

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION**

**INTERIM APPLICATION NO. 1304 OF 2019
WITH
INTERIM APPLICATION (L) NO. 36014 OF 2022
IN
CAVEAT (L) NO. 226 OF 2019
IN
PETITION NO. 207 OF 2019**

Mrs. Pramila Shirish Jain ... Applicant

In the matter between :

Kanchan Satish Kriplani ... Petitioner

Versus

Mrs. Pramila Shirish Jain ... Caveator

Neeta Thakurdas Tharani ... Deceased

Mr. Shrey Fatterpekar a/w Anuja Jhunjunwala i/by M Mulla
Associate for the Petitioner.

Ms. Dhara Shah i/by Mr. Satish J. Agarwal for the Applicant/
Caveator.

**CORAM: MANISH PITALE, J.
DATE : 12th MARCH 2024**

P.C. :

. Heard learned counsel for the parties.

2. These two applications have been filed by the proposed caveator in peculiar circumstances. The petition has been filed for grant of probate of Will dated 7th December 2005. The petition is

filed by the executor, who is also the wife of one of the beneficiaries under the Will. As per the Will, the beneficiaries are two nephews of the deceased Neeta Thakurdas Tharani.

3. In the aforesaid petition, the applicant filed caveat on 3rd June 2019 and it was allotted lodging No. 177 of 2019. It is undisputed that the citation was served on the applicant on 24th May 2019 and the caveat was filed on her behalf on 3rd June 2019, which was within the period of fourteen days for filing of caveat prescribed under Rule 401 of the Bombay High Court (Original Side) Rules, 1980 (hereinafter referred to as 'said Rules'). It is also an admitted position that an affidavit in support of the said caveat was placed on record.

4. When it came to light that the aforesaid caveat was defective, in the sense that it was filed under Section 148-A of the Code of Civil Procedure Code, 1908 (CPC) instead of being filed under Form 116 of the aforesaid Rules, the applicant was constrained to file a further caveat on 17th July 2019, allotted lodging No. 226 of 2019. A perusal of the proceedings dated 16th October 2019 of the Addl. Registrar (O.S.), shows that filing of the subsequent caveat on 17th July 2019 was noticed. The proceedings also record that the objections pertaining to the caveats on record were brought to the notice of the advocate for the applicant and thereafter the proceedings were adjourned.

5. Thereafter, the proceedings were adjourned on further occasions for removal of the office objections. It is also a matter of record that as regards the subsequent caveat filed on 17th July 2019, no affidavit in support of the caveat was placed on record.

6. In these circumstances, the applicant filed Interim Application No. 1304 of 2019 for condonation of delay in filing the caveat. In this application, pleadings were completed as reply affidavit and rejoinder affidavit were placed on record.

7. It appears that in the light of the objection taken on behalf of the original petitioner in the said application, the applicant was advised to file subsequent application bearing Interim Application (Lodging) No. 36014 of 2022, wherein, apart from seeking condonation of delay in filing the caveat, the applicant sought permission to file fresh caveat with affidavit in support thereof.

8. Both the applications have come up for consideration before this Court.

9. The learned counsel appearing for the original petitioner has raised objection to the prayers made in the applications by contending that since the initial caveat was defective, having been filed under Section 148-A of the CPC, the second caveat could also not be taken into consideration, as there was no affidavit in support of the subsequent caveat on record. There appears to be

only one affidavit in support of the caveat and that too in support of the initial caveat, which is admittedly a defective caveat and it cannot be taken into consideration by this Court.

10. By relying on Rules 401 and 402 of the said Rules, the learned counsel appearing for the original petitioner submitted that the present applications cannot be considered and that therefore, the applications ought to be dismissed, paving the way for grant of probate as an uncontested proceeding.

11. The learned counsel appearing for the original petitioner relied upon judgment of this Court in the case of ***Asha Shrichand Raheja & Anr. v/s. Purshotam Vishandas Raheja, 2011 (4) Mh.L.J. 230*** and ***Ketankumar Manganlal Sharma v/s. Dahiben Vasantkumar Patel & Ors. (Judgment and Order dated 17th February 2014, passed in Chamber Summons (Lodging) No. 131 of 2013 in Petition No. 466 of 2010).***

12. It is submitted that in the aforesaid judgments, particularly in the case of ***Asha Shrichand Raheja & Anr.*** (supra), this Court dealt with almost identical facts and came to a conclusion that the initial caveat filed under Section 148-A CPC being defective could not be taken into consideration and further that the subsequent caveat could not be acted upon as it was not supported by an affidavit.

13. It was further submitted that reliance placed on behalf of the applicant on the order dated 11th December 2020, passed by this Court in the case of ***Premratan Balkrishna Bhabhda v/s. Madanmohan Narnarayan Bhabhda (Interim Application No. 1348 of 2020 in CTSL No. 203 of 2019 in Testamentary Petition No. 886 of 2019)***, is wholly misplaced, for the reason that the said subsequent order passed by this Court was in ignorance of the two aforementioned judgments passed by this Court. It is submitted that the subsequent order relied upon by the applicant is *per incuriam*.

14. On the other hand, the learned counsel appearing for the applicant submits that this Court may take into consideration the aspect that if the contentions raised on behalf of the original petitioner are to be accepted, technicalities will defeat the cause of justice. It is submitted that the applicant cannot be punished for the mistakes committed by the advocate who filed the initial defective caveat under Section 148-A of the CPC. It is further submitted that under Rules 401 and 402 of the aforesaid Rules, the Court retains the power to condone delay and also to permit filing affidavit in support of the caveat after expiry of eight days, specified in Rule 402 of the said Rules. It was submitted that approach adopted by this Court in case of ***Premratan Balkrishna Bhabhda*** (supra) is an approach advancing the cause of justice and that in the facts and circumstances of the present case also, this Court may consider adopting such an approach and allowing the

applications.

15. It is further brought to the notice of this Court that letters of administration were granted in favour of the applicant, as far back as on 19th June 2017, when Testamentary Petition No.179 of 2017 was allowed. The beneficiaries under the Will, concerning the present petition, have filed a revocation petition bearing Miscellaneous Petition No. 122 of 2018, which is being contested by the applicant, thereby indicating that the parties are already before this Court canvassing their respective stands in respect of the estate of the deceased.

16. It is submitted that the revocation petition was filed on 20th July 2018 and the present probate petition was filed subsequently on 26th November 2018 in respect of the alleged Will dated 7th December 2005. It is submitted that these facts ought to be taken into consideration by this Court, so as to pass an appropriate order in the present applications, facilitating a contest on merits between the parties in the instant petition.

17. This Court has considered the material on record in the backdrop of the submissions made on behalf of the rival parties. It is undisputed that the initial caveat filed on behalf of the applicant under Section 148-A of the CPC was indeed filed within the period of fourteen days prescribed under Rule 401 of the aforesaid Rules, as the citation was served on the applicant on 24th May

2019 and the initial caveat was filed on 3rd June 2019.

18. Upon becoming aware of the fact that the initial caveat was defective as it was filed under Section 148-A of the CPC instead of it being filed under Form 116 of the aforesaid Rules, amends were made on behalf of the applicant by filing the subsequent caveat on 17th July 2019 in the proper form. Both the caveats were allotted lodging numbers by the department.

19. The department also noted the filing of the two caveats and adjourned the proceedings for the applicant to take appropriate steps to remove the office objections. It is also an admitted position that while an affidavit in support of the initial defective caveat was indeed filed, no affidavit in support of the subsequent caveat could be placed on record.

20. In this backdrop, the applicant appears to have been advised to file these two applications i.e. Interim Application No. 1304 of 2019 and Interim Application (Lodging) No. 36014 of 2022. Both the applications pray for condonation of delay in filing the subsequent caveat dated 17th July 2019. The subsequent application also makes an additional prayer for permission to file fresh caveat with affidavit in support of the caveat.

21. The facts and circumstances that come to the fore on the basis of the material brought to the notice of this Court, are that

while the applicant did approach this Court with alacrity to file a caveat in order to raise objection to the grant of probate in respect of the said Will. But, the initial caveat was admittedly filed in a defective manner. This Court is of the opinion that such defective filing has to be attributed to the advocate and it cannot be said to be a mistake or fault on the part of the applicant. Nonetheless, even if the said defective caveat was supported by an affidavit, the same cannot be taken into consideration.

22. The crucial fact is that subsequently on 17th July 2019, the applicant did file a caveat in Form 116 under the aforesaid Rules, which admittedly suffers from delay. The instant two applications pray for condonation of delay in filing the subsequent caveat on 17th July 2019. In view of the fact that the citation was admittedly served on 24th May 2019, there can be no dispute about the fact that the caveat filed in the proper format on 17th July 2019 indeed suffered from delay, as Rule 401 of the aforesaid Rules mandates filing of caveat under Form 116 within fourteen days of service of the citation. The Rule 402 of the aforesaid Rules, mandates filing of the affidavit in support of the caveat within eight days of filing of the caveat.

23. At this stage, it would be appropriate to refer to the aforesaid two Rules i.e. Rules 401 and 402 of the said Rules, which read as follows :

“401. Caveat – Any person intending to oppose the grant of probate or letter of administration shall file a caveat in Form No. 116 within fourteen days from the service of the citation upon him or within such shorter time as the Judge in Chambers may direct. Notice of the filing of the caveat shall be given by the Prothonotary and Senior Master to the petitioner or his Advocate on record. The Judge in Chambers may extend the time to file a caveat, provided the grant has not in the meantime been issued.

402. Affidavit in support of caveat – An affidavit in support of a caveat shall be filed within eight days from the date of the filing of the caveat, notwithstanding the Court vacations. Such affidavit shall state the right and interest of the caveator, and the grounds of the objections to the application. A copy of the said affidavit shall be served by the caveator on the petitioner or his advocate on record. If such affidavit be not filed within the prescribed time, the caveat shall not prevent the grant of probate or letters of administration. No such affidavit shall be filed after the expiry of the said eight days without an order of the Judge in Chambers.”

24. The above quoted Rules, specify the time period within which the caveat is to be filed and the affidavit in support thereof. It is crucial that, both the Rules retain power in the Judge in Chambers to extend the time for filing caveat and also to permit the affidavit in support of the caveat to be taken on record after expiry of the period of eight days from filing of the caveat. Rule 401 of the said Rules indicates that such power can be exercised, provided that the grant has not been issued in the meanwhile. In the present case, it is an admitted position that the probate is yet to be granted. Thus, this Court indeed retains the power available under Rules 401 and 402 of the said Rules.

25. The contention raised on behalf of the original petitioner is based on the judgment of this Court in the case of ***Asha Shrichand Raheja & Anr.*** (supra). A perusal of the said judgment shows that the facts appear to be similar and this Court, while rejecting both the caveats, had reached a conclusion that while the first caveat filed in the defective format could not be considered at all, the second caveat could also not been taken into consideration due to violation of Rules 401 and 402 of the aforesaid Rules. A perusal of paragraphs 9 to 11 indicates the reasoning adopted by the Court, while passing the operative portion of the order in paragraph 15 of the said judgment.

26. This Court has perused the aforementioned portion of the said judgment, but it is found that there is no discussion in the said judgment on the specific power retained in the Judge in Chambers in Rules 401 and 402 of the aforesaid Rules. A perusal of the said judgment also shows that no arguments were raised in that context, as a consequence of which the Court was not called upon to consider the said aspect of the matter. There is indeed no discussion on the exercise of power by the Judge in Chambers for extending the time to file caveat i.e. for condoning the delay in filing caveat and also as to the manner in which the power can be exercised under Rule 402 of the said Rules, for permitting affidavit in support of the caveat to be taken on record after expiry of eight days of filing of the caveat.

27. While considering the facts of the present case, this Court is inclined to hold that the distinguishing feature is the specific contention raised on behalf of the applicant before this Court in the present case with regard to the manner in which the power retained in the Judge in Chambers is to be exercised under Rules 401 and 402 of the aforesaid Rules. The subsequent judgment in the case of ***Ketankumar Manganlal Sharma*** (supra) also does not discuss the aforesaid aspect of the matter. Reference is indeed made to Rule 401 of the aforesaid Rules, but there is no specific discussion in the manner in which the Judge in Chambers is to exercise the power that is retained in both Rules 401 and 402 of the aforesaid Rules.

28. The subsequent order passed by this Court in the case of ***Premratan Balkrishna Bhabhda*** (supra) indeed makes no reference to the earlier two judgments and in that sense the learned counsel appearing for the original petitioner may be justified in contending that the efficacy of the view adopted in the said subsequent order is diluted due to lack of reference to the earlier aforementioned judgments. Yet, the approach adopted in the said order in the case of ***Premratan Balkrishna Bhabhda*** (supra) indicates that Court has placed emphasis on the purpose of the power retained with the Judge in Chambers under Rules 401 and 402 of the aforesaid Rules, rather than emphasising on technicalities. In fact, while permitting the applicant/caveator therein to withdraw an earlier affidavit filed in the caveat, permission was granted to file a fresh

caveat with a further permission to file affidavit in support thereof within eight days.

29. This Court is of the opinion that the testamentary Court being a Court of conscience ought to exercise powers retained with the Judge in Chambers in Rules 401 and 402 of the aforesaid Rules to further the cause of justice.

30. Adopting a hyper-technical approach, which would result in preventing a party from placing its case before the Court would result in such a party being non-suited at the threshold, which certainly will not further the cause of justice.

31. Additionally, this Court finds that the parties are already locked in a battle in a petition filed for revocation of grant of letters of administration issued in favour of the applicant, as far back as on 19th June 2017. The beneficiaries under the subject Will, of which probate is sought in the present petition, have filed the Miscellaneous Petition for revocation, which is being contested on merits by the applicant herein. These circumstances also bring in a feature for distinguishing the present case from the case of *Asha Shrichand Raheja & Anr.* (supra), wherein this Court had held against the applicant/caveator. In any case, as noted herein above, there is no discussion in the said judgment on the powers retained by the Judge in Chambers under Rules 401 and 402 of the said Rules for condoning delay in filing caveat and for

directing acceptance of the affidavit in support of caveat after expiry of eight days.

32. In the facts of the present case, this Court is convinced that rejecting the applications filed by the applicant would amount to giving primacy to hyper-technicality over a judicious approach for ensuring a fair opportunity to the applicant to place her objections in the testamentary petition. This Court is not commenting upon the merits of the claims made on behalf of the applicant, but in the facts of the present case, she certainly deserves an opportunity to place her objections before this Court.

33. In a sense, filing of the subsequent application i.e. Interim Application (Lodging) No. 36014 of 2022 is superfluous and the second prayer in the said application can certainly not be granted. But, here again it is found that the applicant appears to be suffering due to the manner in which the advocates have handled her case of filing caveat and raising objections to the present petition. From the very beginning, although, the applicant did act with alacrity and filed caveat within the period of fourteen days prescribed in Rule 401 of the aforesaid Rules, her advocate committed a mistake in filing the caveat under Section 148-A of the CPC, instead of filing the same under Form 116 of the aforesaid Rules. The series of mistakes appear to have continued in the form of filing the aforesaid subsequent application, despite the fact that an application was already on record seeking

condonation of delay in filing the subsequent caveat dated 17th July 2019.

34. In view of the above, both the applications are partly allowed. The delay in filing caveat dated 17th July 2019 bearing Lodging No. 226 of 2019 is condoned and the caveat is directed to be taken on record. Consequently and in the interest of justice, this Court further exercises power under Rule 402 of the said Rules to grant permission to the applicant to file affidavit in support of the caveat within eight days from today. If the applicant fails to file such affidavit, the order passed today shall stand recalled without reference to the Court.

35. The Applications stand disposed of.

BIPIN DHARMENDER
PRITHIANI

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Date: 2024.03.15 10:38:42 +0530

MANISH PITALE, J.