

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
CHAMBER SUMMONS NO.86 OF 2017
IN
TESTAMENTARY SUIT NO.100 OF 2011
IN
TESTAMENTARY PETITION NO.588 OF 2011

Jaya Talakshi Chheda	...	Applicant
In the matter between		
Tanuja Jayantilal Bhagat	...	Plaintiff
Vs.		
Jayantilal K. Bhagat and another	...	Defendants

Mr. K. T. Kukreja a/w. Ms Bhumika Gada and Mr. Nilkanth Gharkar i/b.
Mr. Devang H. Shah for Applicant.
Mr. Firoz Bharucha i/b. Mr. Sachin Pawar for Plaintiff/ Respondent in CST
No.86 of 2017.
Mr. K. Surve i/b. Mr. Amit Sheth for Defendant No.2. (Orig. Defendant No.1.)

CORAM : R. G. KETKAR, J.
DATE : AUGUST 21, 2017

P.C. :

Heard Mr. Kukreja, learned Counsel for the applicant and
Mr. Bharucha, learned Counsel for the plaintiff and Mr. Surve, learned
Counsel for defendant No.2 at length.

2. By this Chamber Summons, the applicant has prayed for issuing
direction to the plaintiff - (a) to amend the Petition by deleting the name
of Hitesh Suresh Bhagat, since deceased, and in its place, substitute the
name of the applicant (Caveatrix) being the mother of the deceased
Hitesh Suresh Bhagat as the only heir and legal representative; (b) to get
the citation issued through this Court against the applicant; (c) to serve
duplicate citation and true copy of the amended Petition upon the
applicant or through her Advocate who agrees to waive service on her
behalf. The relevant and material facts for disposing of this Chamber

Summons, briefly stated, are as follows:

3. On 18.02.1979, Suresh Bhagat and the applicant herein got married. On 05.07.2006, Suresh Bhagat and the applicant were divorced. It is the case of the prosecution that on 13.06.2008, Suresh Bhagat was murdered by the applicant and their son Hitesh Bhagat. Applicant and Hitesh Bhagat were arrested for the offence of murder in July 2008. On 14.10.2008, Maniben, mother of Suresh Bhagat executed her Will. In October 2008, Maniben instituted Suit No.3197 of 2008 for the administration of the estate of the deceased Suresh Bhagat. On 03.03.2010, Maniben executed a Codicil to her Will and appointed plaintiff as Executrix. On 19.09.2010, Maniben died. On 23.04.2011, plaintiff filed Probate Petition No.588 of 2011. In paragraph 8 of the Petition, plaintiff asserted that “the deceased widow (Maniben Kalyanji Bhagat) at the time of her death left her surviving, the following as her next-of-kin's according to the Hindu Succession Act, 1956 (for short 'Act') by which she was governed by the following persons, who are residing at the following address.” Applicant and Hitesh were referred in clause (d) (i) and (ii). Petition was later on converted into Testamentary Suit No.100 of 2011.

4. On 31.07.2013, the learned Additional Sessions Judge, Greater Bombay, convicted Hitesh Bhagat and the applicant along with other co-accused in Sessions Case No.294 of 2009 (Old MCOC Case No.14 of 2008) for committing murder of Suresh Bhagat and sentenced them to suffer life imprisonment. On 05.09.2013, Criminal Appeal No.968 of 2013 filed by Hitesh Bhagat against the order of conviction admitted by this Court. Though the appeal was admitted, the conviction was neither stayed nor the sentence was suspended. On 23.03.2014, Hitesh Bhagat died in jail while undergoing the sentence of life imprisonment.

5. The applicant has taken out present Chamber Summons for deleting the name of Hitesh Suresh Bhagat, since deceased, and in its place, substituting her name, being the mother of the deceased Suresh Bhagat as the only heir and legal representative.

6. In support of this Chamber Summons, Mr. Kukreja strenuously contended that applicant has right to defend the Testamentary Petition and the Testamentary Suit. He submitted that Maniben Kalyanji Bhagat had instituted Suit No.3197 of 2008 for administration of the estate of her deceased son Suresh Bhagat. During the pendency of the administration suit, Maniben expired as a result of which initially, Vinod Kalyanji Bhagat, son of Maniben and brother of deceased Suresh prosecuted the administration suit. Plaintiff took out Chamber Summons No.1095 of 2011 for transposing herself in the said Suit. By order dated 22.02.2013, plaintiff was transposed and amendment was carried out in the administration suit. In that Suit, Hitesh took out Notice of Motion No.1062 of 203. By order dated 25.09.2014, applicant was allowed to represent deceased Hitesh. On 29.09.2014, Notice of Motion No.1062 of 2013 was disposed of and this Court protected 50% share of Hitesh in the estate of the deceased Suresh. He further submitted that against the order of conviction recorded by the learned Sessions Judge, Hitesh has preferred Criminal Appeal No.968 of 2013. The applicant took out Criminal Application No.171 of 2014 to prosecute the said appeal on behalf of the deceased Hitesh. By order dated 07.04.2017, the Division Bench of this Court permitted the applicant to continue in the criminal appeal as appellant. Mr. Kukreja submitted that Section 25 of the Act will not be a bar for the applicant to defend the Suit and the Probate Petition instituted by the plaintiff. In support of his submissions, he relied upon the following decisions:

- a. ***Anil Behari Vs. Latika Bala Dassi*, AIR 1995 SC 566** and

in particular paragraph 15;

- b. ***Biro Vs. Banta Singh*, AIR 1980 Punjab & Haryana 164;**
- c. ***Ram Chatterjee Vs. Tapati Mukherjee*, (2002) 3 Calcutta Law Times 208 (HC)**, and in particular paragraphs 15 to 18; and
- d. ***Mitthulal Vs. State of M.P.*, AIR 1975 SC 149**, and in particular paragraph 4 thereof.

7. He also invited my attention to paragraph 14 of ***Minoti Vs. Sushil Mohansingh Malik*, AIR 1982 Bombay 68** to contend that the applicant is entitled to be given opportunity to contest the claim of the plaintiff on merits.

8. On the other hand, Mr. Bharucha submitted that by the present Chamber Summons, the applicant has prayed for her impleadment in the place of deceased Hitesh Suresh Bhagat. In other words, the question whether applicant is entitled to defend the Suit does not arise. He further submitted that during the pendency of the trial, applicant and Hitesh were not enlarged on bail. By order dated 31.07.2013, the learned Sessions Judge, Greater Bombay convicted Hitesh Suresh Bhagat, deceased and the applicant. He relied upon the decision in of the Apex Court in ***B. R. Kapur Vs. State of Tamil Nadu*, (2001) 7 SCC 231** to contend that the presumption of innocence comes to an end once the conviction is recorded. He also relied upon the decision of this Court in ***Minoti* (supra)**, where the learned Single Judge of this Court (Coram : C. S. Dharmadhikari, J. as his Lordship then was) has considered various decisions as also Section 25 of the Act and also the principles of equity, justice and good conscience and held that the words and phrases used in Section 25 will have to be construed in the light of these principles, namely, principles of equity, justice and good conscience and this is also the well established principle of public

policy. He submitted that the learned Single Judge held that in view of Section 25 of the Act, applicant, who is convicted of an offence of a murder is disqualified from inheriting the property of the person murdered or any other property in furtherance of the succession to which he or she committed or abetted the commission of the murder. He, therefore, submitted that no case is made out for granting any relief to the applicant.

9. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. It is not in dispute that the applicant and her son Hitesh were tried for the offence punishable under Section 302 Indian Penal Code, 1860 (for short 'I.P.C.') for committing murder of Suresh Bhagat on 13.06.2008. Applicant and her son Hitesh were arrested in July 2008. It is not in dispute that during the pendency of the trial, applicant and her son Hitesh, since deceased, were not enlarged on bail. On 31.07.2013, the learned Additional Sessions Judge, Greater Bombay convicted Hitesh and the applicant herein for committing murder of Suresh Bhagat and sentenced them to suffer life imprisonment. Criminal Appeal No.968 of 2013 filed by Hitesh against the order of conviction was admitted by this Court on 05.09.2013. Pending that appeal, Hitesh died on 23.03.2014. The applicant took out Criminal Application No.971 of 2014 for prosecuting the said appeal on behalf of the deceased Hitesh. By order dated 07.04.2017, Division Bench permitted the appellant to continue the Criminal Appeal as appellant. It is also not in dispute that though the appeal preferred by Hitesh is admitted, the conviction is not stayed and the sentence is also not suspended. Section 25 of the Act reads thus,

“25. Murderer disqualified.- A person who commits murder or abets the commission of murder shall be disqualified from inheriting the property of the person murdered, or any other

property in furtherance of the succession to which he or she committed or abetted the commission of the murder.”

10. Section 25 was considered at length by this Court in **Minoti** (*supra*). In paragraphs 7 and 12, this Court observed thus,

“7. It is an admitted position that the word "murder" is not defined in the Hindu succession Act, It appears that S. 25 was introduced in the Hindu succession Act practically to give statutory sanction to the view expressed by the privy council in *Kanchawa v. Girimallappa*, AIR 1924 PC. 209 while dealing with such a contention the privy Council; observed that there is much to be said in support of the principles of jurisprudence which can be traced in Hindu Law, which would warrant in inference that a man cannot take advantage of his own wrong. The privy council further observed that this principle is the principle of equity, justice and good conscience, which disqualifies and excludes the murderer from inheriting any interest in the property of the person murdered. The privy council also held that the murderer in such case should be treated as non-existent and not as one who forms the stock for fresh line of descent. Thus, it appears that Ss. 25 and 27 were enacted by the legislature to give statutory approval to the principles of equity, justice and good conscience which disqualifies murder from inheriting the property of the person murdered . Therefore, the words and phrases used in S. 25 will have to be construed in the light of these principles viz. The principles of equity, justice and good conscience. This is also the well established principle of public policy.

12. In my opinion this is the correct approach for interpreting the provisions of Section 25 of the Act, which incorporates a paramount principle of public policy based on principle of public policy based on principles of justice, equity and good conscience, so that the person will not be able to take the advantage of his own crime. In this context it is pertinent to note that the words used are "commits murder or abets commission of murder" and not "is convicted of an offence of murder and not "is convicted of an offence of murder or abetment of offence of murder." Therefore, it is clear that the legislature has used the term "murder" in S. 25 of the Hindu Succession Act not in a technical sense as defined in S. 300 of the I.P.C. ., but in a wider and popular sense, which must include in its import even culpable homicide or unlawful

manslaughter. It is neither possible nor desirable to lay down general rule in this behalf, because to some extent it must depend on the facts and circumstances of each case.”

11. In view thereof, I do not find that applicant has made out a case for grant of any relief. Mr. Kukreja heavily relied upon paragraph 14 to contend that in that case, defendant No.1 was permitted to contest the claim of the plaintiff on merits. I do not find any merit in this submission as the defendant No.1 in that case was allowed to contest the claim of the plaintiff on merits on the basis of concession given by the learned Counsel for the plaintiff. In fact, in paragraphs 13, the learned Single Judge observed thus,

“13. ... I am not called upon at this stage to decide the question as to what will be the scope of inquiry before the civil court in case of acquittal. I have decided the question of disqualification under S. 25 of the Hindu succession Act on the basis of the position as it stands today. Parties are at liberty to raise all permissible contentions in case of subsequent development or change in circumstances.”

12. Mr. Kukreja relied upon the decision of the Apex Court in **Anil Behari** (*supra*), and in particular paragraph 15 thereof to contend that the judgment of conviction and sentence passed by the Sessions Court convicting applicant and Hitesh and sentencing them for life imprisonment is relevant only to show that there was such a trial resulting in conviction and sentence and it is not evidence of the fact that applicant and Hitesh were the murderers. That question has to be decided on evidence. In that case, Binod Lal Ghosh had executed last Will and Testament on 29.07.1912. He had appointed 5 persons as executors and executrices, whose details are as follows:

- (i) Anil Nath Basu, Attorney-at-Law,
 - (ii) Brindaban Chandra Mitter, who died in July 1913.
- They were attesting witnesses to the Will.
- (iii) His adopted son, Charu Chandra Ghose,

- (iv) His wife Haimabati Dasi, who died on 22.05.1921 and,
- (v) His brother's widow Muktakesi Dasi.

13. On 05.03.1920, the testator was said to have been murdered by Charu who was placed on his trial, convicted for murder and sentenced to transportation for life. Charu served his term of imprisonment and was released from jail some time in 1933.

14. On 30.09.1921, an application for probate of the Will was made on the Original Side of the Calcutta High Court on behalf of - (i) Anil Nath, (ii) Muktakesi Dasi and (iii) Latikabala Dasi (wife of Charu) as out of executors / executrices appointed by the testator, Brindaban Chandra Mitter had died in July 1913 and Haimabati Dasi died on 22.05.1921. The grant was made on the same day i.e. 30.09.1921. On 24.07.1933, application was made by Debi Prosad Mitter, son of Brindaban Chandra Mitter for the grant of probate to him along with Anil Nath Basu and Latikabala Dasi. In that application, the previous grant of probate dated the 30.09.1921, the death of Muktakesi Dasi some time in October 1932 and the fact of his attaining majority some time in January 1924 were recited. On the 16.09.1933, Debi Prosad Mitter's application was granted.

15. On 04.12.1933, Latikabala Dasi and Sushamabala Dasi (testator's nephew's wife) applied to the High Court for an order for discharging the executors appointed previously and for a direction to hand over the entire estate of the testator to the applicants. Debi Prosad Mitter resisted the application by filing affidavit dated 07.12.1933 wherein he referred to grants of the probate made in 1921 and 1933 and stated that testator Binod Lal Ghosh was murdered on 05.03.1920 by Charu and that on the death of Haimabati in May 1921, the testator's first cousin Girish

Chandra Ghosh became entitled to the residue of the estate of the testator. In the affidavit, he set out the genealogical table of the family of the testator showing how Girish Chandra Ghosh was related to the deceased.

16. On 16.05.1934, the High Court dismissed the application for discharging the persons who had been granted the probate. Girish Chandra Ghosh died in December, 1940 without taking any steps in the Court claiming his rights, whatever they were, in the testator's estate. It was only on 17.09.1949, the appellant, who is one of the four sons of the said Girish Chandra Ghosh, made an application to the Calcutta High Court on the Original Side praying that the probates dated 30.09.1921 and 16.09.1933 in respect of the Will dated 29.07.1912 be revoked, annulled and / or set aside and that an administrator pendente lite be appointed. The learned Single Judge ordered revocation of the grants and directed that the Will be proved in solemn form on notice to the applicant and the other sons of Girish and also after a general citation to all persons interested in the estate. He also appointed the appellant as an administrator pendente lite with usual powers to take charge of the estate, with costs to the applicant to be paid out of the estate and directed the other opponents-respondents to bear their own costs.

17. On appeal by Latikabala Dasi, the Appellate Bench allowed the appeal and dismissed the application for revocation of the probate with costs of both the courts.

18. It is in that context, the Apex Court observed that Girish, who died in 1940, lived for about 19 years after the grant and took no steps in that direction. Though Girish was aware of the grant at the latest in 1933 when Debi Prosad Mitter took proceedings to obtain a grant in his own favour also.

19. In paragraph 15, it was observed thus,

(15) ... If Girish had initiated proceedings for revocation of the grant and had insisted on the will being proved in his presence, the courts would have had no difficulty in having all the necessary evidence before it because the chief person who had played the most leading part in the execution of the will, in its registration and in its being admitted to probate, viz., Anil Nath Basu, was then alive and could have been examined. But for reasons not made clear in these proceedings Girish did not think it worth his while to take any steps in court to 36 282 challenge the will or the grant. The estate was worth anything between five to forty lakhs, perhaps nearer five lakhs than forty lakhs. Girish was a mere pensioner belonging to a middle class family. Either he did not think it worth his while to embark on a litigation with all its uncertainties or he had not the wherewithal to do so. The record as it stands does not satisfactorily explain the reasons why Girish refrained from making any attempts to get this large estate. If the will was not genuine or valid, Girish would take the reversionary estate at once because the testator's widow died in 1921 and there was no other impediment in his way, except to get rid of the will. If, on the other hand, the will was genuine- and valid, even then he would stand to gain all the interest which had been bequeathed in favour of Charu. The fact that Girish did not take advantage of his position as the nearest reversioner as on partial intestacy goes a long way to support the great probability of the will being valid and genuine, especially as it had been probated and because the appellant in his long petition for revoking the grant has not made the least suggestion casting any doubt on the genuineness and validity of the will. ...”

20. In my opinion, the said decision is not applicable to the present case. Section 25 of the Act did not fall for consideration of the Apex Court. All that decision lays down is as regards relevancy of previous judgment of Criminal Court under Section 43 of the Indian Evidence Act, 1872. The said decision was subsequently considered by the learned Single Judge of Punjab and Haryana High Court in **Biro's case** (*supra*). In paragraph 5 of that report, on evidence, the trial Court found that the plaintiff was proved to be the adopted son and that the defendants were proved to be the sisters of Jaggar Singh. The trial Court also came to the conclusion that the plaintiff had murdered his

adoptive father and as such was not entitled to succeed in view of Section 25 of the Act. The plaintiff's Suit was dismissed.

21. In paragraph 6, it is noted that the lower appellate Court came to the conclusion that the plaintiff could not be stated to have intended to cause the death of Jaggar Singh and as such was not guilty of offence of murder and Section 25 of the Act was not a bar in his way. The lower appellate Court came to that conclusion on the ground that the conviction of the plaintiff by the criminal Court was under Section 304 I.P.C. and he could not be treated as a murderer, for he was not convicted for murder but for culpable homicide not amounting to murder. In the result, the appeal was allowed and the suit for declaration and possession filed by the plaintiff was decreed by the lower appellate Court. It is against that decision, defendants preferred appeal in the High Court. In paragraph 11, the learned Single Judge also held that the plaintiff - respondent being guilty of murder clearly attracted Section 25 of the Act with the result that he would not be entitled to succeed to the estate left by his adopted father who was murdered by him.

22. In the case of **Ram Chatterjee** (*supra*), the decision of this Court in **Minoti** (*supra*) was considered in paragraph 18 and it was observed thus,

“18. ... Further it is clear from the judgments of Andhra Pradesh High Court and Bombay High Court as referred to above that irrespective of findings of the Criminal Court in a full-fledged criminal trial by acquitting the accused from the charge of murder in terms of Section 302 of Indian Penal Code, the Civil Court had the competency to adjudicate the matter against the said accused while dealing the question of murderer in terms of Section 25 of Hindu Succession Act, 1956. Hence, in a proceeding before Civil Court praying disqualification to inherit the property in terms of Section 25 of the said Act pre-trial and/or post trial of charge of murder by a competent Criminal Court regarding the issue in question is irrelevant and since under Section 43 of the Evidence Act, the judgment of the

Criminal Court has no independent impact upon the Civil Court, has the jurisdiction to decide the matter independently. ...”

23. Mr. Kukreja also relied upon the decision of the Apex Court in **Mitthulal** (*supra*) to contend that each case must be decided on the basis of evidence recorded in it. In that case, appeal was directed against the order passed by the High Court of Madhya Pradesh confirming the conviction and sentence of the appellants. The appellants with four others were prosecuted for offences under Section 326 read with Section 34 and Section 325 read with Section 34 I.P.C. In that case, the High Court had convicted the appellants not only on the basis of the evidence recorded in the case against them and four other accused, but also took into account the evidence recorded in the cross case against Ganpat, Rajdhar and others. It is in that context, the Apex Court observed in paragraph 4 that “it is elementary that each case must be decided on the evidence recorded in it and evidence recorded in another case cannot be taken into account in arriving at the decision. Even in civil cases, this cannot be done unless the parties agree that the evidence in one case may be treated as evidence in the other. Much more so in criminal cases would this be impermissible. Even this judgment is not applicable for the purpose of considering the controversy raised in the Chamber Summons.

24. In the light of the aforesaid discussion and in view of the decision of this Court in **Minoti** (*supra*), as the position stands today, applicant has incurred disqualification as contemplated by Section 25 of the Act. Applicant is at liberty to raise all permissible contentions in case of subsequent development or change in circumstances. Subject to this, Chamber Summons fails and the same is dismissed with no order as to costs.

(R. G. KETKAR, J.)