

Arun

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
CHAMBER SUMMONS NO. 52 OF 2018
IN
TESTAMENTARY SUIT NO. 218 OF 2017
IN
TESTAMENTARY PETITION NO. 1202 OF 2017**

Rohan Kunal Surinder Dhir	...Applicant
<i>In the matter between</i>	
Reena Dhir	...Plaintiffs
<i>Versus</i>	
Naina P Mahtani	...Defendant

***Mr Ashish Kamat, with Mr Kedar Desai, Ms Sneh Nainan & Ms I Ali,
i/b Desai Desai Carrimjee & Mulla, for Applicant in Chamber
Summons No. 52 of 2018 and Caveator in Testamentary Petition
No. 1485 of 2017***

***Ms Pooja Jalan, i/b MBS & Company, for the Defendant in Chamber
Summons No. 52 of 2018 in Testamentary Suit No. 218 of 2017.***

**CORAM: G.S. PATEL, J
DATED: 19th June 2018**

PC:-

1. The Petition is for Probate of a Will dated 7th April 2000 and the Codicil dated 7th November 2001 of one Indra Gobind Malani who died in Mumbai on 24th April 2017. The Petitioner, Reena Dhir

(“**Reena**”) is one of the deceased’s daughters. The Petition is contested by Naina Mahtani (“**Naina**”), another daughter and Vimla Mintz (“**Vimla**”) a third daughter. The contest is thus between the three daughters of the deceased. The Applicant in this Chamber Summons is Rohan Kunal Surinder Dhir (“**Rohan**”). He is Reena’s son.

2. Reena is not only an executor named in Indra Malani’s Will; she is also a legatee. Rohan himself is a legatee and stands to receive a bequest of a valuable property near Churchgate at CCI Chambers. Rohan does not oppose the Petition. Quite the contrary. He supports the Will. The Caveators on the other hand, propound a later Will. That Petition filed by Naina and Vimla is now numbered as Testamentary Suit No. 29 of 2018 and it came to be numbered as a suit because of a Caveat that Rohan entered challenging that later Will.

3. This is actually a material factor in support of Rohan’s present application. Technically speaking, Rohan is not an heir of the deceased at the time of succession so long as his mother is alive. He however has a bequest under the Will his mother propounds. I am not examining the question of whether this does or does not give Rohan a “a caveatable interest” strictly speaking although I have allowed Mr Kamat to address me on that question. I do not think it is necessary to enter into this aspect of the matter. The fact is that Rohan is supporting the earlier Will and Codicil, the ones mentioned above. He is actively contesting his maternal aunts’ application for Probate in respect of her later Will. That alone, perhaps even without a substantial bequest in his favour, would

perhaps entitle him to say he too should be allowed to play some role in the present Petition brought by his mother in her capacity as an executor named in the earlier Will and Codicil. Consequently, I have absolutely no manner of doubt that in equity, and especially given that any order in these matters is an order *in rem*, Rohan should be allowed into the proceedings. The only question is what role he should be allowed to play, and what restrictions, if any, should be placed on him while he is made a party.

4. Before I address that question, I think it is necessary to make it abundantly clear that Rohan cannot be possibly be a co-plaintiff. In an ordinary suit, that would have been the easiest course of action and there would have been no difficulty. This is not possible because Probate action can only be brought by an executor and Rohan is not an executor named in the Will that he supports and which his mother propounds. Equally Rohan cannot enter a caveat to oppose the Will simply because he does not. He supports it. This therefore takes us directly to the question of what role should Rohan be allowed to play in these proceedings and in what capacity.

5. Mr Kamat's anxiety is not so much that his mother will contrive to arrive at some settlement of these litigations detrimental to Rohan's estate but that she may not able to prosecute the Petition quite as effectively as the law demands having regard to her age, health and the fact that she is often away in the UK.

6. There is no option but to allow Rohan to be joined as 3rd Defendant to the present Suit. However this needs to be

circumscribed so that the integrity of the trial that lies ahead is not compromised. Specifically, it must be clarified that this impleadment is subject to a few conditions. Rohan agrees that he will not be filing any Caveat because he cannot nor an Affidavit in Support. His cross-examination of the Defendant's witnesses will thus be restricted and he is unlikely to be allowed to be able to put an independent positive case to those witnesses.

7. Next, it is clarified that when the Plaintiff leads her evidence, any questions that Rohan may have for those witnesses must be placed before the Defendants begin their cross-examination. As an added precaution, since Rohan cannot be possibly take further examination-in-chief and, given his support for the Petitioner, technically cannot cross-examine the Plaintiff's witnesses, his questions, if any, to the Plaintiff's witnesses will be taken directly in Court and not left to be done before a Commissioner. Rohan should not under any circumstances be allowed to put any questions to the Plaintiff's witnesses after the Defendant's cross-examination is over. That is necessary to maintain the balance of the trial itself, and to not permit any attempt to undo the effect of the cross-examination. Mr Kamat readily accept this.

8. As to the Defendants' witnesses, this presents no real difficulty in sequencing. However, since Rohan's cross-examination is likely to be limited at least to the extent that since he will not have a supporting pleading he may not be able to place an affirmative contrary case of his own, his cross-examination of the Defendants' witnesses should precede the cross-examination by the Plaintiff. This, however, I will leave open to the time of the trial and the

decision of the court at that time, for it is equally possible that the trial court may then permit Rohan to cross-examine the Defendants' witnesses after the Plaintiff but to a restricted extent.

9. Finally I would clarify that I do not intend this particular case to serve as any sort of a precedent for future cases. I have therefore not addressed this as a matter of law but only having regard to the very peculiar circumstances that arise in the facts and circumstances of the case.

10. The Chamber Summons is thus made absolute in terms of prayer clause (a) with the requirement that the Applicant Rohan be joined as 3rd Defendant to the proceedings. The Advocates for the Petitioner will carry out the amendments without need of reverification within two weeks from today.

11. Mr Kamat also clarifies that on that amendment being effected, the Petitioner will engage separate representation. This is essential. The statement is noted.

12. The Chamber Summons is disposed of in these terms.

(G. S. PATEL, J)