

(2014) 12 BOM CK 0070

In the Bombay High Court

Case No : Notice of Motion No. 42 of 2012 in Testamentary Suit No. 74 of 2012
in Testamentary Petition No. 1196 of 2011

Prashant Gopal Gokhale

APPELLANT

Vs

Manasi Shyamsunder Kelkar

RESPONDENT

Date of Decision : 03-12-2014

Acts Referred:

Hindu Succession Act, 1956 — Section 11, 8, 8(b), 9

Citation : (2015) 1 BomCR 270

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

Bench : Single Bench

Advocate : Swati P. Gautam, Advocate for the Appellant; Suresh More, Advocate for the Respondent

Judgement

G.S. Patel, J.—This is the Plaintiff's Notice of Motion for dismissal of a Caveat filed by one Manasi Shamsunder Kelkar on 24th November 2011.

2. The Motion itself has a chequered history. It was first dismissed on 21st January 2014. Mr. Justice Dhanuka held that since the Caveat was filed by the widow of a brother of the testator, the brother having died before the testator, the Caveatrix had a cavetable interest. The other heirs cited are the deceased testator's sisters.

3. The matter was carried in appeal. It seems that before the Appeal Court points were not urged before the learned single Judge were argued including inter alia that one of the properties dispute is tenanted; that tenancy rights cannot be bequeathed; and therefore the Caveatrix was entitled to sustain the Caveat. Paragraphs 4 and 5 of the Appeal Court read as follows:

4. It appears that the contentions raised by the learned counsel on either side were not raised before the learned Testamentary Judge. Hence, we set aside the order dated 21 January 2014. The Notice of Motion No. 42 of 2012 will be restored before the learned Testamentary Judge and will be heard afresh and

decided in accordance with law after considering all contentions available to the parties.

5. The appeal is accordingly allowed in the aforesaid terms without expressing any opinion on the merits of controversy between the parties. All contentions are kept open.

4. It seems to me clear from a reading of the Appeal Court's order that the Appeal was not decided on merits at all. All contentions were, in fact, expressly kept open. It was only because points were raised before the Appeal Court that were not reflected in the order of the learned single Judge that the matter was remanded. This is how the Notice of Motion comes up for hearing and final disposal today.

5. One Sudhakar Dattatray Kelkar ("Sudhakar") died in Mumbai on 21st December 2010. He is said to have left a Will dated 13th December 2010. Sudhakar was a bachelor. A Petition for probate of that Will was brought by the executor named in it, one Prashant Gopal Gokhale. In the Petition, Sudhakar's three sisters, Nilima Prabhakar Khare, Neela Narhari Pethe and Vaishali Vasant Gadre, were cited as Sudhakar's heirs and next kin.

6. A Caveat was filed by one Manasi Shyamsunder Kelkar ("Manasi") on 24th November 2011. She has filed an Affidavit in Support of her Caveat. Manasi is the widow of one Shyamsunder Dattatray Kelkar ("Shyamsunder"), Sudhakar's brother. Shyamsunder died before Sudhakar. Had Shyamsunder been alive, he would undoubtedly have been an heir of the Sudhakar as well. The submission therefore is that Shyamsunder's widow succeeds to Shyamsunder's interest in Sudhakar's estate. Indeed, it is on this basis that the learned single Judge was earlier persuaded to dismiss the Notice of Motion.

7. But Mr. More on behalf of Manasi takes an additional plea as well. He submits that under Clause 8 of the Will in question, Sudhakar purportedly made a bequest of his share in an immovable property that is admittedly tenanted i.e. Rooms No. 3 and 4, Madhavwadi, Central Bungalow, Dadar, Mumbai 400 014. Mr. More submits that any such bequest is illegal and void, and that it is settled law that a tenancy can only be inherited; it cannot be the subject matter of a bequest. There can be no quarrelling with that proposition. It is undoubtedly the correct position in law.

8. Mr. More is, however, in error in his submission, one that I believe is somewhat more than merely fantastic, that a probate decides questions of title. He cites no authority in support of this proposition. He cannot. That law has been settled for several decades, 9. Mr. More's submission, therefore, that should Probate be granted, Manasi, who is in occupation of his tenanted property, will be evicted is entirely without substance. Manasi's rights, whatever they may be, over the tenanted premises remain unaffected by the grant of Probate. The probate itself cannot cause her eviction. Her rights to the tenanted property must be established by a court of competent jurisdiction in a properly brought

proceeding. These cannot be decided by the Probate Court. Indeed, they cannot be decided by the High Court. The submission that the Appeal Court has "required" the Probate Court to decide the questions of Manasi's tenancy is entirely misplaced and unsustainable.

10. Similarly any claim that Manasi may have in any other properties are also unaffected by the grant of probate. Her claims to title to any property are not decided in probate proceedings.

11. This leaves the question of whether the Caveatrix has any caveatable interest whatsoever in the property. Mrs. Swati Gautam, learned advocate for the Petitioner, draws attention to Sections 8, 9 and 11 of the Hindu Succession Act which read as follows:

8. General rules of succession in the case of males.- The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter:-

- (a) firstly, upon the heirs, being the relatives specified in Class I of the Schedule;
- (b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;
- (c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and
- (d) lastly, if there is no agnate, then upon the cognates of the deceased.

9. Order of succession among heirs in the Schedule.- Among the heirs specified in the Schedule, those in class I shall take simultaneously and to the exclusion of all other heirs; those in the first entry in class II shall be preferred to those in the second entry; those in the second entry shall be preferred to those in the third entry; and so on in succession.

11. Distribution of Property among heirs in class II of the Schedule.- The property of an intestate shall be divided between the heirs specified in any one entry in class II of the Schedule so that they share equally.

(Emphasis supplied)

12. From conjoint reading of these Sections, the following principles emerge:

- (a) The heirs in Class I will take or inherit in preference to those in class II.
- (b) Section 8(b) makes it clear that where there is no heir in class I the devolution is upon the heirs in class II of the schedule.
- (c) Then comes Section 9 and this makes it clear that where class I heirs inherit they all take simultaneously and to the exclusion of all other heirs. However, the picture is slightly different for class II heirs simply because class II has a number of sub-entries from I to IX. These are set out in a hierarchical fashion.
- (d) Section 9 makes it clear that the heirs in the first entry in class II are to be

preferred to the heirs in the second entry to the class II; those in the second entry to be preferred to those in the third entry; and so on. What this means is that if where the devolution is on heirs in class II, those in a higher-echelon entry take in preference to those lower in the hierarchy. For instance, if the deceased's father is alive, and since the father is in a prior entry, he will take to the exclusion of the other heirs mentioned in entries II to IX. In short, the heirs in a higher numbered entry oust those in an entry that is numbered after them.

13. The sisters of a deceased Hindu fall in Entry II of Class II. A brother's widow is in Entry VI of class II. It is clear, therefore, that the sisters will take to the exclusion of the predeceased brother's widow.

14. This issue came up for consideration before a learned single Judge of our Court (Mr. V.C. Daga, J, as he then was) in *Ashitkumar Surendra Mehta Vs. Trilochanaben Thakorlal Fojdar and Others*, It appears that this decision was not brought to the notice of Mr. Justice Dhanuka when this Notice of Motion was first decided; the decision was, however, cited before the Division Bench in appeal.

15. I am not only in respectful agreement with the Ashitkumar decision, I am bound by it. In that decision Section 9 has been construed in the same manner as I have observed above. The caveators in that case fell under Item 2 of Entry II of Class II. The other heirs were those in Items No. 3 and 4 of Entry IV of Class II. The Caveators therefore, took no interest in the estate, held Mr. Justice Daga.

16. It may not be out of place to note that the Ashitkumar decision came up before Mr. Justice Dhanuka recently in *Panna Surendra Mehta Vs. Jaisukh Krishnalal Shah and Another*, . It is indeed piquant that Panna Surendra Mehta involved succession to the estate of Trilochanaben, one of the Caveators in the earlier Ashitkumar case before Mr. Justice Daga. The Ashitkumar decision was cited before and followed by Mr. Justice Dhanuka in *Panna Surendra Mehta*. Again, not only am I in respectful agreement with the decision in *Panna Surendra Mehta*, but I am bound by it. There are, thus, not one but two earlier decisions of learned single Judges of this Court that are binding on me.

17. In this case, the Caveatrix Manasi, as the "brother's wife" falls in Entry VII of Class II, while Sudhakar's three sisters find place in Entry II, Class II. The sisters will necessarily therefore take to the exclusion of the predeceased brother's widow.

18. The Caveatrix has thus no caveatable interest. She also gains no caveatable interest on account of her claim to the tenanted premises. On either count, her claim to a caveatable interest must fail.

19. Notice of Motion is therefore is made absolute in terms of prayer clauses (a) and (b). The Caveat filed by Manasi Shaysunder Kelkar is dismissed and discharged.

20. This being the only caveat, the Suit succeeds. It is decreed. Drawn up decree

dispensed with. Petition to be proceed as uncontested Petition for the grant of Probate. Probate should be issued expeditiously. All concerned to act on an authenticated copy of this order.

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Krishna Kumar Birla Vs. Rajendra Singh Lodha and Others, ; Mrs. Hem Nolini Judah (since deceased) and after her Legal Representative Mr. Marlean Wilkinson Vs. Isolyne Sarojbashini Bose and Others, ; Ghulam Qadir Vs. Special Tribunal and Others, ; Mrs. Elizabeth Antony Vs. Michel Charles John Chown Lengera,