

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.481 OF 2013
ARISING FROM
CHAMBER SUMMONS NO.39 OF 2013
IN
TESTAMENTARY SUIT NO.11 OF 2012
IN
TESTAMENTARY PETITION NO.724 OF 2004

- | | | |
|--------------------------------------|---|--------------------|
| 1. Jadeja Navalsing Mahobatsing, |] | |
| Age : 40 Yrs., |] | |
| Occu.: Agriculture & Business, |] | |
| R/at Ravalvadi, Bhuj, Kutch. |] | |
| |] | |
| 2. Patel Ramjibhai Naranbhai Halai, |] | |
| Age : 40 Yrs., |] | |
| Occu.: Agriculture & Business, |] | |
| R/at Godpar, Taluka - Bhuj, Kutch. |] | |
| |] | |
| 3. Mugal Abdulbag Muhammadbag, |] | |
| Age : 50 Yrs., |] | |
| Occu.: Agriculture & Business, |] | |
| R/at Godpar, Taluka - Bhuj, Kutch. |] | |
| |] | |
| 4. Rabadiya Devji Nanji, |] | |
| Age : 40 Yrs., |] | |
| Occu.: Agriculture & Business, |] | Appellants / |
| R/at Nilkantha Nagar, Mandvi, Kutch. |] | (Prop. Defendants) |

Versus

- | | |
|--------------------------------------|---|
| 1. Mahesh Govind Trivedi, |] |
| Indian Inhabitant, Hindu, |] |
| R/at Uttam Villa, St. Mary Toad, |] |
| Vile Parle (West), Mumbai - 400 056. |] |
| The sole Executor, named in the Will |] |
| of the Deceased |] |
| |] |

2. Bhagwanji G. Trivedi [since deceased],]
Ground Floor, Trivedi Niwas,]
Rashtyashala Road, Vile Parle (West),]
Mumbai - 400 056.]
]
3. Mugatlal G. Trivedi,]
At present residing at Ground Floor,]
Trivedi Niwas, Rashtyashala Road,]
Vile Parle (West), Mumbai - 400 056.]
and in Jamnagar at Sameer Apartment,]
2nd Floor, Street No.6, Patel Colony,] Respondents /
Jamnagar, Gujarat.] (Org. Defendants)

Mr. Sanjay Jain, a/w. Ms. Preeti Gada, for
the Appellants.

Mr. Venkatesh Dhond, Sr. Counsel, a/w.
Mr. Shailesh Mendon, i/by Ms. Reena
Salunke, for the Respondents.

**CORAM : V.M. KANADE &
DR. SHALINI PHANSALKAR-JOSHI, J.J.**

RESERVED ON : 25TH AUGUST, 2015

PRONOUNCED ON : 11TH SEPTEMBER 2015

JUDGMENT : [Per Dr. Shalini Phansalkar-Joshi, J.]

1. This Appeal is arising out of the Judgment and Order dated
10th June, 2013 passed by the learned Single Judge of this Court,

whereby the Chamber Summons No.39 of 2013 taken out by the Appellants for their impleadment as Respondents in Testamentary Suit No.11 of 2012 came to be dismissed.

2. Brief facts of the Appeal can be stated as follows :-

One Ramalaxmi Ravishankar Trivedi had various properties in Bombay as well as at Kutch, more particularly, agricultural land, admeasuring about 13 Acres 24 Gunthas, situate in Survey No.154 at Mandvi City and being known as "Bhandarvali" at Godharai Falia, Kutch, Gujarat. She had executed an Irrevocable Power of Attorney on 28th August, 1997 in favour of her late brother Bhagwanji Trivedi, the late Respondent No.2 herein. During her lifetime itself, Respondent No.2 had, by Deed of Sale dated 29th November, 1997, transferred the said land to one Narayanbhai @ Nanalal Jethalal Fufal. Ramalaxmi expired on 31st January, 2004 at Kutch, leaving behind Respondent Nos.1, 2 and 3 as her brothers and two sisters.

3. After her death, on 18th April, 2007, Respondent No.2 herein had registered the said Deed of Sale before Sub-Registrar Office

at Kutch. Thereafter, on 29th March, 2008, by executing registered Deed of Sale, said Narayanbahi Fufal transferred that land to the present Appellants and since then the Appellants are in exclusive possession of the said land.

4. After the death of Ramalaxmi on 31st January, 2004, one of her brothers, i.e. Respondent No.1, filed the Petition for grant of Probate in respect of the registered Will dated 31st August, 2001, executed by Ramalaxmi in his favour. Her two other brothers, namely, Respondent Nos.2 and 3 contested the said Petition for Probate. Hence, it was converted to Testamentary Suit.

5. Meanwhile, Respondent No.1 has also filed Special Civil Suit No.86 of 2007 before the Principal Senior Civil Judge, Bharuch, Kutch for cancellation of the Sale Deed executed by Respondent No.2 in favour of Narayanbhai Fufal, contending inter alia that deceased Ramalaxmi has executed a registered Will on 31st July, 2001 and on the basis thereof, he has become entitled to get all her property. In the said Suit, he also challenged the Power of Attorney executed by Ramalaxmi in favour of Respondent No.2, on the basis of which Respondent No.2 had sold property to

Narayanbhai Fufal. The present Appellants were joined in the said Suit as party-Defendants, in view of the Deed of Sale executed by Narayanbhai Fufal in favour of the Appellants on 29th March, 2008. In that Suit, the Court framed various issues in respect of the entire transaction of sale, by virtue of which the Appellants claimed to have become owners of the land.

6. That Suit came to be dismissed on 21st June, 2012.

7. In view thereof, the Appellants took out Chamber Summons in Testamentary Suit, pending before the learned Single Judge, seeking their impleadment in the Suit on the ground that they are having caveatable interest in the agricultural land, which was arraigned as the subject matter of the estate left behind by the deceased. It was contended that the said agricultural land was no longer the estate of the deceased on the date of filing the Probate Petition and, therefore, Respondent No.1 cannot pray for the grant of Probate in respect of the said property. It was submitted that, by virtue of the Deed of Sale executed in their favour, the Appellants have become exclusive owners of the said agricultural land and they have special interest in the said

property. Their presence, as proposed Respondents/Defendants was, therefore, necessary for the decision of the Probate Suit. If the Probate Suit is decided without joining them, their interests and rights will be affected and, therefore, it was requested that in the interest of justice and equity, they may be permitted to join as party-Defendants in the Suit to contest the grant of Probate.

8. This Chamber Summons taken out by the Appellants was resisted by the Plaintiff / Respondent No.1 herein, by contending, inter alia, that the Appellants have no right, title or interest in respect of the property left behind by the deceased and hence no locus standi to become party to the probate proceedings. According to Respondent No.1, the alleged transaction of Appellants purchasing one of the properties of the deceased from one of the brothers of the deceased, under the Power of Attorney alleged to have been executed by the deceased was void, ab-initio and not binding upon the Respondents. It was further contended that the entire claim of the Appellants, while taking out Chamber Summons, was based on the dismissal of the Special Civil Suit filed in the Court of Principal Senior Civil

Judge, Bhuj, in which the Respondents herein have challenged the transaction claimed by the Appellants in respect of the said property. The decree of dismissal passed in the said Suit has been set aside by the High Court of Gujarat in First Appeal No.2453 of 2012 preferred by the Respondents herein. While allowing the Appeal on 5th December, 2013. It is clearly held that the Appellants have no right, title or interest in the suit property. In view thereof, it was submitted that the claim of the Appellants of having caveatable interest in the property is already negatived by the Division Bench of the High Court of Gujarat. Since the entire transaction, on the basis of which the Appellants claimed the right in the property, has been set aside by the competent Court, according to Respondent No.1, the claim of the Appellants of having caveatable interest in the property left behind by the deceased is totally nullified. Therefore, the Appellants had no right to contest the probate proceedings and the Chamber Summons taken out by them for their impleadment deserved to be dismissed.

9. The learned Single Judge, after hearing learned counsels for both the parties, was pleased to dismiss the Chamber Summons,

by holding that the claim of the Appellants being based on title and as the Testamentary Court cannot determine the issue of title, the Appellants' claim for impleadment in the probate proceedings cannot be entertained. Further it was held that, even if the Will of deceased Ramalaxmi is probated, the title of the property claimed by the Appellants would not be determined, as the same would be only determined in the Appeal, which was, at the relevant time, pending in Gujarat High Court. As regards the contention of the Appellants challenging the execution of the Will, learned Single Judge held that, being a purchaser of the property from the assignee of the constituted attorney of the deceased, Appellants would have no knowledge of the execution of the Will of the deceased. The Power of Attorney executed by the deceased would stand terminated on the death of the deceased and, therefore, the Appellants cannot be a proper party in the Testamentary Suit. In the result, the Chamber Summons was dismissed.

10. This order of the learned Single Judge is challenged in this Appeal by learned counsel for the Appellants, by submitting that the Appellants are the assignee of one of the property mentioned

in Schedule I of the Testamentary Suit and, therefore, they are having caveatable interest. They are also in exclusive use, occupation and possession of the said property since the date of registered Sale Deed dated 29th March, 2008. All the natural heirs of the deceased, except the Probate Petitioners, have supported the said Conveyance. The grant of Probate in such situation, without impleadment of the Appellants, would displace the rights acquired by the natural heirs in the property upon intestate death of the deceased. Hence, the Appellants, as successors to the natural heirs, are entitled to caveatable interest. By placing reliance on the various authorities, learned counsel for the Appellants has urged that even a “slightest or remote interest” in the property of the Testator entitles a person to file caveat and contest the grant of Probate. According to him, the Appellants have more than the slightest or remote interest. Even the decree passed by the Gujarat High Court against the Appellants is subject to grant of Probate. Hence, the Appellants will be vitally and adversely affected, if Testamentary Suit is decided without joining them as party.

11. Per contra, learned counsel for the Probate Petitioner/

Respondent No.1 has supported the impugned order of the learned Single Judge rejecting the Chamber Summons, by submitting that the Judgment of the Gujarat High Court in First Appeal No.2453 of 2012 has sealed the fate of the Appellants' claim as in the said Judgment, the claim of the Appellants, based on the title, acquired on the basis of alleged Power of Attorney executed by the deceased is clearly and staunchly negated. Moreover, the Special Leave Petition No.CC 7184 of 2014 preferred by the Appellants in the Supreme Court challenging the said Judgment in Appeal is also dismissed. Therefore, the Appellants have absolutely no case. Hence, according to learned counsel for Probate Petitioner, Appellants have failed to show any interest, much less, the caveatable interest for their impleadment in the Probate Suit. As to the suspension of the decree passed in First Appeal by Gujarat High Court, it is urged that only that part of the decree, which entitled the Probate Petitioner to get the property is suspended, subject to the decision of probate proceedings, whereas, the first part of the decree which negated the claim of the Appellants based on their title is absolute and not suspended in any way. Hence, according to learned counsel for Probate Petitioner, no

interference is warranted in the impugned order of the learned Single Judge.

12. In our considered opinion, before adverting to the rival submissions of learned counsels for both the parties, it would be necessary to revisit the chronology of the events and the admitted facts.

13. The claim of the Appellants is admittedly based on the title. According to the Appellants, they are the bonafide purchasers of the suit property from one Narayan Fufal, in whose favour Deed of Sale was executed by Respondent No.2, on the basis of the Irrevocable Power of Attorney executed by deceased Ramalaxmi in his favour. This entire transaction, which was entered into by Respondent No.2 in favour of Narayan Fufal and thereafter Narayan Fufal entering into transaction with the Appellants in respect of the suit property was challenged by Respondent No.1 by filing a Special Civil Suit No.86 of 2007 in the Court at Bhuj, Kutch. In the said Suit, Respondent No.1 has sought the relief of cancellation of the Sale Deed in respect of the property executed by Respondent No.2 during the lifetime of deceased Ramalaxmi

in favour of Narayan Fufal. By way of amendment in the said Suit, the names of the present Appellants were also brought on record as in the meanwhile Narayan Fufal had sold the property in favour of the Appellants and put them in possession of the property. Respondent No.1 herein has sought two specific and separate reliefs in the said Suit; first pertaining to the cancellation of the said sale transaction and second pertaining to his own rights, to get possession of the suit property.

14. The specific prayers made in the said Suit were as follows :-

“(a) Be pleased to allow the suit of the plaintiff with costs.

(b) Be pleased to pass a decree holding that the registered document dated 18.04.2007 executed by the defendant no.1 in favour of the defendant no.2 is illegal, unauthorized, with malafide intention, fraudulent, null and void and invalid and the same be cancelled and it be declared that the said is not binding to the plaintiff.

(c) Be pleased to pass a decree holding that the

registered document dated 29.03.2008 executed by the defendant no.2 in favour of the defendants no.3 to 6 is illegal, unauthorized, with malafide intention, fraudulent, null and void and invalid and the same be cancelled and it be declared that the said is not binding to the plaintiff.

(d) Be pleased to pass a permanent injunction order restraining the defendants that they may not sell the suit property either themselves or through anybody or may not create any encumbrances thereon or may not get the said land converted into non-agricultural land or may not do any other transaction.”

15. The said Suit was dismissed at the trial court stage, however, in the First Appeal preferred by Respondent No.1 bearing No.2453 of 2012, the decree of the Trial Court was set aside and the Appeal was allowed. A categorical finding is recorded in the said Judgment in paragraph Nos.36, 37 and 28, as follows :-

“36. The present appeal succeeds.

(1) as defendant No.1 has sought to transfer the suit property through deed of power of attorney, which is not irrevocable and which is unenforceable / defective power of attorney deed, hence, in the circumstances of the case, no right, title or interest is passed in favour of defendant No.2 and consequently nor in favour of defendant Nos.3 to 6.

(2) as defendant Nos.3 to 6 are not bona fide purchasers for value without notice. Almost all material circumstances are against defendant Nos.3 to 6. Filing of application by plaintiff claiming breach of undertaking by defendant No.2, then, the fact that son of defendant No.2 is an advocate practicing along with and under the advocate for defendant No.2. Then the say of defendant No.5 in his evidence,

all these are possible to read in favour of the plaintiff.

(3) as the findings of the learned trial court, - except the finding that the suit is bad for not praying relief of possession, - are not only bad in law and illegal, but almost all of them are perverse.

37. The learned trial court has laboured hard to draw the conclusion that transaction under challenge had taken place in presence of deceased Ramalaxmiben. The overwhelming circumstances of the case that points towards different direction, ignored or not properly appreciated by the trial court, while no evidence is led on behalf of defendant No.1, appreciation of other evidence is grossly erroneous. Hence, its finding is perverse. Fine attempt made by the learned advocate Shri. Gandhi to support the finding of the trial court by covering and connecting this finding with

legal submission fails, as facts and circumstances of the case do not help the learned advocate.

38. In view of the above discussion, the appeal succeeds. The judgment and decree passed by the learned trial court in Special Civil Suit No.86/2007 is hereby quashed and set aside."

16. Thus, as regards the decree or the reliefs sought by Respondent No.1 in the said Suit seeking cancellation of the entire sale transaction executed in favour of initially Narayanbhai Fufal and thereafter in favour of the Appellants, the Gujarat High Court has categorically held that, *"the Appeal succeeds and the Judgment and Decree of the Trial Court is accordingly quashed and set aside"*. That part of the Judgment of the Gujarat High Court has become absolute as such, as in Para No.39 of the Judgment also, there is categorical pronouncement that, *"the Appeal succeeds. The Judgment and Decree passed by the learned Trial Court is hereby quashed and set aside. The Appeal is allowed with costs"*.

17. As regards the second relief which was sought by the Plaintiff therein, of getting possession of the land, which was subject matter of the Suit and which relief was sought by the Plaintiff therein at the appellate stage, it was held that, this right to possession, as claimed by the Plaintiff therein, cannot be granted at this stage, as the probate proceedings were pending in this Court and as in the probate proceedings, he will have to prove the execution of the Will on the basis of which he was claiming interest and possession in the suit property. By placing reliance upon the decision of the Supreme Court in the case of ***Binapani Kar Chowdhury Vs. Satyabrata Basu & Anr., AIR 2006 SC 2263***, it was held that, this part of the Judgment and Decree passed in favour of the Plaintiff relating to Plaintiff's right to get possession of the suit land, passed in the Appeal, will take effect only on the Plaintiff therein succeeding in obtaining and producing the probate of the Will and till then the decree to that effect should be considered only as provisional and not to be given effect to.

18. Thus, the perusal of the Judgment of the Gujarat High

Court, which has now become final in view of the dismissal of the Special Leave Petition No.CC 7184 of 2014 preferred by the Appellants herein, in the Supreme Court, it is very clear that the entire Judgment and Decree passed therein is not kept in abeyance or in suspension, but only that part of the Judgment and Decree, which holds the Plaintiff therein entitled to get possession of the said land is kept in abeyance or suspension till the probate is granted in their favour. So far as first part of the Judgment and Decree relating to cancellation of the sale transaction in favour of the Appellants, the Judgment is very clear and categorical. Not only in para No.36, but also in para No.38, it is held that, *“Appeal succeeds and the Judgment and Decree of the Trial Court is quashed and set aside”*. There is also categorical finding recorded that the entire sale transaction, based on irrevocable Power of Attorney was illegal, null and void.

19. In view thereof, submission of learned Counsel for the Appellants that the entire Judgment and Decree passed by Gujarat High Court is under suspension or abeyance cannot be accepted. As rightly submitted by learned counsel for the Respondent, if the Gujarat High Court wanted to keep that part

of the decree also in abeyance or suspension till the grant of probate, Gujarat High Court would not have entered into the futile exercise of deciding the legality and validity of the sale transaction executed in favour of the Appellants. Gujarat High Court would have straightaway either stayed the Appeal till the decision of probate proceedings or would not have allowed the Appeal, as it has done by specifically observing that “*the Appeal succeeds*”. As a result of the success of the said Appeal and in the light of the specific prayers made by the Plaintiff in the said Suit, it has to be held that now the rights of the Appellants, based on the title, stand determined. Appellants cannot agitate the same. Reliance placed by the learned Counsel for the Appellant in this respect on the Judgment of ***Smt. Indira Nehru Gandhi Vs. Raj Narain & Anr., (1975) 2 SCC 159***, is also misplaced, as the facts of the said case are totally different, especially, because the said case pertains to stay on disqualification under the Representation of the People Act, 1957.

20. Once it is held that whatever interests Appellants are claiming in the suit property, were on the basis of the title

derived from the deed of sale and that claim has already been rejected by the competent court, the case of the Appellants that they are having caveatable interest in the property of the deceased and therefore entitled to be impleaded, goes away completely.

21. As regards the contention of the Appellants that they are assignees of one of the properties, mentioned in Schedule I of Testament Petition, from the heir apparent, namely Respondent No.2, and therefore they have a caveatable interest, the said contention also cannot be accepted as their claim based on title is rejected by the competent court and that decision has achieved finality upto the Supreme Court. As a matter of fact, the claim of the Appellants in the Chamber Summons and also in this appeal was based on the fact that they are having title to the suit property on the basis of deed of sale and said title was upheld by the Court of Civil Judge Senior Division, in Gujarat State in Special Suit No.115 of 2007 and therefore, they are entitled to be impleaded in the probate proceeding. However, as the decree passed in Special Civil Suit No.115 of 2007 is already quashed and set aside and categorical finding is recorded to the effect that the Appellants have no

right, title or interest in the property and Respondent No.1 is entitled to get possession of the said property subject to decision of probate petition, the very foundation of the Appellants' claim of having caveatable interest in the property stands demolished. If at all Appellants were having any other claim in the suit property, apart from the one based on the title, like being the assignees of heir apparent of deceased Ramalaxmiben, Appellants ought to have raised that claim in the said suit. Apparently Appellants have not done so. In such situation, the said claim is also barred by principles of res-judicata under Section 11(4) of the Code of Civil Procedure.

22. As to the reliance placed upon various judgments, by learned counsel for the Appellants, the crux of all these authorities is that, even if caveator has a slightest interest in the property of the deceased, he becomes entitled to be impleaded as party in probate proceeding. In our opinion, there can hardly be any dispute about this legal proposition, however, what is of utmost significance is that caveator's interest in the property should not have been already negated by the court of competent jurisdiction, as has happened in the instant case.

23. In the first authority relied upon by learned counsel for appellants, ***M.K. Sowbhagiammal and anr -vs- Komalang Ammal and anr, AIR 1928 Madras 803,*** a test is laid down by the Madras High Court to determine caveatable interest of the caveator and it was held if grant of probate would in any manner displace any right of the caveator, it has to be held that he has caveatable interest in the property of the deceased. Hence person whose right would be displaced in any manner whatsoever on grant of probate would be considered as a person having caveatable interest. Same legal position is reiterated in ***Swantantranandji -vs- Lunidaram Jangaldas and in Krishna Kumar Birla -vs- Rajendra Singh Lodha, (2008), 10 SCC 300.*** There can be absolutely no two opinions about this legal proposition. In the instant case however, whatever interest the present Appellants had in the suit property was not dependent on the grant or non grant of probate but it was dependent on his title to the property and his right to the property has already been displaced, in view of the decision in Special Civil Suit No.117 of 2005. Therefore, here the grant or non grant of probate has no effect whatsoever to displace or

otherwise the right of the Appellants in the property of the deceased. Hence the Appellants cannot be called as having caveatable interest in the property.

24. The next authority relied upon by learned counsel for the Appellants is **G. Gopal -vs- C. Bhaskar and ors (2008) 10 SCC 489**; wherein principle laid down in the above said authority has been reiterated, further holding that the interest howsoever slight is sufficient to entitle the party to oppose grant of probate. Here in the case, assuming that the Appellants had not only having slight interest, but substantial interest in the property of the deceased, as their claim to that interest being based on the title and being already adjudicated upon, this authority also cannot be made applicable to the facts of the present case.

25. In **Thomas P. Jacob -vs- M.G. Varghese and ors, (AIR 1978 Ker 193)**, relied upon by learned counsel for Appellants, it was held that, “just like purchaser or assignee, even a creditor of the natural heir has *locus standi* to oppose the grant or probate or to apply for revocation of the probate when

the interest of the natural heir, in the estate of the deceased would be adversely affected by grant of probate”. Again in the instant case the *locus standi* of the Appellants based on their title is already decided in negative by the competent court. Therefore, neither as a purchaser nor as a assignee, the Appellants can claim caveatable interest in the property.

26. Learned counsel for Appellants has also relied upon ***AIR 1949 Cal 296, Dinabhandhu Roy Brajraj Saha -vs- Sarala Sundar Dassaya, and AIR 1957 Cal. 631, Pramode Kumar Roy -vs- Sephalika Dutta***, to submit that the person acquiring an interest in property even after the death of deceased, can be joined as party to the probate proceedings, if he has caveatable interest.

27. In our opinion, these authorities also cannot be of help to the appellants as in the present case the claim of the Appellants to be impleaded in the probate proceeding is not denied because they have acquired interest in the property subsequent to the death of Ramlaxmiben but because they have failed to prove that interest.

28. The second leg of argument advanced by learned counsel for Appellants is that the probate proceedings are practically without any contest as such and therefore, the impleadment of the Appellants is essential. However, this submission also cannot be accepted for the simple reason as laid down in the case of **Krishna Kumar Bira -vs- Rajendra Singh Lodha (2008) 4 SCC 300**, that, “the person cannot also be impleaded as party even on the apprehension that those who have caveatable interest and to whom citations had been issued would not take any interest in the litigation”. It was held that, “such apprehension would not permit the impleadment of any person as a caveator if he did not otherwise have a caveatable interest”.

29. The plea raised by learned counsel for the appellants that the judgment rendered in probate proceedings is judgment *in rem* is also dealt with by the Supreme Court in this authority. It was held that though it is a judgment *in rem*, its application is limited as it would not determine the question of title. In the instant case the title of the Appellants is already determined. Now allowing Appellants to raise their claim in the probate

proceedings, on the basis of the same title which is already determined, is as good as entertaining the claim which is barred by res judicata and rendering the probate proceeding as proceeding qua title, which is not legally permissible. Hence even if it is held that the Appellants are not asserting the title adverse to estate, considering the fact that their title to the property is already determined, they have no right to be impleaded in the property.

30. In our considered opinion, therefore, the learned Single Judge has rightly rejected the Chamber Summons taken out by Appellants. The appeal, therefore, holds no merit, hence stands dismissed. The parties to bear their own costs.

[DR. SHALINI PHANSALKAR-JOSHI, J.] [V.M. KANADE, J.]

C E R T I F I C A T E

**Certified to be true and correct copy of the original
signed judgment**