

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/LETTERS PATENT APPEAL NO. 1012 of 2018

In R/TESTAMENTARY PETITION NO. 1 of 2018

With

CIVIL APPLICATION (FOR DIRECTION) NO. 1 of 2019

In R/LETTERS PATENT APPEAL NO. 1012 of 2018

With

R/SPECIAL CIVIL APPLICATION NO. 9792 of 2018

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CIVIL APPLICATION (FOR DIRECTION) NO. 1 of 2019

In R/SPECIAL CIVIL APPLICATION NO. 9792 of 2018

FOR APPROVAL AND SIGNATURE:

HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA AGARWAL
and

HONOURABLE MR. JUSTICE ANIRUDDHA P. MAYEE

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	No
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

VINAYAKRAO SHANTILAL DESAI & ANR.

Versus

NA

Appearance:

MR VS DESAI(1398) for the Appellant(s) No. 1,2
for the Respondent(s) No. 1

Appearance:

MR VS DESAI for the Petitioner
MR KSHITIJ M. AMIN, ADVOCATE FOR MR DEVANG VYAS, ASG for
for the Respondent(s) No. 1

**CORAM:HONOURABLE THE CHIEF JUSTICE MRS. JUSTICE SUNITA
AGARWAL
and
HONOURABLE MR. JUSTICE ANIRUDDHA P. MAYEE**

Date : 13/03/2024

**CAV JUDGMENT
(PER : HONOURABLE THE CHIEF JUSTICE
MRS. JUSTICE SUNITA AGARWAL)**

1. Two connected matters, viz., Special Civil Application No. 9792 of 2018 and Letters Patent Appeal No. 1012 of 2018 have been filed by Mr.Vinayakrao Shantilal Desai who has appeared in person ("Mr. V.S. Desai, party-in-person") to argue the matter.

2. The appeal has been presented on 11.06.2018 challenging the judgment and order dated 01.05.2018 passed by the learned Single Judge in Testamentary Petition No.1 of 2018, filed under Section 300 of the Indian Succession, 1925. The party-in-person, viz. Mr. V.S. Desai who is the original petitioner in the testamentary suit, sought probate of the 'Will' executed by him as Manager in the name of Ms. Shraddhaben Manjulal Majmudar, for her properties.

3. It may be noted that the original petitioner, party-in-person was appointed as the Manager of Ms.Shraddhaben under the Mental Health Act, 1987

(hereinafter referred to as "M.H. Act") by an order dated 11.04.2012 passed in Misc. Civil Application No. 79 of 2017 by the District Judge, Vadodara. There is no dispute about the fact that Ms. Shradhaben was mentally ill person and treated as indoor patient at the hospital for mental health. She had died on 01.01.2018 at the age of 76 years. The Will-in-question was executed in her name during her lifetime on 23.02.2016.

4. Learned Single Judge taking note of Sections 54 to 59 of the M.H. Act, came to the conclusion that the Manager has no free hand to deal with the properties of the mentally ill person. He is subjected to control and supervision of the competent authority which is responsible for appointing him as manager for the properties of the mentally ill person. As per the provisions of Section 59 of the Indian Succession Act read with the provisions of M.H. Act, the manager appointed under the M.H. Act cannot execute the 'Will' to deal with the properties of a person who is a mentally ill person or a person not of sound mind. With these observations, it was held that the Will-in-question cannot be said to be a 'Will' executed by Ms. Shradhaben and she cannot be said to be the testator of the 'Will'. The 'Will' executed by the Manager appointed under Section 54 of the M.H. Act,

is not a Will in the eye of law. The Testamentary Petition has, thus, been dismissed holding that it cannot be entertained to consider the prayer for grant of probate in connection with the document appended to the petition called as 'Will'.

5. It may be noted that after dismissal of the Testamentary Petition by the judgment and order dated 01.05.2018 and presentation of the Letters Patent Appeal challenging the said decision of passed the learned Single Judge, the Special Civil Application No. 9792 of 2018 was presented on 20.06.2018 by Mr.V.S. Desai, party-in-person, Manager of Ms.Shraddhaben with the relief as under:-

a) to declare S.59, S.59's Explanation 4, and Explanation 4's words "or from illness" of the I. S. Act, 1925 vis-à-vis the mentally ill persons ineffective, ultra vires, void ab initio;

b) to duly quash the impugned provisions wholly or partly;

c) to grant such other reliefs as necessary in the case

6. Pressing the writ petition and the appeal, the petitioner (party-in-person) would submit that sections 35 and 37 of the Gujarat Court of Wards Act, 1963, which requires approval of the Court of Wards to transfer or grant any charge on or

interest in the property by a Government ward, also does not prohibit making of 'Will' by the Government ward. Proviso to section 37 of the Gujarat Court of Wards Act, 1963, rather facilitates making of 'Will' by providing that consent shall not be withheld unless the 'Will' is contrary to the personal or special law applicable to the Ward or it is likely to cause considerable pecuniary embarrassment to the property or lower considerably the influence or responsibility of the family in public estimation.

7. The contention, thus, is that there is no prohibition in the Gujarat Court of Wards Act, 1963, from making 'Will' of a mentally ill person. Section 59 of the M.H. Act, on the other hand, confers same power upon the Manager appointed under the Act in regard to the management of the property of the mentally ill person. Emphasis has been laid on the words 'same power' as occurring in section 59 of the M.H. Act to assert that the petitioner having been appointed as manager of the property of Ms. Shraddhaben under section 59 of the said Act, was having the same power to execute the 'Will' as could have been exercised by the owner herself. It was contended that execution of 'Will' by the petitioner on behalf of the mentally ill person is in exercise of the power within the meaning of

section 59 of the M.H. Act.

8. Reference has been made to Section 58 of the M.H. Act to assert that the Manager of the property of a mentally ill person is responsible for maintenance of the mentally ill person as well as his/her property. As regards proviso to section 59, it was argued that the prohibition contained in the said proviso only pertains to transfer *inter vivos* and cannot be applied in the matter of execution of 'Will' of the mentally ill person. Moreover, obtaining free choice of the testator or the mentally ill person for execution of the 'Will', in the instant case, was an impossibility. Applying the doctrine of impossibility, the manager of the property of the mentally ill person was empowered to execute the 'Will'. Moreover, the transaction made by the 'Will' are at arm's length and for no personal benefit of the petitioner herein. The petitioner who has been appointed as Manager of the property by a Court of law has acted bonafide in execution of a 'Will' in favour of a trust taking care of the mentally ill persons who are being exploited by normal people. The petitioner having acted bonafide, learned Single Judge was required to issue notice to the parties, frame issues and try the matter before forming any opinion on the validity of the 'Will'.

9. Reference has been made to the provisions of the the Rights of Persons with Disabilities Act, 2016, to assert that the said Act has been enacted to provide support to disabled such as mentally ill persons. It was urged that as per Article 14 of the Constitution of India, a person of unsound mind cannot be discriminated against a person of sound mind. There are express provisions under Articles 13, 14, 15, 19(1)(a)(c), 21, 25 and Article 300A of the Constitution of India, which support the version of the petitioner that the mentally ill persons having a right to life cannot be discriminated against any normal person. He/She is entitled to lead his/her life in the same way as that of a normal person. Reference has been made to the following decisions to substantiate the above submissions:-

Sr. No.	CITATION	PARTY NAME
1	(2022)7 SCC 1	VEENA SINGH <u>V/S</u> DISTRICT REGISTRAR/ ADDITIONAL COLLECTOR F/R AND ANOTHER
2	(2021)5 SCC 370	VIKASH KUMAR <u>V/S</u> UNION PUBLIC SERVICE COMMISSION AND OTHERS
3	(2021)SCCOnline Del 4856	S.D. <u>V/S</u> GOVT. OF NCT OF DELHI AND OTHERS
4	(2020)9 SCC 1	VINEETA SHARMA <u>V/S</u> RAKESH SHARMA AND OTHERS

5	(2020)9 SCC 356	HARI KRISHNA MANDIR TRUST <u>v/s</u> STATE OF MAHARASHTRA AND OTHERS
6	(2019)11 SCC 1	INDIAN YOUNG LAWYERS ASSOCIATION AND OTHERS (SABRIMALA TEMPLE, IN RE) <u>v/s</u> STATE OF KERALA AND OTHERS
7	(2017)10 SCC 1	K. S. PUTTASWAMY AND ANOTHER <u>v/s</u> UNION OF INDIA OTHERS
8	(2012)1 SCC 656	SURAJ LAMP AND INDUSTRIES PRIVATE LIMITED <u>v/s</u> STATE OF HARYANA AND ANOTHER
9	(2011)9 SCC 1	K. T. PLANTATION PRIVATE LIMITED AND ANOTHER <u>v/s</u> STATE OF KARNATAKA
10	(2011)7 SCC 639	STATE OF MADHYAPRADESH <u>v/s</u> NARMADA BACHAO ANDOLAN AND ANOTHER
		NARMADA HYDRO ELECTRIC DEVELOPMENT CORPORATION DEVELOPMENT <u>v/s</u> NARMADA BACHAO ANDOLAN AND ANOTHER
		STATE OF MADHYAPRADESH <u>v/s</u> NARMADA BACHAO ANDOLAN AND ANOTHER
		NARMADA BACHAO ANDOLAN AND ANOTHER <u>v/s</u> STATE OF MADHYAPRADESH
		NARMADA HYDRO DEVELOPMENT CORPORATION <u>v/s</u> NARMADA BACHAO ANDOLAN AND ANOTHER
11	(2007)6 SCC 724	S. RATHINAM ALIAS KUPPAMUTHU AND OTHERS <u>v/s</u> L.S. MARIAPPAN AND OTHERS

12	(1997)2 SCC 387	STATE OF W.B. AND ANOTHER <u>V/S</u> KAILASH CHANDRA KAPUR AND OTHERS
13	(1994)2 SCC 511	GUMPHA (SMT) AND ANOTHER <u>V/S</u> JAIBAI
14	(1974)2 SCC 33	IN RE PRESIDENTIAL POLL
15	(1972)2 SCC 442	AMAR CHANDRA CHAKRABORTY <u>V/S</u> COLLECTOR OF EXCISE, GOVERNMENT OF TRIPURA AND OTHERS

10. Referring to the decision of the Apex Court in **Ravinder Kumar Dhariwal and Another v. Union of India[(2023) 2 SCC 209]**, it was submitted that the Apex Court has adopted two model, one is support model and another is substitution model. In the substitution model adopted by the Apex Court, all such steps which are to be taken by the owner of the property, who is otherwise a mentally ill person, can be taken by the manager. The contention is that the prohibition as contained in Section 59 of the Indian Succession Act, 1925, in making 'Will' by a person other than a person of sound mind is contrary to the spirit of the Constitution of India as also the provisions as contained in the M.H. Act, the Gujarat Court of Wards Act, 1963 and hence, the same is to be declared ultra vires.

11. Learned counsel appearing for the respondents on the other hand, would submit that the Indian Succession Act is a Central Act and any provision

of the State Act will not override the Central Act. The execution of the 'Will' being a personal choice of the owner, cannot be exercised by any other person. Even under the M.H. Act, the Manager has no power to transfer the property of a mentally ill person and, as such, the 'Will' executed by him cannot be sustained in the eye of law.

12. So far as the validity of Section 59 of the Indian Succession Act, 1925, it is submitted that the Act is in place since the year 1925 and the law which is operational for a considerable period of time cannot be held to be ultra vires.

13. Considering the rival submissions of the party-in-person and the learned counsel appearing for the private respondents, suffice it to note that the 'Will' "is a legal declaration of a person's wishes regarding the disposal of his or her property or asset after death". A written instrument legally executed by a person making disposition of his or her asset to take effect after death, can only be with the expression of willingness of such person to execute the same. The wishes of a person who is the testator of the 'Will' should be a free will which means that such person is allowed to choose what he or she wants. Expression of free will would require the capability of conscious choice and decision as also

the intention of the person executing the 'Will'. The expression of such feeling is personal to the person executing the document, which is known as 'Will' in the legal parlance.

14. For this reason, the Indian Succession Act provides for the capability of a person of making 'Will', which includes that the person making 'Will' shall be of sound mind and should not be a minor. Explanation 4 to Section 59 provides guidance by further stating that a person making 'Will', if in such a state of mind for the reason of illness or any other cause or on account of intoxication that he does not know what he is doing, would be incapable of making a 'Will'. It is, thus, necessary that in order to make a valid 'Will', the testator need to be in perfect state of health, specifically in sound state of mind and should not be incapacitated in any manner from expressing his or her free will or making of conscious choice.

15. In the instant case, the owner of the property, namely, Ms. Shraddhaben, admittedly was a mentally ill person and was treated as an indoor patient at a hospital for mental treatment. The petitioner herein, party-in-person, was appointed as the manager under Section 54 of the M.H. Act to manage her property. Going by the provisions of

the M.H. Act, it is evident that the manager of the property of mentally ill person appointed by the Court does not have unfettered powers to deal with the property of a mentally ill person. The duties of the manager aligned in section 58 require that such person appointed as manager of the property of a mentally ill person shall be responsible for the maintenance of the mentally ill person and of such members of his/her family as are dependent on him. Section 59 though confers power on the Manager so appointed under the M.H. Act to exercise the same power in regard to the management of the property of the mentally ill person, as the mentally ill person would have exercised as owner had he not been mentally ill, but it does not confer power on the manager to alienate the property in any manner. The proviso to section 59 prohibits transfer of any immovable property of the mentally ill person in any manner or creation of lease on such property for a period exceeding five years, except with the permission of the District Court. The assertion of the petitioner that execution of the 'Will' of mentally ill person is not prohibited by the proviso to section 59 is a misconceived argument. What has not been provided by the law cannot be done by the petitioner in the capacity of manager of the mentally ill person.

16. On a conjoint reading of section 59 of the

Indian Succession Act and Explanation 4 attached to it, as also section 54 read with sections 57, 58 and 59 of the M.H. Act, we are also of the considered opinion that the execution of 'Will' by the manager of the property of a mentally ill person, namely, Ms. Shraddhaben in the instant case, was an act without any authority of law. A 'Will', which has to be an instrument of expression of free will or conscious choice of the owner of the property, could not have been executed by the manager on the premise that he can exercise the same power as could have been exercised by the mentally ill person had she not been mentally ill.

17. We, therefore, do not find any error in the opinion drawn by the learned Single Judge that the manager has no free hand to deal with the properties of the mentally ill person. The conclusion that the owner of the property Ms. Shraddhaben not being testator of the 'Will', the document executed cannot be said to be a 'Will' in the eye of law. There is no error in the decision of the learned Single Judge in rejecting the Testamentary Petition on the ground that there is no question of grant of probate in connection with such a document.

18. No benefit can be derived from the decisions relied by the petitioner (party-in-person), noted

hereinabove.

19. For the above discussion, no merit is found in the challenge to the validity of section 59 of the Indian Succession, 1925, which is in conformity with the fundamental concept of 'Will', which is meant to be a document executed by free will or conscious choice of the owner of the property.

20. The appeal challenging the order of rejection of the testamentary petition and the connected Special Civil Application seeking to challenge the validity of Section 59 of the Indian Succession, 1925, are found misconceived and dismissed, accordingly.

Consequently, connected Civil Applications also stand disposed of.

(SUNITA AGARWAL, CJ)

(ANIRUDDHA P. MAYEE, J.)

BIJOY B. PILLAI