

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**NOTICE OF MOTION NO. 73 OF 2017
IN
TESTAMENTARY SUIT NO. 171 OF 2016
IN
TESTAMENTARY PETITION NO. 876 OF 2016**

Raj Kumar Mittal & Ors.

...Applicants/Plaintiffs

Vs.

Rajesh Venkateshwar Somani

...Defendant

Dr.Birendra Saraf, Mr.Huzefa Khokhawala, Mr.Jay Sanklecha I/b. Nankani
& Associates for Plaintiffs.

Mr.R.S. Tripathi I/b. R.R. Mishra for Defendant.

CORAM : S.C. GUPTE, J.

6 OCTOBER 2017

P.C. :

The present notice of motion is taken out in a testamentary petition for probate. The motion prays for dismissal of a caveat and affidavit in support thereof filed in the petition and grant of probate after such dismissal.

2 The testamentary petition is filed by the Petitioners, claiming as executors of the last will, codicil and testament of Venkateshwar Onkarmal Somani, for probate of the last will, codicil and testament. The Respondent to the notice of motion is a caveator, who has filed a caveat dated 22 July 2016 and an affidavit of the same date in support of the caveat, in the testamentary petition. Upon filing of the caveat and affidavit in support thereof, the petition has been converted into a testamentary

suit. That was without reference to the Petitioners / Applicants. The Petitioners / Applicants have now taken out the present notice of motion on the ground that the Respondent / caveator has not made out any single ground of objection to the grant of probate. It is accordingly prayed that the caveat should be dismissed and the conversion of the testamentary petition into a suit be revoked and probate be granted to the Petitioners.

3 The brief facts of the case, which are necessary to consider the present notice of motion, may be noted as follows :

A mutual will was executed by the deceased Venkateshwar Onkarmal Somani with his wife Leela Venkateshwar Somani on 2 March 2009. The deceased had also executed a codicil to this mutual will on 6 March 2014 along with his co-testator, i.e. his wife, Leela Venkateshwar Somani. The deceased died at Mumbai on 19 June 2015. The Petitioners, as executors of the last will, codicil and testament of the deceased, seek probate through the present testamentary petition. On 22 July 2016, the Respondent filed a caveat and an affidavit in support thereof. It is the case of the Respondent in his affidavit in support of the caveat that he is the son of the deceased and as such, has a caveatable interest in the matter. It is submitted that the present petition for probate is not maintainable, since it seeks probate of a joint and mutual will during the lifetime of the co-testator. The second objection of the Respondent / caveator is that the bequest contained in the last will, codicil and testament is *inter alia* in respect of the alleged right, title and interest of the deceased in immovable properties, which include properties owned by Shreeniwas Cotton Mills Ltd. It is submitted that an agreement to sell shares of Shreeniwas Cotton Mills Ltd. dated 2 July 2007 was entered into by the deceased with

M/s.Lodha Group and as a consideration, the deceased had received payment of about Rs.12.52 crores together with 11000 sq.ft. built-up area in the premises to be constructed on the land of Shreeniwas Cotton Mills Ltd. It is submitted that this payment and consideration were derived from inheritance and not earned out of any self-acquired property of the deceased.

4 The present application for dismissal of the caveat is on the footing that none of the two objections raised by the caveator bears on the question, which this court has to consider as a Probate Court in the present testamentary petition. It is submitted that the only grounds of objection that are germane in a testamentary petition are those that concern either the testamentary capacity of the testator or the due execution of the will. It is submitted that since the grounds of objection in the present case do not concern either of these aspects, there is no relevant ground of objection, which this court is called upon to consider in opposition to the probate petition. It is submitted that since no relevant ground of objection is disclosed by the caveat, it should be dismissed and the matter should be treated as an uncontested matter and the probate applied for should straightway be granted.

5 In opposition to the present application, it is submitted by the Respondent / caveator that under the relevant provisions of law, the moment a caveat is entered by any next of kin of the deceased disclosing caveatable interest, the petition ought to be converted into a contested suit; the merits of the objections raised by the caveator, which form part of his written statement in the suit, should be considered only at the trial of the suit and not at the very threshold, i.e. at the time of admission of the

caveat.

6 The controversy really concerns the kind of objections that may be entertained by the Probate Court as part of the caveat, which makes the matter a contested one calling for a trial. Is it sufficient for the caveator to merely indicate his caveatable interest and not make out any ground of objection, which is relevant for considering whether or not to grant the probate applied for, or is it that at least one relevant ground, which is germane for the consideration of the Probate Court, must be spelt out in the affidavit in support of the caveat so as to enable the court to treat the testamentary petition as a contested matter and convert it into a suit which must then go to trial. This, in short, is the main question to be decided in the present matter. Once this is decided, the supplementary question, then, is, whether any such ground, if necessary, is made out in the present case.

7 Section 284 of the Indian Succession Act speaks of a caveat to be filed by an interested party. As the wording of the section itself indicates, this caveat is “against the grant of probate or administration”. If that is so, it must show that probate or administration ought not to be granted to the Applicant. On plain terms, what this means is that the caveator must indicate some ground which bears on the admissibility of the will to probate. A will is not admissible to probate, if its due execution is not proved before the Probate Court. A valid execution of a will has three important aspects. The first is the testamentary capacity of the testator. The testator must be shown to be in a disposing state of mind, entitled to make a testamentary disposition. Secondly, it must be shown that the execution of the will is a voluntary act on the part of the testator and not vitiated by

fraud, coercion or undue influence or misrepresentation. It again bears on the state of mind of the testator. The third aspect is the legal formalities associated with the execution of a will. These include formalities such as affixing of the signature of the testator to the document in the presence of two witnesses, who sign the document as witnesses in the presence of each other and the testator. These three aspects are the only aspects, which the Probate Court needs to consider before granting of probate. The Testamentary Court is clearly not concerned with either the title of the testator to the property bequeathed through the testamentary instrument or the legal effect of any particular bequest.

8 Rules 401 and 402 of the Bombay High Court (Original Side) Rules, which respectively deal with caveat and affidavit in support of caveat, also make this clear. A person intending to oppose the grant of probate or letters of administration must file a caveat in Form No.116 within fourteen days from the date of service of the citation upon him or within such shorter time as the Judge in Chambers may direct (Rule 401). Rule 402 provides for filing of an affidavit in support of caveat within eight days of filing of the caveat. It requires such affidavit to state the right and interest of the caveator, and the grounds of his objection to the application for probate or letters of administration. In plain terms, thus, Rules 401 and 402 of the High Court (Original Side) Rules read with Section 284 of the Indian Succession Act make it clear, as a first principle, that the caveator must state grounds of his objection to the application for probate or letters of administration, as the case may be. These grounds of objection, it is trite to say, must be grounds which are statable and of substance and not merely nominal or of form. A caveator, in other words, simply because he has the requisite right and interest of a caveator, cannot seek to oppose the

grant of probate or letters of administration without indicating any ground of objection which bears on the question whether the grant should be made or not.

9 Apart from the very principle of these provisions of law, there is ample authority for this proposition. In one of the early cases decided by Calcutta High Court on this issue, namely, the case of **In the goods of Nanda Lal Sett**¹, Calcutta High Court was concerned with an affidavit in support of a caveat, which did not disclose any material to show why probate should not be granted to the will in question. The ground of opposition to the probate, which was raised in the affidavit, was that the testator, Nandalal Sett, claimed the property through his deceased predecessor Prosanna Kumar Sett, who had created a trust of his properties for certain charities with power to the executrix to appoint a trustee. It was submitted that the executrix died without appointing any trustee. The objection of the caveator was that there being no other provision made for appointment of a trustee or trustees in accordance with the will of his predecessor Prosanna Kumar Seth, the testator Nandalal Sett had no power or authority, express or implied, to nominate or appoint or constitute any trustee or trustees. In other words, the objection of the caveator was that the testator Nandalal Sett, since deceased, had committed a breach of his predecessor Prosanna's trust by appointing the trustee of the trust fund created by Prosanna's will. In the face of such an objection, the court was of the view that the affidavit misconceived the scope and function of the affidavit in support of the caveat. The court noted that the grounds of objection in support of a caveat against probate of any will have to disclose material to show why probate should not be granted. In other words, an

1 1954 SCC OnLine Cal 133

affidavit to support the caveat has to show that the will was not duly or lawfully executed as a will. The court observed in this behalf as follows :

“5. In my opinion the whole of this affidavit in support of the caveat misconceives entirely the scope and function of an affidavit in support of the caveat required by the Rules of this Court to state "the grounds of the objections". The present application is for probate of the will of Nandalal Sett, dated the 26th July, 1952. The grounds of objection in support of a caveat against this will have to disclose materials to show that probate should not be granted to this will. In other words, such an affidavit to support a caveat has to show that that will was not duly or lawfully executed as a will. The only questions germane for the Court to consider at the time of making a grant of the probate of a will are questions relating to the testamentary capacity of the testator whose will has to be probated and the due execution of that will by the testator. Questions of testamentary capacity will obviously cover considerations of physical and mental capacity such as inter alia appreciation of what is being done, sanity, duress, undue influence, fraud, and questions of due execution will include inter alia such considerations as signature or thumb impression of the testator to the will, its proper execution and attestation. They are grounds of objection to the grant of probate.”

The reasons for this statement of law are not far to seek. As explained by Calcutta High Court, the caveat is simply a warning given by a person having or asserting any interest in the estate of the deceased against the court issuing any probate without notice to the caveator. A caveat is accordingly a notice not to any individual but to a court not to allow proceedings to be taken in the matter of the will of the deceased without notice to the caveator. The purpose for which the caveat is entered is to give time to the caveator to make enquiries and to obtain such information as to enable him to determine whether or not there are adequate grounds

for opposing the grant of probate or to give an opportunity of raising any question arising in respect of the grant. After making these inquiries, an affidavit is submitted in support of the caveat which must then disclose the grounds of objection to the grant. If a proper affidavit disclosing right and interest of the caveator as well as the grounds of objection to the grant is not made within the time laid down, the next stage, which treats the matter as a contentious cause, is not reached. As noted by Calcutta High Court, in the aforesaid case, what was attempted to be done was not to claim that the testator had no testamentary capacity to make the will or the fact that it was not duly executed, but only that the particular provision in the will could not be given effect to as it was in breach of the trust created by the predecessor of the testator through whom alone he claimed. This was no ground of objection to the grant of probate of the will of the testator. It was at best an objection about the construction of a particular provision in the will of the testator and concerned its effect. As held by Calcutta High Court, if there was no ground germane to the question as to whether or not to grant probate, the caveat could not be treated as a valid caveat which would turn the matter into a contentious cause so as to require a trial. This case was followed by the same High Court in the later case of **In the Goods of Shrutika Doshi (Deceased)**².

10 There is an authority of our court also in the case of **Kaikhosrow Aspendiar Oshtori vs. Dr.Meherji Aspendiar Oshtori**³ for this proposition. That was a case where the caveator had made a bald assertion that the will was invalid and illegal without stating why it was so. A learned Single Judge of this court observed that in a probate petition, the only issue that could be raised and which warranted a decision, was

2 **2017 SCC OnLine Cal 8288**

3 **Notice of Motion No.122/2006 in Testamentary Suit No.33/2006 dated 15.12.2006**

whether the will, of which probate was sought, was a valid and legal Will. The court held that in the premises, it was absolutely necessary for maintaining a caveat in a probate petition to dispute the validity and legality of the will in the affidavit filed in support of the caveat, since that was the only issue which the Probate Court was concerned with whilst considering the grant.

11 The ground that the property bequeathed by the testamentary instrument does not belong to the testator, is neither here nor there so far as the Probate Court is concerned. As noted above, the Probate Court is not concerned with the title of the testator to the property sought to be bequeathed. The court simply concerns itself with the question as to whether the will was validly and lawfully executed by the deceased testator and whilst considering this question, it considers the three aspects, which are noted above. Nothing more and nothing less.

12 The only other objection raised by the Respondent / caveator in the present case is that the will of which probate is sought, being a joint and mutual will, cannot be probated during the lifetime of the co-testator. This ground clearly is devoid of any merit. It is an established position in law, as affirmed by the Supreme court in **Kochu Govindan Kaimal vs. Thayankoot Thekkot Lakshmi Amma**⁴, that a joint will is nothing but individual wills made by two or more testators, though contained in a single document. The court observed that a joint will, though unusual, was not unknown to law. It quoted a passage from *Halsbury's Laws of England* and the statement of law in this behalf in *Jarman on Wills* based on observations of Farewell, J. in *Duddell in re. Roundway v. Roundway*, that a

4 1959 Supp. (1) SCR 1 : AIR 1959 SC 71

joint will is a will made by two or more testators contained in a single document, duly executed by each of the testators, disposing of either their separate properties, or their joint property and that on the death of the first of the two testators, the will is admitted to probate as a disposition of the property that he possesses. The will is admissible to probate once again on the death of the second testator, assuming that no fresh will has been made regarding the disposition of the second testator's property.

13 The fact that the will in the present case is not merely joint, but also mutual, does not imply any impediment to probate either. A mutual will is a will whereby an agreement is entered into by and between testators, who may be testators of separate wills or co-testators in a joint will, in regard to the application of the property, where testators confer reciprocal benefits on each other with the same ultimate disposition of the estate of each testator on the death of the survivor. The co-testators usually undertake not to revoke or alter their respective testamentary dispositions except with consent of each other. Mutuality of the wills, however, has nothing to do with their admissibility to probate. As explained by the Supreme Court in the case of **Krishna Kumar Birla vs. Rajendra Singh Lodha**⁵, the mutual agreement in the will/s merely reflects on the aspect of enforceability of the agreement either in equity or by way of a suit for specific performance. Even when the agreement is breached by the surviving testator after the death of the other testator or joint testator, as the case may be, the survivor's will is admissible to probate and the representative under the latter will takes the property thereunder, though he takes it subject to the terms of the mutual will.

5 (2008) 4 SCC 300

14. The statement of law in this behalf in *Halsbury's Laws of England*, 4th Edn. Vol.50, P.108, as noted by the Supreme Court in **Krishna Kumar Birla's** case, is quoted below :

"221 ... Even when there is such an agreement and one party has died after departing from it by revoking or altering the will, the survivor having notice of the breach cannot claim to have the later will set aside, since the notice gives him the chance of altering the will as regards his own property; and the death of the deceased party is itself sufficient notice for this purpose. If, however, the deceased has stood by the agreement and not revoked or altered his will, the survivor is bound by it, and although probate will be granted of a later will made by him in breach of the agreement, since a Court of Probate is only concerned with the last will, the personal representatives of the survivor nevertheless hold his estate in trust to give effect to the provisions of the joint will or mutual wills."

Also quoted below is the statement in *Lewin on Trusts*, 17th Edn., PP.270-271, noted by the Supreme Court in this behalf :

"10-27 ...If the survivor, whether or not after taking an actual benefit under the arrangement, alters his will, his personal representative takes the property which is subject to the agreement upon trust to perform the contract. Equity cannot prevent the survivor from revoking his will, for instance, by marriage or another will, but it causes his personal representatives to give effect to his revoked will insofar as his contract bound him not to revoke it..."

15. After noting Indian Law and laws of various other jurisdictions in this behalf, the Supreme Court in **Krishna Kumar Birla's** case categorically held that probate has to be granted of a will, which is in breach of the mutual will/s or in the prejudice to the agreement not to

revoke the mutual will/s. As a matter of principle the court held that (i) a will made in prejudice of an agreement will nevertheless be effective as a will as it is by its very nature and by its very essence a revocable instrument and (ii) a subsequent infringing will would be valid even if it revokes an earlier mutual will.

16 If, whether or not a subsequent will by the surviving co-testator is in breach of an earlier joint and mutual will, such subsequent will is admissible to probate, there is no apparent reason why probate of the deceased co-testator's will, forming part of such joint and mutual will, should not be granted during the lifetime of the surviving co-testator. Mutuality of the will/s, after all, has no bearing on admissibility to probate, whether of the will of the deceased co-testator or of the surviving co-testator after the latter's death.

17 Mr.Tripathi, for the Defendant/Caveator, relying on the judgment of the Supreme Court in the cases of **B. Venkatamuni vs. C.J. Ayodhya Ram Singh⁶** and **K. Laxmanan vs. Thekkayil Padmini⁷**, submits that in any event, the probate court is bound to satisfy itself as to the totality of the circumstances with a view to uphold the legality and genuineness of a will, even when no particular plea of suspicious circumstances is raised by the caveator. That may be so. But there is indeed no such circumstance pointed out at the Bar, which would call for any trial. The matter cannot be treated as a contentious matter and a trial cannot be ordered merely on a theoretical consideration such as this.

18 Learned Counsel lastly submits that under clause 6 of the joint

6 (2006) 13 SCC 449

7 (2009) 1 Scc 354

and mutual will, the executors are directed to take charge of the estate “after our death”, that is to say, after the death of both joint testators. Learned Counsel submits that the intention of the joint testators was to make a testamentary disposition of their property after the death of both and not earlier. The argument is plainly against the tenor of the will. There is a bequest of each of the co-testators to the other of them of the entire estate, i.e “of the first-dying of us to the survivor of us absolutely.” This is clearly a testamentary disposition, which operates from the death of the first-dying of the two testators. For claiming this disposition, it is necessary to probate the will of the first-dying of the testators. If no probate is granted to the joint will so far as the deceased testator is concerned on the arguments of the Caveator here, several anomalies may ensue as a consequence. Under Section 213 of the Succession Act, 1925, no right as executor (or legatee) can be established in any court of justice without grant by a competent court of probate (or letters of administration with the will annexed) of the will under which the right is claimed. As held by the Supreme Court in **Mrs.Hem Nolini Judah vs. Mrs.Isolyne Sarojbashini Bose**⁸, it is immaterial whether the right under the will is claimed as a plaintiff or as a defendant; in either case Section 213 will be a bar to any right being claimed by a person under a will whether as a plaintiff or as a defendant unless probate or letters of administration of the will have been obtained. Thus, it will be impossible to the executors to collect any asset of the deceased testator or defend any action against it during the lifetime of the co-testator. That would be an absurd and unpalatable consequence.

19 None of the objections of the Respondent / Caveator is thus germane or has any material bearing on the permissibility of the grant. The

8 1962 Supp. (3) SCR 294 : AIR 1962 SC 1471

caveat and the affidavit in support thereof are accordingly dismissed and the order converting the petition into a testamentary suit is revoked. The petition shall be treated as an uncontested petition and probate of the last will, testament and codicil of the deceased Venkateshwar Onkarmal Somani as prayed for shall accordingly be ordered, having effect throughout India. Office to act accordingly.

20 The Notice of Motion is disposed of in the above terms.

(S.C. GUPTE, J.)