

Shephali

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
TESTAMENTARY SUIT NO. 20 OF 1986**

IN

TESTAMENTARY PETITION NO. 199 OF 1986

RP Madon & Anr ...Plaintiffs

Versus

MC Nanavati & Ors ...Defendants

WITH

CAVEAT NO. 19 OF 2018

IN

TESTAMENTARY SUIT NO. 20 OF 1986

IN

TESTAMENTARY PETITION NO. 199 OF 1986

Rashna Phiroz Madon ...Plaintiff

Versus

Khorshed Rusi Ghandhy ...Caveator

WITH

CAVEAT NO. 20 OF 2018

IN

TESTAMENTARY SUIT NO. 20 OF 1986

Rashna Phiroz Madon ...Plaintiff

Versus

Dr Eddie Phiroz Bharucha & Ors ...Caveators

Mr Yatin R Shah, *for the Plaintiff.*
Mrs Shivani Khanna, *i/b FZB & Associates, for Caveator No. 1.*

CORAM: G.S. PATEL, J
DATED: 4th April 2018

PC:-

1. The Caveat filed on 2nd February 2018 by Khorshed R Ghandhy appearing in person has been dismissed for non-removal of office objections.

2. The surviving Caveat No. 20 of 2018 also of the same date was filed by Dr Eddie Phiroz Bharucha, Dr Nadir Eddie Bharucha and one Mrs Perin Dubash, all trustees of the Dr Phiroz Cooverji Bharucha Charity Trust, a public charitable trust. There is a supporting Affidavit of the Trustees' Constituted Attorney, one Farrokh Minoo Rustomji. The limited ground taken is this. The deceased, Maki Shiavax Dhanbhoora, was admittedly a tenant of Flat No. 14, 3rd Floor, Hornby View (Gunbow Street), Fort, Mumbai 400 0001, C.S. No. 1867 of the Fort Division. Maki Dhanbhoora died on 8th May 1985 and the Petition propounds a Will said to have been left by her, and which is dated 29th March 1985. A copy of the Will is at Exhibit "A" to the Petition from page 20. Clause 7 of the Will at pages 21 and 22 reads thus:

"7. I am a tenant of the abovementioned flat in the building known as "Hornby View" situate at Gunbow Street, fort, Bombay 400 001 in which I am residing. As I have no children of my own, Rashna Phiroz Madon, the daughter of our neighbours, Dinaz and Homi Kapadia, has

been living since her childhood with me and my husband (and after his death with me) in the said flat as a member of my family. I give devise and bequeath my tenancy rights as also all other my right title and interest whosoever in the said flat to the said Rashna absolutely."

3. It is on account of this purported bequest of the tenancy that the Trustees of Dr Phiroz Cooverji Bharucha Charity Trust have filed a Caveat. This is the limited ground and it is set out in paragraphs 2 and 3 of the Affidavit in Support of the Caveat.

4. On behalf of the Caveators, Mrs Khanna states that the Trustees' only intention is to safeguard their ownership property. She submits that it is settled law that a tenancy is transmitted in accordance with the provisions of the Maharashtra Rent Control Act and can never be the subject of a testamentary bequest. She is correct in this submission. The consequence, inevitably, is that even if the probate is received in Will in question, the so-called bequest of the tenancy will necessarily fail. The tenancy can only devolve or be transmitted in the manner contemplated by the Maharashtra Rent Control Act, in and no other fashion.

5. The consequence of this is that even if the Will receives probate, that probate is and will necessarily be deemed to be given in respect of the Will *without* its clause 7. The reason is self-evident. The probate will operate *in rem* and, therefore, cannot attach to a bequest that is wholly void and must fail. This does not mean that because of the invalidity of a particular bequest the due execution and attestation of the Will cannot be proved or that the remaining

bequests, which may otherwise be valid, cannot take effect. Thus, while probate is always granted to a Will, where the Will contains a void bequest, the probate is always considered in law and held to be granted to a Will without that void bequest.

6. For the purposes of Probate Petition, therefore, the tenancy of this nature cannot be a part of the assets of the deceased. I find that it is included in Item 4 in the schedule of assets at page 27.

7. There is a little point in continuing the Suit as a contested action, because the Trustees do not challenge the making or any facet of the Will or its making. Their challenge is restricted and limited to their interest and they are correct in what they say at least to that extent, although it may be necessary to observe that this would not give them a caveatable interest *per se*.

8. I will proceed to discharge the Caveat with these observations and will also direct an immediate amendment of the schedule of assets to the Petition to delete item 4. That amendment is to be carried out within a week from today, without need of reverification.

9. In this view of the matter, the Petition is uncontested and will proceed to grant of probate. The Suit is, therefore, infructuous.

10. The Registry will ensure when issuing the grant, there is a specific exclusion of clause 7 of the Will.

11. Mr Shah will serve a copy of the amended Petition on M/s FZB & Associates for completeness.

(G. S. PATEL, J)