

JSN

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY & INTESTATE JURISDICTION
TESTAMENTARY SUIT NO. 39 OF 1989
IN
TESTAMENTARY PETITION NO. 279 OF 1989
WITH
NOTICE OF MOTION NO. 199 OF 2016**

Xavier Gabriel Hillary Almeida & Others ...Plaintiffs
Versus
Rui Fransisco Rodrigues & Others ...Defendants

**WITH
TESTAMENTARY SUIT NO. 21 OF 1985
IN
TESTAMENTARY PETITION NO. 296 OF 1985
WITH
NOTICE OF MOTION NO. 1875 OF 2011**

Rui Francisco Rodrigues ...Plaintiff
Versus
Xavier Gabriel Hillary Almeida & Others ...Defendants

**Mr. Piyush Raheja, with Mr. Dinesh P. Guchiya, for the Plaintiffs in
TS/39/1989 & Defendants in TS/21/1985.
Mr. Saeed Akhtar, with Mr. Hitesh Thorat, & Mr. Khushnood
Akhtar, for Defendant No. 1(a) in TS/39/1989 & Plaintiff in
TS/21/1985 & Applicant in NMT/199/2016.**

CORAM: G.S. PATEL, J
DATED: 29th September 2016

PC:-

1. The Petition is for probate to the last Will and Testament allegedly dated 15th August 1988 made by one Maria Luisa Almeida, the 1st Plaintiff's mother. The Petition is being opposed by various persons including, importantly for our purposes today, the 1st Plaintiff's sister and now, after her demise, her son Rui Rodrigues.
2. This is a Motion filed by Mr. Rui Rodrigues in which he says, first, that the Testamentary Petition/Testamentary Suit should be dismissed; and second that the Plaintiffs must be restrained from pursuing an eviction Suit bearing R.A.E. Suit No. 249/345 of 2011 filed by the 1st Plaintiff against a tenant, one John Lobo, in the Court of Small Causes at Bandra.
3. On the question of prayer (a), for dismissal of the suit, Mr. Akhtar says that the ground for dismissal is because the 1st Plaintiff in his Small Causes Court Suit has asserted a title contrary to the title of the deceased in respect of a property at Borivali. In that Small Causes Court Suit, the 1st Plaintiff has described himself as the owner of the property. The bequest in the Will sought to be propounded includes this property. According to the 1st Defendant, it was the deceased's husband's property. The fact that the 1st Plaintiff has in a Suit against a tenant made a claim in respect of the property does not mean that he has asserted a title contrary to that of the deceased. In the present proceedings, what is being assessed

is not title but proof of a Will. That is the limited enquiry. The Will must be proved in its solemn form. There is no question of a title to the property being determined or ascertained in these proceedings. Prayer (a) for dismissal of the Suit on this ground (and no other ground) is made out, is not sustainable.

4. On the second question, for a stay of the Small Causes Court suit, In my view, I cannot possibly grant the relief. Although this is the High Court, in Testamentary matters, the Court sits in exercise of its testamentary and intestate jurisdiction under the Indian Succession Act. It does not exercise appellate powers over the Court of Small Causes. I do not think that I have the inherent power in the intestate and testamentary jurisdiction to stay the proceedings in the Court of Small Causes. That application must be brought before a competent Court with sufficient jurisdiction.

5. In any case, under the Succession Act. powers are conferred on a District Judge. Section 299 says that the orders of a District Judge are subject to an Appeal in the High Court. Section 300 provides that the High Court has concurrent jurisdiction with the District Judge in the exercise of all powers conferred upon the District Judge. Section 300(2), read with Section 57 makes it clear that in the presidency towns of Calcutta, Madras and Bombay, it is the High Court, i.e., the Chartered High Court, that must receive applications for probate or Letters of Administration. Other High Courts cannot unless authorized to do so by a Notification issued by the State Government and published in the Official Gazette. Testamentary matters being governed by Section 57, the testamentary and intestate jurisdiction that this Court exercises

while hearing Petitions for Probate is not its Ordinary Original Civil Jurisdiction but is its Testamentary & Intestate Jurisdiction.

6. Even under Clause 12 of the Letters Patent, the Original Jurisdiction as to Suits does not extend to the Suits within the jurisdiction of the Small Causes Court. Clearly, the Testamentary & Intestate Jurisdiction is neither the Ordinary Original Jurisdiction nor is it the Extraordinary Original Civil Jurisdiction. It is also not the Appellate Jurisdiction that may be invoked under Clause 21 of the Letters Patent. Indeed a testamentary action is not a regular Suit properly so-called. It is merely required to be tried, under Section 295 of the Succession Act and under our Rules, as nearly as possible in the form of a regular Suit. Therefore, what is being tried is the Petition. We only renumber it as a Suit for convenience and nothing else. I do not believe that there is a binding precedent to the contrary. None is shown to me, at least none that considers the legal position. An order that merely grants the injunction without a discussion of the jurisdictional basis for such an injunction cannot be said to be a binding precedent. Prayer (b) must, therefore, necessarily be rejected.

7. Consequently, Notice of Motion No. 199 of 2016 is dismissed. There will be no order as to costs.

8. I must note that during the hearing, there was a wholly regrettable incident involving Mr. Akhtar's son, Mr. Khushnood Akhtar, who was supposedly assisting his father. I have refrained from including in this finalized order the severe directions I passed

and observations I made in open Court, and I have so done so, pulling back from what was dictated in Court, only because of the apology and plea for leniency that came from Mr. Akhtar senior — I can scarcely begin to imagine a father's mortification at having to witness this — and also because Mr. Raheja, for the Plaintiff, joins in the plea. I will, therefore, and only on the sincerity of their joint application, let this pass, but I will do so just this once; there will not be a second occasion for any such clemency. I trust Mr. Khushnood Akhtar gets my drift. He would be well advised not to test the boundaries of a court's patience and tolerance, nor to mistake its kindness for weakness.

(G. S. PATEL, J.)