

JSN

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
CHAMBER SUMMONS NO.88 OF 2014
WITH
CHAMBER ORDER NO.889 OF 2012
IN
TESTAMENTARY SUIT NO.16 OF 2002
IN
TESTAMENTARY PETITION NO.558 OF 1989**

Chandangauri Amarchand Doshi	... Deceased
Kirti Amarchand Doshi & Ors.	... Applicants
<i>Versus</i>	
Bharat Amarchand Doshi & Anr.	... Respondents

Dr. Birendra Saraf, *with Mr. Rohan Savant, Mr. Ashwin Shetye and Mr. Abhay Dhadiwal, i/b Jaykar and Partners, for the Applicants in Chamber Summons.*

Mr. H.S. Thakkar, *Senior Advocate with S.P. Kanga for the Applicants in Chamber Order.*

CORAM: G.S. PATEL, J
DATED: 2nd May 2016

PC:-

1. This is a contest between a brother on one side, the Applicant in the Chamber Order, and his own brother and sister on the other, the Applicants in Chamber Summons. All seek substitution as Petitioners in a proceeding to prove their father's Will.

2. I will take the array of parties as it appears in the cause title of the Chamber Summons. The original Petitioner, Chandangauri Amarchand Doshi, the widow of one Amarchand Doshi, was the probate Petitioner. Chandangauri and Amarchand had eight children. Five of these are Applicants in the Chamber Summons. Two are the Respondents. There was an eighth offspring who died without leaving heirs. Thus, these are the seven surviving children.

3. The matter has a strange history. Amarchand Doshi died on 15th August 1984. He left a Will dated 15th December 1965. His wife Chandangauri was its sole executor and also its sole beneficiary. On 23rd August 1989, Chandangauri filed Testamentary Petition No.558 of 1989 for probate to Amarchand's Will. It was at this time that one of their sons Bharat, the Applicant in Chamber Order and the 1st Respondent to the Chamber Summons, filed an Affidavit, also dated 23rd August 1989 consenting to the grant of that probate.

4. Several years passed. The matter remained at that stage. On 26th September 2001, some 12 years later, Bharat sought to withdraw his consent to the grant of probate. At this, the Testamentary Petition, till then uncontested, was renumbered as Testamentary Suit No.16 of 2002.

5. Again there followed a hiatus. On 8th July 2005, Bharat now had another change of mind, or heart, or both. He sought to withdraw his caveat. In other words, he withdrew his withdrawal of his consent. In still other words, he consented (or re-consented) to the grant.

6. At this stage the Testamentary Petition for probate was uncontested. Probate ought to have been granted within a few months. For some reason, that nobody can explain to me, nothing at all happened. The matter remained as it was.

7. Then Chandangauri herself died on 7th October 2012. About two months later, on 4th December 2012, Bharat filed the present Chamber Order No.889 of 2012. In this he seeks that he be substituted as a Petitioner. I note that there is no formal application for conversion of the Petition into one for Letters of Administration. The basis for this application is that, according to him, Chandangauri herself made a Will dated 18th September 2012, of which he, Bharat, is now the sole legatee and sole executor. He claims that all his siblings have agreed to this and have countersigned the Will in acceptance of it. This is the basis of his claim in the Chamber Order and it is expressly so stated in paragraph 2 of the Affidavit in its Support.

8. In May 2014, Kirti Doshi, Sudha Javeri, Sonak Danak, Nalini Shah and Harish Doshi, all children of Amarchand and Chandangauri, filed the present Chamber Summons. Bharat is the 1st Respondent to it. The other sister Jyoti Chaudhry is the 2nd

Respondent. The Applicants in the Chamber Summons seek that Kirti and Sudha be substituted as Petitioners and that the Petition be converted to one for Letters of Administration with Will annexed proving Amarchand's Will.

9. Today I am told that Bharat has, in the meantime, on 13th April 2013, filed a separate Petition for probate to Chandangauri's Will. I only note that this is filed after four years after she died. Citations have not yet been issued or served.

10. The only question today, therefore, is whether it is Bharat or Kirti and Sudha who should be appointed Petitioners in place and instead of Chandangauri in the proceeding for proof of Amarchand's Will.

11. Dr. Saraf for the Applicants in the Chamber Summons submits that this right should be given to Kirti and Sudha. Chandangauri was not only an executor she was also sole legatee and they are among her heirs. In view of the decisions of a Single Judge of this Court in *Smt. Komal Suresh Chainani v Haresh Chetan Thadani & Ors.*,¹ Bharat cannot claim any right as executor of Chandangauri's Will till such time as probate is obtained to it. Dr. Saraf also relies on the decision of the Division Bench of this Court in *Vatsala Srinivasan v Narisimha Raghunathan*.² This considers the Supreme Court decision in *Shambhu Prasad Agarwal & Ors. v Bhola*

1 Order dated 29th July 2013 in Chamber Summons No.40 of 2013 in Suit No.93 of 2000, per R.D. Dhanuka, J., paragraph 8, p. 7.

2 2011 (2) Mh. L.J. 953.

Ram Agarwal.³ Shortly stated, the result of these two authorities is that the heirs of an executor are not entitled to carry on that Petition for probate upon the death of the executor; but the heirs of the legatee can certainly carry on a Petition for proof of the Will in the form of a Petition for Letters of Administration with Will annexed.

12. Mr. Thakkar, who appears for Bharat, says that, there is an immediate vesting in Bharat in view of Section 211 of the Indian Succession Act and, in any case, Kirti and Sudha are not legatees or heirs entitled to carry on Chandangauri's Petition in view of Section 232 of the Indian Succession Act.

13. It is difficult to accept the reasoning advanced by Mr. Thakkar. If we keep aside for a moment the consideration of Chandangauri's own Will, then all the surviving children stand on exactly same footing. Kirti and Sudha, just as much as Bharat, are the heirs of a legatee of Amarchand's Will, and following the decision of the Supreme Court and the Division Bench are all equally entitled to maintain a Petition for Letters of Administration with Will annexed. I do not think that it is possible to accept Mr. Thakkar's submission that Chandangauri having been an executor also, and having applied for probate, her heirs are necessarily and only "the heirs of an executor". The heirs of a person who is both executor and legatee are his or her heirs only *qua* his or her executorship. In effect, he says that executorship ousts the legacy when both are conferred on a single person. I find nothing in law or logic to commend this. A person may serve in both capacities. His or

3 (2000) 9 Supreme Court Cases p.714.

her heirs are not denuded of their rights are heirs of a legatee merely because that legatee was also conferred executorship. To hold otherwise would, in my view, be result in all manner of unintended and unimaginable inequities. The decision of the Division Bench cannot be carved up in this fashion and applied selectively.

14. Chandangauri fulfilled both capacities. She was an executor. She was also the sole legatee. Chandangauri's children are her heirs as a legatee and that heirship cannot be denied or eclipsed merely because she has sought probate, acting as an executrix, to her late husband's Will.

15. On the other hand, Bharat's claim to continue with proof of Amarchand's Will to the exclusion of all others flows from and only from his claim to being the sole executor and legatee of Chandangauri's Will, one that is yet to be proved, one that is yet to be received probate. It is pointless to say at this stage that the others have consented. That Will may or may not be contested. It may or may not survive that contest. That is a matter that lies well ahead, and I do not see how Bharat can telescope his recently filed and yet to be cited Petition for probate to Chandangauri's Will into his mother's Petition for probate to his father's Will in this fashion. Probate to Amarchand's Will was never obtained. Now it cannot be obtained. Letter of Administration with Will Annexed must be obtained. Only when that is done can any title pass in Amarchand's estate pass to Chandangauri, and it is only when Chandangauri's Will is probate can any title in her estate pass to Bharat. I do not see how Bharat can fuse or meld all these linear legal consequences and steps into one as he now claims to be entitled to do.

16. The only question then is who is the most suitable of these contestants. To my mind, Bharat has such an enormous conflict of interest on his hands that it is almost impossible, with any sense of fairness or equity, to accept his candidacy. Let me be very clear about this. Amarchand's entire estate was given to his wife Chandangauri. When she sought probate to his Will, Bharat first consented. He then withdrew his consent. He then withdrew that withdrawal of consent. He now claims to be a sole legatee of Chandangauri's estate. In other words, the entirety of Amarchand's estate Will flow down only to Bharat and to the exclusion of all others; that is what Bharat claims, and it is for this reason and for this reason only that he now displays such enthusiasm to seek probate to his father's Will, one that he had once opposed.

17. Mr. Thakkar insists that regard be had to some provisions of Chandangauri's Will. I do not think that it is either necessary or proper. It is sufficient to note only that that Will excludes all other children. Bharat says that this is with their consent. That remains to be tested. In fact Dr. Saraf says that so-called consent was not obtained in the Will itself but in the guise of preparing some settlement documents.

18. In any case, the Chamber Order is defective, if one should be of a mind to turn to such technicalities. It does not seek a conversion of the Petition into one for Letters of Administration. Mr. Thakkar says it should be allowed to be amended. Certainly that was possible, had there been no opposition to it, and had Dr. Saraf's client not filed a properly framed Chamber Summons in the meantime. I find it hard to believe that in the four years that it has been pending, it

did not occur to anybody on Bharat's side to try and correct this error.

19. As against this, the conduct of Kirti and Sudha at least has the merit of consistency. Even Bharat has nothing whatever to say about their lack of suitability to be Administrators. His only case is that he is the more entitled because of Chandangauri's Will, but that, as we have seen is not a relevant consideration.

20. In the result the Chamber Order is dismissed. The Chamber Summons is made absolute in terms of prayer clause (a). Amendment to be carried out within a period of four weeks from today.

(G. S. PATEL, J.)