

Atul

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
NOTICE OF MOTION NO. 38 OF 2018**

**IN
CAVEAT (L) NO. 205 OF 2017
AND
CAVEAT (L) NO. 206 OF 2017
IN**

TESTAMENTARY PETITION NO. 205 OF 2017

Piedade Joai Pereira	...Petitioner
<i>Versus</i>	
Sukrina Mascarenhas and Anr	...Caveators

**Ms Kashmira Bharucha, i/b Rajiv Jadhav for the Petitioner.
Mr Vincent E Pereira, for the Caveators.**

**CORAM: G.S. PATEL, J
DATED: 26th March 2018**

PC:-

1. The Notice of Motion is by the Petitioner. She seeks that the Caveats filed by Sukrina Mascarenhas and Guilhermina D'Souza be discharged as not maintainable. Both Caveats are dated 16th May 2017.

2. For some reason that I am unable to understand the two Caveats are described as Caveatrix No. 2 and Caveatrix No. 3. This is entirely wrong. There are only two Caveats and the two persons are, therefore, Caveators Nos. 1 and 2 and not Nos. 2 and 3.

3. In any case, the submission is misconceived. Ms Bharucha submits that since the Petition is *simpliciter* for Letters of Administration to the property and credits of the parties' late father, Joao Sebastiao Pereira, and no Will or Testamentary Writing has been propounded in opposition, therefore, the Caveats must be discharged. This is not a submission that lends itself to any acceptance. The Affidavit in Support of the Caveats clearly show that it is the case of the two Caveators that the flat in which the deceased resided and which is really the subject matter of this entire dispute was purchased, according to them, by the 2nd Defendant since the father did not have money to pay the necessary amount when the flat was allotted by the BEST. Whether this is right or wrong is a matter of evidence and will be decided at the trial. It is not something that can be summarily decided and most certainly does not make the Caveat not maintainable.

4. The second prayer in the Notice of Motion is that the Petitioner be allowed to enter in and reside in the flat in question. The flat is at Ghatkopar. The case of the Caveators is that the Petitioner was abroad. There were other siblings. They live in the flat. The Petitioner did not have exclusive use of the flat. In addition, during his lifetime the deceased made an Affidavit saying that the 2nd Defendant would be the owner of the flat and there is, besides, a nomination in her favour. Although the nomination will

not defeat an interest ascertained on succession, it may nonetheless be a piece of evidence to be tested at the trial of the Suit. For these reasons, it is not possible to grant the reliefs prayed.

5. The only order that can be passed on this Notice of Motion is to direct the two Caveators/Defendants not to dispose of the flat, create any third party rights or part with possession of it, or any part of it, pending the hearing and final disposal of the Testamentary Suit / Petition.

6. As to the submission by the Petitioner that she must be immediately put back into possession, it is not possible to accept this. This prayer is expressly rejected. Apart from anything else, it is the Petitioner's own case that it is the 2nd Defendant who is in possession although the Petitioner alleges that this possession was unlawfully taken by the 2nd Defendant. At this stage, there is nothing to indicate that the Petitioner was in lawful and settled position of the flat. Indeed there is, in paragraph 7 of the Affidavit in Support of the 2nd Defendant's Caveat, an allegation that on 7th September 2016 the Petitioner, her brother Denis and sister Eusteria (both supporting the Petitioner) tried to forcibly enter the flat, threw stones at the door and broke the door bell. The 2nd Defendant has lodged FIRs with the Pant Nagar Police Station, Ghatkopar on 20th May 2016 and again on 1st September 2016. All of this will have to be addressed at the trial.

7. There is also the question of delay in bringing the Petition. While this may not affect the Petition itself, it is certainly a factor to

be considered for the grant of interim relief. The deceased admittedly passed away on 6th September 1997. The Petition was filed twenty years later only in 2017.

8. The Notice of Motion is dismissed, subject to the restraint on disposal and parting with possession of the flat noted above. No costs.

(G. S. PATEL, J)