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

APPEAL No. 192 OF 2015
IN
TESTAMENTARY SUIT No. 7 OF 2001
IN
TESTAMENTARY PETITION No. 564 OF 1998
WITH
NOTICE OF MOTION (L) No. 555 OF 2015
IN
APPEAL No. 192 OF 2015

Vasumant S. Sethi	Appellant
Vs.	
Harendra Premji Shah	Respondent

Ms. Aarmin Wandrewala a/w. Prayag Joshi i/b. Bipin Joshi for
Appellant
Mr. Bhavin Gada i/b. Harakchand & Co. for Respondent

CORAM : V. M. KANADE
REVATI MOHITE DERE, JJ.

DATE : JANUARY 21, 2016

P.C. :

1. Heard the learned counsel appearing on behalf of the Appellant and the Respondent.
2. The Appellant is aggrieved by an order passed by the Learned Single Judge dated 17.2.2015. By the said order, the Learned Single Judge was pleased to dismiss the caveat filed by the Appellant herein

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and allow the notice of motion, which was taken out by the Respondent.

3. Few facts, which are necessary for deciding the appeal, are as under.

4. Shri Premji Lakhamshi Shah Executed a Will on 5.6.1991. He has expired on 26.9.1994. The Respondent filed a Probate Petition on 5.5.1998. Wife and daughter of the deceased filed a Caveat along with affidavit in support of the Caveat on 18.11.1998. During the pendency of the suit, Defendant No.1 – Smt. Hirabai Premji Shah (wife of the deceased) has expired. Thereafter issues were framed by the Learned Single Judge on 10.02.2012. The said issues are as under :

ISSUES

- (1) Do the plaintiffs prove that the writing dated 5th June, 1991 is the last Will and Testament of the deceased late Premji Shah (testator) ?
- (2) Do the plaintiffs prove that the said Will has been duly executed by the deceased Premji Shah while he was in sound disposing state of mind?
- (3) Does the plaintiffs prove that the Will dated 5th June, 1991 was executed in accordance with law and has been duly attested in accordance with law?
- (4) Do the defendants prove that the deceased had

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revoked Will and that may in Subsequent Will in respect of which they are alleged to have filed probate Petition No.564 of 1998?

(5) What order?

5. Thereafter on 10.2.2012, affidavit in lieu of examination in chief and the compilation of documents were filed by the Respondent / Original Plaintiff. Both the documents were marked as exhibits in evidence and the Court Receiver was appointed to record the cross examination of the parties. The cross examination of PW-1 was commenced on 3.7.2012 and it was over on 19.7.2012. Thereafter, second witness in the Will, Mr. Shantilal Sethia (PW-2) had filed his affidavit in lieu of examination in chief on 28.7.2012 and his cross examination was commenced and concluded on 31.7.2012 and thereafter affidavit in lieu of examination in chief was filed by the Appellant/Original Defendant No.2. Compilation of documents were also filed. On 26.6.2013, the Learned Single Judge was pleased to direct the Respondent/ Original Plaintiff to file statement of admission and denial of documents. Thereafter, the matter was listed on number of occasions and was adjourned from time to time. On 23.12.2014, the Learned Single Judge had recorded that the suit is now at the stage of marking of the Defendant's documents and thereafter the matter was adjourned to 20.1.2015. The Learned Single Judge had

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deleted the Issue No.4, framed by the earlier Learned Single Judge. Thereafter, on 30.1.2015, the Respondent took out notice of motion No.11 of 2015 for dismissal of Caveat filed by the Appellant. In the impugned order, the Learned Single Judge had dismissed the Caveat and allowed the notice of motion and had given direction to the Registry to grant Probate to the Respondent herein.

6. The learned counsel for the Appellant has submitted that evidence of the two witnesses of the Respondent was already recorded and the evidence of the Appellant /Org. Defendant was to be concluded within a short time and, therefore, at this stage, it was not open for the Respondent to take out notice of motion for dismissal of the caveat. The learned counsel for the Appellant has further submitted that not only the Caveator was discharged, but also a direction was given to the Registry to grant Probate to the Respondent. It is submitted that the impugned order is, therefore, liable to be set aside.

7. On the other hand, the learned counsel for the Respondent submits that the affidavit in support of the Caveat did not disclose any cause of action and no averements were made in the affidavit in support of the Caveat. It is submitted that since the affidavit in support of the Caveat is in the nature of written statement, for want of

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proper pleadings, the Learned Single Judge was justified in dismissing the Caveat. Reliance was also placed on the judgment of the Learned Single Judge of this Court in the case of **Mr.Kaikhosrow Aspendiar Oshtori ..Petitioner vs. Dr.Meherji Aspendiar Oshtori and Anr. ...Caveators, decided on 15th December, 2006 in Notice of Motion No.122 of 2006 in Testamentary Suit No.33 of 2006.** It is submitted that this order of the Learned Single Judge was upheld by the Division Bench of this Court in Appeal No.64 of 2007. It is submitted that the Learned Single Judge has relied on the law laid down by this Court, which was confirmed by the Division Bench and was justified in passing the impugned order.

8. The submissions made by the learned counsel for the Respondent cannot be accepted. The chronology of dates and events discloses that the suit was practically at the fag end and the cross examination of the Defendant was to be concluded. The Plaintiff has already examined two witnesses and the issues were framed by the Learned Single Judge on 19.12.2011. In our view, at this stage, after the evidence was led, it was not open for the Plaintiff to take out a notice of motion for dismissing the Caveat since proper averments were not made in the affidavit in support of the Caveat.

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9. We have gone through the judgment and order passed by the Learned Single Judge in the case of **Mr.Kaikhosrow Aspendiar Oshtori (supra.)** and also the order passed by the Division Bench of this Court. In the said case, the Learned Single Judge apart from granting the Probate, has mentioned that no averments were made in the affidavit in support of the caveat and has also clearly mentioned that the Caveators have actually acted pursuant to the Will and have taken steps to implement the Will. It has also been recorded that there was a memorandum of understanding, which was signed by the parties and under these circumstances, the Learned Single Judge has dismissed the Caveat. The Division Bench has also noted the fact that the Caveators have acted pursuant to the Will and has, therefore, observed that under these circumstances no fault could be found with the impugned order passed by the Learned Single Judge.

10. The orders passed by the Learned Single Judge as well as the Division Bench of this Court do not disclose that the issues were framed in the said matter. In our view, therefore, the observations made by the Learned Single Judge and the Division Bench in the said case can be distinguished from the facts and circumstances of the present case.

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11. In our view, the trial was almost over and at the stage of final hearing of the case, the Learned Single Judge could have dismissed the Caveat after appreciating the evidence on record. We are, therefore, of the view that the Learned Single Judge was not justified in passing the impugned order at the fag end of the suit. The impugned order, therefore, is set aside. Hearing of the suit is expedited. The Learned Single Judge is directed to complete the evidence of the Defendant and decide the suit on merits and in accordance with law. Appeal is allowed and disposed of in the aforesaid terms.

[REVATI MOHITE DERE, J.]

[V. M. KANADE, J.]