

Executor's Capacity to Manage Estate During Imprisonment

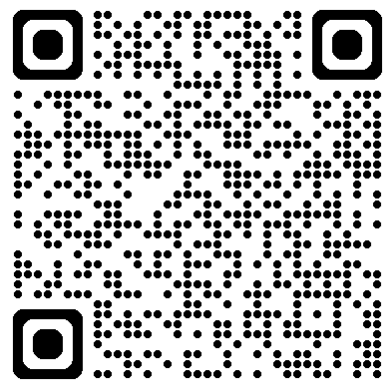
Case Name: Lalit Timothy D'Souza v. Lawra D'Souza

Citation: 2024:BHC-OS:15195

Act: Indian Succession Act, 1925

Case Brief & MCQs on this case is available in the eBook:

["Bombay High Court Cases in October 2024"](#)



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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION

INTERIM APPLICATION NO.2827 OF 2022
IN
TESTAMENTARY SUIT NO. 16 OF 2004
IN
TESTAMENTARY PETITION NO. 491 OF 2003

VISHAL
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PAREKAR

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Laura D'Souza

...Applicant/
Ori. Defdt. No.1

In the matter of

Lalit Timothy D'Souza
vs.

...Plaintiff

1. Lawra D'Souza
2. Lorna D'Souza
3. Lavina Khan

...Defendants

Mr. Shanay Shah a/w Mr. Rahul Jain, Ms. Khushboo Rupani, Ms. Akriti Shinha i/by HSA Advocates for Applicant in IA- 2827 of 2022 /Ori. Defendant No.1.

Mr. Karl Tamboly, Mr. Hrushi Narvekar, Mr. Atir Patel, Ms. Viloma Shah i/by Ms. AVP Partners for Plaintiff.

CORAM : N. J. JAMADAR, J.
DATE : OCTOBER 3, 2024

JUDGMENT :

1. Heard the learned Counsel for the parties.
2. This is an application for appointment of an Administrator *pendente lite* under Section 247 of the Indian Succession Act, 1925 (the Succession Act) for the estate described in the Schedule-I appended to the Testamentary Petition, except for the properties

listed at serial Nos.1 and 9. The principal prayer is to an appoint the Court Receiver, High Court Bombay as the Administrator *pendente lite*. In the alternative, the applicant has prayed that she be appointed as an Administrator.

3. Shorn of unnecessary details, the background facts can be stated as under:

(a) Timothy D'souza (the deceased) was the father of the applicant-Defendant No.1, Lalit D'souza, the plaintiff, Lorna D'souza, the Defendant No.2 and Lavina Khan, the Defendant No.3.

(b) According to the Applicant, the deceased died intestate, on 7th April 2003. The plaintiff took complete and exclusive control of the estate of the deceased. As disputes arose amongst the plaintiff and defendants, Lorna D'souza, the Defendant No.2, instituted Suit No.2889 of 2003 for the administration of the estate of the deceased.

(c) The plaintiff propounded a Will dated 14th March 2003, purportedly executed by the deceased, and filed Testamentary Petition No.491 of 2003. The applicant filed Caveat. The Defendant Nos.2 and 3 also filed the Caveats opposing the grant of probate. The Testamentary Petition has thus been converted into instant Testamentary Suit.

(d) In Suit No.2889 of 2003, the Defendant No.2 filed Notice of Motion No. 2679 of 2003 and the applicant took out the Notice of Motion No.2743 of 2004 for appointment of the Court Receiver. By an order dated 18th August 2005, a learned Single Judge of this Court granted interim relief in both the Notices of Motion.

(d) The plaintiff assailed the aforesaid order by filing Appeal Nos. 773 and 774 of 2005. In the said Appeal, consent terms were filed and the aforesaid interim order stood substituted by the arrangement set out thereunder including an injunction against the parties restraining them either by or through their agents from transferring, disposing of, encumbering, transferring tenancies or parting with possession in any manner of the properties constituting the estate of the deceased.

4. In the aforesaid background, the applicant has preferred this application asserting *inter alia* that the plaintiff had been convicted by the Court of Sessions, Greater Bombay for the offence punishable under Section 326 of the Indian Penal Code, 1860 for having caused grievous hurt to Defendant No.2 by firing six gun shots at her and was sentenced to suffer rigorous imprisonment for three years and pay fine. In appeals, a Division Bench of this Court found the plaintiff guilty of the offence punishable under Section 307 of the IPC and sentenced him to suffer rigorous imprisonment for ten

years and pay fine. Plaintiff has been undergoing the sentence.

5. The applicant apprehends that the plaintiff might have already created third party rights in respect of the estate of the deceased in contravention of the consent order. Over the years, according to the applicant, the plaintiff has misused the properties and misappropriated the funds for his personal gain and to the exclusion of other heirs. The estate of the deceased is of considerable magnitude and, at present, there is nobody to administer the huge estate of the deceased. The applicant is even unaware as to what consists and forms part of the entire estate of the deceased.

6. It is further asserted as the plaintiff has been convicted for the offence punishable under Section 307 of the IPC and is undergoing the sentence, it would be improper to allow such tainted and incompetent person to administer the estate of the deceased. Thus the applicant avers that the plaintiff is not fit and capable to administer the estate of the deceased either personally or through an agent. Since by consent of the parties, the Court Receiver has already been appointed in respect of the two of the properties, namely Lalit Bar and Restaurant and Lalit Refreshment, in order to preserve the estate and protect the interest of the applicant and other heirs, it is expedient that the Court Receiver is appointed as

an Administrator *pendente lite* under Section 247 of the Indian Succession Act, 1925.

7. An affidavit-in-reply has been filed on behalf of the plaintiff. Refuting the allegations that the deceased died intestate, the plaintiff contends that the deceased left behind Last Will and Testament dated 14th March 2003, whereunder the plaintiff has been appointed as the sole executor. Thus, the application for appointment of an Administrator *pendente lite* deserves to be rejected on this count alone as an executor appointed by the deceased would thereby be displaced.

8. The plaintiff asserts, the application has been filed belatedly after about 20 years of the filing of the Testamentary Petition with an oblique motive to take undue advantage of the situation in which the plaintiff finds himself. The application thus suffers from gross delay and laches. In fact, the applicant has been guilty of breach of the consent order and the plaintiff was constrained to file contempt petition. Bald allegations that the plaintiff is a tainted and incompetent person have been made. There is no material to indicate that the estate of the deceased has not been administered or is now not being administered. The plaintiff has taken all the requisite steps to preserve and protect the estate in question.

9. With regard to the alleged disqualification on account of the prosecution of the plaintiff, it is asserted that those criminal proceedings have been ongoing since the year 2008 and the issue is subjudice before the Supreme Court in Criminal Appeal No. 1627 of 2021. Yet, despite being aware of the prosecution of the plaintiff since the year 2008, the applicant never questioned the competence and qualification of the plaintiff. It is only with a view to take an undue advantage of the situation, the instant application for appointment of Administrator *pendente lite* has been filed. The plaintiff categorically denies that the estate is in danger of being a usurped, misappropriated or third party rights being created therein. The applicant has never misused the estate and misappropriated the funds for his personal gain. No case for appointment of an Administrator Pendente Lite is thus made out.

10. In the backdrop of the aforesaid facts and pleadings, I have heard Mr. Shanay Shah, the learned Counsel for the Applicant/Defendant No.1, and Mr. Karl Tamboly, the learned Counsel for the Plaintiff, at some length.

11. The learned Counsel took the Court through the material on record including the orders passed in the Notices of Motion No. 2679 of 2003 and 2743 of 2004 in Suit No. 2889 of 2003 and in Appeal No. 773 and 774 of 2005 dated 21st October 2005 passed by

the Appeal Bench.

12. Before advertng to note the submissions canvased on behalf of the parties, it may be apposite to note that, at the heart of the matter is the entitlement of the parties to succeed to the estate of the deceased. The Defendants/daughters of the deceased, assert that the deceased died intestate. The plaintiff, on the other hand, has propounded the purported Last Will and Testament of the deceased dated 14th March 2003. The core question as to whether the deceased died testate or intestate, gave rise to the suit for administration to the estate of the deceased and the instant Testamentary Suit No. 16 of 2004.

13. There is not much controversy over the fact that the interim order was initially passed in the Notice of Motion Nos. 2679 of 2003 and 2743 of 2004 in Suit No. 2889 of 2003 and with the consent of the parties, the said order passed by the learned Single Judge dated 18th August 2005 was set aside and substituted by the arrangement arrived at between the parties. The said consent order is still in force and governs the rights and liabilities of the parties.

14. As is evident, the capacity of the plaintiff as the executor of the Will of the deceased dated 14th March 2003 is borne out by the said purported Last Will and Testament. Likewise, it is a matter of

record that the plaintiff was initially convicted for an offence punishable under Section 326 of the Penal Code and sentenced to suffer rigorous imprisonment for three years and fine and in Appeal the said order passed by the learned Sessions Judge was set aside and the plaintiff has been convicted for an offence punishable under Section 307 the Penal Code and sentenced to suffer rigorous imprisonment for ten years. Incontrovertibly, the plaintiff is undergoing the sentence.

15. In the light of aforesaid rather uncontroverted facts, Mr.Shah, the learned Counsel for the applicant, submitted that the executor of the Will is in prison. Neither the applicant nor other heirs of the deceased are aware about the status of the properties. There has not been a true and faithful disclosure about the estate of the deceased, by the plaintiff. Mr. Shah thus urged that the estate of the deceased is in complete jeopardy.

16. Amplifying the aforesaid submissions, Mr.Shah would urge that there are two pressing factors which warrant the appointment of an Administrator *pendente lite*. First, the necessity of appointment of an Administrator as there is nobody to manage the estate. It is inconceivable that the plaintiff would be in a position to manage the estate of the deceased, while being incarcerated. Mr. Shah made an earnest endeavour to draw home the point that, the

applicant is not seeking appointment of an Administrator *pendente lite* for the sole reason that the plaintiff has been convicted and sentenced to suffer imprisonment. It is the necessity of the management of the estate which is the prime factor.

17. Second, the estate of the deceased can only be preserved if the Administrator *pendente lite* is appointed. There is an imminent danger of the estate of the deceased being squandered away, dissipated or otherwise lost. If the estate of the deceased is not securely preserved, the applicant and other heirs of the deceased would suffer an irreparable loss. Therefore, in the peculiar facts of the case, the appointment of an Administrator is imperative.

18. To lend support to the aforesaid submissions, Mr. Shah placed reliance on a decision of a learned Single Judge of the Calcutta High Court in the case of **Priyambada Debi Birla Vs. Ajoy Kumar Newar & Ors.**¹ and a Division Bench Judgment of this Court in the case of **Inderjeet Singh Amardeep Singh Chadha Vs. Davinder Kaur Amardeep Singh Chadha**².

19. Mr. Tamboly, the learned Counsel for the plaintiff countered the submissions on behalf of the applicant by canvassing a multi-pronged submission. First and foremost, according to Mr. Tamboly,

1 2006 SCC OnLine Cal 280.

2 (2019) 4 AIR Bom R 24

the delay of about 20 years in taking out this application for appointment of Administrator *pendente lite* singularly erodes the credibility of the claim. During this period, the applicant neither sought appointment of administrator *pendente lite* nor demanded the accounts or even a disclosure. The applicant did not institute any Suit for administration of the estate of the deceased. As a bolt from the blue, the applicant has preferred this application, which is actuated by a design to reap undue advantage of the situation.

20. Mr. Tamboly urged with a degree of vehemence that, if there was necessity of administration or protection of the estate, the applicant ought to have approached the Court with a reasonable promptitude. Even the ground that the plaintiff has been convicted and sentenced to imprisonment, according to Mr. Tamboly, does not enure for the benefit of the applicant as the plaintiff was initially convicted by the Court of Sessions in the year 2012 itself. Yet for 12 years, no application for appointment of Administrator came to be filed asserting that the plaintiff is a “tainted and incompetent person”.

21. Secondly, Mr. Tamboly would urge that the applicant is making an invidious attempt to overreach the order passed by the Division Bench in Appeal Nos.773 and 774 of 2005 dated 21st October 2005, and that too with the consent of the parties. The

Court Receiver came to be appointed only in respect of the two properties. The rest of the properties have been under the administration and management of the plaintiff. The applicant cannot be permitted to indirectly circumvent the said order by seeking an appointment of Administrator *pendente lite*. If at all the applicant desired to change the arrangement arrived at with the consent of the parties, it was incumbent upon the applicant to move in the administration suit seek modification of the said order.

22. Thirdly, taking the Court through the averments in the instant application, Mr.Tamboly would urge that, Mr.Shah has canvased a case which has not at all been pleaded. Neither the necessity of appointment of the Administrator has been pleaded nor is it contended that the plaintiff suffers from disability to manage the estate of the deceased. No particulars of alleged acts in contravention of the consent order, misutilization of the property and misappropriation of the funds for personal use have been furnished.

23. Lastly, Mr.Tamboly submitted that under Section 223 of the Indian Succession Act, the persons who are disqualified for grant of probate have been enumerated. A person who is incarcerated in prison is not *per se* disqualified to continue to act as executor of the deceased. Imprisonment of the executor, by itself, cannot be the

justification for appointment of an Administrator *pendente lite*.

24. To lend support to the aforesaid submissions, Mr. Tamboly placed reliance on Division Bench Judgments of Calcutta High Court in the cases of **Hara Coomar Sircar Vs. Doorgamoni Dasi**³; and **Dharm Raj Tiwari Vs. Badri Prasad Tiwari**⁴; a decision in the case of **Thoppai Venkataramier Vs. A. Govindarayalier**⁵; and a Judgment of the learned Single Judge of this Court in the case of **Prachi Prakash Pandit and Ors. Vs. Pushpa sharad Ranade and Ors.**⁶.

25. Mr. Shah joined the issue by canvassing a submission that there are more than adequate pleadings in the application on the aspects of both the necessity of appointment of an Administrator and the dire need to preserve and protect the estate of the deceased. Refuting the contention that the application suffers from delay and laches, Mr. Shah submitted that the necessity arose in the year 2021 when the sentence imposed upon the plaintiff by the Court of Sessions was enhanced to 10 years rigorous imprisonment. Mr. Shah urged with tenacity that the provisions contained in Section 223 which proscribe grant of probate to a minor and a person of unsound mind, cannot be so construed as to circumscribe the power of appointment of an Administrator *pendente lite* under Section 247

3 (1893) ILR 21CAL 195.

4 2002 SCC OnLine Cal 716

5 (1926) The Law Weekly 462

6 MANU/MH/0801/2004

of the Succession Act. It would be preposterous to urge that since the plaintiff does not suffer from disqualification under Section 223, he must be continued to be entrusted with the administration of the estate of the deceased despite having incurred disqualification by acts and conduct, urged Mr.Shah.

26. The aforesaid submissions now fall for consideration.

27. Indisputably, the plaintiff is the named executor of the purported Will and Testament of the deceased.

28. It may thus be appropriate to note the consequences that emanate from the appointment of the executor by the testator. Ordinarily, not only the intention of the testator in the matter of the disposition of the property is to be given effect to but also the intention of the testator to execute the testamentary disposition by the named executor has to be respected. On the demise of the testator, the estate of the testator vests in the executor. For all purposes, the executor assume the character of the legal representative of the deceased qua estate which is the subject matter of the bequest.

29. The interplay between the provisions contained in sections 211 and 213 of the Succession Act deserves to be kept in view before advertng to note the power of appointment of an administer

pendente lite under section 247 of the Succession Act. Sections 211 and 213 of the Succession Act read as under:-

211. Character and property of executor or administrator as such —

(1) The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such.

(2) When the deceased was a Hindu, Muhammadan, Buddhist, Sikh, Jaina or Parsi or an exempted person, nothing herein contained shall vest in an executor or administrator any property of the deceased person which would otherwise have passed by survivorship to some other person.

.....

213. Right as executor or legatee when established

(1) No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in ¹[India] has granted probate of the will under which the right is claimed, or has granted letters of administration with the will or with a copy of an authenticated copy of the will annexed.

(2) This section shall not apply in the case of wills made by Muhammadans or Indian Christians, and shall only apply-

(i) in the case of wills made by any Hindu, Buddhist, Sikh or Jaina where such wills are of the classes specified in clauses (a) and (b) of section 57; and

(ii) in the case of wills made by any Parsi dying, after the commencement of the Indian Succession (Amendment) Act, 1962 (16 of 1962), where such wills are made within the local limits of the ordinary-original civil jurisdiction of the High Courts at Calcutta, Madras and Bombay, and where such wills are made outside those limits, in so far as they relate to immovable property situate within those limits.

30. On a plain reading of section 211, it becomes abundantly clear

that the executor of the testator is the latter's legal representative for all purposes, and the entire property of the deceased vests in him in that capacity. Vesting of the property of the testator in the executor is on the strength of the Will itself and not as a consequence of the Probate. The Will gives the property to the executor. Probate is a means which the law provides for establishing the Will. Vesting of the property is, however, not to be equated with the vesting of the beneficial interest in the property. To put in other words, the property vests in the executor only for the purpose of representation.

31. A useful reference in this context can be made to a decision of the Supreme Court in the case of **Commissioner, Jalandhar Division vs. Mohan Krishan Abrol & Another**⁷ wherein it is observed that-

10] A bare reading of section 211 shows that the property vests in the executors by virtue of the will and not by virtue of the probate. Will gives property to the executor; the grant of probate is only a method by which the law provides for establishing the will. In the case of **Kulwanta Bewa v. Karamchand, AIR 1938 Calcutta 714**, it has been held that section 211 provides that the estate of the deceased vests in the executor; that the vesting is not of the beneficial interest in the property; but only for the purposes of representation.

(emphasis supplied)

32. Section 213 of the Succession Act, provides that the rights under the Will by executor or legatee cannot be established unless

⁷ (2004) 7 SCC 505.

the Probate or Letters of Administration was obtained. However, for the purpose of representation to the estate of the testator, grant of Probate is not peremptory. Vesting of the right is enough for the executor or administrator to represent the estate of the testator. Section 211 and 213 of the Succession Act operate in different spheres.

33. In the case of **FGP Limited vs. Saleh Hooseini Doctor and Anr.**⁸ the distinction between sections 211 and 213 of the Succession Act was postulated, inter alia, as under:-

47] Therefore, it is Section 211 and not Section 213 that deals with the vesting of property. This vesting does not take place as a result of probate. On the executor's accepting his office, the property vests on him and executor derives his title from the Will and becomes the representative of the deceased even without obtaining probate. The grant of probate does not give title to the executor. It just makes his title certain.

48] Under Section 213, the grant of probate is not a condition precedent to the filing of a suit in order to claim a right as an executor under the will. This vesting of right is enough for the executor or administrator to represent the estate in a legal proceeding.

.....

51] But Section 213 operates in a different field. Section 213 enjoins that rights under the Will by executor or a legatee cannot be established unless probate or letters of administration are obtained. Therefore, Section 211 and Section 213 of the said Act have different areas of operation.

52] Even if Will is not probated that does not prevent the vesting of the property of the deceased on the executor/administrator and consequently

⁸ (2009) 10 Supreme Court Cases 223.

any right of action to represent the estate of the executor can be initiated even before the grant of the probate.

34. In the light of the aforesaid position in law, as regards vesting of the property in the executor and, consequently, the rights and obligations of the executor qua the estate of the deceased, the prayer for appointment of an administrator *pendente lite* deserves to be appreciated. Section 247 of the Succession Act, reads as under:-

247. Administration pendente lite—Pending any suit touching the validity of the will of a deceased person or for obtaining or revoking any probate or any grant of letters of administration, the Court may appoint an administrator of the estate of such deceased person, who shall have all the rights and powers of a general administrator, other than the right of distributing such estate, and every such administrator shall be subject to the immediate control of the Court and shall act under its direction.

35. From the text of section 247 of the Succession Act, the grounds on, and the circumstances under, which the testamentary Court can invoke the said power do not become explicit. Evidently, the power appears to be of a discretionary nature. The guiding factor would, however, be the preservation of the estate of the testator and effective management thereof till the determination of issue of grant of Probate or Letters of Administration. In the case of **Inderjeet Singh** (supra) on which reliance was placed by Mr. Shah, a

Division Bench of this Court, elucidated the contours of the power to appoint the administrator *pendente lite*. The observations in paragraph 25 read as under:-

25] From the phraseology of the aforesaid Section, it becomes evident that it incorporates an enabling provision and invests the testamentary Court with power to appoint an administrator *pendente lite*. The text of aforesaid section does not, in terms, spell out the circumstances in which an administrator *pendente lite* may be appointed. Undoubtedly, the testamentary Court, in the backdrop of the facts and circumstances of the given case, ought to be satisfied as to the necessity for appointment of an administrator *pendente lite*. The object of conferring jurisdiction upon the testamentary Court to appoint an administrator *pendente lite* is implicit. The object appears to be to ensure that the estate of the testator is effectively managed and securely preserved for the benefit of the persons who are ultimately found to be entitled to succeed to it. This broad object subsumes in its fold a situation wherein it is brought on record that the act and conduct of the person in possession of the estate of the testator are detrimental to the protection and preservation of the estate. The afore- extracted section gives ample discretion to the Court as to the person who can be appointed as an administrator *pendente lite*. There is no apparent prohibition for appointment of a party to the testamentary proceedings as an administrator *pendente lite*. However, the provision expressly puts two limitations on the powers of the administrator *pendente lite* : (i) he has no right to distribute the estate; and (ii) he is subject to the immediate control of the Court and shall act under its direction.

36. In the light of the aforesaid enunciation of law, reverting to the facts of the fact, the primary hurdle which the applicant is required to surmount is the order passed by the Appeal Bench pursuant to the consent terms arrived at between the parties. As noted above, by the said order, dated 21st October, 2005, with the consent of the

parties, interim arrangements were put in place with regard to the estate of the deceased. The consent terms, inter alia, record that the interim orders will continue till the final hearing and disposal of the administration Suit No. 2889 of 2003 and Testamentary Petition No. 491 of 2003, which has since been converted into Testamentary Suit No. 16 of 2004. Under the said consent order, the Court Receiver, High Court, has been appointed Receiver in respect of Hotel Lalit Refreshment and Hotel Lalit Bar and Restaurant. Lorna D'Souza, the defendant No. 2 has been appointed as an agent for conducting the business in respect of Hotel Lalit Bar and Restaurant and Lawra D'Souza, the defendant No. 1 has been appointed as an agent for the conducting the business in respect of Lalit Refreshments.

37. Under clause (h) thereof, an injunction operates till the disposal of administrative suit and the instant suit, against the parties restraining them from transferring, disposing of, encumbering, transferring tenancies or parting with possession in any manner of the properties constituting the estate of the deceased.

38. In the context of the aforesaid order, two issues deserve consideration. One, whether the Court would be justified in appointing an administrator *pendente lite* during the currency of

the aforesaid order passed by the Appeal Bench in the administrative suit as well as the instant suit. Two, whether the interim measures, under the consent order, are not adequate to protect the estate of the deceased and the interest of the parties ?

39. The submissions of Mr. Shah seeking appointment of administrator *pendente lite* was premised on two planks. First, there is an emergent necessity of appointment of administrator on account of acts and conduct of the plaintiff. An endeavour was made to urge that the plaintiff has either created third party rights in the estate of the deceased or was in the process of creating the third party rights, the plaintiff has misutilized the estate of the deceased and converted the estate for his personal use. These contentions were sought to be substantiated by asserting that the plaintiff has never furnished accounts of the estate of the deceased. Thus, there is a genuine apprehension that the plaintiff might have created third party rights in the estate of the deceased and/or usurped the estate of the deceased.

40. I have carefully perused the averments in the application. The averments appear to be in the nature of apprehensions and inferences. These contentions are required to be appreciated in the light of the fact that there is an injunction which runs against all the parties from transferring, alienating or otherwise disposing of the

estate of the deceased. In the face of such injunction order, which is of wide amplitude, in my considered view, mere allegations that the plaintiff might have created third party rights or is in the process of creating third party rights in the estate of the deceased do not sustain the weight of the submissions sought to be canvassed on behalf of the applicant.

41. Likewise, the allegations that the assets have been misused and funds have been misappropriated by the plaintiff for his personal use and to the exclusion of other heirs of the deceased, are general in nature. The parties were fully cognizant of the fact that the plaintiff had taken full control of the estate of the deceased. The parties agreed to an interim arrangement wherein the Court Receiver came to be appointed only in respect of two of the establishments. Thus, at this stage, the applicant cannot be permitted to urge that the plaintiff had unjustifiably taken control of the estate of the deceased to the exclusion of his siblings. In the least, the applicant could have placed on record the material to demonstrate, albeit prima facie, the instances of alleged misuse of the estate and misappropriation of the funds and conversion of the estate of the deceased by the plaintiff for his personal use. The submissions of Mr. Tamboly that the case set up in the application regarding apprehension of creation of third party rights and alleged

misappropriation and misapplication of the estate of the deceased, is not borne out by material on record, thus carries substance.

42. This leads me to the second limb of the submission of Mr. Shah. As the plaintiff has been convicted for an offence punishable under section 307 of the Penal Code and sentenced to suffer imprisonment for 10 years, Mr. Shah would urge, appointment of an administrator becomes imperative for two reasons. First, the administration of the estate of the deceased cannot be entrusted to a tainted and incompetent person like the plaintiff who has been convicted for an attempt to commit murder of his sister. Second, on account of plaintiff's incarceration there is an emergent necessity of appointment of administrator *pendente lite* to manage the estate left behind by the deceased, apart from the aforesaid two hotels, in respect of which the Court Receiver has been appointed. The necessity of appointment of an administrator is of critical importance as there is nobody to manage the estate of the deceased.

43. Mr. Shah, it must be noted, made an earnest endeavour to advance a calibrated submission. At the outset a disclaimer was sought to be made that the applicant does not seek appointment of an administrator *pendente lite* for the sole reason that the plaintiff has been convicted and sentenced to suffer imprisonment. The said factor, according to Mr. Shah, is one of the concomitant

circumstances which warrants exercise of the power under section 247 of the Succession Act with a view to preserve and protect the estate of the deceased and the interest of the heirs of the deceased. It was further submitted that an inevitable consequence of the imprisonment of the plaintiff is, inordinate delay in the disposal of the suit.

44. In the case of **Priyambada Debi Birla** (supra) a learned single Judge of the Calcutta High Court elaborately considered the principles and precedents in the matter of appointment of an administrator *pendente lite* and enunciated that apart from the Indian Succession Act, 1925 and Code of Civil Procedure, 1908, the Probate Court has inherent power to take measures to protect the estate and properties of the deceased whenever the Court thinks fit and appropriate.

45. In the facts of the said case, one of the circumstance which weighed with Calcutta High Court, in the appointment of an administrator *pendente lite*, was that the named executor was an accused in a prosecution for criminal breach of trust. The observations in paragraph 56 on which a strong reliance was placed by Mr. Shah read as under:-

56] There were proceedings initiated in the past against executor under Companies Act, 1956. At present and there

is a criminal prosecution against the executor. The executor Lodha is to defend the criminal prosecution, as he is one of the accused persons and his challenge in the criminal prosecution at the initial stage failed right up to Supreme Court. He is facing trials before the appropriate Court. Proceedings were initiated for search and seizure in connection with these proceedings. It is difficult for the Court to allow a person who is the accused to control and manage huge and vast estate of the deceased when he is facing charge of criminal breach trust, not qua executor. He has to defend this case personally. Appropriate Court, prima facie, found that there are allegations amongst other against the Lodha for trial of criminal prosecution. I am not oblivious of thought that mere initiation of proceedings does not render a particular person to be untrustworthy or incompetent to hold an office, but it is question of image of key person at whose hands large number of companies are rested for de facto control and management. Sitting in Probate Court I do not think a tainted person should be allowed to manage or handle the estate. It is one of the instances of necessity.

(emphasis supplied)

46. Mr. Tamboly, learned counsel for the plaintiff would urge that the aforesaid observations in paragraph 56 of the decision in the case of **Priyambada Debi Birla** (supra) cannot be read in isolation and torn out of context. Mr. Tamboly would urge that it is not the personal attribute of the executor but the necessity of appointment of the administrator *pendente lite* that is of determinative significance. In the aforesaid case, the Calcutta High Court has explicitly recorded that the element of necessity is of paramount importance. Reliance was placed on the observations, in paragraph 40, which read as under:-

40] However Courts of our country it seems to me did not blindly follow the principles laid down in case of Bellew v.

Bellew or of Horrell v. Witts. In the case of Brindaban Chandra Saha v. Sureswar Shaha Paramanick and Ors. 10 CLJ 263 Division Bench of this Court taking note of the English case Bellew v. Bellew, ruled that the Court of Probate would grant APL in all cases where necessity for the grant is made out; and this is so because while the suit is pending there is not one legally entitled to receive or to hold the assets or to give discharges. In the case of Jogendra Lal Chowdhury v. Atindra Lal Chowdhury XIII CLJ 34 the Division Bench of this Court was again of the view while dealing with the corresponding provision of present Section 247 (Section 34 of the Indian Probate and Administration Act, 1881) that not only there must be a contest in the probate proceedings there must be necessity for such appointment.

(emphasis supplied)

47. It would also be contextually relevant to extract the observations in paragraph 46 in the aforesaid judgment, wherein the Calcutta High Court has extracted the observations of the Division Bench of the same Court in the case of **Sudhirendra Nath Mitter vs. Arunendra Nath Mitter**⁹ which exposit the concept of “necessity”. They read as under:-

46] In the case of **Sudhirendra Nath Mitter v. Arunendra Nath Mitter and Ors.** while discussing all the case decided in past on the question of appointment of administrator pendente lite, the learned single Judge of this Court held that in all cases where necessity is made out appointment be made. The word necessity was also explained in this judgment as an illustration in paragraph 14 of the said judgment. It was spoken therein:-

“...the necessity arises when there are assets to be collected; there is no representative to collect them; there is a 'bona fide' litigation respecting the title to that representation.

48. To buttress the submission that, the fact that the plaintiff has

9 AIR 1952 Cal. 418

been sentenced to imprisonment, by itself, does not constitute a legal disability to continue to act as an executor of the deceased, Mr. Tamboly invited the attention of the Court to the observations of the Division Bench of Calcutta High Court in the case of **Hara Coomar Sircar** (supra) wherein it was observed that, there was no provision in the Probate and Administration Act, V of 1881, which gives the District Judge any discretion to refuse an application for probate by an executor named in the Will on the ground that, in the opinion of the Judge, he is not a fit and proper person to be entrusted with that office. Reliance was also placed on the decision in the case of **Thoppai Venkataramier** (supra), wherein, following the decision in the case of **Hara Coomar Sircar** (supra), it was enunciated that, it was well settled that the Court can not refuse an executor probate because it considers him unfit to be executor, unless the unfitness is of the nature of legal incapacity, that is, minority or unsoundness of mind.

49. In another Division Bench judgment of the Calcutta High Court, **Dharm Raj Tiwari** (supra), it was reiterated that where an application for Probate was made by executor, the Court can not refuse the Probate on the count that the applicant was unfit on the ground of his poverty or insolvency. The restriction with regard to grant of Probate under section 223 is restricted to minors and

persons of unsound mind and association of individuals not being a company, satisfying the condition of the rules prescribed by the Government.

50. The aforesaid decisions, in my considered view, lay down that if the executor applies for Probate and is not otherwise disqualified under section 223 of the Succession Act, the Court cannot refuse to grant Probate on the ground that in the opinion of the Court, the named executor is not a fit person. These decisions simply lay down that the Judge can not by recording a subjective satisfaction rule that the named executor does not deserve to be entrusted with the execution of the Will. However, to urge that the provisions contained in section 223 of the Succession Act control the exercise of the jurisdiction under section 247 of the Succession Act, is to miss the true import of the power conferred on the Testamentary Court as a Court of conscience.

51. If there is an objective material on the basis of which the testamentary Court comes to the conclusion that the named executor deserves to be divested of the estate of the deceased, the provisions contained in section 223 of the Succession Act cannot be pressed into service to urge that the named executor is not disqualified thereunder. A provision which incorporates the grounds of disqualification for grant of Probate cannot be so construed as to

control the powers of the Court under section 247 of the Succession Act to appoint an administrator *pendente lite*. These two provisions operate in different fields. Lest, if the submission of Mr. Tamboly is acceded to, in no case the Testamentary Court would be in a position to appoint an administrator *pendente lite* where the testator names an executor who is not otherwise disqualified under section 223 of the Succession Act.

52. Normally, where an executor is named by the testator, the Court is not inclined to appoint an administrator *pendente lite* unless there is gross misconduct or mis-management or waste of the estate on the part of executor. In the very appointment of the executor by the testator is the implicit confidence that the testator has reposed in the executor. Strong grounds are, therefore, required to appoint an administrator *pendente lite* displacing the executor. The moot question that comes to the fore is, whether the imprisonment of the plaintiff is such a circumstance as to warrant the appointment of an administrator *pendente lite*.

53. In the facts of the case, the following factors, bear upon an answer to the aforesaid question.

- (i) What is the extent of the estate of the deceased which vest in the executor ?

(ii) Is the estate in the state of, “in medio” ?

(iii) Does the imprisonment of the plaintiff hinders the administration and management of the estate ?

(iv) Whether the administrator *pendente lite* is imperative for the effective management and preservation of the estate of the testator for the purpose of devolution on the persons who are ultimately found entitled to succeed to the same ?

54. From the perusal of the Schedule I to the testamentary suit, it becomes evident that there are large number of immovable properties and running business concerns which were left behind by the deceased. Apart from the liquid and financial assets, as many as 22 properties are in the nature of immovable properties or running concerns or businesses operated from the immovable properties. The necessity of management of these properties can hardly be questioned. The submission on behalf of the plaintiff that the plaintiff has not been called upon to explain as to how he is managing the affairs of the estate, despite being incarcerated, though appears attractive at the first blush, does not carry much substance.

55. The necessary corollary of the incarceration of the plaintiff is that the plaintiff is incapacitated to manage and administer the

estate of the deceased, personally. It is one thing to say that a person who is incarcerated is not disqualified to be an executor, or for that matter, for the grant of Probate. It is a completely different thing where the inevitable consequence of incarceration is that executor is disabled from managing the estate of the deceased. If the estate is such that it does not require active management as is in the case of a passive investment, the incarceration of the executor may not have a bearing. However, whether the estate is large and comprises running business ventures, which require day to day management, it would be difficult to accede to the submission that the incarceration does not operate as a legal disability.

56. In the facts of the case, having regard to the large number of properties, which include business concerns, it would be naive to believe that the incarceration of the plaintiff does not affect the management and administration of the estate of the deceased.

57. The submission of Mr. Tamboly that the application suffers from delay and laches and even the ground of prosecution of the plaintiff which is now urged to assail the character and competence of the plaintiff to continue to act as an executor has been available since 2012, may not be wholly misplaced. However, the sequence of events cannot be lost sight of. It was on 13th September, 2021 the plaintiff was convicted by the Division Bench of this Court for an

offence punishable under section 307 of the Penal Code and sentenced to suffer 10 years rigorous imprisonment. This development bears upon the claim for appointment of an administrator *pendente lite*. Incontrovertibly, though the plaintiff has filed a Criminal Appeal before the Supreme Court, the sentence has yet not been suspended and the plaintiff continues to be incarcerated.

58. In my considered view, the consequences which emanate from the sentence of 10 years imprisonment constitute a significant change in circumstances, from the one which prevailed when the plaintiff was accused of an attempt to commit murder and the Court of Session found him guilty of an offence under section 326 of the Penal Code and imposed sentence of 3 years imprisonment. The aspect of delay and laches, if viewed from the aforesaid prism, does not detract materially from the claim of the applicant.

59. I am conscious of the fact that, theoretically, it cannot be urged that the estate of the deceased is, "in medio". Upon the death of the testator, the estate vested in the plaintiff under section 211 of the Succession Act. There is no qualm on the point that the plaintiff took complete and effective control of the estate of the deceased and, in fact, that is the grievance of the defendants. However, the implication of the imprisonment of the plaintiff cannot be

completely brushed aside.

60. In the totality of the circumstances, in my view, despite interim measures which are in operation pursuant to the consent order passed by the Appeal Bench, the exigency of the situation brought about by incarceration of the plaintiff, warrants some measures to protect and preserve the estate of the deceased.

61. Should that measure be the removal of the plaintiff as the executor, bothered the Court. As noted above, by naming an executor the testator expresses his utmost confidence in the executor and, ordinarily, such named executor must be allowed to continue to act as the executor and represent the estate of the deceased and also continue to manage the same, albiet so long as the named executor does not betray the trust and confidence. In the facts of the case, the contention on behalf of the defendants that the plaintiff has mismanaged or mal-administered the estate or misappropriated or converted it for his personal use, are in the realm of allegations.

62. Section 301 of the Succession Act which empowers the Court to suspend, remove or discharge an executor, reads as under:-

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.

63. A useful reference in this context can be made to a Division Bench judgment of Madhya Pradesh High Court in the case of **Dr.Smt.Kusum Kurre and Anr. vs. Dharam Singh**¹⁰ wherein the circumstances in which the Court can invoke the power under section 301 of the Succession Act was succinctly postulated. The Madhya Pradesh High Court observed, inter alia, as under:-

It is pertinent to note that in the text of this section no specific grounds have been included/enumerated for removal of any private executor or administrator. The executor so named in the will, therefore, should be removed only when proper case in that behalf is made out for last wishes of the deceased as expressed in his will nominating a person and an executor should be highly respected. While exercising power u/s 301 of the Indian Succession Act, the Court must guard itself against any frivolous attempts for collateral purposes to remove the executor. If the Court finds that the person making an application has not come out with a clear title or has not come with clean hands, the application should be refused. However, if the Court finds on proper enquiry that the executor is acting contrary to the interest of the beneficiary, is not honestly carrying out wishes of the deceased, has started claiming title in the property adverse to the deceased or the legatee, is withering away the property to the detriment of the interest of the legatee, it shall be justified in exercising its jurisdiction under this provision in removing the executor and succeeding him by another. In such cases main guide must be the welfare of the beneficiary. Want of honesty or want of proper capacity to exercise duties or want of reasonable fidelity may well justify an order under this section directing removal of the executor.

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64. At the same time, in the instnat case, the plaintiff is incapacitated from managing the vast estate of the deceased on account of the incarceration deserves consideration. In such a situation, in my view, appointment of an administrator *pendente lite* straightaway displacing the executor may not be justifiable. Having given anxious consideration to situation which obtains, in my considered view, it would be imperative to first have a complete picture of the assets of the deceased. The persons who are in the occupation of the properties, the current status of the businesses, the persons who are conducting and/or managing those businesses and the financial health thereof. For that purpose, the Court Receiver needs to be associated with the executor as a joint administrator. The Court Receiver will not, however, disrupt the existing situation. Appointment of the Court Receiver to take stock of the situation and file a comprehensive report, without interfering with the day today management of the properties / business, will equip the Court to pass further orders, if required, with a view to protect and preserve the estate of the deceased.

65. For the foregoing reasons, I am inclined to appoint the Court Receiver, High Court as a joint administrator *pendente lite*, subject to certain conditions.

Hence, the following order.

ORDER

- (a) Application stands partly allowed.
- (b) The Court Receiver, High Court, Bombay, is appointed as a joint Administrator *pendente lite* with the plaintiff in respect of the properties at serial Nos. 2 to 8, 10 to 13, 15 to 18 and 23 to 26 described in Schedule-I appended to the Petition subject to the following conditions:
- (i) The Court Receiver shall not take possession of any of the properties either physical or symbolic.
- (ii) It will not be necessary to display the board of the Court Receiver at any of the properties.
- (iii) The Court Receiver is not to change the present status as to possession, tenancies, management and/or conducting of the businesses in any of the properties.
- (iv) The carriage of the businesses/commercial entities shall continue to remain with the plaintiff and/or his attorney, or agent, manager appointed by the plaintiff.
- (v) The Court Receiver, any officer/official of the Court Receiver, or any professional or person appointed by the Court Receiver shall have access to the above properties and shall be entitled to take inspection of the properties

after giving 3 days notice to the occupants/manager/caretaker of the premises.

(vi) The plaintiff and/or his agent, attorney and/or assign or any other person carrying on the business and/or management of the aforesaid properties shall provide access to the Court Receiver or any officer or professional appointed by the Court Receiver to the account books, records and all the relevant documents in respect of the aforesaid properties.

(vii) The Court Receiver is entitled to take the assistance of empanelled accountant and/or any other professional/service provider.

(viii) The Court Receiver shall compile data qua each of the properties comprising of the present occupant, in case of residential premises, the Manager and/or the person conducting the business at the commercial entities /ventures, the character in which such person occupies the premises or carries on the business therein, whether the business is a running concern and the income and expenditure statement at the end of December 2024.

(ix) A comprehensive report regarding the status of each

of the properties, including the points enumerated above, be filed by the Court Receiver by 24th January 2025 and its copies served on all the parties.

(x) The applicant will lodge the matter with the Court Receiver and pay initial charges as per Rule 591 of Bombay High Court (Original Side) Rules within a period of one week from the date of uploading of this order.

(xi) The applicant will also bear the charges and expenses of the Court Receiver in the event the Court Receiver and /or official of the Court Receiver is required to visit the premises situated beyond the limits of Greater Mumbai.

(xii) The charges, expenses and costs to be borne by the applicant shall be subject to further orders.

(xiii) The report to be filed by the Court Receiver pursuant to the aforesaid directions, be listed before the Court on 10th February, 2025.

(xiv) Parties will be at liberty to seek further order/directions based on the Court Receiver's Report.

Application disposed.

(N. J. JAMADAR, J.)

1. At this stage, Mr. Tamboly, the learned Counsel for the plaintiff, submits that the steps to be taken by the Court Receiver pursuant to this order be kept in abeyance for a reasonable period so as to facilitate the plaintiff to consider his position and seek redressal.

2. Since the plaintiff is incarcerated, the request seems justifiable.

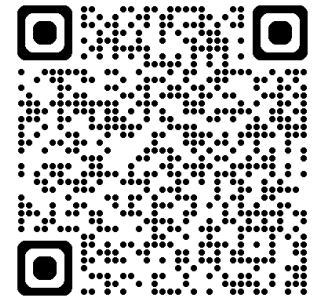
3. The Court Receiver shall not take steps pursuant to this order for a period of two weeks.

4. Consequently, the period stipulated in the order for compliance by the Court Receiver shall stand correspondingly extended by two weeks.

(N. J. JAMADAR, J.)

Case Brief & MCQs on "Lalit Timothy D'Souza v. Lawra D'Souza" (2024:BHC-OS:15195) is available in the eBook:

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