

**Anil Dattatray Parab and Others Vs. Jayadev Bal Thackeray**

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**Court :** Mumbai

**Decided On :** May-05-2014

**Judge :** R.D. Dhanuka

**Appeal No. :** Notice of Motion (L) No. 66 of 2014 In Testamentary Suit No. 82 of 2013 In Testamentary Petition No. 99 of 2013

**Appellant :** Anil Dattatray Parab and Others

**Respondent :** Jayadev Bal Thackeray

**Judgement :**

1. By this Notice of Motion, the plaintiffs seek that the counter claim made by the defendant as pleaded in paragraphs 5 to 7, 9 and 126 to 132 of the affidavit in support of the caveat dated 12th February, 2013 be rejected as not maintainable being beyond the testamentary and intestate jurisdiction of this court.

2. Mr.Shah, learned counsel appearing on behalf of the plaintiffs invited my attention to various paragraphs of the affidavit in support of caveat which indicates that it is averred by the defendant that the defendant has 1/3rd share in all the immoveable and moveable properties known and unknown to him and seeks to make a counter claim in the said affidavit in support of the caveat in respect of his alleged 1/3rd share in all the properties of the deceased Mr.Bal K.Thackeray. My attention is also invited to the prayers in the affidavit in support of caveat by which the defendant has sought a declaration that the defendant is entitled to 1/3<sup>rd</sup> share

in the entire estate and properties of Mr. Bal Keshav Thackeray and he is entitled to use, occupy, possess and enjoy such properties forming part of his 1/3<sup>rd</sup> share. The defendant also seeks appointment of a fit person as Commissioner to take inventory of all such properties and to divide the entire estate and properties of the deceased and grant 1/3<sup>rd</sup> share out of such properties to the defendant.

3. Mr. Shah learned counsel submits that this court does not decide the title in respect of the estate of the deceased and thus no such counter claim can be made in the affidavit in support of caveat. Learned counsel invited my attention to the provisions and particularly Rule 402 of the Bombay High Court (Original Side) Rules which provides for the procedure for filing of an affidavit in support of the caveat. My attention is also invited to Rules 397 to 400 of the Bombay High Court (Original Side) Rules. Learned counsel submits that since testamentary court cannot decide the issue of title in respect of properties of the deceased and the properties are not the subject matter of testamentary petition, no relief in respect of properties can be considered in affidavit in support of caveat and the same is beyond the jurisdiction of the testamentary court, the defendant who is directly or indirectly claiming share in the properties of the said deceased, such reliefs are beyond the scope and jurisdiction of this court.

4. Ms. Sarnaik, learned counsel appearing on behalf of the defendant on the other hand placed reliance on the judgment of this Court in case of **Namdeo Mali vs. Jayram Barde and others 2008 (2) Bom.C.R. 178** in support of her submission that the reliefs claimed in the affidavit in support of the caveat is in the nature of the petition of letters of administration and it is prayed that only in the event of this court refusing to grant probate in favour of the petitioner, it would be presumed that the said deceased died intestate and in that event all the legal heirs of the said deceased would be entitled to 1/3<sup>rd</sup> share each in the estate of the said deceased. Learned counsel also placed reliance on the judgment of the Division Bench of this court delivered on 19th January, 2011 in case of **Smt. Vatsala Srinivasan vs. Narisimha Raghunathan and Anr. in Appeal No. 1009 of 2010** in support of the submission that in the event of the petition for probate being rejected, at that stage to avoid any multiplicity of the proceedings, this court shall convert the affidavit in support of the caveat as petition for letters of administration.

5. Learned counsel also placed reliance on Rule 376 of the Bombay High Court (Original Side) Rules, and would submit that a party is entitled to file application for letters of administration in cases where deceased has died intestate. It is submitted that the right of the defendant to file such application cannot be taken away and to avoid any multiplicity of the proceedings, the affidavit in support of the caveat can be considered as petition for letters of administration in terms of Rule 376 of Bombay High Court (Original Side) Rules.

6. A perusal of the affidavit in support of caveat and particularly paragraphs 5, 6, 7, 9, 126 to 132 clearly indicates that it is case of the defendant that the defendant being one of the son of the said deceased testator is entitled to 1/3<sup>rd</sup> share in his properties whether moveable or immovable and is entitled to such share in such properties on demise of the said deceased. The defendant has also sought an order and decree in the affidavit in support of the caveat for such declaration and for distribution of 1/3<sup>rd</sup> share in such properties by appointing a Commissioner.

7. A perusal of Rule 376 read with section 218 makes it clear that if a Hindu who has died intestate, administration of his estate may be granted to any person who according to the rules for the distribution of the estate applicable in case of such deceased would be entitled to the whole or any part of such deceased estate. When several such persons applies for such administration, it shall be in the discretion of the court to grant it to anyone or more of them. Rule 376 which in my view has to be read with section 218 of Indian Succession Act, 1925 provides for filing of an application for letters of administration where the deceased died intestate. If according to the defendant the said deceased had died intestate, a separate petition for letters of administration in terms of Rule 376 read with section 218 of Indian Succession Act, will have to be filed by the defendant.

8. On conjoint reading of Rules 376 and 396 to 402 of Bombay High Court (Original Side) Rules, it clearly indicates that upon filing of such petition for letters of administration in the form prescribed i.e. Form no. 103, upon numbering of the petition citation has to be served within the time prescribed. Upon service of such citation all such legal heirs and/or next of kin are entitled to file caveat under Rule 401 and affidavit in support of caveat under Rule 402 of the Bombay High Court

Original Side Rules. The Prothonotary and Senior Master is required to give notice of such application for letters of administration to the Collector of Bombay and the Superintendent of Stamps.

9. In so far as judgment of this court in case of **NamdeoMali (supra)** relied upon by Ms.Sarnaik, learned counsel appearing for the defendant is concerned, a perusal of the said judgment indicates that in a probate petition, defendant who propounded a separate Will in respect of the same deceased filed a counter claim and sought probate in respect of such Will propounded by the defendant. The plaintiffs did not raise any objection in respect of the maintainability of such counter claim. The Trial court framed issues whether the applicant as well as opponents were entitled to probate in pursuance of the Will propounded by each of the parties. Since both the proceedings were in respect of the probate in respect of the separate Will propounded by both parties in respect of the same deceased and the plaintiff not having raised any objection about maintainability of such counter claim, the trial court having passed decree in both the matters, this court in the first appeal held that no interference was warranted with the order passed by the trial court. The trial court had granted probate in favour of the opponents and had rejected the claim for probate of the plaintiff who was appellant before this court. In my view, the said judgment is not applicable to the facts of this case at all. In this matter both the proceedings are not for the same reliefs.

10. In this case the defendant has filed an affidavit in support of caveat under Rule 402 of the Bombay High Court (Original Side) Rules. Perusal of Rule 402 of the Bombay High Court (Original Side) Rules clearly indicates that in the affidavit in support of the caveat, the caveator shall state the right and interest of the caveator and grounds of objections to the application. Rule 403 provides that upon affidavit in support of caveat filed, such petition shall be numbered as a suit in which the petitioner shall be the plaintiff and the caveator shall be the defendant.

11. In my view, the affidavit in support of the caveat required to be filed under Rule 402 is only for the purpose of showing the right and interest of the caveator and is for the purpose of raising objections to the application for grant of probate or letters of administration. In such affidavit in support of caveat, no claim of any

nature whatsoever can be made by the caveator. The caveat or affidavit in support of caveat cannot be considered as a suit. Caveator has accordingly not paid any court fees treating such affidavit in support as a suit rightly.

12. In so far as judgment of the Division Bench in case of **Smt.VatsalaSrinivasan (supra)** relied upon by Ms.Sarnaik learned counsel appearing for the defendant is concerned, the Division Bench of this court was concerned with the issue whether on demise of the sole executor appointed under the Will who was petitioner in the petition for probate whether his legal heirs can be brought on record in place of the sole arbitrator. It is held that both the proceedings i.e. for the grant of probate as well as the proceedings for letters of administration with the Will is annexed is initiated for protecting the interest of the legatees under the Will. The essence of the enquiry in both the proceedings is the same and relates to the genuineness and authenticity of the Will. It is held that the legal heirs of the executor cannot be brought on record since the right to seek the probate of the Will subsists in the executor alone. But the beneficiary under the Will is not prohibited from continuing the existing proceedings. It is held in the said judgment that the court in the proceedings for probate does not decide the question of title and is only concerned with the issue as to whether the documents set forth has been duly executed by the testator and whether the testator was at the time of execution of the document in a sound and disposing state of mind. The testamentary court does not determine the question or the title to the property but whether the testator has executed this testamentary instrument voluntarily and with a free Will. In my view, the Division Bench in case of **Smt.Vatsala(supra)** is of no assistance to the defendant in support of the submission that the counter claim shall be permitted to be made in the affidavit in support of the caveat to avoid multiplicity of proceedings.

13. In my view in a testamentary suit the property left behind by the deceased is not the subject matter of the testamentary suit. The testamentary court thus does not decide about the property of the deceased and as to how the same has to be distributed on grant of the probate or refusal of grant of such probate. In my view since the property is not the subject matter of the probate petition, no counter claim can be permitted in respect of the property of the deceased in the

testamentary suit. In any event, the affidavit in support of the caveat is not a proceedings in which any such relief for declaration and distribution of the property of the deceased can be granted by this court.

14. In my view, no claim of any nature whatsoever can be allowed to be made in the affidavit in support of the caveat. Even if the present petition filed by the petitioner for obtaining probate in respect of the alleged Will of the deceased testator is rejected for any reasons, this court has no power to pass an order for distribution of the estate of the deceased in favour of the legal heirs on the basis of the deceased having expired intestate in the absence of any proper petition for letters of administration or suit for administration of estate of the deceased on record of this court. In my view counter claim thus made by the defendant in the affidavit in support and that also not being in the form prescribed under the Bombay High Court (Original Side) Rules and without following appropriate procedure thus cannot be considered.

15. It is not in dispute that the said deceased Mr. Bal Thackeray had three sons including Mr. Bindumadhav Thackeray who predeceased the deceased. If any such petition for letters of administration is filed by the defendant, citation would be also required to be served on the legal heirs of the said predeceased son of the said deceased Mr. Bal Thackeray. All such reliefs are beyond the jurisdiction of the testamentary court. The counter claim thus made by the defendant in various paragraphs stated aforesaid and particularly in paragraph 132 are accordingly rejected as not maintainable. Notice of Motion is allowed in the aforesaid terms.

No order as to costs.

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