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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**ORDINARY ORIGINAL CIVIL JURISDICTION**  
**NOTICE OF MOTION NO. 1857 OF 2016**  
**IN**  
**SUIT NO. 624 OF 2016**

Dhirubhai Alias Dhirajlal H. Desai & 2 Others ...Plaintiffs  
*Versus*  
Lataben Abuwalla & 13 Others. ...Defendants

**Mr. D.D. Madon, Senior Advocate, with Ms. Bindi Dave, Ms.  
Nikita Bhansali, i/b Wadia Ghandy & Co., for the Plaintiffs.**

**Mr. Z. Andhyarujina, with Mr. Aditya Khandeparkar, Mr. R.S.  
Bidkar & Mr. Satchit Bhogle, i/b M/s. Hariani & Co., for  
Defendants Nos. 1, 5 and 9.**

**Mr. S.V. Doijode, with Ms. F.J. Thakkar, i/b Doijode Associates, for  
Defendants Nos. 6 and 7.**

**Mr. Shyam Mehta, Senior Advocate, with Mr. Anirudh Hariani,  
i/b Kalpesh Joshi & Bhojraj, for Defendants Nos. 2 and 10.**

**CORAM: G.S. PATEL, J**  
**DATED: 2nd September 2016**

**PC:-**

1. In this matter, I had previously dictated an order on 26th August 2016. While correcting that order, an issue of maintainability arose. It seemed to me then that if the suit was not maintainable at all, I could pass no order on it, even by consent. I therefore placed the matter on board for directions on 30th August 2016. I indicated

my queries to the appearing Counsel and asked them to consider the point. By consent, the order of 26th August 2016 was held in abeyance. I stood the matter over to today. I have now heard Mr. Madon and Mr. Mehta on the question of maintainability that I raised. I note that the Defendants have taken a defence of maintainability, though on entirely distinct and separate grounds, *viz.*, under the Companies Act. The issue on which I sought assistance was whether such a suit for administration in terms of a Will could ever lie when probate to that Will had been separately sought. Having noted this for the record, I will express no final opinion on it, except only to say that *prima facie* it is not such as would prevent me from passing an ad-interim order. I will however leave open all questions of maintainability.

2. This is an application for ad-interim reliefs in a Suit ostensibly for administration of the estate of one Dr. Saurabh Desai (“**Dr. Desai**”), who died on 28th May 2013, in terms of a Will he is said to have made on 7th January 2006, in which he appointed the three Plaintiffs as executors. Plaintiffs Nos. 2 and 3 are also said to have been co-trustees along with Dr. Desai of a Public Charitable Trust that bore his name and which he settled on 7th May 2006 under an indenture that was ultimately registered on 21st June 2006.

3. Dr. Desai was unmarried and had no lineal descendants. Defendants Nos. 1 and 2, Lataben and Meenaben, are his sisters. Defendant No. 10, Vidyut Dilip Shah (“**Vidyut**”), is the Meenaben’s son-in-law. Dr. Saurabh Desai established and held significant holdings in several companies. These included Defendant No. 3, Pearim Pharmaceuticals Private Limited

(“**Pearim**”); Defendant No. 4, Alvaetra Laboratories Private Limited (“**Alvaetra**”); and Defendant No. 5, Saurabh Desai Exports Private Limited (“**SDEPL**”).

4. At the time of his death, Dr. Desai held 58% of the equity in Pearim; 54% of the equity in Alvaetra; and 86% of SDEPL’s equity. SDEPL in turn held 88% of the equity in a South Africa-based company, viz., Defendant No. 6, Portfolio Pharmaceutical (Pty) Limited (“**the SA Company**”). Defendant No. 7, one Jenny Holland (“**Holland**”), is the sole director of the SA Company.

5. Defendant No. 8 (“**Chandulal**”) — unrelated to Dr. Shah’s family — is a director in Pearim. Defendant No. 9, Dhiren Shah (“**Dhiren**”) is Chandulal’s son, and a director in Alvaetra and SDEPL. Defendant No. 12, Sunandaben Kumar Desai (“**Sunandaben**”) is Dr. Desai’s sister-in-law (the widow of his predeceased brother). Defendant No. 11, Rajeev Desai (“**Rajeev**”) is her son. He has propounded a competing, later Will of 22nd May 2014. Defendant No. 13, one Nileshbhai P. Patel, is allegedly a transferee from Rajeev and Sunandaben of some agricultural land that Dr. Desai held. Defendant No. 14 is the eponymous Public Charitable Trust Dr. Desai established, the Dr. Saurabh J. Desai Charitable Trust (“**the Trust**”).

6. There is a very long history of disputes for last couple of years since Dr. Desai died. The Plaintiffs claim to have been unaware of their appointment as executors in Dr. Desai’s Will of 7th January

2006. They say they found out only much later when that Will came to light by a reference to it in the Will propounded by Rajeev.

7. The grievance presently relates to several distinct of classes or types of property. There is some detailing set out at page 58 of the plaint. Principally, we are concerned for the purposes of present ad-interim application, with (a) Dr. Desai's shareholdings in Pearim, Alveatra and SDEPL; (2) Flat No. 30, Sheela Cooperative Housing Society Limited, Bhulabhai Desai Road, Mumbai 400 026 ("**the Warden Road flat**") and (3) certain immovable properties at Navsari and Valsad ("the Gujarat properties").

8. As regards the Warden Road flat, it is presently the registered office address of all three of these companies, Pearim, Alveatra and SDEPL. The flat itself is vacant. It is not possible, at this stage, to give that flat out on leave and license although that would be an optimal solution for all concerned. Mr. Mehta who appears for Meenaben and Vidyut makes a statement that these Defendants will make payments either themselves or through one of the companies of the necessary society charges and take care of all maintenance and other outgoings. He says that while SDEPL has issued cheques, the Sheela Cooperative Housing Society Limited has not deposited those cheques, possibly on account of the present disputes. Meenaben, Vidyut and SDEPL are at liberty to write to the Sheela Cooperative Housing Society Limited, enclosing a copy of this order, and request that those cheques be deposited. If those cheques require to be replaced or revalidated, those Defendants will take the necessary steps in that behalf. This is, of course, without prejudice to all the rights and contentions on all sides. The Society too will

accept those cheques without prejudice to any rights and contentions that it may have. Further, the Warden Road flat shall not, without leave of the Court obtained after at least 10 days' notice to the Advocates for the Plaintiffs, be alienated, transferred, encumbered or subjected to any third party rights (including giving it on leave and license basis). This order will operate against all the Defendants.

9. As regards the four Gujarat properties listed at Serial Nos. 6 to 9 of the Schedule at Exhibit "A", these were the subject matter of a previous ad-interim order dated 11th July 2016 (Mr. Justice K.R. Shriram). Paragraph 5 of that order reads as follows:

"5. Therefore, until the next date of hearing, Defendant Nos. 11, 12 and 13 by themselves or their successors, representatives, agents, servants and/or any other person(s) claiming through, under or in trust for them either directly or indirectly, are restrained from in any manner entering into, using, occupying, selling, transferring, disposing of, alienating, encumbering, pledging, creating third party rights in respect of the estate of the Deceased described in the Schedule, Exhibit "A" to the Plaint together with the assets and properties disclosed by the Defendants, or any part of portion thereof."

10. This order was first, in respect of all the assets, including Dr. Desai's shareholdings, the Warden Road Flat and the Gujarat properties among them, and, second, directed against Rajeev, Sunandaben and Nileshbhai Patel. In regard to the Gujarat properties (but not the other assets in Exhibit "A" to the Plaint) ,

this order will now extend to all the Defendants except the SA Company and Holland (who have not even a remote connection to the Gujarat properties). This ad-interim order will continue till further orders.

11. This leaves the question of what, if anything, is to be done as an ad-interim arrangement in respect of the shareholding of Dr. Desai and, after him, his estate in Pearim, Alvaetra and SDEPL.

12. Very shortly stated, Mr. Madon's case is that within nine days of Dr. Desai's passing, Chandulalbai (the so-called 'outside' Director in Pearim) and Dhirenbai acted to appoint Vidyut to a directorship of SDEPL, Pearim and Alvaetra. Chandulalbai appointed Vidyut a director of SDEPL and Alvaetra on 6th June 2014. On that very day, Dhirenbai (Chandulalbai's son), appointed Vidyut as a director of Pearim. On that very day, Dhirenbai notified Vidyut of a board meeting of SDEPL to be held on 11th June 2014, the agenda for which included the approval of Vidyut as a director of SDEPL and the issuance of 10 shares of SDEPL to him (Vidyut). That meeting was held on 11th June 2014. On 18th June 2014, Dhirenbai notified Vidyut of a further board meeting of SDEPL. The agenda at this meeting was to allot 74,990 shares of SDEPL to Vidyut at par. Dhirenbai informed the shareholders of SDEPL. It seems that Lataben and Meenaben consented to this issue at that time. A board meeting of SDEPL was held on 23rd June 2014, and the resolution proposing this further issue was passed. Shortly thereafter, Lataben's purported to revoke her mother's consent to the issue of shares. Lataben has since reaffirmed her assent and is now supporting Vidyut.

13. Mr. Madon's case is that the three Plaintiffs were unaware of the Will of 2006 that appoints them as executors. They only found out about it when Rajeev filed a Miscellaneous Petition before the Navsari Court seeking probate to a Will dated 22nd May 2014 that he said was Dr. Desai's latest Will. That Will references the 2006 Will. It is upon seeing that reference that the Plaintiffs learnt of the 2006 Will, one that is registered, and obtained a copy from the office of the Sub Registrar of Assurances.

14. What Mr. Madon submits is that the Will that the Plaintiffs propound, of 7th January 2006, contains a bequest of 75% of his estate to the Trust that Dr. Desai set up in his lifetime and of which Plaintiffs Nos. 2 and 3 were co-trustees along with Dr. Desai. Mr. Madon contends that the further share issue of SDEPL has resulted in a complete dilution of the shareholding of Dr. Desai in that company and thus caused a loss to his estate. As executors — and only in that capacity and in no further — the Plaintiffs are, he says, entitled to an injunction restraining these Defendants and companies from acting upon these resolutions purporting to issue further shares. Effectively he, therefore, seeks a restoration of a *status quo ante* to the date of Dr. Desai's death.

15. There are, I believe, very many difficulties in Mr. Madon's way. I set apart for the present the question of maintainability that I briefly touched upon at the start of this order, though that might conceivably be a reason to deny all relief. I will proceed for the moment on the basis that the issue is simply to be deferred, this being an ad-interim application that seeks to preserve the parties in *status quo*. I must see whether a case has been made out to found

such a relief. I do not see how these Plaintiffs can possibly claim such a relief at this stage. There are two competing Wills. Rajeev propounds a Will dated 22nd May 2014. He has sought probate of that Will. That is a Will of a later date than the one propounded by the Plaintiffs. If Rajeev succeeds in obtaining probate of the Will of 22nd May 2014, then there is no question of the Plaintiffs being executors of a previous Will of 7th January 2006. It is only if Rajeev's application for probate of the 2014 Will fails that the Plaintiffs will be entitled to proceed with their application for probate of the 2006 Will. That, however, is also being contested (or will be contested). The success or failure of even that probate application is uncertain. Mr. Madon says that the 2014 Will propounded by Rajeev also names all three of these very Plaintiffs as executors but the bequest to the Public Charitable Trust is one-third of the present bequest, i.e., 25% of the estate. While this may be true, it is not an admitted position that *either* of these Wills today is accepted is without challenge. The Will propounded by Rajeev is also under challenge. If neither Will succeeds, then the succession will be as on intestacy and the Trust will then succeed to *no* part of Dr. Desai's estate. I am unable to see how, given these facts, Mr. Madon can be said to have made out a case showing that his clients have a vested or beneficial interest in any part of that estate. Their's is perhaps a speculative interest, if that.

16. Qualitatively, there is a vast difference between an order in respect of the Warden Road flat and the Gujarat properties on the one hand and these shareholdings on the other. Those immovable properties are in a sense 'static' — their preservation is necessary for whoever succeeds to the estate, either on intestate succession or

by testamentary bequest. The shareholdings are, in contrast, kinetic: there are other shareholders involved, the companies themselves are ongoing, functioning legal entities, and there is an entirely separate body of law that governs or controls the functioning of those companies and their shareholders. What Mr. Madon seeks is an adjudication of the correctness or otherwise of certain appointments and share issues in relation to SDEPL. That must (a) be the subject matter of separate proceedings under the statute governing companies, their conduct and their dealings; and (b) must be at the instance of a party who can maintain and sustain such a challenge. It is unclear how a Court concerned with the administration of an estate can be expected to examine the validity or correctness of a board resolution or of a general body resolution passed by a company; the more so when the administration is sought by *executors* under a Will, ones professing no personal interest, and when probate to that Will is yet to be obtained and is being challenged, but it is shown that there is a competing Will (also under challenge). As I have said, this suit proceeds on the assumption that one of the two Wills must necessarily prevail. That is by no means assured. If neither Will succeeds, then any vestige of interest that these Plaintiffs can claim evaporates.

17. The Plaintiffs profess to have no interest other than as executors of Dr. Desai's 2006 Will. This avowal of detachment is unconvincing, at least as regards Plaintiffs Nos. 2 and 3. Their appointment to executorship may only be a part of the story. Plaintiffs Nos. 2 and 3 are also trustees of the Trust; and if what they say is correct, they are entitled, as Trustees, to control over fully three-fourths of Dr. Desai's holdings in SDEPL, and,

consequently, dominion over the affairs of that company. Their interest is not nearly as distanced as they would have me believe — they function as both executors and as Trustees of a beneficiary (the public charitable trust). True distancing and the avoidance of all conflict of interest would require them to forsake, relinquish or renounce one or the other, and to elect to continue either as trustees or as an executors. They are under no legal obligation to do this, but it seems to me clear that this would be the right and proper thing to do. To retain both capacities, *i.e.*, to act *qua* Trustees of the public charity and simultaneously *qua* executors of the 2006 Will is, if not a direct conflict of interest, then certainly lacking in the desirable arms-length distancing. I cannot help wondering if these two Plaintiffs might have displayed quite this enthusiasm and energy had they been required to function in only one of these two capacities; or, for that matter, if SDEPL was not quite as profitable as it seems to be. It is not the wealth of SDEPL that matters. If Plaintiffs Nos. 2 and 3 are to be believed, then their concern must be asset-value agnostic, and they must be able to show that they would have sought such protection irrespective of the size of the estate asset base. Of this, I remain unconvinced.

18. It is, therefore, enough to observe that any further dealings with these shareholdings will be subject to the outcome of this Notice of Motion and the Suit. There can be no question of a restraint against any of the Defendants concerned from acting on any resolutions that they may have passed or to which they were party. I do not think it is possible at this stage to make any other order in regard to these shareholdings.

19. Mr. Doijode appears on behalf of the SA Company and Holland. The latter is an outsider. She holds 12% of the equity in the SA Company. It seems that the SA Company has substantial cash deposits and Mr. Doijode urges me to make some sort of an order to the effect that SDEPL, the majority shareholder in the SA Company, should not deal with the deposits of the SA Company. Mr. Doijode is at too far a remove from the frame of this Suit to be eligible for any such order. Holland clearly has a battle on her hands for control of the SA Company and SDEPL. That is a fight for another arena. It cannot be loaded onto this particular litigation.

20. Mr. Madon clarifies that in the present action, the Plaintiffs' claim is only *qua* executors. They are, however, also Trustees of Dr. Desai's public trust, and in that capacity, their claim may be different. Mr. Madon expresses a concern that having been appointed executors, and not having gained as complete a protective order as they wished, specifically in regard to the shares of Pearim, Alvaetra and SDEPL, the three Plaintiffs, as executors, ought not to face a future liability for any loss that might be caused on account of the Defendants' dealings with the estate's holdings in those companies. Mr. Mehta, Mr. Andhyarujina and the Advocates for the other Defendants all confirm on instructions that the Plaintiffs will not be held accountable or liable for any loss that might be caused on account of the Defendants' dealings in the shares of those three companies.

21. This is of necessity an ad-interim order because the Defendants have raised a preliminary issue under Section 9A of the Code of Civil Procedure, 1908. Following the settled law on the

subject,<sup>1</sup> that preliminary issue will have to be framed and decided. Since this matter is before me, I will frame that issue. The issue is framed as follows:

“Whether this Court has jurisdiction to entertain and try the present Suit?”

22. Mr. Madon confirms on instructions today that the Plaintiffs do not propose to lead evidence on the preliminary issue. The Defendants, too, confirm that they wish to lead no evidence.

23. List the matter for hearing on the preliminary issue on 24th October 2016, at 3.00 p.m.

**(G. S. PATEL, J.)**

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1. *Foreshore Co-operative Housing Society Ltd v Praveen D. Desai*, (2015) 6 SCC 412.