

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION**

**CHAMBER SUMMONS NO. 76 OF 2016
IN
TESTAMENTARY SUIT NO. 29 OF 2012
IN
TESTAMENTARY PETITION NO. 341 OF 2012**

Gospi G. Bharucha Nee Gospi Hoshie
Dolikuka

.. Applicant/Intervener

In the matter between :

Shernaz Faroukh Lawyer & Anr.
Vs.
Manek Dara Sukhadwalla & Anr.

.. Plaintiffs/Orig, Petnr.
.. Defendants/Caveators

**WITH
CHAMBER SUMMONS NO. 89 OF 2016
IN
TESTAMENTARY SUIT NO. 25 OF 2012
IN
TESTAMENTARY PETITION NO. 05 OF 2012**

Gospi G. Bharucha Nee Gospi Hoshie
Dolikuka

.. Applicant/Intervener

In the matter between :

Manek Dara Sukhadwalla & Anr.
Vs.
Shernaz Faroukh Lawyer & Ors.

.. Plaintiffs/Orig.Petnrs.
.. Defendants/Caveators

Mr.Vijaysingh Thorat, senior advocate a/w. Ms. Prachi Tatke and Ms.Yashavi Panchal i/b M/s. K. Ashar & Co. for applicant in CST/76/2016 and CST/89/2016.

Mr.Rahul Narichania, senior advocate a/w. Mr.Naval Agarwal, Mr.P.A. Kabadi, Mr.Jeehan Mehta and Ms.Taruna Nagpal i/b Doijode Associates for

plaintiff in TS/29/2012 and for caveators in TS/25/2012.

Mr.Jishnu Chowdhary a/w. Mr.Prathamesh Kamat i/b M.K. Tanna for plaintiff in TS/25/2012 and for defendant in TS/29/2012.

CORAM : K.R.SHRIRAM, J.
DATE : 1ST FEBRUARY, 2017

P.C.

1 The applicant has filed the above two chamber summons for condoning the delay in making this application and to permit the applicant to intervene in the respective Testamentary Suits.

2 It is the case of the applicant that the applicant's paternal grandmother Mrs.Goolbai Shivasha Dolikuka and Mr.Burjor Ardeshir Dalal, who was the father of the deceased Parvez Burjor Dalal were siblings. One Ardeshir Nassarwanji Dalal, had three children, viz., Hormasji Dalal (Son), Burjor Dalal (son) and Goolbai Shivasha Dolikuka (Daughter). Burjor Dalal had three sons, viz., Jameshed Burjor Dalal, Parvez Burjor Dalal (deceased) and Darabshaw Burjor Dalal.

3 The subject matter of these suits relate to the estate of Parvez Burjor Dalal. Goolbai Shivasha Dolikuka had many children, one of whom was a son, Hoshie. The applicant is the daughter of Hoshie. It should also be noted that the applicant's brother Shiavax Hoshie Dolikuka is already a caveator in

both the suits.

4 Shri Thorat for the applicant submitted that the plaintiffs in both the suits have not admitted that the applicant has any genealogical connection as stated in the application. At the same time, there is nothing on record to disbelieve the applicant's case either. The applicant, in the affidavit in rejoinder, has also produced documents which *prima-facie* indicate the relation that the applicant states to the deceased is correct. I would hasten to add it is only a *prima-facie* observation.

5 If we proceed on this basis, the provision of law that would be applicable is Section 55 of the Indian Succession Act, 1925 which reads as under :

“55. Division of property where intestate leaves neither lineal descendants nor a widow or widower nor a widow of any lineal descendant -When a Parsi dies leaving neither lineal descendants nor a widow or widower nor [“a widow or widower of any lineal descendant”] his or her next-of-kin, in the order set forth in Part II of Schedule II, shall be entitled to succeed to the whole of the property of which he or she dies intestate. The next-of-kin standing first in Part II of that Schedule shall be preferred to those standing second, the second to the third, and so on in succession, provided that the property shall be so distributed that [“each male and female standing in the same degree of propinquity shall receive equal shares”].”

Part II(4) of Schedule reads as under :-

***“.....
(4) Children of paternal and maternal grandparents and the lineal descendants of such of them as have predeceased the intestate.”***

Therefore, the applicant being a lineal descendant of the paternal grand parent of the deceased, would certainly fall in the above category being a lineal decedent of the paternal grant parent of the deceased. In view thereof certainly, the applicant *prima-facie* establishes that the applicant has caveatable interest in the estate of the deceased.

6 Shri Narichania, senior advocate submitted that : (a) the applicant has not established that she has any genealogical connection and some interest in the estate of the deceased; (b) the applicant has come with unclean hands and has made false statements/inconsistent or willful mis-statements in the affidavit in support and then in the rejoinder; and (c) the application is hit by Article 137 of the Schedule to the Indian Limitation Act, 1963.

Shri Chowdhary for the plaintiff in Testamentary Suit No.25 of 2012 made submissions similar to submission made by Shri Narichania.

7 Coming to the first point of opposition mentioned above, I have already observed that *prima-facie* the applicant seems to have caveatable interest in the estate of the deceased.

8 As regards the second point of opposition, i.e., deliberate mis-

statement, false/inconsistent statements, unclean hands etc., if one considers the affidavit in support and the affidavit in rejoinder together, yes, there are inconsistencies and mis-statements. Shri Narichania relied upon three judgments of the Apex Court, viz., ***S.P. Chengalvaraya Naidu (Dead) By LRS. Vs. Jagannath (Dead) By LRS. & Ors.***¹; ***Oswal Fats and Oils Limited Vs. Additional Commissioner (Administration), Bareilly Division, Bareilly & Ors.***² and ***Dalip Singh Vs. State of Uttar Pradesh & Ors.***³ to submit that the applicant having come with unclean hands and having resorted to falsehood and unethical means to achieve her goal in getting her application allowed, should be dealt with strictly and shown the door. Shri Chowdhary relied upon a judgment of this Court in ***Navbharat International Ltd. Vs. Cargo Onboard m.v. AMITES (at Kandla) & Ors.***⁴ to submit that falsehood should not be entertained and the applicant should be shown the door.

9 It is true and I also feel that there are instances, and it is only increasing, where parties file false affidavits and play a fraud on the Court to snatch orders. Justice Kuldeep Singh in ***S.P. Chengalvaraya*** (supra), in paragraph 5 observed :

1 (1994) 1 SCC

2 (2010) 4 SCC 728

3 (2010) 2 SCC 114

4 NMS/2853/2010 WITH NMS/3649/2010 IN ADMS/19/2010 DT. 19.03.2014.

“5We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court - process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.”

10 In *S.P.Chengalvaraya Naidu* (Supra), a partition suit was filed by the respondent without disclosing the Deed of Release executed by him relinquishing his rights in the property and preliminary decree obtained. Hence the Court concluded that the preliminary decree was obtained by playing fraud on Court and liable to be set aside.

11 In *Oswal Fats and Oils Limited* (supra), the Apex Court followed the same principal that if a person is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the Court not only has the right but a duty to deny relief to such person.

That was a case where the appellant had decided to set up agro-based paper projects in the State of Uttar Pradesh. The Board of Directors of appellant had authorized three individuals K, J and S to negotiate and finalise purchase of land. An application was submitted by the appellant to Joint Director of Industries for granting permission under Sections 154(2) of U.P. Zamindari Abolition and Land Reforms Act, 1950 for purchase of land in excess of 12.5 acres. The appellant, however, without waiting for

response of the authority concerned, purchased 40.45 acres of land through various sale deeds.

The State of Uttar Pradesh challenged the transfer and declared purchase in excess of 12.5 acres as against the provisions of the law. After passing of the order by the Collector, the appellant and the State Government entered into lease agreement whereby the State Government agreed to lease excess land measuring to about 28 acres to the appellant for a period of 30 years and the lease agreement was signed by two of the persons K and J authorised by the Board of Directors. In the lease agreement, the appellant admitted that transfers made in its favour by bhumidars were contrary to law and thus void, and as such the land vested in the State. The appellant, thereafter, filed writ petition taking a stand that S was not authorized to enter into compromise or to make a statement relinquishing land in favour of the State and it was also pleaded that the appellant was entitled to purchase land in excess of 12.5 acres but the appellant did not bring the lease agreement where they had admitted that the transfers made in its favour was void, to the notice of either the Additional Commissioner or the High Court. In the list of dates and the memo of special leave petition filed in the Apex Court also there was no mention of lease agreement. This being background, the Court came heavily upon the appellant.

12 In *Dalip Singh* (Supra), the Court lamented the fact that a new creed of litigants have cropped up who do not have any respect for truth and they shamelessly resort to falsehood and unethical means for achieving their goals. Such a litigant who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief.

In that case, the appellants misled the authorities entrusted with the task of implementing the provisions of U.P. Imposition of Ceiling on Land Holdings Act, 1960 and the Courts and got transmitted land through three generations and retained possession of the surplus land.

13 Undoubtedly, the Courts have taken this strong view. The facts and circumstances that prevailed in those three cases, had it been so in this case, even this Court would have taken the same view and thrown out the party attempting to pollute the stream of justice. But here is a case where the applicant is not asking for any substantial order or relief but only says that the applicant should be joined as a party to the proceedings. The applicant wants to be heard in the two testamentary suits. The applicant cannot be compared to the likes of persons who played a fraud on the Courts and authorities as in those cases relied upon by the plaintiffs. I would only consider the statements as mere aberrations or inconsistencies and not

fraudulent mis-statements requiring the applicant to be shown the door. The inconsistencies are only so far as how and when the applicant got knowledge of the filing of the two petitions. It should also be noted that when the earlier affidavit in support of a proposed chamber summons was sworn (the chamber summons was never lodged) on 31st January 2013, the applicant has only stated that the applicant is related to the deceased and therefore needs to be joined as a party to the suit. That chamber summons was supposed to be taken out by Advocate Shri Balkrishna S. Shetty. The present chamber summons is taken out by another Advocate M/s. K. Ashar & Co. In between, the applicant has also explained how she was going through divorce proceedings with her husband. The applicant has also been candid to state that it was her ex-husband who was the main support behind the idea of taking out the chamber summons in 2013. I would give the benefit of doubt to the applicant. The judgments relied upon to by Shri Narichania and Shri Chowdhary are cases where there were gross abuse and gross false statements made by the parties. The facts and circumstances in those cases were different. The plaintiffs in the two suits before this Court are propounding two separate Wills. In one suit being Testamentary Suit No.29 of 2012, the plaintiff is the ex-wife of the brother of the deceased who was divorced from her husband way-back in 1954. She is not a legal heir of the deceased. In the other Will, in Testamentary Suit No.25 of 2012,

the propounder of the Will is a total stranger unrelated to the deceased. Again not a legal heir. The applicant herein atleast *prima-facie* appears to be a legal heir, if both the Wills propounded are not granted probate, stands to benefit and therefore is an interested party in the estate of the deceased. The applicant's brother is already joined as a caveator in both suits. Therefore, in view of the facts and circumstances of the case, this is not a case that merits a strong and strict action like throwing out the applicant.

14 Coming to the third point of limitation, Shri Narichania submitted that residuary Article 137 of the Limitation Act is applicable and the application should have been filed within three years from the time the right to apply accrued. Article 137 reads as under :-

<i>Any other application for which no period of limitation is provided elsewhere in this Division.</i>	<i>Three years</i>	<i>When the right to apply accrues.</i>
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15 The two suits originated as petitions for Probate. Rule 401, 402 and 403 of the Bombay High Court (OS) rules, reads as under :

401 Caveat – *Any person intending to oppose the grant of probate or letter of administration shall file a caveat in Form No. 116 within fourteen days from the service of the citation upon him or within such shorter time as the Judge in Chambers may direct. Notice of the filing of the caveat shall be given by the Prothonotary and Senior Master to the petitioner or his Advocate on record. The Judge in Chambers may extend the time to file a caveat, provided the grant has not in the meantime been issued.*

402 Affidavit in support of caveat – An affidavit in support of a caveat shall be filed within eight days from the date of the filing of the caveat, notwithstanding the Court vacations. Such affidavit shall state the right and interest of the caveator, and the grounds of the objections to the application. A copy of the said affidavit shall be served by the caveator on the petitioner or his advocate on record. If such affidavit be not filed within the prescribed time, the caveat shall not prevent the grant of probate or letters of administration. No such affidavit shall be filed after the expiry of the said eight days without an order of the Judge in Chambers.

403 Procedure on affidavit in support of caveat being filed –

(i) Upon the affidavit in support of the caveat being filed, the petition shall be numbered as suit in which the petitioner shall be the plaintiff and the caveator shall be defendant. Notice of the fact that the petition has been renumbered as a suit shall be given by the Prothonotary and Senior Master to the petitioner or his Advocate on record. The notice shall be in Form No.117. The petition shall be treated as the plaint and the affidavit in support of the caveat shall be treated as the written statement of the caveator. The procedure in such suit shall, as nearly as may be, be according to the procedure applicable to civil suits on the Original Side of the Court.

(ii) Where there are two or more caveators and each of them has filed an affidavit in support of his caveat, separate suit numbers shall not be given to the petition, but all the caveators shall become party defendants in one suit.

16 Therefore, Rule 401 Rule provides that any person intending to oppose the grant of probate or letters of administration shall file a caveat within 14 days of the service of the citation upon him or within such shorter time as the Judge in chambers may direct. The Judge in chambers may extend the time to file the caveat provided that the grant has not in the meanwhile been issued.

Rule 402 of the rules provides that an affidavit in support of the caveat shall be filed within 8 days from the date of the filing of the caveat.

Such affidavit shall state the right and interest of the caveator and the grounds of objections to the application for grant of probate/letters of administration. Rule 402 further provides that no affidavit shall be filed after the expiry of the period of 8 days without an order of the Judge in chambers.

Rule 403 of the Rules provides that upon the affidavit in support of the caveat being filed, the petition for grant of probate/letters of administration shall be numbered as a suit in which the petitioner shall be the plaintiff and the caveator shall be the defendant. Rule 403 further provides that petition shall be treated as a plaint and the affidavit in support of the caveat shall be treated as written statement of the caveator and the procedure in the suit shall, as nearly as may, be according to the procedure applicable to civil suits on the Original Side of the Court.

17 Under the limitation Act, no period is advisedly prescribed within which a petition for probate or letters of administration or succession certificate must be made after the death of the deceased. An application for Probate is to seek the Court's imprimatur to perform a duty created by a Will or for recognition as a testamentary trustee. The right to apply is a continuous right which is capable of being exercised as long as the object of the trust exists or any part of the trust, if created, remains to be executed. Being a continuous right, it can be exercised at any time after the death of

the deceased, as long as the right to do so exists. [*Vasudev Daulatram Sadarangani vs Sajni Prem Lalwani*]⁵

18 The Court in *Vasudev Daulatram Sadarangani* (supra), went ahead to hold that the right to apply may not accrue necessarily within three years from the date of the death of the deceased but when it becomes necessary to apply, which may be at any time after the death of the deceased, be it after several years but the petitioner himself must explain the delay.

19 In my view, the three years period prescribed under Article 137 of the Limitation Act is presumably on the assumption that the necessity to make the application would ordinarily arise within that time. Delay cannot be equated with the absolute bar of limitation. Once execution and attestation of the Will are proved, the suspicion of delay in making the application no longer operates.

20 In this case, two caveators have filed caveats and the petitions are already converted into suits and the Code of Civil Procedure shall, as nearly as may be, apply. No citation, however, has been served upon the applicant. What the applicant is seeking is to join as a defendant in the two suits. No period of limitation is prescribed in the Limitation Act for a party who

5 AIR 1983 BOM 268

wishes to be joined as a party defendant. Residuary Article 137 says within three years when the right to apply accrues. But when did the right to apply accrue? No citation has been served. Therefore, in my view, as in the case of filing a petition for grant of probate, the right to apply is a continuous right which is capable of being exercised as long grant has not been issued.

21 Shri Thorat submitted that as the petitions have now been converted into suits, Order I, Rule 10 of the Code of Civil Procedure is applicable and the applicant may be considered as a necessary party. I do not agree *stricto sensu* with Shri Thorat also. The Apex Court in ***Husein Abdul Karim Panju vs Mariambai Abdul Rahim***⁶ held the provisions of the Code of Civil Procedure do not in terms apply but broad principles laid down therein cannot be excluded.

22 In this suit, the Court has to conclude whether the Will propounded by the plaintiffs has been validly executed. The jurisdiction of the Probate Court is limited being confined only to consider the genuineness of the Will. Parties rights are not determined. If the Probate is not granted, the applicant will be a beneficiary as *prima-facie* observed earlier. Therefore, the applicant wants to join and oppose the grant of probate. To that extent the

6 AIR 1973 SC 175

applicant is a necessary party. The test required to be applied is : does the claim of grant of probate prejudice the applicant's right because it defeats some other line of succession in terms whereof the applicant has asserted her right?

23 Shri Narichania submitted that what is filed is not an application to condone delay in filing caveat but application to be impleaded as a party to the suit. Shri Narichania also submitted that in the affidavit in support or in the rejoinder to this application, no ground has been raised as to why the Probate cannot be granted.

In my view, these are hyper technical objections. The applications are on the basis that the applicant is a necessary party to the two suits. First of all no citation has been served on the applicant. So filing of caveat or affidavit in support as per Rule 401 and 402 does not arise as far as the applicant is concerned. Secondly, over 45 years ago, the Apex Court in ***Jai Jai Ram Manoharlal Vs. National Building Material Supply, Gurgaon***⁷ held that our rules of procedure are handmaid to the administration of justice. If a person having a caveatable interest, is entitled to show that the alleged Will is not the last will of the deceased validly made in accordance with the provisions of law, then he must be allowed a reasonable

⁷ AIR 1969 SC 1267

opportunity of so doing and his defence cannot be shut out on the ground that he had not initially pleaded elaborately the grounds of opposition.

24 It is settled law that Rules of Procedure are enacted to further the cause of justice and not to create obstacles in their way or to impede it. Moreover, it will create a vinegarish situation if the period of limitation for this application is applied because for the petitioner to file a Probate Petition, there is no time prescribed. Rule 382 of the High Court (OS) Rules only states that if an application for probate is made for the first time after the lapse of three years from the death of the deceased, the reason for the delay shall be explained in the petition and if explanation for the delay is found unsatisfactory, the Prothonotary and Senior Master may require such further proof of the alleged cause of delay as he may deem fit. And instead of seeking the relief as sought in this motion, if the applicant had sought condonation of delay in filing a caveat, under Rule 401, this Court could have extended the time to file caveat as the grant is yet to be issued.

25 In the circumstances, chamber summons No. 76 of 2016 and chamber summons No. 89 of 2016 are allowed in terms of prayer clause (d).

The plaintiffs to amend the plaint and serve a copy of the amended plaint upon the defendants within four weeks from today. The defendants to

file an affidavit as close to an affidavit which would normally be filed in support of the caveat. The said affidavit to be filed within two weeks of receiving copy of the amended plaint.

26 At this stage, Shri Narichania and Shri Chowdhary seek stay of this order.

Stay refused.

(K.R. SHRIRAM, J.)