

Shephali

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
NOTICE OF MOTION NO. 93 OF 2014
IN
TESTAMENTARY SUIT NO. 36 OF 2014
IN
TESTAMENTARY PETITION NO. 1581 OF 2013**

Arun Madhukar Tupe	...Applicant
<i>In the matter between</i>	
Arun Madhukar Tupe	...Plaintiff
<i>Versus</i>	
Sainth Madhukar Tupe	...Defendant

**Mr. Tejas Vora, a/w Mr. Varun Shivhare, i/b Mrs. Bina Shivhare, for
the Plaintiff.**

**CORAM: G.S. PATEL, J
DATED: 13th January 2015**

PC:-

1. Heard Mr. Vora, learned Advocate for the Plaintiff, who has filed the present Notice of Motion seeking a discharge or dismissal of the Defendant's Caveat.

2. The Petition is for Letters of Administration to the property and credits of one Madhukar Kashinath Tupe who died in Mumbai on 14th October 1998. The Petition is filed by the deceased's son. A Caveat was entered on 28th February 2014 by another son. That Caveat was in time and the Petition was then renumbered as Suit.

3. In essence, the case of the Caveator is that the deceased left a Testamentary Writing. This is stated in the affidavit in support of the Caveat but the writing itself was not annexed to that supporting affidavit. It is, however, annexed as Exhibit "A" to the Affidavit in Reply to the present Notice of Motion. That so-called Testamentary Writing is a note in a nomination form of the Purshottam Nagar 'A' Cooperative Housing Society Limited, Jari Mari Mandir Marg (West), Mumbai – 400 050. In that nomination form, the deceased is supposed to have nominated his wife, Mandakini, and after her, her son Sainath, the Defendant as the sole legatees of this flat. On the basis that the nomination is attested by two persons, the Defendant claims that this nomination is a Will.

4. It is true that under the Indian Succession Act there is no particular form for a Will. But if the Defendant's contention is to be accepted, it necessarily follows that the Defendant must have filed a Petition seeking Letters of Administration with Will annexed to that testamentary disposition. He has not done this. Merely annexing the document to an affidavit in reply to this Notice of Motion is not sufficient. If that writing is, as the Defendant claims, noted a Will, it must be proved in its solemn form. Failing that no title can pass.

5. Now apart from making these allegations, the Defendant has done nothing to prove that Will. It is not in dispute that he has been cited as one of the heirs and has in fact been served with a citation. That is how he came to file a Caveat in the first place. This is the only ground taken in opposition to the Petition for Letters for Administration. In my view, it is not sufficient to sustain the Caveat by making an allegation that there exists a Will without there being, in some reasonable time, a petition to have that Will proved in its solemn proof. The Defendant's delay and indolence betrays his own cause.

6. For all these reasons, the Notice of Motion is made absolute in terms of prayer clauses (a) and (b). In the facts and circumstances of the case, there will also be an order in terms of prayer clause (c) dispensing with justification of the surety for the share of the Caveator / Defendant.

7. The Petition will, therefore, now proceed as an uncontested Petition for the grant of Letters of Administration.

8. Drawn up decree/order to be dispensed with. All concerned to act on an authenticated copy of this order.

(G. S. PATEL, J.)