

Atul

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
NOTICE OF MOTION NO. 177 OF 2018
IN
TESTAMENTARY SUIT NO. 178 OF 2017
IN
TESTAMENTARY PETITION NO. 620 OF 2017
AND
CHAMBER SUMMONS NO. 43 OF 2018**

Kavita Suresh Malani & Anr	...Plaintiffs
<i>Versus</i>	
Gunita Malhotra & Anr	...Defendants

Mr Aditya Shiralkar, *with AR Bapat, for the Plaintiffs.*
Ms Firdaus Moosa, *with Swati Deshpande, i/b MDP & Partners, for the Defendants.*

CORAM: G.S. PATEL, J
DATED: 3rd October 2018

PC:-

1. Heard.

2. The application is by the Plaintiffs for dismissal of the two caveats on the limited ground that the caveators do not have a caveatable interest.

3. The Petition was originally filed for probate of a Will allegedly dated 30th June 2016, said to have been left by one Umeshchand Malhotra. He died on 14th December 2016. A copy of the Will is at Exhibit “B” to the Petition. It mentions that his parents have both died, that he was unmarried, and that he had no children. Clause 3 of the Will speaks of Umeshchand’s brother, Sumesh, who himself died earlier on 30th August 1993. Sumesh was married to one Gunita and they had a son named Jagneesh. Jagneesh is Defendant No. 2 to the present Petition. In clause 3 of the Will, Umeshchand is supposed to have said that his sister-in-law Gunita (present Defendant No. 1) and her son Jagneesh (present Defendant No. 2) had severed all relations with him and that he did not wish to give either of them any bequest in his property. By clause 5, Umeshchand appointed Kavita and Savita, his sisters as joint executors of the Will.

4. The Notice of Motion is on this basis that under the provisions of Section 8 of the Hindu Succession Act, the Petitioners, being the sisters of a deceased Hindu male, are ranked higher in priority than the deceased’s sister-in-law (the deceased’s brother’s widow) and the deceased’s nephew (the deceased’s brother’s son). Section 8 is to be read with the Schedule. This is how Section 8 and the Schedule read:

“8. General rules of succession in the case of males.

— The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter —

(a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;

- (b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;
- (c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and
- (d) lastly, if there is no agnate, then upon the cognates of the deceased.

SCHEDULE

HEIRS IN CLASS I AND CLASS II

Class I

Son; daughter; widow; mother; son of a pre-deceased son; daughter of a pre-deceased son; son of a pre-deceased daughter; daughter of a pre-deceased son; daughter of a pre-deceased son of a pre-deceased son; widow of a pre-deceased son of a pre-deceased son; son of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased son of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased son.

Class II

- I. Father.
- II. (1) Son's daughter's son, (2) son's daughter's daughter, (3) brother, (4) sister.
- III. (1) Daughter's son's son, (2) daughter's son's daughter, (3) daughter's daughters's son, (4) daughter's daughter's daughter.

- IV. (1) **Brother's son**, (2) sister's son, (3) brother's daughter, (4) sister's daughter.
- V. Father's father; father's mother.
- VI. Father's widow; **brother's widow**.
- VII. Father's brother, father's sister.
- VIII. Mother's father; mother's mother.
- IX. Mother's brother; mother's sister.

Explanation.—In this Schedule, references to a brother or sister do not induce references to a brother or sister by uterine blood."

(Emphasis added)

5. The case of the Plaintiffs is that they fall within sub-entry (4) of Entry II of Class II. The 2nd Defendant, Jagneesh, the deceased's brother's son is in sub-entry (1) of Entry IV and the 1st Defendant, the deceased's sister-in-law, i.e. the deceased's brother's widow, is the second entry in Entry VI of Class II. Thus, the Petitioners are ranked higher in priority than both Defendants.

6. Section 9 of the Hindu Succession Act says:

"9. Order of succession among heirs in the Schedule.— Among the heirs specified in the Schedule, those in class I shall take simultaneously and to the exclusion of all other heirs; **those in the first entry in class II shall be preferred to those in the second entry; those in the second entry shall be preferred to those in the third entry; and so on in succession.**"

(Emphasis added)

7. Thus, the Petitioners would take to the exclusion of all the other heirs. On this basis it is submitted that neither of the Defendants have any caveatable interest in the estate of the deceased. In other words, even if the Will is not proved (as opposed to the concept of the Will being ‘disproved’ within the meaning of the Indian Evidence Act), neither of the Defendants would succeed to any part of the deceased’s estate.

8. In fairness, Ms Moosa for the Defendants does not contest the legal position as regards succession. Her submission is limited to this: that the properties that the deceased purported to bequeath in his Will were not in fact his to bequeath. They did not vest in him. They were the properties and assets of the AC Malhotra HUF and Defendant No. 1 is a co-parcener in that HUF. Her apprehension is that, as a consequence and result of probate being granted, especially for want of any contest, the Petitioners will then attempt to claim a title to these properties although they were never the properties of the deceased.

9. Ms Moosa is correct to this extent that if there is a contest as to title, it is not decided by probate proceedings. The limited remit of a probate Court is to ascertain whether the Will is proved in its solemn form within the meaning of Section 63(c) of the Indian Succession Act read with Sections 68 to 70 of the Indian Evidence Act. It is well settled that orders in probate do not confer or pass title. It, therefore, only needs to be clarified that even if the

Petitioners obtain probate, they will not, by virtue of simply that fact, be deemed on account of probate to have acquired any title to any of the properties in the estate.

10. Every one of the properties in the deceased's estate is necessarily subject to a separate substantive civil proceeding on title and the Defendants are at liberty to institute proceedings to establish their title; specifically that the assets that the deceased purported to bequeath were not his and were the assets of the AC Malhotra HUF; and further, of necessity, to apply for the necessary interim protective orders as well. All contentions in that regard are necessarily kept open.

11. In addition, of course, the Defendants are also entitled to apply, if they so wish, for a partition of that HUF and to secure their shares, rights, title and interest in that HUF and in its assets.

12. But this does not give the Defendants a 'caveatable interest' in the estate. Indeed to accept this submission would, in my view, lead to a material contradiction, which is not to the Defendants' purpose or advantage. It would necessarily imply an acceptance by them that the assets *did* belong to the deceased and that he could dispose them of, while they contest the genuineness of the Will. This would make any separate suit by the Defendants on title needlessly complicated and might unnecessarily compromise their position. Paragraphs 4 and 11B at pages 119 and 125 to 127 of the Affidavit in Reply make it clear that while the Defendants do not accept the Will, their primary concern is not the Will *per se* but

whether the deceased did hold title to the assets that the Petitioners say form part of his estate. A contest as to the Will is one thing and requires a caveatable interest. A contest as to the deceased's title to any particular property whether mentioned in the Will or in the Schedule to the Petition is a different matter altogether and is necessarily subject to any substantive civil proceedings that the person who claims a right or entitlement to that property may bring.

13. The Defendants are, therefore, fully at liberty without any restriction whatsoever to pursue their claims of title in respect of all or any of the assets mentioned in the Will or in the Schedule to the Testamentary Petition. As I have noted this will not given the Defendants a caveatable interest. At the cost of repetition, neither the grant or probate nor absence of opposition to it will confer on the Petitioners title to the property if the deceased has no title to that property.

14. Ms Moosa has instructions to state that the Defendants will adopt suitable proceedings on or before 15th October 2018. Having regard to the anxiety expressed by the Defendants, the Registry will not process the Petition, which is now uncontested, until two weeks after that date and, in any event, none of the land or revenue authorities in question are to accept any application for transfer of any of those properties to the name of the Petitioners solely on the basis of the grant of probate.

15. If the Petitioners apply for any such transfer, they will give Ms Moosa for the Defendants at least two weeks' written advance notice.

16. This order will be subject to further orders in the civil proceedings that the Defendants will file.

17. The Notice of Motion is made absolute in terms of prayer clause (a), subject to the foregoing observations and directions. There will be no order as to costs.

CHAMBER SUMMONS NO. 43 OF 2018

18. The Chamber Summons is by the Plaintiffs to amend items at Serial Nos. 2, 3 and 5 of the Schedule. What is interesting is that in the unamended Petition the Plaintiffs proceeded without defining any percentage holding of the deceased in those properties and mentioning only the deceased's 'undivided right, title and interest'. The properties in question are land admeasuring 304 sq mtrs bearing Survey No. 2, Hissa No. 5, CTS No. 409 at Village Erangal, Taluka Borivali; land admeasuring 253 sq. mtrs bearing Survey no. 2, Hissa No. 6, CTS No. 399, at Village Erangal, Taluka Borivali; and land admeasuring 7.5 acres at Neral, Village Awasara, Taluka Karjat District Raigad. Item at serial No. 5, Neral property is described in the schedule as "All that ownership of agricultural land".

19. The proposed amendment now accepts that so far as the two Erangal properties at Sr Nos. 2 and 3 are concerned, the deceased had only 50% right, title and interest in the property. As regards the Neral property, according to the Plaintiffs, the two Defendants have, respectively, a 11.11% and 20% undivided share, right, title and interest in that property.

20. This is important because this Chamber Summons is, therefore, the clearest possible admission by the Plaintiffs that the deceased did **not** have 100% title to the properties at Erangal at Sr Nos. 2 and 3, or to the property at Neral. The Plaintiffs' description of the respective shares of the properties are also disputed. Apart from this, the Defendants are not accepting that the deceased had full title to any of the other assets listed in the estate either.

21. This necessarily means, following the order on the Notice of Motion, that no application for transfer to the Plaintiffs' name as heirs or legatees of the deceased of the lands at Erangal (at Sr Nos. 2 and 3) or at Neral can be permitted without notice to the Defendants. This will in fact extend to all the properties mentioned in the Will and also to all the properties listed in the Schedule.

22. In any case, the admission by the Plaintiffs as to the maximum interest that the Plaintiffs could claim through the deceased in the Erangal and Neral properties (at Sr Nos. 2, 3 and 5) is noted and may be relied on by the Defendants at any stage in any appropriate proceedings.

23. In this analysis I am only concerned with the amendments sought to items at Serial Nos. 2 and 3 at Erangal. Item at Serial No. 1 of the schedule also relates to another property at Erangal and that is wholly disputed by the DefendantDefendants.

24. Subject to these observations and directions, the Chamber Summons is allowed.

25. Amendments to be carried out within two weeks from today. Reverification is necessary.

(G. S. PATEL, J)