and this Court is ordered to consider the same in accordance with law uninfluenced by the observation recorded in the impugned order.

9. Mr. S.D. Jokhia, L.A. for the applicants has relied upon a reportable case No. C.A. No. 5254/06 of **P.V. Guru Raj Reddy V/s. P. Neeradha Reddy & Ors. etc.** in which Hon'ble Apex Court has held that

"In the present case, reading the plaint as a whole and proceeding on the basis that the averments made therein are correct, which is what the Court is required to do, it cannot be said that the said pleadings ex facie discloses that the suit is barred by limitation or is barred under any other provisions of law. The claim of the plaintiffs with regard to the knowledge of the essential facts giving rise to the cause of action as pleaded will have to be accepted as correct. At the stage of consideration of the application under Order VII rule 11 the stand of the defendants in the written statement would be altogether irrelevant.

Mr. Jokhia has further relied on a case of **Jagjeevam Prasad V/s. Parvathi Bai in Writ Petition No. 6413/07** wherein the Hon'ble High Court of Karnataka has observed that :-

Following the said judgement, it was held that application for grant of probate and letters of administration is covered by the Article 137 of the Limitation. Therefore, it has been held in the absence of specific provisions in the limitation Act prescribing the period for filing a petition for grant of probate, the case would fall under Article 137 of the Limitation Act and the cause of action for filing that application arises from the date when right to apply for grant of probate arises.

The question of law framed is answered accordingly i.e. Article 137 is attracted either for filing the petition for probate or for revocation the probate.

Mr. Jokhia further relied upon a case of **Delhi Wakf Board V/s. Jagdish Kumar Narang** reported in **1997(0)GLHEL-SC 7593**. The Hon'ble Supreme Court has observed that "*Code of Civil Procedure, 1908-Or.7 R.11, Or.7 R.13-In earlier proceedings, suit was rejected under R.11-Second suit filed on the same cause of action-whether liable to be dismissed as barred-held second suit not liable to be dismissed on the ground that plaint was rejected in earlier suit-Appeal allowed.*" I have gone through above case laws, which help the applicants.

10. Mr. S.D. Jokhia has cited a case of Pallav Sheth V/s. Custodian reported in 2001(0) GLHEL-SD 20594, this case law is on Article 17 of the Limitation Act.

The opponents have filed present application to reject in the C.M.A. No. 34/15, but in light of provisions of O.7, R.11 and the objection of the applicants, there is clear disclose of cause of action by the applicants, the C.M.A. No. 34/15 does not attract the provisions of O.7, R.11 of C.P.C. It also appears that the right to sue of the applicants is survive and the applicants came to know about the result of C.M.A. No. 26/93 on 3/11/2014, so, the applicants have filed this C.M.A. 34/15 on 21/5/15 as this application is not barred by any law or barred by the provisions of Art. 137 of the Limitation Act and it appears that applicants have filed present application within a period of limitation, hence, in view of above discussion, this court pass the following final order in the interest of justice.

ORDER

The application Ex. 32 of the opponents is hereby ordered to be rejected with no order as to cost.

Signed and pronounced in open court today 11th day of May 2017

Date : 11/05/2017.
Porbandar.

(Nilesh Ashokbhai Ejner)
GJ-00484
Principal Senior Civil Judge
Porbandar.