



**2.** This Interim Application is filed by the Applicant – Original Respondent / Caveatrix for seeking modification of the order dated 04.07.2023 passed by this Court.

**3.** Certain brief facts are required to be narrated for adjudication of this Interim Application.

**3.1.** Testamentary Petition 1996 of 2022 was filed by one Ms. Mangala Sarosh Bana – Petitioner, married younger daughter of deceased late Kamlakar Dattopant Abhyankar for seeking probate of last Will and Testament of the deceased. The Applicant Caveatrix is the married elder daughter of the deceased. Testamentary Petition 1996 of 2022 was filed on 06.04.2022. Petitioner is the sole executor in the Will.

**3.2.** Along with the Petition notarized consent Affidavit dated 09.03.2022 was filed by the Applicant / Caveatrix giving her No-objection and free and full consent for grant of probate of the Will of the deceased in favour of the Petitioner justifying surety for legacy to be dispensed with and waiving service of citation upon her.

**3.3.** However subsequently after 10 months, on 18.01.2023 the Applicant / Caveatrix filed Caveat No. 89 of 2023 to oppose grant of probate in favour of original Petitioner by contending that she was

not aware about the Testamentary Proceedings as also disowning her own consent affidavit which was executed and notarized by her.

**3.4.** When the Caveat and the Testamentary Petition was heard by this Court on 20.06.2023, including the Application for seeking dismissal of the caveat, this Court in paragraph Nos. 4 and 5 noted as under:-

*“4. In that view of the matter, considering the consent given by the Respondent at the outset leading to grant of probate, the Caveat filed by the Respondent would not be maintainable unless and until it points out an absolute perversity or fraud. Nothing of that sort is brought on record. There is only one immovable property which is a flat situated at Mumbai Central which is required to be sold and apportioned between the parties.*

*5. Mr. Rane would submit that Caveator now desires to challenge the Will and signature part of the Will. At this stage it is too late in the day. Nevertheless Affidavit-in-Reply be filed to the Application.”*

**3.5.** The case was thereafter fixed on 04.07.2023.

**3.6.** On 04.07.2023, learned Advocates for the Applicant and the Caveator were heard by this Court and after hearing them at length and deliberating on the issues, order was passed of which paragraph Nos. 2, 3 and 4 are relevant for the purpose of the present Application. They read thus:-

*“2. After hearing their respective objections it has fallen from the Court that considering the fact that the Applicant and the Respondent are the only two legal heirs / sisters entitled to the legacy / estate of the deceased, it would be fruitful if both the parties claim the legacy in equal proportion / share (50% each).*

3. *Mr. Haritwal after taking instructions from his client has submitted that the Caveator / Respondent would be agreeable for the same. Mr. Narula after taking instructions from his client has also submitted the Applicant / Petitioner is also agreeable for the same.*

4. *In that view of the mater, Applicant / Petitioner is granted leave to amend the present Petition and convert the same into "Letters of Administration along with Will annexed". Necessary amendment shall be carried out within a period of two weeks from today. Re-verification stands dispensed with. Copy of the amended Petition be served on Mr. Haritwal within a period of one week thereafter.*

**4.** Before I proceed further it needs to be noted that the assets of the deceased comprised of four movable properties and one immovable property. Learned Advocates informed the Court on 04.07.2023 that all movable assets were apportioned and distributed equally between the two legal heirs i.e. daughters of the deceased. They informed the Court that now the only property remains is the immovable flat belonging to the deceased situated at Mumbai Central (said flat).

**5.** In that view of the matter and after hearing the parties, Court expressed its suggestion as noted in paragraph No. 2 of the order dated 04.07.2023.

**6.** It is pertinent to note that thereafter, only after taking instructions from the Caveatrix, learned Advocate agreed for apportionment / distribution of the said flat in equal proportion. In view of the agreement between the parties expressed to the Court, this

Court passed the order in paragraph No.4 directing issuance and grant of Letters of Administration along with Will annexed and further consequential directions as stated in the order.

**7.** The present Interim Application is now filed on 28.08.2023 seeking a modification to the effect that if the parties had agreed to claim the legacy in equal proportion i.e. 50% each, this Court ought to have directed the parties to make a joint application to the Registry. By the present Application, the Applicant / Caveatrix seeks addition of the words '*by making a joint application*' at the end of paragraph No. 2.

**8.** The ground on which the present Application is filed for modification is contained in paragraph No. 3 of the Application. Mr. Haritwal would contend that in view of the unjust and unfair conduct on the part of the original Petitioner during distribution of the liquid asset i.e. gold belonging to the deceased, when the order dated 04.07.2023 was passed, the Applicant / Caveatrix was therefore against passing of any order in favour of the Petitioner being the sole executor of the property of the deceased. However, this specific ground as pleaded was not exhibited or informed to the Court on 04.07.2023. On the contrary, the Applicant Caveatrix had categorically given instructions and agreed to the distribution equally in accordance with law. At the time of arguments, it is submitted by Mr. Haritwal that the

original Petitioner (younger sister) is not on talking terms with the Applicant / Caveatrix (elder sister) and does not respond to her messages / advances nor does reply to any information sought for by the Applicant / Caveatrix regarding sale of the flat. Hence the Applicant / Caveatrix has now lost faith in the original Petitioner and it is apprehended by her that the original Petitioner may sell the property / flat without complete disclosure of the actual amount / value (cash) received from such sale to the Applicant / Caveatrix and thus may cause detriment to the Applicant. In short, now trust deficit is pleaded. This is what is argued before me today. He would fairly submit that this is the sole reason for filing the Interim Application and nothing more.

**9.**            *PER CONTRA*, Mr. Narula would submit that assuming grant of Letters of Administration in favour of the original Petitioner, the Petitioner undertakes to carry out the procedure for sale of the immovable property / flat transparently with all disclosures to the Respondent and if the Respondent has any apprehension whatsoever, the Respondent can be free to get a buyer or a higher offer who can match the sale price of the buyer brought by the Petitioner or if so required take independent steps to sell the said immovable property / flat for which a buyer can be brought by her in which case the Petitioner will co-operate in all respect. After all, the flat needs to be

sold and proceeds are to be apportioned equally. He would submit that though Respondent is harping on appointment of the Court Receiver to sell the flat / immovable property and then apportion the sale proceeds to the extent of 50% each, such submission on the part of the Applicant / Caveatrix is to the detriment of both the parties. He would submit that appointment of the Court Receiver will undoubtedly fetch a much lower price and shall cause financial loss to both the parties. All that he would submit is that no prejudice whatsoever will be caused as every step that the Petitioner would take for sale of the immovable property / flat shall be disclosed in writing to the Applicant / Caveatrix and the Petitioner is ready and willing to give such an undertaking if the Respondent expresses apprehension.

**10.** I have considered the submissions of both the learned Advocates and perused the pleadings. Both parties are *ad idem* that the flat has to be sold. After hearing the learned Advocates, I can only say that the present Application has been filed by the Applicant / Caveatrix since there is reluctance to communicate and respond by the original Petitioner who is the younger sister of the Applicant Caveatrix. Considering the order passed on 04.07.2023 and the consent recorded therein, I find that there is no error apparent on record made by this Court in paragraph Nos. 2 and 3 of the said order as pointed out by the Applicant. The said order cannot be corrected in the manner and

fashion as sought for by the Applicant / Caveatrix as it is impermissible in law to do so. Once the consent affidavit has been filed by the Applicant / Caveatrix and she having agreed before the Court to apportion the estate of the deceased and distribute the same to the extent of 50% each, modification sought for by the present Interim Application cannot be granted as sought for by the Applicant / Caveatrix. Suggestion of the Applicant / Caveatrix in paragraph No.10 as such cannot be considered and cannot be allowed as there is no ambiguity whatsoever in the interpretation of the said order which can be exploited by the original Petitioner.

**11.** In view of the above, the additions of the words “*by making joint application.*” at the end of paragraph No.2 is not at all required in view of the consent of the Applicant / Caveatrix having been recorded by this Court in the order dated 04.07.2023.

**12.** Resultantly, Interim Application is dismissed.

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[ MILIND N. JADHAV, J. ]

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