

Shephali

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
TESTAMENTARY SUIT NO. 85 OF 2017**

IN

TESTAMENTARY PETITION NO. 1624 OF 2017

WITH

CAVEAT NO. 131 OF 2017

AND

CAVEAT NO. 132 OF 2017

GS Krishnan

...Plaintiff

Versus

Laxmi Krishnan & Anr

...Defendants

Mrs Madhuri Gaikwad, i/b MG Legal, for the Plaintiff.

Mr Karl Tamboly, i/b Chandra Naik, for Defendant No.2

Mr Sangramsinh Yadav, for Defendant No.1.

CORAM: G.S. PATEL, J

DATED: 13th/14th March 2018

PC:-

1. Mrs C.D. Thangammal made a Will. She appointed her son S Vishwanathan (Mohan) as the sole Executor of this Will. Another legatee of the Will is another son GS Krishnan. Her married daughter Laxmi Krishnan is also a beneficiary.

2. GS Krishnan filed this Petition for Letters of Administration with Will annexed. GS Krishnan is not an Executor and therefore he could not file for Probate. Laxmi Krishnan, his married sister, entered a caveat.

3. It is the action of S Vishwanathan that has muddied the waters considerably. He is the deceased's son as well. He is the sole named Executor. However, he purported to enter a Caveat opposing the grant of Letters of Administration. I am given to understand that this is on the basis that the Will purports to make a bequest of a tenancy. His Advocate, Mr Naik, argues such a bequest cannot be made. That is correct. That only means that bequest is void and will fail. That does not mean that the Will is invalid. However, entering a Caveat disputes the Will. S Vishwanathan cannot persist with his Caveat and simultaneously retain his capacity as an Executor. The two are incompatible. In obtaining representation to an estate under a Will the right of a named Executor to obtain Probate is above the right of a legatee to obtain Letters of Administration with Will annexed. Therefore, if Vishwanathan persists in prosecuting his Caveat, he will have renounced executorship in writing.

4. It appears that on 23rd August 2017 despite the opposition from Ms Gaikwad for the Petitioner, it was somehow miscommunicated to the Court that Vishwanathan would apply for Probate. It is for this reason that the Court directed the Plaintiff to convert the Petition to one for Probate.

5. In any case that direction was incomplete because it would require the substitution of the petitioner applying for Letters for Administration with Will annexed with the name of the Executor, Viswanathan; the discharge of Viswanathan's Caveat; and the deletion of Vishwanathan's name as the 2nd Defendant.

6. Before me today, the 2nd Defendant Vishwanathan categorically states through his advocate he is not giving up or withdrawing challenge to the Will. He intends to pursue his Caveat. He disputes the authenticity, execution and attestation of the Will.

7. He also states that he is renouncing executorship of the Will. This is inevitable. He cannot simultaneously challenge a Will and claim to be the Executor of the very Will that he challenges.

8. It seems to me now after an extended discussion in Court that the 2nd Defendant has not the slightest clue of his duties and responsibilities as an Executor. He has instructed his Advocate to say, and say repeatedly, that he is concerned with tenancy rights in the deceased's flat and some additional area purchased or not purchased. These are matters of no concern in such a proceeding. I am also at this stage not concerned with the quality or nature of the challenge. The fact is that the 2nd Defendant undoubtedly has a caveatable interest being an heir of the deceased. The moment he enters a Caveat there is a contest to the due execution and attestation of the Will. The statement made on 23rd August 2017 before the Court regarding a division of the estates was dependent upon the statement made and noted in paragraph 4 that the 2nd

Defendant was “ready and willing to act as an Executor of the Will”. Today he is clear before me that he is *not* willing to do this. He repeatedly links executorship to inheritance of tenancy rights although these are in law two entirely different things governed by two entirely different statutes.

9. Ms Gaikwad in fairness points out that she has not filed any formal application for recall or modification of the 23rd August 2017 order. In my view she need not do so. She is quite correct in pointing out that the entire question of converting this Petition from one for Letters for Administration with Will annexed to one for Probate depended on, and only on, the willingness of the 2nd Defendant to act as an Executor; and that necessarily carried with it his duty to withdraw his Caveat and give up his challenge to the Will as also his deletion as 2nd Defendant and his substitution as the Petitioner. Given that he is unwilling to do any of this, and since he has at least twice stated through his Advocate before me that he renounces his executorship that renunciation is accepted. This carries immediate consequences under Section 230 of the Succession Act which clearly states that once a person has renounce executorship he shall not “ever thereafter” apply for a grant under Probate. Further, under Section 141, a legatee who is a named executor cannot ‘take under the Will’ unless he manifests his duty to act as an executor. This the 2nd Defendant has not done. The very filing of a Caveat is sufficient to dislodge an executor from that position. It is well settled that an Executor is an unique position of trust *vis-à-vis* the Testator and has a solemn obligation to carry out the deceased’s wishes in terms of the Will.

10. The 2nd Defendant having filed a Caveat, though that is being withdrawn, has, by filing a caveat to oppose the Will, and by questioning its legality in the Affidavit in Support of the Caveat, renounced his Executorship. It is incongruous and quite untenable that an Executor named in a Will should be allowed to both continue *qua* Executor and yet oppose the very Will that appoints him as such. As I pointed out in the order dictated yesterday, paragraphs 12 and 25 of the 2nd Defendant's Affidavit in Support of the Caveat contains pleadings that the Will in question is illegal and void. The 2nd Defendant cannot be an executor of a Will he himself says is illegal and void.

11. Viewed from either perspective, and given the statement made before me today, the previous order of 23rd August 2017 will necessarily have to stand modified. The present Suit will continue as a contested Suit for Letters for Administration with Will annexed.

12. I will now take up the matter for framing issues and further directions.

13. It needs to be noted that the Petition was originally filed for Letters for Administration with a photocopy of a Will annexed. By the order of 23rd August 2017, the 2nd Defendant, who had the original Will, was directed to deposit it in the registry. That Will has been deposited.

At 3:00 pm

14. At this stage, Mr Tamboly seeks to appear for 2nd Defendant saying that he has been briefed over the lunch recess. I have allowed him to appear. He accepts that in view of what is stated *inter alia* in paragraph 12 and 25 of the 2nd Defendant's Affidavit in Support of the Caveat, the 2nd Defendant cannot possibly continue as an Executor of the Will. In those paragraphs, the 2nd Defendant has on solemn affirmation said more than once that the Will is illegal.

15. The 2nd Defendant is personally present in Court. Before me and while the matter has been discussed 2nd Defendant instructs Mr Tamboly to state that the 2nd Defendant is withdrawing his Caveat. The statement is noted and it is also accepted. The Caveat of the 2nd Defendant is dismissed as withdrawn.

16. This leaves the limited challenge between the Plaintiff and the 1st Defendant, brother and sister. It appears to me that the sister's contest is primarily in regard to alleged tenancy rights. Obviously a tenancy cannot be bequeathed. What this means is that the only other two clauses of consequences in the Will are Clauses 11 and 12. Clause 11 makes a bequest to all three children in equal shares of a flat in Coimbatore. The flat has been sold by the Testatrix in her lifetime. The sale proceeds are obviously part of the estate. That brings us to Clause 12 and here there is a provision for a distribution of the rest of the estate equally between the three children.

17. On seeing this, Mr Yadav for the 1st Defendant seeks time to take instructions since it now appears that the 1st Defendant's continued opposition to the Will cannot be possibly result, even if successful, in her getting more than a one-third share in the residuary estate.

18. List the matter on 14th March 2018.

14th March 2018

19. The matter is at Sr No. 908 today on the supplementary board. It was at Sr No. 24 yesterday on the main board.

20. Today, after taking instructions, the Advocates for both Defendants confirm that 1st and 2nd Defendants are each withdrawing their respective Caveats. These two caveats are dismissed and discharged as withdrawn. The Petition is therefore uncontested and will therefore proceed for grant of Letters of Administration with Will annexed.

21. It is, however, clarified that this order cannot possibly affect the legality or illegality of any bequest purportedly made in the Will. If a bequest is contrary to law or otherwise void, the mere fact that these Defendants have withdrawn their Caveats does not and cannot mean that they have given up or surrendered their contentions in that behalf. The reason is self-evident. Such questions of title to immovable property, or, for that matter, to any property, are never decided in proceedings for Probate or Letters of Administration

with Will annexed. In these proceedings we are concerned with, and only with, proof of the Will in its solemn form, that is to say whether the Plaintiff establishes that the Will was properly executed by a person competent to do so, and the execution of it was attested in the manner required by law. Nothing further is ever tested in such a proceedings.

22. The registry will now proceed with the grant of Letters of Administration with Will annexed.

23. Grant to be issued expeditiously. There is no question of requiring fresh service of citations in view of this order and the forgoing circumstances.

24. All concerned to act on an authenticated copy of this order.

(G. S. PATEL, J)