

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
(IN ITS TESTAMENTARY AND INTESTATE JURISDICTION)
NOTICE OF MOTION NO.49 OF 2017
IN
TESTAMENTARY SUIT NO.5 OF 2017
IN
PETITION NO.1495 OF 2016

Gautam Rasiklal Ashra	...	Applicant
In the matter of		
Gautam Rasiklal Ashra	...	Petitioner / Plaintiff
Vs.		
Bharat Rasiklal Ashra	...	Respondent / Defendant

Ms Priyanka Kothari with Mr. Ayaz Bilawala and Ms Neha Bhatt i/b. Bilawala and Co. for Plaintiff.
Mr. Sumeet Moholkar for Defendant.

CORAM : R. G. KETKAR, J.
DATE : AUGUST 9, 2017

P.C. :

Heard Ms Kothari, learned Counsel for the petitioner / plaintiff and Mr. Moholkar, learned Counsel for respondent / defendant.

2. By this Motion, the petitioner / plaintiff has prayed for dismissal of the Caveat filed by the respondent / defendant.

3. In support of this Motion, Ms Kothari submitted that respondent / defendant has filed Caveat even before the citation could be served upon him. In the affidavit in support of the Caveat, defendant has stated that he has learnt of the present Petition being filed through the official website of this Court. She invited my attention to Rule 401 of the Bombay High Court (Original Side) Rules (for short 'Rules'), which provides that Caveat, if any, should be filed after the citation is served upon those having a caveatable interest. A Caveat filed by the defendant is not as per the Rules. On this ground, the Caveat filed by the defendant ought to be dismissed. She relied upon the decision of this

Court in the case of ***Captain Makhan Lal Barua @ M. L. Barua, 2014 (2) Bom.C.R.144***, and in particular paragraphs 9 and 10 thereof. In paragraph 10, this Court held that time to file Caveat within 14 days commences from the date of service of citation upon the next of kin. She, therefore, submitted that Motion may be made absolute in terms of prayer clause (a).

4. On the other hand, Mr. Moholkar relied upon the decision of this Court in ***Abhiraji Vs. Vimal, 2010 (3) Mh.L.J. 28***, and in particular paragraph 4 thereof. He submitted that the purpose of service of citation is to ensure that all heirs and next-to-kin of the deceased whose consent has not been filed in the proceedings should be served so that after service if probate or letters of administration are granted, grievance should not be made that he was not properly served. He, therefore, submitted that no case is made out for granting any relief.

5. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. The petitioner has instituted Testamentary Petition for obtaining the probate of the last Will and Testament dated 25.08.2011 of the deceased Smt Prabhavati Rasiklal Ashra. A perusal of paragraph 10 thereof shows that the deceased died leaving behind respondent / defendant, son of the deceased and the petitioner and married daughter Mrs. Geeta Garach. In other words, respondent / defendant is one of the heirs and legal representatives of the deceased. Ms Kothari relied upon Rule 401 of the Rules. It is the case of the petitioner that respondent / defendant has filed Caveat even before the citation could be served upon him as he learned filing of the Petition through official Website of this Court. However, she could not point out any Rule prohibiting filing of Caveat prior to lodging of the testamentary proceedings. In view thereof, I do not find that the petitioner is entitled to relief of dismissal of the Caveat. Hence, the Motion is dismissed.

(R. G. KETKAR, J.)