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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.118 OF 2009
IN
TESTAMENTARY SUIT NO.39 OF 2009
IN
TESTAMENTARY PETITION NO.972 OF 2009

Jyoti V. Bhasin	...Plaintiff
V/s.	
Bimladevi B. Rawal & Anr.	...Defendants

WITH
CHAMBER SUMMONS NO.1510 OF 2017
IN
TESTAMENTARY SUIT NO.39 OF 2009
IN
TESTAMENTARY PETITION NO.972 OF 2009

Krishnadevi G. Rawal	...Deceased
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IN THE MATTER BETWEEN :

Jyoti V. Bhasin	...Plaintiff
V/s.	
Bimladevi B. Rawal & Anr.	...Defendants

WITH
CHAMBER SUMMONS NO.153 OF 2017
WITH
CHAMBER SUMMONS NO.154 OF 2017
IN
NOTICE OF MOTION NO.118 OF 2009
IN
TESTAMENTARY SUIT NO.39 OF 2009
IN
TESTAMENTARY PETITION NO.972 OF 2009

Mrs.Lata Desai with Mr.Salil Dabke I/b Ms.Pallavi Divekar for the Plaintiff.

CORAM : R.D. DHANUKA, J.
DATE : 14TH JANUARY, 2019.

P.C. :-

1. Pursuant to the order dated 19th December, 2018 passed by this Court, the plaintiff has published the notice in two newspapers and has already filed the affidavit of service insofar as the defendant no.2 is concerned. The caveat filed by the defendant no.1 is already dismissed by a separate order passed by this Court. None appeared for the defendant no.2 when the matter was called out. This Court has thus proceeded with the matter after perusing the pleadings filed by both the parties in this Notice of Motion No.118 of 2009 and the affidavit in support of the caveat filed by the defendant no.2 is concerned.

2. By this notice of motion, the plaintiff seeks dismissal of the caveat filed by the defendant no.2 dated 27th March, 2009. The plaintiff claims to be an adopted daughter of Krishnadevi Gulzarilal Rawal. The petition is filed for the Letters of Administration with the Will annexed to the property and credits of the said deceased. The petition was filed in the month of February, 2006. It is the case of the plaintiff that since the defendant no.2 had no caveatable interest of any nature whatsoever, his name was not cited in the said petition for

Letters of Administration. The defendant no.2 however has on his own filed the affidavit in support of the caveat. The testamentary petition was accordingly converted into the testamentary suit. This Court framed the issues on 11th July, 2017. Insofar as this notice of motion is concerned, the defendant no.2 has filed an affidavit in reply dated 5th October, 2009 raising various issues opposing this notice of motion *inter-alia* praying for setting aside the dismissal of the caveat filed by him.

3. Heard Mrs.Desai, learned counsel for the plaintiff and have perused the averments made by the defendant no.2 in the affidavit in support of the caveat, affidavit in reply in this notice of motion and also the records in Petition No.927 of 2006.

4. A perusal of the affidavit in reply filed by the defendant no.2 indicates that the notice of motion is opposed on the ground that the defendant no.2 being the nephew has caveatable interest in the estate of the deceased. The defendant no.2 is the son of the brother of the deceased. The notice of motion is also opposed on the ground that the Deed of Adoption relied upon by the applicant is not proved as per the provisions of law. It is also the case of the defendant no.2 that the plaintiff did not show the name of the defendant no.2 as the legal heir and without citing his name, has filed the petition *inter-alia* praying for Letters of Administration. In paragraph 10 of the affidavit

in reply to the notice of motion, the defendant no.2 has also challenged the title of the deceased in the the flat situated at Sukh Sagar Co-operative Housing Society Limited.

5. Mrs.Desai, learned counsel for the plaintiff submits that since the defendant no.2 did not have any caveatable interest and did not fall in Class – I, the name of the defendant no.2 was not required to be cited in the testamentary petition. Insofar as the issue raised by the defendant no.2 that the plaintiff has not proved the Deed of Adoption is concerned, it is submitted by the learned counsel that the said issue cannot be decided by this Court in this testamentary petition. The defendant no.2 has not filed any separate proceedings challenging the Deed of Adoption propounded by the plaintiff.

6. Insofar as the issue raised in the affidavit in reply that the deceased testator was not the primary owner of the property in Sukh Sagar Co-operative Housing Society Limited is concerned, it is submitted that this Court cannot decide the issue of title in respect of the said property exercising the testamentary jurisdiction. She submits that none of the objections raised in the affidavit in support of the caveat would indicate that the defendant no.2 has caveatable interest to oppose grant of Letters of Administration or in support of the case that caveat is maintainable by the defendant no.2.

7. A perusal of the record indicates that the defendant no.2 does not claim to be Class – I heir of the deceased testatrix. He claims to be a nephew of the deceased testatrix. On the other hand, insofar as the plaintiff is concerned, the plaintiff claims to be an adopted daughter and placed reliance on the Deed of Adoption in the petition filed before this Court. The issue as to whether the petitioner being adopted daughter or not, has not challenged by the defendant no.2 by filing any appropriate proceedings. This Court cannot decide that issue in the testamentary petition.

8. Insofar as the objection of the defendant no.2 that he had caveatable interest is concerned, in my view since the defendant no.2 did not fall in Class – I and there was no other legal heir and next of kin of the deceased falling in Class – I, except the plaintiff, the plaintiff rightly did not cite the caveator or any other person as the legal heir of the deceased testatrix. The defendant no.2 thus has no caveatable interest and thus was rightly not cited. The defendant no.2 thus could not have filed the affidavit in support of the caveat along with the caveat to oppose the petition for Letters of Administration filed by the plaintiff.

9. Insofar as the issue raised by the defendant no.2 that the testatrix was not the absolute owner of the flat situated at Sukh Sagar Co-operative Housing Society Limited is concerned, the

Testamentary Court has no power to decide the title of the property allegedly owned by the testatrix in the testamentary proceedings. Such issue also thus cannot be considered by this Court while considering the affidavit in support of caveat.

10. The plaintiff has thus made out a case for dismissal of the affidavit in support of the caveat as well as the caveat.

11. I therefore, pass the following order :-

a). The Notice of Motion No.118 of 2009 is allowed in terms of prayer clause (a). The caveat as well as the affidavit in support of the caveat filed by the defendant no.2 is discharged. There is no other caveat on record filed by any other party. The testamentary suit is thus required to be proceeded with as uncontested matter. Office is directed to proceed with the matter as uncontested matter expeditiously.

b). In view of the aforesaid order, the interlocutory proceedings filed by the plaintiff i.e. Chamber Summons Nos.1510 of 2017, 153 of 2017 and 154 of 2017 do not survive and are accordingly disposed of.

c). There shall be no order as to costs.

(R.D. DHANUKA, J.)