

SHEPHALI

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
CHAMBER SUMMONS NO. 53 OF 2018
IN
TESTAMENTARY SUIT NO. 11 OF 1995
IN
TESTAMENTARY PETITION NO. 160 OF 1994

OJASWINI KAMALAKAR SAMANT,
Age 48 years, Occupation – Homemaker of
Mumbai, Hindu Indian Inhabitant, residing
at Plot No. 21, Samant Bungalow, 38th
Road, TPS – III, Off Gurunanak Marg,
Bandra (West), Mumbai 400 050
being the Sole Executrix mentioned in the
Will of the Defendant ... **APPLICANT**

IN THE MATTER BETWEEN

VIJAYKUMAR JANARDAN PANDIT,
of Bombay, Indian Inhabitant, residing at
Pandit House, Plot No. 200, 28th Road,
Bandra, Bombay 400 050 ... **PLAINTIFF**

versus

KAMINI JANARDAN PANDIT,
also of Bombay, Indian Inhabitant, residing
at 104, St. Anne's Apartment, Off Pali Mala
Road, Bandra, Bombay 400 050 ... **DEFENDANT**

descendants. Vijaykumar claimed he was her sole heir. Ojaswini has filed Miscellaneous Petition (L) No. 1046 of 2018 to revoke the Letters of Administration Vijaykumar obtained, putting up Kamini's Will dated 10th April 1999. Ojaswini has also filed a Testamentary Petition No. 1052 of 2018 seeking probate to Kamini's Will.

4. A copy of Kamini's Will is annexed at Exhibit "B" to the Affidavit in Support of the Chamber Summons from pages 21 to 23. A few clauses of these are material:

"I appoint Kum Ojaswini Kamalakar Samant as the sole Executrix and Trustee of my this Will.

1. I own and possess on what is ordinarily called ownership basis a flat, being Flat No. 104, situate at St. Annes Apartment, in St. Annes co-operative Society Ltd., situate at the address mentioned above. I hold five shares of Rs. 50/- each in respect of the said flat. The said flat is my self acquired property and I am able to dispose of the same in any manner I like.

4. I also own and possess certain valuable Jewellery which absolutely belongs to me. All the aforesaid properties are my self acquired properties and I am able to deal with and dispose of the same in any manner I like. Besides the above I have no any other property in Bombay or else where.

5. I hereby absolutely bequeath all my right title claim and interest in the aforesaid moveable property viz. Cash and the Jewellery as described above, absolutely in favour of my maternal cousin 1) Ojaswini Kamalakar Samant 2) Dnyanesh Kamalakar Samant 3) Kum. Sujata Sachit

Dabholkar 4) Nachiket Vibhakar Sukhthankar and friend 5) Kum. Smriti Kumta.

6. I direct my Executrix the said Ojaswini Kamalakar Samant to divide the said Jewellery and Cash and all my property both moveable and immovable and also all my moveable and immovable properties which I die possessed of, equally among all the aforesaid persons including my Executrix.

9. All my residual estate which I die possessed of, shall be similarly divided equally amongst all the aforesaid persons."

5. Mr Jain for Vijaykumar submits that the Chamber Summons is misconceived and not maintainable. It is his submission that Kamini's challenge to Janardan's Will ended on her death. Kamini's estate could receive no part of Janardan's estate other than what little was left to her in Janardan's Will. It is not in dispute that in Janardan's Will, propounded by Vijaykumar, the principal beneficiaries are Vijaykumar and his family, and the bequest to Kamini is relatively small.

6. Mr Jain constructs his case thus: He submits that every Will is to be read without reference to any external factors. It is, as he puts it, the "dictionary", meaning that every word and phrase in the Will must be read and construed according to the Will itself. He makes reference to Chapter VI of the Indian Succession Act 1925 which deals with construction of Will and, in particular, to Sections 82 to 87:

"82. Meaning of clause to be collected from entire will.

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The meaning of any clause in a will is to be collected from the entire instrument, and all its parts are to be construed with reference to each other.

Illustrations

(i) The testator gives to B a specific fund or property at the death of A, and by a subsequent clause gives the whole of his property to A. The effect of the several clauses taken together is to vest the specific fund or property in A for life, and after his decease in B; it appearing from the bequest to B that the testator meant to use in a restricted sense the words in which he describes what he gives to A.

(ii) Where a testator having an estate, one part of which is called Black Acre, bequeaths the whole of his estate to A, and in another part of his will bequeaths Black Acre to B, the latter bequest is to be read as an exception out of the first as if he had said "I give Black Acre to B, and all the rest of my estate to A".

83. When words may be understood in restricted sense, and when in sense wider than usual.

General words may be understood in a restricted sense where it may be collected from the will that the testator meant to use them in a restricted sense; and words may be understood in a wider sense than that which they usually bear, where it may be collected from the other words of the

will that the testator meant to use them in such wider sense.

Illustrations

(i) A testator gives to A "my farm in the occupation of B," and to C "all my marsh-lands in L." Part of the farm in the occupation of B consists of marsh-lands in L, and the testator also has other marshlands in L. The general words, "all my marsh-lands in L," are restricted by the gift to A. A takes the whole of the farm in the occupation of B, including that portion of the farm which consists of marsh-lands in L.

(ii) The testator (a sailor on ship-board) bequeathed to his mother his gold ring, buttons and chest of clothes, and to his friend, A (a shipmate), his red box, clasp-knife and all things not before bequeathed. The testator's share in a house does not pass to A under this bequest.

(iii) A, by his will, bequeathed to B all his household furniture, plate, linen, china, books, pictures and all other goods of whatever kind; and afterwards bequeathed to B a specified part of his property. Under the first bequest B is entitled only to such articles of the testator's as are of the same nature with the articles therein enumerated.

84. Which of two possible constructions preferred.

Where a clause is susceptible of two meanings according to one of which it has some effect, and according to the other of which it can have none, the former shall be preferred.

85. No part rejected, if can be it reasonably construed.

No part of a will shall be rejected as destitute of meaning if it is possible to put a reasonable construction upon it.

86. Interpretation of words repeated in different parts of will.

If the same words occur in different parts of the same will, they shall be taken to have been used everywhere in the same sense, unless a contrary intention appears.

87. Testator's intention to be effectuated as far as possible.

The intention of the testator shall not be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible.

Illustration

The testator by a will made on his death-bed bequeathed all his property to C. D. for life and after his decease to a certain hospital. The intention of the testator cannot take effect to its full extent because the gift to the hospital is void under section 118, but it will take effect so far as regards the gift to C. D."

7. He, in fairness, also draws attention to Sections 103 of the Indian Succession Act 1925:

"103. Property to which residuary legatee entitled.

Under a residuary bequest, the legatee is entitled to all property belonging to the testator at the time of his death, of which he has not made any other testamentary disposition which is capable of taking effect.

Illustration

A by his will bequeaths certain legacies, of which one is void under section 118, and another lapses by the death of the legatee. He bequeaths the residue of his property to B. After the date of his will A purchases a zamindari, which belongs to him at the time of his death. B is entitled to the two legacies and the zamindari as part of the residue."

8. In regard to Section 211, set out below, his submission is that the vesting of Kamini's estate in the executor, Ojaswini, is the estate as on the date of the Will and not on any other date.

"211. Character and property of executor or administrator as such.—

(1) The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such.

(2) When the deceased was a Hindu, Muhammadan, Buddhist, Sikh, Jaina or Parsi or an exempted person, nothing herein contained shall vest in an executor or

administrator any property of the deceased person which would otherwise have passed by survivorship to some other person."

9. These submissions are in support of his case that Ojaswini has no caveatable interest in regard to Janardan's estate. Ojaswini is an executor of Kamini's Will, and is also a legatee. She will receive her share of Kamini's estate, subject to Kamini's Will being proved, and that estate will be the one that she obtains on the date of Kamini's death and nothing further.

10. In regard to Clause 9, the residuary clause set out above, his submission is that this only pertains to those portions of Kamini's estate that were not mentioned in her Will and are required to be distributed in terms of that Will (subject of course to proof of Kamini's Will in its solemn form). As on the date of Kamini's death, her estate included absolutely nothing from Janardan's estate other than the bequest made to Kamini.

11. Ms Bhagwat for Ojaswini on the other hand submits that this is a wholly incorrect interpretation of the law. She points out that, having regard to the fact that Janardan's Will is yet to receive probate, none of his heirs have received anything under that Will. Should Vijaykumar succeed in proving the Will, he will undoubtedly take under the Will — but so will Kamini, although her bequest is relatively minor. On the other hand, should Kamini succeed in her challenge to Janardan's Will as propounded by Vijaykumar, not only will Vijaykumar receive less, but Kamini — and this now means her estate — will stand to receive much more. It is her submission that

Kamini having challenged the Will in her lifetime, that challenge cannot fail automatically only on account of her death. Vijaykumar is not entitled in law to, as it were, a walkover without having to prove the Will in its solemn form. The construction by Mr Jain is incorrect in any case, she submits, because even if that interpretation is to be accepted, it only means that Kamini's estate *yet* stands to receive something from her father's estate; and this legacy or bequest from Kamini's father can only be covered by the distribution directed in Clause 9 of Kamini's Will. She says that what Vijaykumar is attempting now to do by opposing this Chamber Summons is to secure to himself the whole of the bequest to Kamini in Janardan's Will by contending that the bequest to her from Janardan falls outside the residuary clause 9 of Kamini's own Will.

12. I believe Ms Bhagwat is correct in her submissions, and Mr Jain is not in his, for I do not for a moment believe nor I am prepared to accept that the death of a defendant in a contested probate action always wholly ousts the defence when there is available a person who can genuinely be said to be the legal representative of the deceased Defendant. Kamini undoubtedly had an interest in Janardan's estate. Ojaswini undoubtedly has an interest in Kamini's estate. The exact dimensions of Kamini's estate cannot be known until the probate Petition in respect of Janardan's Will is finally decided. Her share will be either as per Janardan's Will or, if it is on intestacy, will be considerably higher.

13. Regard must be had in my view to the provisions of Section 211, though possibly not for the purposes that Mr Jain intends. The emphasis there, correctly placed, must be on the words "legal

representative”. This is an expression that is not defined in the Succession Act. The definition in the Code of Civil Procedure 1908 is instructive. Section 2(11) of the Code of Civil Procedure 1908 reads thus:

“2(11) “legal representative” means a person who in law represents the estate of a deceased person, and includes any person who inter-meddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued;”

14. This has to be read with Order XXII Rule 4A(2) which speaks of a notice being required to be given to *such of the persons having an interest in the estate of the deceased person as the Court thinks fit*. It seems to me, therefore, clear that to refuse this Chamber Summons would not only be incorrect in law but patently unjust and inequitable.

15. We require to go no further than Kamini’s Will itself to understand that her residuary Clause 9 is not in any sense restrictive, but pertains to everything else that legally and lawfully forms part of her estate before it is fully distributed. The contrary interpretation, commended by Mr Jain, would lead to an anomalous situation. It would then mean that a part of Kamini’s estate is covered by Clause 9, but there might yet be part of her estate, yet to be received as a legacy from her father, that, though part of her estate, falls *outside* Clause 9. That can never be. There can never be both testamentary and intestate succession simultaneously.

16. It is in this view of the matter that I hold that Ojaswini does have a caveatable interest in Kamini's estate, being named as a legatee in Kamini's Will and also named as an executor to that Will. Indeed it is Ojaswini's primary duty as an executor to ensure that Kamini's estate is fully and correctly husbanded and all items that fall in that estate are brought into the hands of the executor.

17. Consequently, the Chamber Summons succeeds and is made absolute in terms of prayer clauses (a) and (b). No costs.

18. Amendments to be carried out within two weeks from the date of this order without need of reverification.

19. At Mr Jain's request, the operation of this order is stayed for a period of four weeks from today.

(G.S. PATEL, J.)