

Shephali

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
CHAMBER SUMMONS NO. 133 OF 2014
IN
TESTAMENTARY PETITION NO. 457 OF 2014**

SWATI S. GHATALIA ... Applicant

In the matter between

NANAK S. GHATALIA
of Mumbai, Indian Inhabitant, residing at
Iris, 6th floor, Flat No. 21-22, G. D. Somani
Marg, Cuffe Parade, Mumbai 400 005, one
of the Executors names under the Will of
the deceased. ... Petitioner

AND

**SWATI SHATISHCHANDRA
GHATALIA**
aged about 49 years, Indian Inhabitant of
Mumbai, residing at Flat No. 21-22, 6th
floor, Iris, Cuffe Parade, Mumbai 400 005 ... Respondent

APPEARANCES

FOR THE PETITIONER	Mr. Nanak S. Ghatalia, in person.
FOR THE RESPONDENT	Mr. Anil D'Souza.

CORAM : **G.S.Patel, J.**

DATED : **24th June 2015**

P.C.:

1. The Applicant in this Chamber Summons seeks that a delay of 119 days in filing the Caveat opposing grant of probate be condoned; that the Caveat dated 25th September 2014 be taken on record; and further interim reliefs pending the Chamber Summons.

2. The Applicant is the probate Petitioner's sister. The probate Petitioner, Mr. Nanak Ghatalia, appears in person. He has filed Petition No. 457 of 2014 seeking probate to the last Will and Testament of the parties' mother, the late Mrs. Urmila Satishchandra Ghatalia, who died on 19th August 2011 in Mumbai. According to Mr. Ghatalia, his mother left a Will dated 16th November 2002. It is of this Will that probate is sought.

3. This matter has been before me since November 2014. It has a chequered history going back even earlier. I have in the course of last few months heard Mr. Ghatalia on several occasions as also the Applicant, Swati Ghatalia, through her counsel. I have in fact attempted to persuade parties to arrive at a settlement. This seems not to be possible.

4. Ordinarily, in such a case, it would have been sufficient to put the proposed Caveatrix/Applicant to terms and to allow her to contest the Will. There are, however, two obstacles in the Applicant's way. The first of these is that this is not the first Caveat that the Applicant filed. She had earlier filed a Caveat which was defective. She sought to amend that Caveat. That was not

permitted. She then filed the present Caveat and the question is whether her first Caveat having been dismissed the Applicant is entitled to file another fresh Caveat curing the earlier defects.

5. The second aspect of the matter that comes in the Applicant's way is the question of her *bona fides*. Without getting into any evidentiary material, on the record as it stands before me, it is clear that the Applicant has herself received a very large amount of her legacy under the very Will that she now claims she is entitled to challenge. She refuses to bring this money back. What she has received is Will in excess or what she would have been entitled to on intestacy. In other words, the Applicant's case is that she is entitled to receive her share of the bequests to her and at the same time maintain a Caveat to challenge the Will under which those very bequests came to her. I am unable to see how this can possibly be. It is clearly prohibited by the Indian Succession Act. I have therefore dismissed the present Chamber Summons. My reasons follow.

6. The testatrix, Urmila Shatishchandra Ghatalia, died in Mumbai on 19th August 2011, and is said to have left a Will dated 16th November 2002.¹ Urmila and Shatishchandra Ghatalia had four children: one Dilip S. Sheth (Ghatalia); the present Petitioner, Nanak Ghatalia; Devan Ghatalia; and the present Applicant, Swati Ghatalia. In her Will, Urmila Ghatalia appointed five executors: her husband; two of her three sons, viz., Nanak Ghatalia and Devan Ghatalia; her brother, one Harshad F. Sheth; and her brother-in-

¹ Urmila Ghatalia's husband, Shatishchandra, too left a Will, one that was dated 2nd July 2002. Probate to this will was obtained on 2nd July 2010.

law, one Kulin V. Ghatalia. Urmila Ghatalia's husband died before her, on 10th September 2008. Kulin Ghatalia passed away on 30th July 2006. This left three surviving executors: Nanak Ghatalia, Devan Ghatalia and Harshad Sheth. Dilip Sheth (Ghatalia) died intestate in Mumbai on 11th May 2005, before Urmila Ghatalia. Letters of administration in respect of Dilip Sheth's properties and credits were granted to Urmila Ghatalia on 19th June 2010.

7. On 1st October 2013, Nanak Ghatalia filed the present petition for Probate to Urmila Ghatalia's Will. The other two executors, Devan Ghatalia and Harshad Sheth, executed declarations expressly reserving their right to join in and apply for probate at a later stage.²

8. At this stage, it is necessary to note that Urmila Ghatalia's Will contains bequests to all four of her children, not necessarily in equal shares. For instance, in Clause 4, she bequeaths 30 tolas of gold to Swati exclusively, the remaining ornaments to be divided between Nanak³ and Devan equally. Urmila Ghatalia also had a 20% share in Flat No.21 at the Iris Co-operative Housing Society Ltd at Cuffe Parade. The flat was owned by her husband's HUF. She left her share to the surviving members of that HUF. Clause 5(c) contains a bequest in equal shares to all four of her children. Her eldest son, Dilip, having died before her, the provisions of Clause 6 operate to have his share of his legacy distributed among the surviving three heirs.

² Paragraphs 5, 6 and 7 of the probate petition.

³ In some portions of this judgment, I have referred to the Petitioner and the Applicant by their first names. This is only for convenience and clarity in a given context; no disrespect is intended to either of them.

9. A citation was served on the present Applicant, Swati Ghatalia, on 15th May 2014. Under Rule 401 of the Bombay High Court (Original Side) Rules, she had 14 days to enter a caveat. She did so on the very last day, 29th May 2014. This was, it seems, not served on Mr. Ghatalia, the Petitioner, for about six weeks, till 10th July 2014. The Affidavit in Support of the Caveat, required under Rule 402 to be filed within eight days of the filing of the Caveat, i.e., by 6th June 2014, was not filed in time. Her Affidavit in Support was dated 27th July 2014, almost exactly one month after the date of her caveat. The Applicant filed Chamber Summons No. 72 of 2014 seeking that a delay of “five days” in filing the Affidavit in Support be condoned.

10. That Chamber Summons was heard on 15th September 2014. The learned single Judge (Mrs. Justice R. S. Dalvi) found, first, that the delay in filing the Affidavit in Support of the Caveat was not on five days as claimed in the Chamber Summons but was of one month and one day. Nonetheless, noting that the petition itself was of 2014, the learned single Judge expressed the view that the delay was not inordinate and could otherwise be condoned.

11. The matter might have ended at that, but for another aspect that seems to have come up during that hearing. It so transpired that the Applicant’s caveat itself was defective. It did not precisely follow the prescribed Form No.116. The errors were, it seems, that instead of the word “without”, the caveat as filed used the word “with”; and, further, the caveat referenced the citation rather than the petition. The citation as filed reads thus:

“Let nothing be done in the matter of the estate of the abovenamed URMILA S. GHATALIA, deceased, who died at Mumbai *or about* 19th day of August 2011, *with due notice of Citation dated 8th May 2014 received on 15th May 2014* to the abovenamed Caveator.

Dated this 29th day of May 2014.

Sd/-

Swati S. Ghatalia
(Caveator- in-person)

The italicized portions above are the errors.

12. The wording of Form No.116 is:

Let nothing be done in the matter of the estate of the abovenamed, deceased, who died at or about day of 19... .., without due notice to the abovenamed caveator.

I must, in passing, note that in at least one of the private publications of the Bombay High Court (O.S.) Rules,⁴ the form itself is incorrectly reproduced.

13. There is on oddity in all this. The caveat was filed by the present Applicant herself, i.e., not through an Advocate. However, her Chamber Summons No. 72 of 2014 was filed through an Advocate, and in the Affidavit in Support of that Chamber Summons, the Applicant said she had, for a variety of reasons that are now immaterial, been unable to instruct her lawyer.

⁴ By Mahendra C. Jain, published by Bombay Law House, updated as of 1st July 2001; page 414

14. In any case, at the hearing of Chamber Summons No. 72 of 2014, the Applicant accepted that her first Caveat, as filed, was defective. This is noted in paragraph 3 of Mrs. Justice Dalvi's order dated 15th September 2014. The Applicant immediately sought leave to amend the Caveat and to rectify the defects. This was opposed, and reliance was placed on a decision of another learned single Judge of this Court⁵ in *Asha Srichand Raheja v Purshotam Vishandas Raheja*.⁶ In *Raheja*, the Court held that a defective caveat was no caveat at all and could not be amended or substituted with another caveat; and it was also noticed that the second or substituting caveat did not have an accompanying Affidavit in Support. The caveat was, therefore, dismissed. This decision was followed in *Ketankumar Maganlal Sharma v Dahiben Vasantkumar Patel*.⁷ In that case, the power of attorney under which the caveat was filed was apparently defective. The learned single Judge followed *Raheja* and applied its ratio.

15. Both *Raheja* and *Dahiben Patel* were cited on 15th September 2014 at the hearing of the present Applicant's Chamber Summons No.72 of 2014. These are noted, though with no independent observations, in paragraph 5 of the order passed that day. The attention of the learned single Judge hearing Chamber Summons No.72 of 2014 does not seem to have been drawn to the fact that the order in *Raheja* had been set aside in appeal on 28th June 2011, the amendment to the caveat permitted, and the caveat allowed to be filed.⁸ It also seems that an appeal against the order in *Dahiben*

⁵ R. Y. Ganoo, J

⁶ 2011 (4) Mh LJ 230

⁷ 2014 (6) Bom CR 532 : 2014 (4) Mh LJ 345; per R.D. Dhanuka, J.

Patel was admitted on 1st October 2014,⁹ just a fortnight after the order on Chamber Summons No. 72 of 2014. This is the position as it obtains today: having been reversed in appeal, *Raheja* is therefore not a binding precedent as a correct statement of law. Given that *Dahiben Patel* adopts the *Raheja* reasoning and applies it, and that an appeal from *Dahiben Patel* has been admitted, it seems to me doubtful whether *Dahiben Patel* too can be cited as a binding authority.

16. The order of 15th September 2014 did not, in my view, turn on either *Raheja* or *Dahiben Patel*. For, in paragraph 6 of that order, the learned single Judge said:

6. It is correct that the caveat is not in proper form. **Caveat in proper form is required to be filed. Though the right to file such an caveat cannot be taken away by law, the caveat already filed cannot be accepted. Consequently the affidavit in support of the caveat at present cannot be allowed to be filed. The application of the caveatrix, therefore, cannot be granted at present. The caveatrix may consider filing another caveat and make the necessary application in that behalf which would be considered, if filed.**

(Emphasis supplied)

17. The order dated 15th September 2014 does not seem to have been challenged in appeal. Following that order, on 25th September 2014, the Applicant filed a fresh caveat, this time in the correct

⁸ Appeal No. 350 of 2011. The Appeal Court's order in *Raheja* also does not seem to have been placed before the R. D. Dhanuka, J. when he heard and decided *Dahiben Patel* on 17th February 2014.

⁹ Appeal (L) No. 570 of 2014

form. On the same day, she also filed the present Chamber Summons. She seeks that a delay of 119 in filing the present (second) caveat be condoned, and that it be allowed to be taken on file.

18. In view of the order of the Appeal Court reversing *Raheja* (and the admission of the appeal in *Dahiben Patel*), I would ordinarily have had little hesitation in granting the present application. After all, the Applicant's error in the first caveat seems to me to be utterly trifling, a mere piffle, and to insist on this level of exactitude is to be far too pedantic and doctrinaire, allowing a matter of procedure and form to trump a question of substance. This is not what our rules of procedure are intended to do: procedure must advance justice, not impede it.¹⁰ No party should, as a general rule, and subject perhaps only to a sufficient demonstration of *bona fides*, be denied an opportunity of being heard.

19. What is that error, too egregious to admit of any cure, with which the Applicant is charged? She used the word "with" instead of "without"; and she referenced the citation. Yet her meaning was plain: she intended to oppose the petition. Certainly she was late in filing her Affidavit in Support of the caveat but as the learned single Judge who heard the Applicant's previous Chamber Summons

¹⁰ *Salmona Villa Co-operative Housing Society Ltd. v Smt. Mary Fernandes & Ors.*, 1997 (2) Bom. C.R. 470 : AIR 1997 Bom 208; *Sushil Kumar Jain v State of Bihar*, 1975 (3) SCR 944; *Sardar Amarjeet Singh Kalra (dead) by L.Rs. & Ors. v Pramod Gupta (dead) by L.Rs. & Ors.*, (2003) 3 SCC 272; *Kailash v Nanhku & Ors.*, (2005) 4 SCC 480; *Mrs. Sarah Mathew v The Institute of Cardio Vascular Diseases*, (2014) 2 SCC 62 (a decision of a 5-judge Bench of the Supreme Court).

No.72 of 2014, that delay is not inordinate. Even today it is not. Mr. Ghatalia may be correct in saying that the Applicant deliberately waited till the last possible moment before entering her first caveat, did not serve it in time, short-served her previous Chamber Summons and so on, but all of this may have been addressed by an order of costs, perhaps substantial, as a condition precedent to allowing the present application. This delay, given the more than somewhat peculiar circumstances of the case, is therefore not a reason in and of itself to reject the Chamber Summons.

20. There is an additional aspect to which Mr. Ghatalia refers. He submits, and perhaps yet again correctly, that no caveator can continually buy time by filing one caveat after another. Our rules allow but a single caveat per caveator. Having filed a defective caveat, and time having expired, Mr. Ghatalia says, there is no warrant for allowing a second caveat in this fashion. The argument overlooks the fact that Mrs. Justice Dalvi's order of 15th September 2014, correctly read, itself gave a sort of liberty to the Applicant to file the present Chamber Summons. The Applicant could, the learned single Judge said, consider filing a fresh caveat and that, and its accompanying application for condoning the delay, would be heard on merits. There is, therefore, nothing so very exceptionable in the Applicant filing this Chamber Summons in the facts that are before me.

21. But there is one point that Mr. Ghatalia canvasses and that is a matter of substantive law, not a matter of how and when discretion should be exercised. Briefly stated, it is this: that after Urmila Ghatalia's death, a partial distribution was commonly

agreed. The present Applicant, Swati Ghatalia, was a party to that understanding. She received a copy of the will. She then received a substantial part of her legacy *under Urmila Ghatalia's* will, and this she has retained. She specifically agreed to receive these amounts as coming to her under the Will, with no protest or caveat entered as this being without prejudice to her right to challenge the Will. Mr. Ghatalia says that the Applicant cannot simultaneously both take under the will and repudiate it. This is the effect of allowing her to enter a caveat at this stage, and since she refuses, despite this being placed on affidavit (and even in open Court, I might add) to return the benefits and legacies she has received she is statutorily barred from challenging the will. She has elected to receive her bequests and no question remains of her challenging the testamentary disposition by which those bequests were made to her.

22. This is completely correct in law. Before I proceed to authorities and the statutory provisions, I must note the relevant facts as they appear from the record.¹¹ Exhibits 2.1 to 2.5, 3 and 4 to Mr. Ghatalia's first Affidavit in Reply dated 17th October 2014 are material for this purpose.¹² These point to the fact that on 10th January 2012, Urmila Ghatalia's four children (the three sons being executors and beneficiaries and the daughter, the present Applicant, being a beneficiary) all agreed to a distribution of about Rs.3 lakhs each to the three named legatees in this regard, viz., the Petitioner, the Applicant and their brother Devan. The Applicant has signed a

¹¹ In his reply affidavits and note of submissions, Mr. Ghatalia raises very many other points regarding the Applicant's conduct *vis-à-vis* the deceased. These are not matters to be considered at this stage. I have, therefore, paid these no mind; they might have been relevant had the Chamber Summons been allowed.

¹² Pages 45 to 54 of the Notice of Motion paperback.

document in this regard.¹³ She does not deny it. A few months later, a very substantial sum of about Rs.84 lakhs was similarly agreed to be and was actually distributed.¹⁴ Again, the Applicant signed a document, and again there is no denial. In November 2012, another amount of Rs.15.75 lakhs was similarly distributed by consensus.¹⁵ This, too, is borne out by a document signed *inter alia* by the Applicant and not denied. In March 2013, a further amount of Rs.10.80 lakhs was similarly distributed by agreement, with the Applicant signing a document;¹⁶ and yet again, there is no denial. A summary of these distributions is produced.¹⁷ It shows that the Applicant received in all an amount of Rs.39,82,764 from Urmila Ghatalia's estate in terms of her Will. It also appears that as long ago as 1 February 2012, Mr. Ghatalia forwarded a copy of Urmila Ghatalia's will to the Applicant among others.¹⁸ There is also material to indicate that the Applicant and her lawyers were aware of the probate petition being prepared *inter alia* to enable her to waive service of the citation.¹⁹ The only answer to all this in the Affidavit in Rejoinder is a *pro-forma*, standardized and general denial in paragraph 12, where the Applicant "repeats, reiterates and confirms" what she has said in her Affidavit in Support of the Chamber Summons and denies "what is inconsistent and contrary thereto." Given the precise documents annexed, this is no denial at all.

¹³ Ex. 2.1, *p.* 45

¹⁴ Ex. 2.2, *pp.* 46-47

¹⁵ Ex. 2.3, *pp.* 48-49

¹⁶ Ex. 2.4, *p.* 50

¹⁷ Ex. 2.5, *p.* 51

¹⁸ Ex. 3, *p.* 52

¹⁹ Ex. 4, *p.* 53 at *p.* 54

23. Across the Bar, the Applicant through her counsel at the time vehemently denied any prior knowledge of the Will. She denied having received any funds from Urmila Ghatalia's estate at all. She said that if any funds were moved, this was by direct transfer, i.e., without her knowledge. I directed Mr. Ghatalia to file a further affidavit. He did so. That affidavit is dated 21st November 2014. It entirely gives the lie to the Applicant's denials. Apart from the email showing the forwarding of the Will, and to which I have just referred,²⁰ Mr. Ghatalia has produced photocopies of cheques showing the disbursements to the Applicant.²¹ All these cheques are in the Applicant's name. The amounts of these cheques *exactly* correspond to the documentation referred to in the first Affidavit in Reply and which bears the Applicant's signature, and which has even now gone without any traverse at all. Even more interesting is the document dated 4th February 2013 from the Applicant's previous lawyers.²² This is addressed to the executors named in Urmila's Will, including Mr. Ghatalia. It specifically accepts that Urmila Ghatalia left a Will and that this Will is dated 16th November 2002. There is no doubt that this is the very Will of which probate is now sought, for paragraph 3 of that letter²³ refers to a bequest (in respect of the "Iris" flat) that exactly matches the bequest in the Will propounded. On the last page of this letter, the Applicant, through her lawyers, called on her three brothers to obtain probate to Urmila Ghatalia's will "at the earliest and not later than 6 months hereafter." Leaving aside for the present whether this is sufficient to unseat the Caveat, it undoubtedly

²⁰ Again annexed as Ex.10, p. 96 of the Notice of Motion paperback.

²¹ Ex. 9, pp. 93 to 95

²² Ex.11, pp. 97-104

²³ At p. 100

demonstrates the Applicant's knowledge of the existence of the Will. Mr. Ghatalia also filed a note in relation to a proposed settlement. Ex.13 to that note,²⁴ shows that in addition to cash, the Applicant has received a significant distribution of shares as well.

24. The situation therefore is this: the Applicant knew of Urmila Ghatalia's Will well before this Petition was filed. Her protests to the contrary are demonstrated to be incorrect. She accepted its terms and, through her lawyers, demanded their implementation; and, further, demanded that probate be obtained. She also received, by agreement of all concerned, a very substantial amount that was a part of her legacy under the Will, and her denials across the Bar are simply without basis. She has signed documentation showing her agreement to the distribution. She does not deny this in her Affidavit in Rejoinder. She has received the amounts agreed, and has received these by cheque. Again, she has deliberately conveyed instructions she knows to be incorrect to her counsel.

25. The order the Applicant seeks is in exercise of a court's discretion. Axiomatically, it is therefore an order in equity. It is much too well settled that he (or in this case, she) who seeks equity must do equity. I say this emphatically not in the context of the doctrine of election, a matter to which I will next turn, but in the context of the manner in which the Applicant has conducted herself; her constant prevarications and obfuscations even in the face of her own admissions. At each turn, she has attempted to deny the undeniable, and has then been caught out. When she comes to Court and asks that the Court believe the case she attempts to make

²⁴ Notice of Motion paperback, *p.* 151

out in her application, the very least one expects is complete candour. This is conspicuous by its absence.

26. It should, therefore, come as no surprise that the Applicant's ship runs aground on statutory shoals. Sections 180 to 187 of the Indian Succession Act deal with the various types of 'election' in testamentary bequests, and Section 187 in terms prohibits a person from simultaneously taking under a Will and challenging it:

187. When acceptance of benefit given by Will constitutes election to take under Will.—Acceptance of a benefit given by a Will constitutes an election by the legatee to take under the Will, if he had knowledge of his right to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives inquiry into the circumstances.

27. The Applicant cannot both accept the bequest and simultaneously repudiate or challenge the very document under which that legacy comes to her. This is the doctrine of election and it is the principle, founded in equity, against approbation and reprobation.²⁵ A person may accept his bequest, or he may repudiate it and impeach the document that purports to make it. He cannot do both, unless, of course, what he receives is equal to or less than that to which he would be entitled should he succeed in impeaching it, and he has, too, while accepting that legacy unequivocally reserved his challenge to the Will. That is not the

²⁵ *Lyla Darius Jehangir (née Ghaswala) v Bakhtawar Lentin of Mumbai & Ors.*, 2007 (1) Bom C. R. 915 : 2007 (1) Mh. L. J. 545; *Mirzban Darabshaw Surti v Cedric Vaz & Anr.*, 2015 (3) Bom CR 380 : 2015 (2) Mh LJ 184

case here. The Applicant agreed to take under the Will, and signed documents saying so. She instructed her lawyers to demand just such a distribution and, indeed, demanded that probate be obtained. As the Supreme Court said in *C. Beepathumma and Ors. v V. S. Kadambolithaya and Ors.*:²⁶

He who accepts a benefit under a deed or will or other instrument must adopt the whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it.

(see Maitland's Lectures on Equity, Lecture 18) The same principle is stated in White and Tudor's Leading Cases in Equity Vol. 18th Edn. at p. 444 as follows:

"Election is the obligation imposed upon a party by Courts of equity to choose between two inconsistent or alternative rights or claims in cases where there is clear intention of the person from whom he derives one that he should not enjoy both. ... That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument."

In other words, one who accepts a benefit under a deed or will or other instrument must adopt the whole contents of that instrument, must conform to all its provisions and renounce all rights that are inconsistent with it. This principle is often put in another form that a person cannot approbate and reprobate the same transaction.

28. Yet, this is precisely what the Applicant wants me to allow her to do when she asks that she be permitted to file a fresh Caveat.

²⁶ AIR 1965 SC 241

She does so but does not say that she will bring back into Court all benefits she has so far received under it.

29. Mr. D'Souza's response is that if the Applicant is required to do so, then so must the other heirs. This is an over-simplification. The other heirs are not put to an election. They do not challenge the Will under which they take. They do not contest the probate petition. They do not approbate and reprobate. Only the Applicant does. Nor can the Applicant seek to put the other heirs to any terms at all; it is she who must show her *bona fides* and it is she who must be put not only to terms but to a specific election. She cannot demand that her election be made conditional on the other heirs bringing back the benefits they have received. In order to challenge the Will, she must surrender what she has received under it.

30. Would a different consideration apply if the amount received by a legatee is equal to or less than what he or she would receive on intestacy, i.e., if his or her challenge to the Will succeeds? Logically, one would presume yes, for in that case there might be no election at all. This would be the case where a distribution is made without any reference to the Will, for instance. But where the distribution is made as one occurring or taking effect *under the Will* and this is accepted without any qualification; and to add to it, there is an acknowledgement of the Will, an acceptance of its terms, and a demand for a probate of it, then I do not think the exception can be accepted or admitted. The ordinary rule of election and against approbation and reprobation must prevail.

31. I have at least three times in Court asked if the Applicant is willing to bring into Court the amounts she has received. She has repeatedly instructed her Counsel to refuse. When an earlier Counsel sought to advise her, she engaged another. Mr. Ghatalia asks what is this approach if not cussedness and sheer bloody-mindedness? He may not be wrong. The Applicant's conduct defies every principle of equity. It violates every norm of fair play. It certainly disentitles her to any sort of equitable discretionary relief. If this Chamber Summons stands to be dismissed, the Applicant has only herself to thank for that result.

32. There is one other aspect that bears mention. Urmila Ghatalia's estate included a large number shares or investments in respect of which Mr. Ghatalia, the Petitioner, was the nominee. Following the decision of a learned single Judge of this Court in *Harsha Nitin Kokate v The Saraswat Cooperative Bank Ltd & Ors.*,²⁷ Mr. Ghatalia claimed to be exclusively entitled to these investments, irrespective of the dispositions in the Will he propounds. His case was founded on a judgment of this Court that set the law at that time; it was not, *stricto sensu*, a claim adverse to that of the estate; for *Kokate* said that nominations (of investments and covered by the statutes in question) would over-ride all testamentary dispositions. I considered the question in this very case, heard along with another case, which I heard along with another matter where an identical issue arose. In my decision, reported as *Jayanand Jayant Salgaonkar & Ors. v Jayashree Jayant Salgaonkar & Ors.*,²⁸ I held *Kokate* to be *per incuriam*, and held that while a nomination would discharge the bank or depository in

²⁷ 2010 (112) Bom L. R. 2014

²⁸ [2015] 190 Comp Cas 44 (Bom)

question, the nominee would still hold those assets in a fiduciary capacity *vis-à-vis* the heirs or legatees of the deceased original holder; or, in other words, that a nomination in respect of such investments was not a testamentary disposition (or, as was argued, ‘a statutory testamentary disposition’) and could not supplant or override the provisions of a Will, nor a claim established on intestacy. Mr. D’Silva submits that Mr. Ghatalia must, following my judgment, bring back those investments and cannot claim them as his own. I do not think Mr. D’Silva’s client is in any position to make any such demand, nor to suggest that the Applicant is even otherwise entitled to hold on to the amounts she received and took under the Will. Mr. Ghatalia has challenged my decision in appeal.²⁹ That is his right and his prerogative. Before me, Mr. Ghatalia unequivocally agrees and undertakes to be bound by the final decision in that matter; and further undertakes that should the appeal (or further appeals) finally fail, he will of course make a distribution of those investments in terms of the Will. Though it is unnecessary in my view, I have accepted those statements as undertakings to the Court.

33. In deciding this Chamber Summons, I have not taken into consideration any of the grounds the Applicant may have set out in her Affidavit in Support of her Caveat. I have not assessed the merits of her possible challenge to the Will. An examination of the Applicant’s *bona fides* is, in my view, critical to the grant of any discretionary equitable relief. There is no explanation at all from the Applicant of the various documents under her signature or the correspondence by her lawyers. Instead, she has only instructed her

²⁹ Appeal No. 311 of 2015

lawyers to make statements that are demonstrably incorrect (denying receipt of the amounts or of a copy of the Will for instance). At every turn, she has been shown to be incorrect in what she says, and even today there is no explanation at all — certainly none on affidavit — about the documents she signed, her actions, her receipt of bequests, or her demands in her advocates' letters. It is impossible, in these circumstances, to find in her favour. That would involve holding that her application passes the threshold test of being *bona fide* and a candid. It does not. It is also not possible, in such a situation, to merely put her to terms. Her conduct itself functions as a species of estoppel. It would be most inequitable to allow her to simultaneously continue to hold the very substantial bequests she has taken under the Will, and taken *as* bequests under the Will without reservation or qualification, and yet allow her to challenge the Will.

34. In this view of the matter, the Chamber Summons is dismissed. There will be no order of costs. As a result, the Petition shall proceed uncontested.

(G. S. PATEL, J.)