

A SAROJ AGARWALLA (DEAD) THR. LR ABHISHEK
AGRAWALLA

v.

YASHEEL JAIN

B (Civil Appeal No. 473 of 2009)

OCTOBER 24, 2016

[DIPAK MISRA AND SHIVA KIRTI SINGH JJ.]

C *Caveat – Original Side Rules of Calcutta High Court – Chapter XXXV- rr. 9,24,28,30 – Testamentary and intestate jurisdiction – Caveat against grant of probate – Caveatable interest – Application for discharge of caveatable interest – Maintainability of – Proceedings initiated by appellant for grant of probate on the basis of Will and testament of appellant’s brother – Appellant pleaded for rejection of the caveats of respondents – High Court turned down appellant’s plea – On appeal, Held: A judgment in the probate proceedings is a judgment in rem and, therefore, a person establishing prima facie interest in the estate of the testator should be permitted to maintain a caveat and contest for probate – It is not necessary to establish caveatable interest by conclusive proof – rr. 28 and 30 make it clear that before the proceedings are numbered as a suit by orders of a Judge for being tried as a suit as per provisions of the C.P.C, the Court may take up a preliminary issue, whether the caveator has a caveatable interest, if an application praying rejection for caveats is filed before the Court – Court to discharge the caveat where, upon trial of such issue, it appears that caveator has no caveatable interest – On facts, claim of grant of probate prejudiced the rights of the respondents, hence they had a caveatable interest – Consequently, caveats filed by them could not be discharged.*

Dismissing the appeals, the Court

G **HELD: 1. A judgment in the probate proceedings is a judgment in rem and, therefore, a person establishing prima facie interest in the estate of the testator should be permitted to maintain a caveat and contest a claim for probate. [Para 5] [880-B]**

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2. Rules 28 and 30 of the Original Side Rules of the Calcutta High Court make it abundantly clear that before the proceedings are numbered as a suit by orders of a Judge for being tried as a suit as per provisions of the Code of Civil Procedure, the Court may take up as a preliminary issue, whether the caveator has a caveatable interest, if such an application is filed before the Court by the petitioner. The preliminary issues are triable before the proceedings are treated as a full-fledged suit under order of the Judge concerned. Whereas suit is required to be tried as per provisions of the Code, the procedure for trial of preliminary issue has been left to the discretion of the court. Rule 30 does not require the court to come out with specific findings in respect of preliminary issue because the language used in Rule 30 requires the court to discharge the caveat where, upon trial of such issue, "it appears that the caveator has no interest". [Para 8] [881-F-H; 882-A]

3. The case of the respondents in both the present appeals is that they have a caveatable interest. The preliminary issue does not relate to the validity or legality of the Will sought to be probated but only to the issue whether the caveator has an interest for which he can maintain the caveat. Although, one respondent-caveator did not file the original Will but he has filed a photocopy of the prior Will allegedly executed by the testator and has also produced the registered envelope through which such copy was sent to him by the testator along with the forwarding letter written by him. Based upon such materials, caveat filed by him should not be discharged. Insofar as the other respondent-caveator is concerned, issue whether she was really a lawful widow of the testator or not cannot be conclusively decided in the probate proceedings but once prima facie materials supported her claim, the application filed for discharge of her caveat deserved dismissal. The test which may be applied in the present case is : Does the claim of grant of probate prejudice the respondent's right because it defeats some other line of succession in terms whereof the respondent as a caveator asserted his/her right? Since the answer, in the facts of the case would be in the affirmative, the respondents have a caveatable interest. [Paras 8, 9, 11] [882-B-E, G; 883-A]

- A *Krishna Kumar Birla v. Rajendra Singh Lodha (2008)*
**4 SCC 300: 2008 (5) SCR 640; Ishwardeo Narain
 Singh v. Kamta Devi AIR 1954 SC 280 – referred to.**

Case Law Reference

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| B | 2008 (5) SCR 640 | referred to | Para 9 |
| | AIR 1954 SC 280 | referred to | Para 10 |

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 473 of 2009.

- C From the Judgment and Order dated 04.05.2007 of the High Court at Calcutta in G. A. No. 131 of 2005 in A.P.O.T. No. 180 of 2005

WITH

C. A. No. 474 of 2009.

- D Jaideep Gupta, Sr. Adv., Anil Agarwalla, Jagdeep Anand, Varun Kapoor, Ms. Shakya Singha Sen, Ms. Anadita Mitra, K. V. Vijayakumar, Advs. for the Appellant.

S. S. Ray, Amitabh Chaturvedi, Vaibhav Gulia, Ms. Rakhi Ray, Ms. Sucharita Biswas, Debapriya Gupta, Mrs. Sarla Chandra, Advs. for the Respondent.

- E The Judgment of the Court was delivered by

- F **SHIVA KIRTI SINGH, J.** 1. Both the appeals arise out of same proceedings initiated by the appellant for grant of probate on the basis of a Will claimed to be the last Will and testament of appellant's brother Jagdish Prasad Tulshan. Appellant's prayer to reject the caveats of respondents in the above proceedings was turned down by a Division Bench of High Court at Calcutta by impugned orders, both dated 04.05.2007. Both the appeals, therefore, have been heard together and shall be governed by this common judgment.

- G 2. The appellant Saroj Agarwalla is the propounder of a Will, alleged to have been executed by one Jagdish Prasad Tulshan. She claims to be the only surviving sister of the testator at the time of his death. She prayed for grant of the Probate of the Will allegedly executed by Jagdish. The respondent in the first appeal, i.e., C.A.No.473 of 2009 - Yasheel Jain lodged a caveat claiming to be the son of a pre-deceased sister of the testator and thus having interest in the estate of the deceased. His
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claim is founded on two grounds, firstly as a nephew of the testator and secondly as the sole beneficiary under an alleged prior Will of the testator in respect of the same estate.

3. A learned Single Judge considered the objection raised by the propounder to the caveat filed by Yasheel Jain and rejected the objection. The Single Judge was of the view that the provision creating the right to file a caveat could be availed by a person who is not a rank outsider and could claim to be an heir after the propounder was no longer alive. In that view of the matter it was held that the caveat filed by Yasheel could not be discharged. Since the Single Judge did not discuss the claim of Yasheel based on an earlier Will, Yasheel filed a cross-objection before the Division Bench. The appeal and the cross objection were heard together. The Division Bench dismissed the appeal of the appellant and allowed the cross-objection by recording its prima facie satisfaction about existence of an earlier Will creating caveatable interest in favour of Yasheel. The Division Bench did not approve the view of the learned Single Judge that Yasheel had a caveatable interest as an heir of the testator but the conclusion of the learned Single Judge was approved, albeit for different reasons as noted above.

4. In the connected civil appeal the prayer of the appellant for grant of probate of the afore-discussed Will of Jagdish Prasad Tulshan was opposed by the respondent Malati Tulshan. She claimed to be the second wife of the testator married on 28.02.1986 and lodged a separate caveat on that basis. The propounder later filed an application for discharge of the said caveat on the ground that Malati was never married to the testator and, therefore, had no caveatable interest in the matter.

5. The learned Single Judge rejected the application for discharge of the caveat on the ground that the Will propounded by the appellant itself conferred some benefits upon Malati and therefore she had acquired caveatable interest. Single Judge also relied upon Rule 9 of Chapter XXXV of the Original Side Rules (hereinafter referred to as 'the Rules') of Calcutta High Court to hold that in case any benefit is conferred upon a person by virtue of the alleged Will, the said rule provided for citation and was attracted. The Division Bench did not agree with the reasonings given by the learned Single Judge and held that mere receipt of some benefits under the Will cannot confer a caveatable interest in a third party unless he claims interest in the estate of the deceased otherwise than by way of Will sought to be probated. But the conclusions of the

- A Single Judge were upheld on the basis of claim of Malati that she was widow of the testator. The Division Bench came to hold that the issue whether Malati is really a lawful widow of the testator or not cannot be conclusively decided in the probate proceedings but once prima facie materials support her claim, the application filed for discharge of her caveat deserves dismissal. This view is founded on the reason furnished by Division Bench by pointing out that a judgment in the probate proceedings is a judgment *in rem* and, therefore, a person establishing *prima facie* interest in the estate of the testator should be permitted to maintain a caveat and contest a claim for probate. At this stage, it is not necessary to establish caveatable interest by conclusive proof. The Division Bench finally made it clear that all its observations were tentative and such observations will not be binding upon the parties or upon any other court if the status of Malati is questioned in any proceedings.

6. On behalf of appellant, claim of Yasheel that he has a caveatable interest on the basis of a prior Will was seriously disputed and contested by learned senior advocate Mr. Jaideep Gupta. He submitted that Yasheel admittedly does not have the original Will with him as noted by the Division Bench itself and, therefore, once it has been held that he has no caveatable interest as a nephew of the testator being son of a pre-deceased sister, the Division Bench erred in holding that he has an interest to maintain his caveat on the basis of an alleged prior Will in his favour. So far as interest of Malati is concerned, the submission on behalf of appellant is that she has made conflicting claims, one, as a widow of the testator and the other based upon benefits under the Will sought to be probated. Since the recitals in the Will described Malati only as a maid servant, according to appellant she could not have claimed to be a widow of the testator.

7. The preliminary issue that has arisen in the probate case which is still pending, relates to “caveatable interest”. Chapter XXXV of the Rules incorporate provisions relating to testamentary and intestate jurisdiction. Rule 1 defines ‘non-contentious business’ to include the business of obtaining probate and letters of administration (with or without the will annexed, and whether general, special or limited) where there is no contention as to the right thereto, as also in contentious cases where the contest is terminated and also includes the business of lodging caveats against the grant of probate or letters of administration. Rules 24, 28 and 30 are relevant to the issues at hand and are hence extracted

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hereinbelow :

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“24. Caveat. Any person intending to oppose the issuing of a grant of probate or letters of administration must either personally or by his attorney file a caveat in the Registry in Form No.12. Notice of the filing of the caveat shall be given by the Registrar to the petitioner or his attorney. (Form No.13).

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28. Procedure on affidavit being filed. Upon the affidavit in support of the caveat being filed (notice whereof shall immediately be given by the caveator to the petitioner), the proceedings shall, by order of a Judge upon application by summons be numbered as a suit in which the petitioner for probate or letters of administration shall be the plaintiff, and the caveator shall be the defendant, the petition for probate or letters of administration being registered as and deemed a plaint filed against the caveator, and the affidavit filed by the caveator being treated as his written statement in the suit. The procedure in such suit shall, as nearly as may be, be according to the provisions of the Code (Forms Nos.14 and 15).

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30. Trial of Preliminary issue. The Court may, on the application of the petitioner by summons to the caveator before making the order mentioned in rule 28, direct the trial of an issue as to the caveator’s interest. Where, upon the trial of such issue, it appears that the caveator has no interest, the Court shall order the caveat to be discharged, and may order the issue of probate or letters of administration, as the case may be.”

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8. A careful reading of Rules 28 and 30 makes it abundantly clear that before the proceedings are numbered as a suit by orders of a Judge for being tried as a suit as per provisions of the Code of Civil Procedure (for short, ‘the Code’), the Court may take up as a preliminary issue, whether the caveator has a caveatable interest, if such an application is filed before the Court by the petitioner. Clearly the preliminary issues are triable before the proceedings are treated as a full-fledged suit under order of the Judge concerned. Whereas suit is required to be tried as per provisions of the Code, the procedure for trial of preliminary issue

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A has been left to the discretion of the court. Rule 30 does not require the court to come out with specific findings in respect of preliminary issue because the language used in Rule 30 requires the court to discharge the caveat where, upon trial of such issue, “it appears that the caveator has no interest

B relate to the validity or legality of the Will sought to be probated but only to the issue whether the caveator has an interest for which he can maintain the caveat.

9. Learned counsel for both the parties have addressed us at some length as to the meaning of the words “caveatable interest”. The matter is no longer *res integra* in view of a detailed discussion of this term in the case of **Krishna Kumar Birla v. Rajendra Singh Lodha**¹. Paragraphs 59 to 86 of this judgment refer to large number of authorities of this Court as well as various High Courts. The conclusions flowing from that judgment including the proposition of law in paragraph 86 clearly support the case of the respondents in both the appeals that they have a caveatable interest. The test which may be applied in the present case is : Does the claim of grant of probate prejudice the respondent’s right because it defeats some other line of succession in terms whereof the respondent as a caveator asserted his/her right? Since the answer, in the facts of the case would be in the affirmative, we are in agreement with the view taken by the Division Bench that respondents have a caveatable interest.

10. A query arises as to why the Division Bench has recorded its views as “prima facie”. The answer has been provided by learned counsel for the respondents by placing reliance upon paragraph 2 of the judgment of this Court in the case of **Ishwardeo Narain Singh v. Kamta Devi**². This Court pointed out that “the Court of Probate is only concerned with the question as to whether the document put forward as the last will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the Probate Court.”

11. Since we have noted the main submission on behalf of the appellant earlier, it is deemed proper to point out that although the caveator Yasheel Jain did not file the original Will, the Division Bench has noted

¹ (2008) 4 SCC 300

² AIR 1954 SC 280

that he has filed a photocopy of the prior Will allegedly executed by the testator and has also produced the registered envelope through which such copy was sent to him by the testator along with the forwarding letter written by him. Upon such materials, the Division Bench recorded its prima facie satisfaction that the caveat should not be discharged. In the case of caveat by respondent Malati, the Division Bench noted the citations in the Will propounded by the appellant showing Malati to be only a maid servant but on the basis of totality of facts and circumstances it rightly came to the conclusion that a person by merely making a contrary statement in the Will cannot change a real relationship if it actually existed and hence at least arguable case in favour of claim of Malati as regards her relation with the testator has been established and hence she deserves to be permitted to contest the probate proceeding. The Court, at the same time made it clear that whether Malati is really a lawful widow of the testator or not cannot be conclusively adjudicated in the probate proceedings and therefore, only a prima facie view was possible to decide whether her caveat should be discharged or not.

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12. We find ourselves in agreement with the views taken by the High Court in the impugned judgments. The appeals are, therefore, dismissed but with no order as to costs.

Ankit Gyan

Appeals dismissed.

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