

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

**NOTICE OF MOTION NO. 97 OF 2009
IN
TESTAMENTARY SUIT NO. 2 OF 1983
IN
TESTAMENTARY PETITION NO. 95 OF 1982**

Dady Jahangir Writer alias Dady J. Writer Jahangir
alias Writer Dady alias Writer D.J. .. Deceased

Dolly Dady Writer .. Plaintiff
Vs.

1] Khurshed Eruch Writer & Ors. .. Defendants

Mr.Rohan Lavkumar a/w. Mr. Anjal Amin i/b M/s. B. Amin and Co. for
plaintiff.

Mr.Chetan Kapadia a/w. Mr.Phiroze Merchant i/b M/s. Apex Law Partners
for applicant.

**CORAM : K.R.SHRIRAM, J.
DATE : 18TH JANUARY, 2017**

P.C.

1 This notice of motion is taken out by the applicant for the following
reliefs :

(a) That, pending the hearing and final disposal of the suit, the parties be directed to bring back all the securities and other belongings as listed in the schedule of the petition which the defendants have disposed off, deal with after the order dated 13th December 2001;

(b) That, pending the hearing and final disposal of this notice of motion, the parties be directed not to create any third party interest of any nature in respect of the belongings estate as mentioned in the schedule of the petition.

2 The applicants are defendant no.3 and defendant no.4 (Caveator No.3 and Caveator No.4) in Suit No.2 of 1983. After the application has been filed, defendant no.4, who was the wife of defendant no.3, expired and therefore this application is being pursued only by defendant no.3.

3 This suit No.2 of 1983 arises out of Petition No.95 of 1982 which was filed by one Dolly Dady Writer as sole executrix and trustee of a purported last Will and testament of her deceased husband-Dady Jahangir Writer who expired on 25th April 1980. The applicant filed a caveat. The caveat was opposed by the plaintiff and the other legal heirs. After hearing the parties, this Court, by an order dated 15th July 1994, took on record the caveats filed by the applicants and directed them to be joined as defendant no.3 and defendant no.4 since deceased in Suit No.2 of 1983. It is stated by the applicant that to defeat the applicants' right, the defendant no.1 withdrew the caveat and obtained a direction from the Court for probating the Will, dated 16th April 1980 in favour of the plaintiff except Item no.6 to the Schedule to the petition. Item 6 is Flat No.B-25, North Bombay Co-operative Housing Society Ltd., Juhu, Mumbai (the said flat).

4 In the order dated 20th December 2001, though the applicants were represented in Court, the Court was pleased to pass an order of which,

paragraphs 1 and 2 read as under :

1 By virtue of the fact that caveat filed by Defendant No.1 has been withdrawn, office to proceed with the grant in favour of the petitioner/plaintiff herein subject to compliance of office objection and save and except to the item at serial No.6 of schedule at Exhibit B to the petition No.95 of 1982 which is the subject matter of litigation between the parties. Liberty to Mr. and Mrs. Surender Kashib to agitate their rights in respect of the flat being flat No.B-25, North Bombay Co-operative Housing Society Ltd., Juhu, Bombay in the suit pending before the City Civil Court, Bombay. As the caveat filed by Defendant No.1 is withdrawn, suit No.2 of 1983 stands dismissed.

2 Shri Gidwani states that if there are any other documents remaining with his clients with regard to the estate of the deceased, the same will be handed over to the petitioner/plaintiff herewith.

5 Against this order, the applicant herein preferred an Appeal being Appeal No.1014 of 2002. It was submitted by the applicants who were the appellants in the Appeal that the Probate Petition got converted into the suit because of the caveats filed by defendant no.1 and the applicants and merely by withdrawal of caveat by defendant no.1, the suit could not have been converted into a Probate Petition and will continue to be a civil suit in which the applicants would have continued as defendants. It was also submitted before the Appeal Court that there was an affidavit which was on record filed by the applicants in which the applicants had pointed out that there was an attempt by the petitioner and defendant no.1 to come to an arrangement to exclude the applicants. It was also submitted that when the applicants had not withdrawn their caveats and that fact was not suppressed from the Court, the Court could not have passed the order dated 20th December 2001 which

was impugned in the Appeal. The Appeal Court, after hearing the parties, set aside the order, dated 20th December 2001 and restored the suit to file and directed the Single Judge to proceed further in accordance with law. That order of the Appeal Court had attained finality.

In the meanwhile, between 20th December 2001 and 6th January 2009, the plaintiff and defendant no1. and other legal heirs have gone ahead and distributed amongst themselves the estate, with the exception of the property at Item No.6 to the Schedule 'B' to the petition (the said flat). Item 6 to the Schedule to the petition, i.e., the said flat, is the property which, according to the applicants, has been bequeathed to the applicant in the Will that the applicant is propounding to have been executed by the deceased. Admittedly, the said flat has been transferred in the name of defendant no.3- the applicant.

6 It is stated by Shri Kapadia that the applicant was the nominee registered with the society based on which the society has transferred the Share Certificate to the applicant and the applicant is also in occupation and possession of the said flat. To that extent, even though the other properties have been distributed between 2001 to 2009, the applicant has not suffered any prejudice. The suit to which a reference has been made in the order dated 20th December 2001, is still pending and I am told, has been stayed by

this Court. The counsels, however, are not clear by which order, the suit has been stayed.

7 Shri Kapadia for the applicant also accepted that the applicant herein is not a legal heir of the deceased but is only claiming by virtue of the Will dated 12th July 1979. Therefore, the applicant, in my view, is not at all concerned with what happened to the other properties of the deceased. Moreover, the applicant has also filed a Petition bearing No. 339 of 2010 for grant of letters of administration in which also the applicant is claiming letters of administration only limited to the said flat.

8 The relief sought in this notice of motion is, ineffect to restore the status of the estate to the position that it was on 20th December 2001 before the order was passed. To a specific query by this Court, Shri Kapadia also confirms that when they filed Appeal No.1014 of 2002, the appellants who are the applicants herein, did not move the Appeal court for any stay order restraining the parties from distributing the estates pursuant to the order, dated 20th December 2001.

9 Today, in my view, after a lot of water has flown under the bridge after the order dated 20th December 2001 was passed, to restore the status of

the estate to the position that it was on 20th December 2001 before the order was passed, makes no sense particularly because the applicant is not prejudiced in any manner in view of distribution of the estate pursuant to the order dated 20th December 2001. In fact the applicant is not concerned with any of those properties. It is the applicant's case that pursuant to a Will dated 12th July 1979, the applicant was the beneficiary to the extent of the said flat. The said flat has been transferred by the society in favour of the applicant. The applicant is in occupation and possession of the said flat. If at all any prejudice would be caused, is, to the others, who, challenged the contention of the applicant that he should be considered as the owner of the said flat and not merely a tenant in view of the Will dated 12th July 1979.

10 Taking into consideration all these facts and circumstances of the case, I am not inclined to grant the reliefs as sought in the notice of motion.

11 The notice of motion accordingly dismissed.

(K.R. SHRIRAM, J.)