

(2013) 10 BOM CK 0009

In the Bombay High Court

Case No : Chamber Summons No. 113 of 2012 in Suit No. 78 of 2012 in Petition No. 561 of 2012, and Suit No. 78 of 2012, Petition No. 78 of 2012 and Suit No. 93 of 2012 in Petition No. 470 of 2011

Mrs. Florie Lawrence D'Souza and Mrs. Prema Steve
Gosciminski

APPELLANT

Vs

Mrs. Nirmala Patrick Bergen

RESPONDENT

Date of Decision : 01-10-2013

Acts Referred:

Citation : (2013) 10 BOM CK 0009

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : Gaurang Mehta, in Chamber Summons No. 113 of 2012 in Petition No. 561 of 2012, Ms. Meenaz Merchant, instructed by H.G. Ganatra, in Testamentary Petition No. 470 of 2011, for the Appellant; Meenaz Merchant, instructed by . H.G. Ganatra, in Respondent/Caveator No. 561 of 2012, for the Respondent

Final Decision : Allowed

Judgement

R.D. Dhanuka, J.—By this chamber summons, plaintiff/petitioner in suit no. 78 of 2012 seeks dismissal of the caveat dated 21st June, 2012 filed by the caveator Ms. Nirmala Patrcik Bergen and permission to proceed with the petition and obtain grant of probate of the last Will and testament dated 17th December, 1999 of the deceased Mrs. Florie Lawrence D'Souza. Mr. Mehta, learned counsel appearing for the petitioner submits that affidavit in reply is served upon the petitioner's advocate by the caveator respondent now and petitioner be permitted to proceed on the basis of denial. Permission is granted. Some of the relevant facts emerge from the pleadings, for the purpose of deciding these proceedings are summarized as under:-

2. On 23rd June, 2008, Mrs. Florie Lawrence D'Souza expired (hereinafter referred to as the said deceased). She had executed her last Will and Testament

dated 17th December, 1999. The said deceased left behind her four daughters and one son. By the said Will, the said deceased appointed two of her daughters as executrices who are the petitioners in petition (561 of 2012). The residuary legatees under the said Will were four daughters of the said deceased.

3. By a letter dated 9th July, 2012 the caveatrix (Mrs. Nirmala P. Bergen) through her advocate addressed to all the legal heirs including executrices appointed under the Will of the said deceased requested the executrices to take steps for obtaining probate of the Will of the said deceased.

4. By letter dated 30th August, 2010, petitioner no. 2, one of the executrix through her advocate informed the caveatrix that she was aware of her duties and responsibilities as an executrix of the Will of the deceased and she shall discharge the same at the appropriate time and place.

5. Vide letter dated 16th December, 2010, the caveatrix through her advocate alleged that the petitioner no. 2 had renounced her rights as an executrix to probate the subject Will of the deceased and requested to produce the original Will of the deceased to enable her to take appropriate proceedings in respect of the said Will.

6. Vide letter dated 7th January, 2011, the petitioner no. 2 through her advocate denied that she had renounced her right as an executrix to probate the Will of the deceased.

7. Vide letter dated 16th February, 2011, the caveatrix through her advocate once again reiterated that from the conduct of petitioner no. 2, it was apparent that she had renounced her right as executrix for the purpose of obtaining probate and once again requested for handing over original Will to enable the caveatrix to take out necessary proceedings in respect of the said Will. It is the case of the petitioners that though it was to the knowledge of the caveatrix that petitioner no. 1 resided at USA, the said letter was sent to the petitioner no. 1 at Bandra address of the deceased.

8. On 18th March, 2011, the caveatrix filed testamentary petition (470 of 2011) in this court inter alia praying for letters of administration with Will annexed. It was averred in the said petition that the executrices had failed and neglected to take up proceedings for probate of the said Will of the said deceased or to renounce their rights as executrices and to handover the original Will to the caveator herein. In the said petition filed by the caveatrix, petitioners were described as executrices.

9. On 23rd June, 2011, the caveatrix filed praecipe through her advocate before the Prothonotary and Senior Master to issue citation upon the petitioners to accept or renounce executorship of the last Will of the said deceased. It is not in dispute that the special citation has not been served upon the petitioners so far for seeking renouncement under the provisions of Section 229 of the Indian Succession Act, 1925.

10. On 5th March, 2012, petitioner no. 1 herein filed testamentary petition (561/2012) as executrix inter alia praying for probate of the last Will of the said deceased. Petitioner no. 2 was subsequently added as petitioner no. 2 to the said petition. The other legal heirs of the said deceased filed their consent affidavits in the said testamentary petition no. 561 of 2012.

11. On 21st June, 2012 and 26th June, 2012, the caveatrix filed her caveat and affidavit in support in testamentary petition no. 561 of 2012. Petitioner filed this chamber summons on 9th August, 2012 inter alia praying for dismissal of the caveat dated 21st June, 2012.

12. This court has clubbed both the petitions filed by the parties i.e. Testamentary Petition no. 470 of 2011 and Testamentary Petition No. 561 of 2012 which are filed by respondent/caveatrix and the petitioners herein respectively and are converted into suits.

13. Mr. Mehta, learned counsel appearing for the petitioners invited my attention to the caveat and affidavit in support filed by the caveatrix. Learned counsel also placed reliance on section 222 of Indian Succession Act, 1925 and submits that probate can be granted only to the executor appointed by the Will. Reliance is placed on section 229 of the Act and is submitted that When a person appointed as an executor has not renounced the executorship, letters of administration shall not be granted to any other person until a citation has been issued, calling upon the executor to accept or renounce his executorship. It is submitted that since special citation has not been served upon the petitioners and in any event since the petitioners have refused to renounce the executorship as is apparent from the correspondence and the petitioners themselves have filed testamentary petition inter-alia praying for probate, letters of administration cannot be issued in favour of the executrix herein.

14. Learned counsel for the petitioners placed reliance on section 230 and 231 of the Act that renunciation by executor can be done only as per section 230 and 231 of the Act. It is submitted that neither the petitioners have renounced the executorship orally in presence of the judge nor by a writing signed by the petitioners.

15. Reliance is placed by the learned counsel for the petitioners on section 232 in support of his submission that respondent being not a residuary legatee is not entitled to seek letters of administration. Reliance is placed on section 234 in support of the submission that the beneficiary is entitled to seek letters of administration only if there is no executor, residuary legatee or representative of a residuary legatee, or he declines or is incapable to act, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate. It is submitted that in this case none of these conditions are satisfied to enable the caveatrix who is one of the beneficiary under the said Will to be granted letters of administration by this court. Learned counsel placed reliance upon section 235 of the Act in support of

his submission that legatee other than an universal or a residuary legatee, until a citation has been issued and published in the manner setout therein, no letters of administration can be issued to any legatee.

16. Mr. Mehta, learned counsel for the petitioners placed reliance on sections 237 and 239 of the Act and would submit that if a will has been lost or mislaid since the testator's death, or has been destroyed by wrong or accident and not by any act of the testator, and a copy or the draft of the will has been preserved, probate may be granted of such copy or draft, limited until the original or a properly authenticated copy of it is produced. It is submitted that in view of section 239, since the original of the Will of the said deceased exist and has been already filed by the petitioners in this court, letters of administration cannot be issued on the basis of the photocopy claimed to have been preserved by the caveatrix.

17. Learned counsel placed reliance on Rules 417 and 418 of the Bombay High Court (Original Side) Rules and submits that unless every person entitled to the general grant has consented or renounced or has cited and has failed to appear, limited grant cannot be issued. It is submitted that limited grant cannot be issued to a person who is entitled to general grant of administration to the property of the deceased. Learned counsel submits that since the original of the Will in question is available, exist and has been already filed limited grant cannot be made available. It is submitted that if there was no executor appointed by the Will, beneficiary could have filed a petition for letters of administration and would have been eligible for general grant and not limited grant. It is submitted that in this case executors have filed this petition and have produced original of the Will, question of granting any limited grant by this court did not arise.

18. On the maintainability of the caveat filed by the caveatrix, Mr. Mehta submits that one of the ground for opposing grant in favour of the petitioners is that the petitioners are deemed to have renounced their rights as executors and the other grounds raised is that they have not taken appropriate and prompt steps to safeguard interest of the estate by coming forward to file petition.

19. Mr. Mehta, learned counsel would submit that by correspondence, petitioners had repeatedly informed the respondent that they had not renounced their rights as executrices and have taken prompt steps to file probate petition. It is submitted that as far as other ground raised in the affidavit in support of the caveat that the petitioners have not taken prompt steps is also incorrect. It is submitted that since Will executed by the deceased is not in dispute and the petitioners who were appointed as executors by the said deceased is not in dispute and since the original Will is produced in this court which is not in dispute, there is no dispute about the authenticity and genuineness of the Will which is the only question which testamentary court can go into while exercising testamentary jurisdiction. It is submitted that thus there is no other issue which remains to be decided by this court in the testamentary petition filed by the petitioners. It is submitted that respondent is thus not entitled to maintain

caveat on these grounds and is not entitled to file petition for letters of administration in view of there being no dispute about Will and about appointment of the petitioners as executrixes and the petitioners already filed petition for probate and having filed original Will in this Court.

20. Ms. Merchant, learned counsel appearing on behalf of the caveatrix on the other hand submits that by various letters addressed by the caveatrix, petitioners were called upon to take prompt steps to file probate petition and to produce original of the Will annexed, the petitioners however did not take prompt steps and were demanding payment of court fees and advocates' fee. It is submitted that since petitioners did not come forward and filed petition for probate, caveatrix were required to file petition for letters of administration with Will annexed in this court. It is submitted that petition filed by the caveatrixes in this court is not for limited grant but is for general grant. It is submitted that since the conduct of the petitioners is not in the interest of the beneficiary, such executrixes cannot be allowed to continue to act as executrixes and to pursue petition filed by them. It is submitted that thus the petition filed by the caveatrix be permitted to be pursued and chamber summons and the petition filed by the petitioners herein be dismissed.

21. Both parties have referred to their respective petitions. Since learned counsel for parties addressed this court in all the three matters, which are interconnected, I have taken both the petitions also on board, perused the pleadings and documents and have decided all the three matters including the respective petitions filed by both parties.

22. On perusal of the records produced by both the parties for perusal of this court, it is clear that the petitioner in petition no. 561 of 2012 and petitioner in petition no. 470 of 2011 are propounding the same Will of the deceased. On perusal of the correspondence and the praecipe filed by the caveatrix, it is clear that appointment of the petitioners as executrixes is not in dispute. Respondent had in fact filed a praecipe for issuance of summons upon the petitioners for calling upon them to renounce their executorship. Even in the correspondence, the respondent's case is that the petitioners were not acting in the interest of the beneficiary and had deemed to have renounced their rights as executrixes. It is thus clear that the appointment of the petitioners as executrixes of the Will is not in dispute. Correspondence indicates that the petitioners have denied the allegations of the caveatrix that the petitioners had renounced their rights as executrixes. On the contrary the petitioners have filed this petition by exercising their rights as executrixes on 5th March, 2012.

22. On bare reading of section 222 of the Indian Succession Act, 1925, it is clear that if the executors are appointed of the Will by the deceased testator and such executors have not renounced their executorship, probate can be issued by the court only to the executors appointed by the Will and not to the beneficiary. It is clear that both the executrixes appointed by the Will are pursuing this petition as executrixes. None of the petitioners have renounced the executorship and thus in

view of section 229 of the Act, letters of administration cannot be granted to the beneficiaries. In my view, respondent being not a residuary legatee is not entitled to seek letters of administration in view of section 232 of the Act.

24. As far as issue as to whether caveatrix who has filed a separate petition for letters of administration with Will annexed can be issued a general grant or not, on perusal of the record, it is clear that there was no dispute that the original of the Will was in custody of the petitioners. Respondent had called upon the petitioners to submit original Will. It is not in dispute that the petitioners have already lodged original Will with the Prothonotary and Senior Master of this court and the same is in custody of this court.

25. Perusal of the record also indicates that in the first notice issued by this court, caveatrix was directed to obtain necessary order from this court to proceed with photocopy of the Will in question and to seek permission to proceed with petition for limited grant and to get the original deposited in this court with the Prothonotary and Senior Master. It is not in dispute that no such application has been made by the caveatrix before this court for permission to proceed with the photocopy of the Will in question and for an order against the petitioners to deposit the original Will in this Court. In this situation, on conjoint reading of sections 237 and 239 of the Act, in my view respondent cannot be issued limited grant in view of the original Will having been already filed in this court by the petitioners. Petitioners have already filed petition for probate in this Court in respect of the same Will of the deceased.

26. As far as issue raised by Mr. Mehta, learned counsel appearing for the petitioner that caveat filed in this proceedings by the caveatrix itself is not maintainable on the ground that there is no dispute about the execution, genuineness and authenticity of the Will is concerned, on perusal of the affidavit in support of the caveat, it is clear that there is no dispute about the genuineness, execution, attestation and authenticity of the Will in question. The respondent caveatrix herself has filed separate petition for letters of administration of the same Will annexed. There is thus no other issue remained to be decided in the petition (560 of 2012) filed by the petitioners for probate.

27. As far as grounds raised in the affidavit in support that the petitioners have renounced their executorship or deemed to have renounced their executorship is concerned, perusal of the record would indicate that the petitioners had denied such allegations made by the respondent in the correspondence itself. The petitioners have thereafter filed this petition inter alia praying for probate of the last Will and Testament of the said deceased. No steps are taken by the respondent to serve special citation on the petitioners to renounce executorship. Learned counsel appearing for the petitioners submit that petitioners have taken prompt steps to file this petition for probate and would pursue it properly and would not renounce their executorship. Statement is accepted. Second issue raised in affidavit in support of the caveat is that petitioners are not acting in the interest of the beneficiaries and are acting fraudulently. In my view, caveat

cannot be maintained on such allegation. If the beneficiary does not find the act of the executrixes in accordance with the provisions of the Indian Succession Act, 1925 or not in compliance with the directions of the testator in the Will, beneficiary would have independent remedy for removal of such executrixes. In my view, both the grounds raised in the affidavit in support of the caveat are not the grounds on which the caveat can be maintained. Testamentary court has to decide whether Will was validly executed and attested and whether deceased was of sound and disposing mind when Will was executed. There is no such dispute raised by the caveatrix in this matter. Caveat thus filed by the caveatrix and the petition for letters of administration filed by the caveatrix thus deserved to be dismissed and petition for probate deserves to be granted.

28. For the reasons aforesaid, I pass the following order:-

- (a) Chamber Summons No. 113 of 2012 filed by the petitioner is allowed.
- (b) Caveat dated 21st June, 2012 filed by the caveator is dismissed.
- (c) As a result of dismissal of the caveat and for the reasons rendered aforesaid, the caveatrix cannot be issued even limited grant, the testamentary petition no. 470 of 2011 filed by the caveatrix is dismissed.
- (d) Office is directed to proceed with the petition no. 561 of 2012 and issue probate on compliance with all other procedure.
- (e) No order as to costs.
- (f) Drawn up order of this order passed by this court dismissing the caveat is dispensed with.

On the oral application of the learned counsel for the caveatrix, operation of this order is stayed for a period of eight weeks.