

Dahiben Vasantkumar Patel and Others Vs. Dahiben Vasantkumar Patel and Others

Dahiben Vasantkumar Patel and Others Vs. Dahiben Vasantkumar Patel and Others

SooperKanoon Citation : sooperkanoon.com/1144772

Court : Mumbai

Decided On : Feb-17-2014

Judge : R.D. Dhanuka

Appeal No. : Chamber Summons (L) No. 131 of 2013 In Petition No. 466 of 2010

Appellant : Dahiben Vasantkumar Patel and Others

Respondent : Dahiben Vasantkumar Patel and Others

Judgement :

1. By this Chamber Summons, applicants seek condonation of delay of 140 days in filing caveat and affidavit in support of caveat. This Chamber Summons is opposed by the original petitioner by filing a detailed affidavit in reply. There is no rejoinder filed by the applicants. Some of the relevant facts for the purpose of deciding this Chamber Summons are as under:-

2. On 22nd April, 2013 citations were received by the caveators at Canada. On 15th/25th June, 2013, Mrs.Dahiben Vasantkumar Patel who is one of the applicant and was served with citation executed a power of attorney in favour of Mr.Suchindra Bhawarlal Soni. Based on such power of attorney, on 4th July, 2013, the said constituted attorney filed caveat in this court on behalf of all the applicants.

3. On 4th July, 2013, applicants filed Chamber Summons (59 of 2013) in Petition No. 466 of 2010 inter alia praying for condonation of delay of 40 days in filing caveat. While opposing the said Chamber Summons No. 59 of 2013, the learned counsel appearing on behalf of the petitioner strongly raised an objection regarding the power of attorney dated 15th/25th June, 2013 on the ground that the same was given only by Mrs.Dahiben Vasantkumar Patel one of the applicant and not by other applicants. An objection was also raised that the said power of attorney was only to deal with two of the flats mentioned therein and not for filing any proceedings including caveat in respect of the estate of the deceased.

4. On 16th September, 2013, applicants herein sought liberty to withdraw the said Chamber Summons No. 59 of 2013 with liberty to file fresh Chamber Summons in view of the objections raised by the original petitioner. By an order dated 16th September, 2013, this court granted liberty to the applicants to withdraw the said Chamber Summons (59 of 2013) with liberty to file a fresh Chamber Summons. Chamber Summons was dismissed with liberty as prayed.

5. On 30th September, 2013, the applicants have executed another power of attorney in favour of the same constituted attorney Mr.Suchindra Bhawarlal Soni. The contents of the power of attorney executed on 30th September, 2013 and 15th/25th June, 2013 are identical. Mr.Vora, learned counsel appearing on behalf of the petitioner invited my attention to both the General Power of Attorneys dated 15th/25th June, 2013 and 30th September, 2013. It is submitted that the specimen signature of the alleged constituted attorney is not identified by any advocate or by notary public. It is submitted that in any event, the power of attorney does not authorise the constituted attorney to file any caveat and/or affidavit in support of caveat or Vakalatnama on behalf of the applicants in the testamentary proceedings but at most empower the constituted attorney to deal with the two flats which are already sold.

6. Mr.Vora, learned counsel appearing for the petitioner submits that the caveat and affidavit in support are admittedly filed on the basis of the first power of attorney dated 15th/25th June, 2013 which was admittedly defective as the same was not given by all the applicants but only by Mrs.Dahiben V.Patel. When this

objections were brought to the notice of the court, the applicants withdrew the earlier chamber summons with liberty to file fresh chamber summons. It is submitted that even the second power of attorney is identical to the first power of attorney. Learned counsel submitted that since the caveat and affidavit in support filed by the applicants is based on the defective power of attorney, such defective caveat and affidavit in support are not the valid caveat and affidavit and thus can be considered to be on record. It is submitted that since the caveat and affidavit in support are defective, the question of condoning delay in filing caveat and affidavit does not arise.

7. Mr.Vora, learned counsel placed reliance on the judgment of this Court in case of **Shrichand Vishandas Raheja vs. Purshotam Vishandas Raheja** reported in **2011(4) Bom.C.R. 61**. Paragraphs 9, 10, 11,13 and 15 to 17 of the said judgment are relevant which reads thus:-

9. I have perused the entire record. It is to be noted that in this matter the caveator has not been served with the citation. The caveator did file the caveat on 10th January, 2011. Caveator by way of abundant caution filed affidavit in support of the said caveat on 10th January, 2011. The very fact that the caveator filed a fresh caveat on 27th January, 2011 clearly goes to show that caveat dated 10th January, 2011 was filed in improper format. In so far as this aspect is concerned, I am inclined to observe that it is noted that Rule 401 of the Bombay High Court (Original Side) Rules (hereinafter referred to as the said Rules) provides Form 116 for filing of the caveat. This will mean that if a caveat is filed not in the prescribed form i.e. Form 116, it cannot be acted upon by the Court. On account of this, I am inclined to hold that the caveat dated 10th January, 2011 cannot be treated as a good caveat. It cannot be acted upon and therefore there is no question of converting the testamentary petition into a testamentary suit based on said caveat dated 10th January, 2011. The argument advanced by learned Counsel Mr. Kamat that filing the caveat in an improper format and then filing a fresh caveat so as to comply with the requirement of said Rules is a matter of procedure, cannot be accepted. If the rules provide filing of a caveat in a proper format, caveat filed in any other format cannot be considered as a good caveat.

10. As stated earlier the caveator has filed caveat in proper format on 27th January, 2011. Even if caveat dated 27th January, 2011 is treated for the sake of argument as a good caveat, it was necessary for the caveator to file affidavit in reply of the caveat within a period of 8 days from the filing of the caveat dated 27th January, 2011 as per Rule 402 of said Rules. Today, the record shows that affidavit in support of the caveat is not filed in respect of the caveat dated 27th January, 2011. Caveat dated 27th January, 2011 filed in the proper format is without any affidavit in support of the caveat as per the provisions of Rule 402 of the said Rules and therefore that caveat also cannot be treated as proper caveat on which office can act.

11. The argument advanced by learned Counsel Mr. Kamat for the caveator that caveat dated 27th January, 2011 was treated by the office as an amendment to the caveat dated 10th January, 2011 and this Court also should treat it as an amendment to the caveat dated 10th January, 2011. This submission is required to be rejected. In my view, if a caveat is to be filed in a particular form, there is no question of filing a new caveat by way of an amendment to a caveat earlier filed in a improper format. The caveat dated 27th January, 2011 cannot be considered as a caveat by way of amendment to caveat dated 10th January, 2011. Hence, caveat dated 27th January, 2011 will have to be treated as a new and independent caveat.

13. For the reasons mentioned aforesaid in the aforesaid matter, I am recording following findings:

(a) Caveat dated 10th January, 2011 having been filed in the improper format i.e. not as per Form No. 116 (as observed by the office) cannot be considered as good caveat and it cannot be acted for further action in the testamentary petition.

(b) Caveat dated 27th January, 2011 is not supported by affidavit in support of the caveat as per the requirements of Rule 402 of said Rules. The affidavit dated 10th January, 2011 cannot be considered as affidavit in support of the said caveat because what is required to be filed first in point of time is caveat and affidavit in support of the caveat has come on record at later point of time. Hence, as of today caveat dated 27th January, 2011 cannot treated as proper caveat and it cannot be

used in this testamentary petition.

(c) Order passed by the office thereby converting testamentary petition in testamentary suit namely Suit No. 14 of 2011 in terms of letter dated 2nd February, 2011 is illegal.

15. In view of the aforesaid discussion, following order is passed.

ORDER

(i) Caveat dated 10th January, 2011 cannot be acted upon by the office as it is not filed in the proper format.

(ii) Caveat dated 27th January, 2011 cannot be acted upon as it is not supported by affidavit as per Rule 402 of the Bombay High Court (Original Side) zRules.

(iii) Order passed in terms of letter dated 2nd February, 2011 converting Testamentary Petition No. 1172 of 2010 in Testamentary Suit No. 14 of 2011 is set aside.

(iv) As of today, office shall treat Testamentary Petition No. 1172 of 2010 as a Petition which can be taken ahead as uncontested petition. Office to process Testamentary Petition No. 1172 of 2010 in accordance with the provisions of law.

(v) In view of the aforesaid orders, notice of motion taken out by the Petitioners has become infructuous and is disposed of with no order as to costs.

(vi) In the peculiar facts and circumstances, there shall be no order as to costs.

16. Learned Counsel Mr. Kamat appearing on behalf of the caveator prays for stay of the operation of the order. In the facts and circumstances of the case, there is no question of staying the operation of the order. Request is rejected.

17. After the aforesaid order is passed, learned Counsel Mr. Kamat appearing on behalf of the caveator prayed for liberty to adopt appropriate proceedings to protect the interest of the caveator. In my view, there is no need to grant specific liberty to adopt appropriate proceedings. A person who is interested in protecting

his right is free to adopt appropriate proceedings.

8. Mr.Vora also placed reliance on the unreported judgment of this court delivered on 28th August, 2009 in case of **Jyoti Mahesh Adwaney vs. Sunder Sahani** in **Misc.Petition No. 39 of 2009** in support of the submission that the caveat has to be filed by the party under Rule 401 to oppose the grant of probate or letter of administration within 14 days of the service of the citation upon him. It is submitted that since the caveat was admittedly defective, the same cannot be considered by this court even for the purpose of condonation of delay.

9. Learned counsel appearing on behalf of the applicants on the other hand does not dispute that the caveat and affidavit in support filed by the applicants in this proceedings was based on the power of attorney dated 15th/25th June, 2013 which was defective. Learned counsel however submits that the applicants be granted liberty to withdraw this chamber summons with liberty to file fresh caveat and affidavit in support of the caveat. In my view, no such indulgence can be shown to the applicants by this court again.

10. A perusal of the record clearly indicates that the caveat and affidavit in support was filed by the applicants based on the power of attorney dated 15th/25th June, 2013 which was admittedly executed only by Mrs.Dahiben V.Patel, one of the applicant and not all the applicants. A perusal of both the power of attorneys also clearly indicates that the said power of attorney is given in favour of the constituted attorney only to deal with the two flats which are already sold. None of this power of attorney gives any power in favour of the constituted attorney to represent the applicants in any court proceedings and more particularly in testamentary petition filed by the petitioner. In my view, the caveat and affidavit in support which is thus filed on the basis of such defective power of attorney cannot be considered as the caveat and affidavit on record of this proceedings. Rule 401 of the Bombay High Court (Original Side) Rules reads thus :-

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.

11. A perusal of Rule 401 clearly indicates that a person intend to oppose the grant of probate or letters of administration has to 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. The said provision however empowers the Judge in Chambers to extend the time to file a caveat, provided the grant has not in the meantime been issued. In my view, the caveat has to be filed in Form No. 116 either by the party who intend to oppose the grant of letters of administration or by the constituted attorney. Since in this court, the applicants have placed reliance on the power of attorney dated 15th/25th June, 2013 on the basis of which the said caveat and affidavit in support came to be filed, it would be necessary to consider whether such power of attorney relied upon by the applicants was in order and would give such power to file caveat and affidavit in support or any legal proceedings in respect of the estate of the deceased.

12. In my view, since the said power of attorney was not executed by all the applicants and in view of the fact that such power of attorney does not give any such power in favour of the constituted attorney to sign and/or represent the applicants or to sign any affidavit or any legal proceedings in respect of the estate of the deceased, such caveat and affidavit in support filed based on such power of attorney cannot be considered as the caveat and affidavit in support in the format prescribed under the High Court Rules. The question of considering any delay or condonation of delay of such caveat and affidavit in support therefore did not arise. In my view such caveat cannot be considered as caveat in Form No. 116 by a person within the meaning of Rule 401 of the High Court (Original Side) Rules.

13. This court in case of **Shrichand Vishandas Raheja (supra)** has considered a situation where original caveat which was filed was found defective was substituted by another caveat. However, no separate affidavit in support of the caveat came to be filed alongwith second caveat filed by the party. This court took a view that affidavit in support of the caveat filed with the first caveat which was

found defective cannot be considered as affidavit in support of the caveat with the second caveat filed by the party. This court has held that the testamentary petition thus could not have been converted by the Prothonotary and Senior Master into a contested suit. Considering these fact, this court directed that such caveat cannot be acted upon by the office as it was not filed in the proper format. This court held that the testamentary petition therefore has to be considered as a uncontested petition. This court however clarified that there was no need to grant any specific liberty to adopt appropriate proceedings. A person who is interested in protecting his rights is free to adopt appropriate proceedings.

14. In my view, the principles laid down in case of **Shrichand Vishandas Raheja (supra)** are applicable to the facts of this case. I do not propose to take a different view in this Chamber Summons. Chamber Summons No. 19 of 2014 is accordingly rejected. It is declared that caveat and affidavit in support filed by the applicants on 4th July, 2013 are not in proper format and not filed by the applicants and thus cannot be considered as caveat and affidavit in support and stands rejected. Testamentary petition has to be treated as uncontested petition. Office to process Testamentary Petition No. 466 of 2010 in accordance with law. Drawn up order is dispensed with. No order as to costs.

15. Application for stay for operation of this order is rejected.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com