
(2018) 08 BOM CK 0019

In the Bombay High Court

Case No : Notice Of Motion No. 28 Of 2018, Testamentary Suit No. 8 Of 2016,
Testamentary Petition No. 186 Of 2015

Bindia Kripalani And Anr

APPELLANT

Vs

Pushpa Hemraj Bhakiya And Ors

RESPONDENT

Date of Decision : 06-08-2018

Acts Referred:

Indian Succession Act, 1925 — Section 213, 218, 222
Code of Civil Procedure, 1908 — Section 114

Citation : (2018) 08 BOM CK 0019

Hon'ble Judges : G.S.Patel, J

Bench : Single Bench

Advocate : Pooja Khandeparkar, Khushnuma Khan, Asadullah, HV Kumarswami

Final Decision : Dismissed

Judgement

1. This Notice of Motion requires more explanation than it deserves. The three Applicants Naresh Nathulal Pal, Pushpa Hemraj Bakhiya and Hemraj

Gangasai Bakhiya are not related either to Balakrishna Ladhmal Chhabda (â?? Balakrishnaâ??), the first of the two deceased persons, or his daughter

Urvashi Balakrishna Chhabda (â??Urvashiâ??). They were the Chhabda familyâ??s servants.

2. It seems that Balakrishna died leaving a Will dated 28th September 2010. His executors, one Rakesh Kumar Jhunjhunwala and Bindia Kripalani

sought Probate to that Will. In his Will, Balakrishna said that his daughter, Urvashi, unmarried, was unable to look after herself. The Will said that she

suffered from severe mental health conditions. She was the sole legatee of his entire estate. The Will placed the responsibility on the executors: if two

doctors certified to Urvashiâ??s capability, the executors and trustees of Balakrishnaâ??s estate and Will would hand over the corpus of his estate

and all accretions to her. The Testamentary trust would thus then end. Urvashi herself filed a Testamentary Petition No. 1645 of 2013 seeking Letters

of Administration without Will annexed claiming to be the sole heir and therefore solely entitled to her father's, Balakrishna's, estate.

3. The two matters were listed together on 13th October 2014 when, and I say this with great responsibility, matters took an exceedingly strange turn.

Neither Petition was contested. Neither Petition was being tried. There were no Defendants. There were no caveats. No issues had been framed.

The learned Single Judge thought it fit to consider which of these two claims, i.e. the one for Probate or the one for Letters of Administration as on

intestacy should be preferred. Urvashi was subjected to a medical examination under some previous orders and those reports were read into the

matter by the Court. Then the Court put some questions to Urvashi. She was given some stationery and made to write out some material. On this the

Court came to the conclusion that she was a person of truth as also a person in knowledge of the estate of the deceased; and that her firmness in

wanting to deal with properties herself was brought out â??loud and clearâ?? before the Court. As both Petitions covered the same estate, they

seemed to have been jurisprudentially telescoped in a manner that I think is not only completely impermissible but renders vulnerable the order itself as

being per incuriam and contrary to the provisions of the Indian Succession Act, 1925 (not one of which is noted in the order). To begin with Section

213 provides that no right as an executor or legatee can be established in any Court of Justice unless a Court of competent jurisdiction has granted

probate of the Will under which the right is claimed or granted. Section 218 provides for persons to whom administration may be granted on intestacy.

Section 222 provides for grant of probate only to executor appointed under the Will. Thus, if Urvashi wanted to contest the Will â?" and she

undoubtedly had a caveatable interest â?" she ought to have filed (or been allowed to file) a caveat to oppose the Probate Petition. Indeed, on the

Court's finding that she was â??capableâ?? and a â??person of truthâ??, this was the only option available to the Court. Instead, the Court

summarily dismissed the Probate Petition on the ground that since the executors did not claim any part of the estate therefore the Probate Petition

would stand dismissed. Letters of Administration were thus directed to be issued to Urvashi.

4. There are very many things in this order that in my view simply could not have been done. A Will disrupts the normal line of succession; otherwise we would have no need for it. The fact that it did not in this case is irrelevant. In the scheme of the Succession Act, Probate is accorded a preferential status, for this very reason. Further, title passes through the executor. It is the duty of the executor to apply for Probate of the Will of which he or she is appointed as such. Letters of Administration simpliciter proceed on the basis of intestacy, i.e. that there is no Will. Where there is a contest between a Petition for Probate or Petition for Letters of Administration, the Petition for Letters of Administration cannot be decided nor can a grant be issued unless the Petition for Probate is dismissed, i.e., the Will is not proved in its solemn form. This may happen on default or after trial; that makes no difference. A Probate Petition blocks a petition for Letters of Administration. On its own the Probate Petition in question would have proceeded departmentally to a grant, since none opposed it. Under no circumstances therefore, until the Testamentary Petition for Probate was disposed of in accordance with law, could the Petition for Letters of Administration have been taken up; and since the Probate Petition was bound to result in a grant, the Testamentary Petition for Letters of Administration had to be dismissed as a matter of routine course. It was emphatically not for the Court to decide which of the two petitions should be preferred. The testamentary court has no such discretion at all. It was for the deceased who made the Will to decide how and in what circumstances his estate would devolve. The role of the Court was to ensure that Probate was granted to that Will in the manner required by law upon Probate being sought.

5. The 13th October 2014 order must be held not to be good law, not reflecting the correct legal position, contrary to the Indian Succession Act, and therefore not dispositive of Urvashi's petition for Letters of Administration. That order does not contain any finding that the Will has not been proved, or that it has been disproved. It simply defenestrates the Probate Petition because it was thought to be less preferable.

6. Regrettably, the entire procedure adopted was one unknown to either the Succession Act or our Rules. In the absence of a Caveat, there was no question of putting any questions to any party. This came dangerously close to the Court entering a caveat of its own and perhaps even stepping into

the arena, something that no Court should ever do especially in matters of evidence. It is an elementary principle of the rule of law that judges who

preside over trials, civil or criminal, never enter the arena.Â Mr Justice Benjamin Cardozo in â??The Nature of the Judicial Processâ?? said:2

â??The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of

his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague

and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to

â??the primordial necessity of order in the social lifeâ??.â??

7. The reason this becomes necessary is because of the submission made today on behalf of the Applicants in the Motion that since the Probate

Petition has been dismissed, the Will stands â??disprovedâ??. This is incorrect. The present Plaintiffs, Bindia Kripalani and Preeti Chhabda, the two

paternal nieces of Balakrishna have filed Testamentary Petition No. 186 of 2015 seeking Letters of Administration with Will annexed in respect of

Balakrishnaâ??s Will. Two different sets of Caveats were entered. One set was filed by Urvashiâ??s maternal aunts and uncles. One of those

Caveats was dismissed by KR Shriram J by an order dated 29th March 2017. The other two Caveats were withdrawn. In the meantime Bindia

Kripalani and Preeti Chhabda filed three Notices of Motion Nos. 95 of 2016, 97 of 2016 and 98 of 2016 to discharge the Caveats filed respectively by

Naresh, Hemraj and Pushpa, the three present Applicants. All those Notices of Motion were before me on 7th June 2016. I allowed all three Notices

of Motion and dismissed all three caveats. The consequence was that Bindia and Preetiâ??s Petition for Letters of Administration with Will annexed

to Balakrishnaâ??s estate proceeded without opposition to a grant.

8. Ms Khandeparkar points outs that the Testamentary Petition No. 186 of 2015 was indeed finally disposed of: Letters of Administration with Will

annexed in respect of the last Will of Balakrishna were issued to Bindia and Preeti. That grant is dated 13th October 2017. It has not been revoked or

cancelled at any time. That order has attained finality. Nothing further therefore requires to be done in that regard.

9. Now matters become truly sinister, and show us why the 13th October 2014

order ought never to have been made. Urvashi herself died on 9th

November 2014. She is supposed to have made a Will dated 27th May 2014. This is titled as an Affidavit-cum-Declaration and there are apparently

three beneficiaries of this Will. I find myself not very greatly surprised to learn that those three beneficiaries are none other than Naresh, Hemraj and

Pushpa, the present Applicants, all three said to be servants in Balakrishna's household. These three persons have filed Testamentary Petition No.

224 of 2017. To this Bindia and Preeti have entered Caveats and this will now be tried as Testamentary Suit No. 174 of 2017. I will not comment any

further on it except to direct the Registry that there is to be no departmental grant without a specific order of the Court in that matter.

10. What these three persons today seek is that my order of 13th June 2016 dismissing their Caveats in Bindia and Preeti's Petition for Letters of

Administration with Will annexed to Balakrishna's Will and subsequent order of 28th June 2017 passed by the Prothonotary and Senior Master

both be recalled and set aside. Against my order of 7th June 2016, the Applicants filed an Appeal. They withdrew it. This is therefore a Motion in the

nature of a review. There are no grounds for review whether under Order 47 or Section 114 of the CPC. All that the Prothonotary and Senior Master

has said is that the Petition is required to be placed before the Court for directions and nothing further. This is not a ground to reject it.

11. The only argument canvassed is that the order of 13th October 2014 operated as a finding that Balakrishna's Will was 'not proved'.

That is incorrect. There was no such finding and, in any case, as I have observed, that order cannot be said to have been one that properly and

lawfully disposed of either the initial Testamentary Petition for probate to Balakrishna's Will or Urvashi's petition for Letters of

Administration. That order was wholly without jurisdiction and is a nullity; no testamentary court had the jurisdiction to unilaterally reject a probate

petition and to prefer one for Letters of Administration instead. As I have observed, there was no decision on merits regarding Balakrishna's Will

at any time. The previous order of 13th October 2014 did not address the due execution and attestation of the Will at all. It only found that since the

beneficiary under the Will was the sole legatee and heir of the deceased therefore the Will could be put to one side, the application for the Probate

could legitimately be ignored or dismissed, and intestate succession be preferred, and this, as I have noted, was entirely without the support of statute

or precedent. Indeed, if this is the approach to be adopted then any objective standard that we may have for assessing the due execution of a Will is

rendered meaningless.

12. In any case, that issue is now entirely otiose, for Bindia and Preeti have in their hands a grant of Letters of Administration with Will Annexed in

respect of Balakrishna's Will, and that has never been revoked. There is no challenge to it; and even if there was, it is now redundant, Urvashi

having passed on. What remains now, therefore, is the contest regarding Urvashi's estate; and, since she was Balakrishna's only heir, her

estate encompasses the whole of Balakrishna's estate.

13. The present Notice of Motion stands dismissed.

14. In the facts and circumstances of the case there will be no order as to costs.

15. List Testamentary Petition No. 174 of 2017 filed in respect of Urvashi's alleged Will for framing issues on 28th August 2018.