

IN THE HIGH COURT AT CALCUTTA

Testamentary & Intestate Jurisdiction
Original Side

Present:

The Hon'ble Justice Arijit Banerjee

TS 14 of 2006

In the Goods of:

Saroj Kumar Chatterjee (Deceased)

For the Plaintiff : Mr. Krishnendu Gooptu, Adv.
Mr. Prantik Garai, Adv.
Mr. C.K. Saha, Adv.
Mr. Partha Pratim Mukherjee, Adv.

For the legal heirs : Mr. Dhruba Ghosh, Sr. Adv.
Of the Caveator : Mr. Soumyajit Ghosh, Adv.
Mr. Rohit Banerjee, Adv.

Heard on : 04.01.2017, 07.02.2017, 28.03.2017,
20.04.2017, 27.04.2017, 03.05.2017,
11.05.2017, 11.07.2017, 20.07.2017,
25.07.2017, 26.07.2017, 05.12.2019,
06.12.2019, 09.12.2019, 27.01.2020,
19.02.2021 & 23.02.2021

CAV on : 23.02.2021

Date of Judgment : 27.08.2021

Arijit Banerjee, J.:

1. This is a curious tale of two Wills. One is dated August 30, 1988 (hereinafter referred to as the 'First Will'). The other is dated August 31,

1988 (hereinafter referred to as the 'Second Will'). Both are said to be Wills executed by Saroj Kumar Chatterjee (in short 'Saroj') who died on September 03, 1988. The First Will was admitted to probate at the instance of one Sabitri Chatterjee (who was named as the sole executrix in the First Will), by this Court by an order dated December 11, 1997.

2. The executors of the Second Will filed the present probate application on November 05, 1990 which was earlier than the date of filing of the probate application in support of the First Will, i.e., June 19, 1991. Upon becoming aware that the First Will had been probated by this Court by order dated December 11, 1997, one of the executors of the Second Will (the other executor having died) applied on January 27, 1998, for revocation of probate that had been granted in respect of the First Will. By a judgment and order dated July 27, 1998 (reported at **1999 (2) CLJ 272**) the Learned Single Judge dismissed the revocation application by observing *inter alia*, as follows:

“23. According to me, it is correct to say that even if the earlier order granting probate is not recalled but by virtue of granting second probate, if any, earlier grant of probate will automatically be annulled or revoked.

31. The case was rested thereon for the purpose of delivering the judgment. But subsequently Mr. Bhattacharya mentioned this matter with notice to the parties by intimating the Court that the Section 118 of the Indian Succession Act has no application in case of Hindus. Therefore, the subsequent Will may not be

construed as prima facie bad Will. I have not called upon to decide as to whether the subsequent Will wherein grant of probate is still pending before this Court is genuine Will or not but I have called upon to dispose of the applications for the purpose of recalling and/or setting aside of as order passed on 11th December, 1997 wherein a probate was granted in respect of a Will.

32. Therefore, parties are at liberty to agitate the point as to applicability and/or scope and submit of Section 118 of the Indian Succession Act, at the time of disposal of the subsequent probate application being contentions cause i.e. a suit.

33. Since, I have already observed that the question of annulment and/or revocation of the earlier probate is dependable upon the result of the subsequent probate proceedings, there is no scope of recalling or setting aside the order passed by the Court granting probate on 11th December, 1997.”

3. Two nephews of Saroj *vis.* Tapan and Kamal who were caveators in respect of the First Will, had also filed applications for revocation of probate of the First Will. Such applications were also dismissed by the judgment and order dated July 27, 1998. Kamal had filed an appeal against the judgment and order dated July 27, 1998. The appeal was dismissed.

4. In the present proceedings the surviving executor of the Second Will prays for an order admitting the Second Will to probate.

5. Saroj had done well in life and was also the beneficiary of substantial inheritance. His wife predeceased him. He had no children. He died on September 03, 1998, possessed of valuable immovable and movable properties. As mentioned above, two documents of Saroj have seen the light of the day, one dated August 30, 1988 and the other dated August 31, 1988, both of which are claimed to be the last Will and testament of Saroj by the executors of the respective Wills. As it stands at present, the First Will has been probated by this Court, albeit in exercise of power under Order VIII Rule 5 of the Code of Civil Procedure. Applications for revocation of such probate have filed. An appeal filed by one of such applicants was dismissed. The matter rested there. In other words, the order dated December 11, 1997 admitting the First Will to probate, has attained finality. The First Will of Saroj has received this Court's certificate that it is a genuine Will of the testator. In this testamentary suit what falls for determination is whether or not the Second Will satisfies the requirements of law and should be admitted to probate. If the Second Will is probated, automatically the probate granted in respect of the First Will shall stand annulled. If not, then, the probate granted in respect of the First Will will stand.

6. Before proceeding further, it may be noted that under the First Will, the sole beneficiary was Sabitri who was also named as sole executrix of the Will. All the properties of Saroj were devised/bequeathed to Sabitri under the First Will. Sabitri executed a Will dated February 06, 2004, whereunder she devised Premises No.143A & B, Rash Behari Avenue, Kolkata – 700 029 (which was a part of Saroj's estate) to one Prof. Gopal Mitra and the rest and residue of her properties (which were also substantially part of Saroj's

estate) to her daughter Anjana. Prof. Gopal Mitra was appointed as the sole executor of Sabitri's Will. Paragraphs 3, 4 and 5 of the Will read as follows:

"3. I, Sabitri Banerjee, accordingly, leave, bequeath and give the entirety of the Premises No.143A & B, Rash Behari Avenue, Kolkata – 700029 to Prof. Gopal Mitra as he has during my lifetime entered into a contract in which I undertook to convey and transfer the property to him or his nominee or nominees and against which I have already received total consideration for my maintenance and other expenditures which will be my just debts and liabilities.

4. I, further leave, bequeath and give all other properties including the movable properties lying in the Locker No.233 in Punjab National Bank, Ballygunge Branch and Locker No.564 in Allahabad Bank, Gariahat Branch and all other assets acquired by virtue of the probate being No.107A of 1991 by the Hon'ble High Court at Calcutta to my only daughter Smt. Anjana Roy (nee Banerjee) and others to be decided by Prof. Gopal Mitra my said executor.

5. Subject to above specific legacies, I, Sabitri Banerjee give, leave and bequeath the rest and residue of my estate including all reversion, expectancy and future assets both movable and immovable, if any, acquired by me hereafter absolutely and forever unto and to the use of

my only daughter Smt. Anjana Roy (nee Banerjee) and others to be decided by Prof. Gopal Mitra my said executor. ”

7. Under his Second Will, Saroj devised the properties at 143A & B, Rash Behari Avenue, Kolkata and at 23 Jugal Kishore Das Lane, Calcutta, absolutely to Bharat Sevashram Sangha, Rash Behari Avenue, Ballygunge, Calcutta, subject to the condition that Bharat Sevashram Sangha would not be entitled to dispose of the property at Rash Behar Avenue, Calcutta, but shall develop the property for the purpose of using the same as a cultural centre which shall bear the name of Haridas Chatterjee Cultural Centre (Haridas Chatterjee was Saroj's father). Saroj gave/devised/bequeathed his other immovable and movable properties to his relatives. Saroj appointed one Romen Kumar Chatterjee (since deceased) & Kamalesh Bhattacharya as the executors and trustees of his Second Will. Sharmistha Bhattacharjee (wife of the surviving executor and the present plaintiff) is a beneficiary under the Second Will of Saroj. In the aforesaid factual background, I may now proceed to consider as to whether or not the Second Will of Saroj passes the tests laid down by law including the relevant provisions of the Indian Succession Act.

8. In the affidavit in support of caveat filed by Gopal it has been stated, inter alia, as follows:

“10. On or about June 1, 2001, the Bharat Sevashram Sangha filed a suit before the Learned Civil Judge (Junior Division), 2nd Court at Alipore, South 24 – Parganas,

against inter alia, Sabitri Banerjee claiming prayers inter alia as contained in the plaint.

(a) A declaration that the plaintiff is a beneficiary to the properties described in the Schedule below by the strength of the Will dated 31.08.1988.

(b) A declaration that the defendant has no right to deal with and/or transfer the property described in the Schedule below till the Original Suit No. G.A. 120 of 1998 is disposed of.

(c) A permanent injunction restraining the defendant from dealing with the property described in the Schedule below till the disposal of the O.S. No. G.A. 120 of 1998.

(d) Cost;

(e) Receiver;

(f) Any other relief or reliefs the plaintiff is entitled to.

11. In the meantime, the said Sabitri Banerjee died on or about August 30, 2004 after having made and published her Last Will and Testament dated February 06, 2004 whereby she appointed me (Prof. Gopal Mitra) as the sole Executor.

12. On or about November 24, 2004 I filed an application for grant of probate of the said Will of Sabitri Banerjee (being PLA No.340 of 2004) and the said application was allowed on January 19, 2005. A copy of

the said application along with the grant dated January 19, 2005 is annexed hereto and marked 'E' and 'F' respectively.

.....

15. On or about March 11, 2005, I (Prof. Gopal Mitra) applied before the Learned Trial Court at Alipore (Learned Civil Judge, Junior Division) for being substituted as defendant instead and place of Sabitri Banerjee and was impleaded as a party thereto.

16. The said suit filed by Bharat Sevashram Sangha was left pending for a long time and no steps were being taken by the plaintiff. In the circumstances, I moved a revisional application before the Hon'ble High Court at Calcutta for early hearing of the said suit and an order was passed directing expeditious disposal of the same. In the meantime, the Bharat Sevashram Sangha obtained legal advice and admitted and the probate granted to Sabitri Banerjee (since deceased) in respect of the Will dated August 30, 1988 of the Late Saroj Kumar Chatterjee was genuine and that she was the sole legatee of the latest Will. Since the Bharat Sevashram Sangha was a respectable public trust and did not wish to be involved in any controversy relating to the untrue Second Will, the said Organization decided to accept the Will dated August 30, 1988 and accept the fact that I was genuinely the

eventual legatee thereunder and as such approached me for compromise of the said suit.

17. On or about November 11, 2005 the Bharat Sevashram Sangha and I filed a written compromise petition before the Learned Trial Court at Alipore (2nd Civil Judge, Junior Division) 24 Parganas (South), whereunder it was agreed between the parties to seek a compromise decree to be passed in the said suit whereunder the defendant (Prof. Gopal Mitra) would be declared the sole and absolute owner in respect of the premises No.143A, Rash Behari Avenue, Kolkata and the suit would stand withdrawn. A copy of the said petition for compromise jointly signed by me and the authorised representatives of the Bharat Sevashram Sangha is annexed hereto and marked 'H'. A copy of the Power of Attorney executed on behalf of the Bharat Sevashram Sangha authorising Shri Dulal Chakraborty to take all steps in the suit on their behalf is also annexed hereto and marked 'I'.

18. By an order dated November 24, 2005 the Learned Trial Court at Alipore was pleased to dispose of the said application by dismissing the said suit. Copies of the relevant orders are annexed hereto and collectively marked 'J'.

19. It shall appear from the said compromise petition that the Bharat Sevashram Sangha had admitted that the

Will dated August 30, 1988 was the genuine Will of Saroj Chatterjee and not the Will dated August 31, 1988 (which is the subject matter of the present proceedings.)

.....

25. I state and submit that in view of the Probate already being granted in favour of the Will dated August 30, 1988, the question of there being another grant of Probate does not arise in respect of a later Will, especially since the application for Probate being P.L.A. No.138A of 1990 has not been proceeded with by the propounders for so long and has been left pending for over 15 years.

26. Further, in view of the categorical admission made on behalf of the Bharat Sevashram Sangha regarding the genuineness of the earlier Will and the invalidity of the later Will dated August 31, 1988, it is clear that no reliance can be placed on the validity of the later Will. I put the propounders to strict proof of the said Will and pray that same may be proved in solemn form before grant. I have in my possession true signatures of the Testator, Saroj Chatterjee on several documents and it is imperative that I will be given an opportunity to inspect the original Will dated August 30, 1988. I reserve my right to make appropriate submissions in respect thereof only thereafter. I further reserve the right to take further ground after inspection of the Will in support of the Caveat filed by me.

27. *In the circumstances, I submit that the instant application be dismissed with costs. I state that the purported document dated August 31, 1988 sought to be relied upon by the petitioners (being Kamalesh Bhattacharjee and Romen Chatterjee) is not a genuine Will in law or on fact and it is unlikely that the said document has been executed in accordance with law or by the alleged Testator at all. I state that Smt. Sabitri Banerjee had genuinely looked after the said Saroj Chatterjee during the last years of his life and it would be completely unnatural for the said Testator to deprive her of his estate and give the same to complete stranger. In any event, the beneficiary of the alleged Will itself has discarded the genuineness of the same. In the circumstances, it is only just and proper that the above application be dismissed.*

28. *I state that I have come to learn that subsequently the Bharat Sevashram Sangha has purported to resile from their joint compromise and filed an application for recalling the compromise petition filed before the Ld. Court at Alipore. No order has yet been passed. In any event it shall appear from a perusal of the plaint filed herein, that suit is wholly misconceived, as it purports to rely upon an unprobated Will in legal proceedings.*

29. *I state that I have been allowed to file the Caveat by this Hon'ble Court and am sufficiently intestated in the*

estate of the deceased. I state that it is apparent from the records I have seen that the purported Will dated 31.08.88 is not genuine, contrived and not executed in accordance with law. The entire execution of such an unnatural Will is stranded in suspicious circumstances. I state that it appears that the alleged beneficiary is in the habit of claiming to be beneficiaries to the estates of several deceased persons and their bonafide is in doubt as will appear from several orders of the Court I have seen regarding them. ”

9. Upon consideration of the pleadings filed by the parties, by an order dated February 24, 2009, a Learned Judge of this Court framed the following issues:

- “1) Is the above Testamentary suit maintainable in its present form on facts and on law?
- 2) Is the alleged document dated August 31, 1988 sought to be propounded executed as a Will in accordance with law?
- 3) Is the document sought to be propounded genuinely a later Will of Saroj Kumar Chatterjee than the Will dated August 30, 1988 (for which Probate has already been granted)?
- 4) To what relief, if any, is the plaintiff entitled?”

10. Sabitri died on August 30, 2004. Gopal Mitra applied for grant of probate of Sabitri’s Will mentioned above. The application was registered as

PLA No.340 of 2004. Probate was granted by this Court to Gopal Mitra on January 19, 2005. Gopal Mitra had filed a caveat in respect of the present proceedings. The caveat was subsequently found to be defective. On an application made by Gopal Mitra being GA No.349/2006, this Court extended the time for Gopal to file caveat by a week from the date of the order. The order also recorded that in case Gopal did not file his affidavit in support of his caveat within the period stipulated under the Original Side Rules of this Court, the caveat would stand discharged. In respect of the plaintiff's contention that Gopal did not have a caveatable interest in respect of the Saroj's estate, the Court held that such question would be considered at the time of final hearing of the suit.

11. It is not in dispute that Gopal filed a fresh caveat within the extended time period granted by the Court and also filed affidavit in support of the caveat within the time period prescribed by the Original Side Rules of this Court. Accordingly, PLA 138A of 1990 was marked as a contentious cause and was renumbered as TS No.14 of 2006.

12. Upon the demise of Gopal, his legal heirs were substituted as defendants in the present suit. In the course of hearing of the suit, Learned Counsel appearing for the propounder/plaintiff again raised the point that Gopal had no caveatable interest and accordingly the caveat filed by him should be discharged. Learned Counsel for the plaintiff submitted that the said point should be decided as a preliminary point. By a judgment and order dated September 06, 2017, I had held that there was no warrant for deciding the question of Gopal's caveatable interest as a preliminary issue. I

recorded in that Order that the issue of Gopal's caveatable interest shall be decided along with the other issues.

13. Accordingly, the same shall be an additional issue in the suit. In my opinion, the said issue needs to be addressed first since, if the plaintiff is correct in saying that Gopal did not have a caveatable interest in the estate of Saroj, the caveat must be immediately discharged and Gopal's affidavit in support of the caveat must be ignored by the Court.

Issue as to whether or not Gopal had caveatable Interest:

14. It was submitted on behalf of the plaintiff that Gopal's right, title and interest in respect of the Rash Behari Avenue property which formed part of Saroj's estate, devolved on Gopal by virtue of Sabitri's Will which was probated by this Court. Sabitri's right, title and interest in respect of the said property is based on Saroj's First Will which has also been admitted to probate. However, as held by the Learned Judge hearing the applications for revocation of probate of the First Will, if Saroj's Second Will is probated by this Court, the probate in respect of the First Will will automatically stand annulled. Consequently, Gopal or his legal heirs will cease to have any right, title or interest in respect of the aforesaid Rash Behari Avenue property. In other words, Gopal only had a contingent right in respect of the said property, as opposed to any vested right. Contingent right cannot create any caveatable interest.

15. It was further submitted that Gopal had no direct interest in the estate of Saroj. He was not a legatee or heir or beneficiary or caveator in respect of Saroj's Second Will. He is trying to come in through Sabitri who

was the caveatrix but who abandoned her claim and failed to file affidavit in support of her caveat. Gopal did not have any real interest in the estate of Saroj.

16. Finally it was submitted that Gopal, prior to filing his caveat and affidavit in support thereof, had sold off the Rash Behari Avenue property to third parties and thereby created adverse right/title on the estate of the testator.

17. In support of his submissions Learned Counsel relied on the following decisions:

- i) ***Krishna Kumar Birla v. Rajendra Singh Lodha & Ors. : (2008) 4 SCC 300.***
- ii) ***Jagjit Singh & Ors. v. Pamela Manmohan Singh : (2010) 5 SCC 157.***
- iii) ***Suraj Lamp & Industries Private Limited v. State of Haryana & Anr. : (2012) 1 SCC 656.***
- iv) ***Usha Subbarao v. B.N. Vishveswaraiah & Ors. : (1996) 5 SCC 201.***
- v) Reliance was also placed on the definition of ‘contingent interest’ in Black’s Law Dictionary.

18. Appearing for the caveator, Mr. Dhruba Ghosh, Learned Senior Advocate, submitted that a caveat can be entered by any person having or asserting an interest in the estate of a deceased person and it has been held that he must show that he has that interest by inheritance or otherwise. It is not the extent of his interest that is important. Even a minuscule interest would suffice. He submitted that the test generally is: Will the grant of

probate to the petitioner displace any right to which the caveator is otherwise entitled? If so, he has an interest. If not, he has none. In this connection he relied on the decision in the case of **Swatantranandji v. Lunidaram Jangaldas : AIR 1937 BOM 397.**

19. Mr Ghosh also relied on the case of **Nabin Chandra Guha v. Nibaran Chandra Biswas and Ors. : AIR 1932 Cal 734** wherein it was observed that taking the words of Section 283 of the Indian Succession Act in their natural meaning, it is sufficient to interpret them as implying a real interest, which is or is likely to be prejudicially or adversely affected by the Will in question. The court further held that a purchaser from an heir after the death of the testator has *locus standi* to oppose grant of probate in respect of the testator's Will; and it is not necessary for the objector to show that he had an interest in the estate at the time of the testator's death.

20. Chapter IV under Part IX of the Indian Succession Act, 1925 (in short 'the said Act') pertains to grant and revocation of probates and letters of administration. Section 284 of the said Act provides for lodging of caveats against grant of probate or administration. Section 285 of the Act provides that no proceeding shall be taken on a petition for probate or letters of Administration after a caveat against the grant thereof has been entered with the District Judge or District Delegate until after such notice to the person by whom the caveat has been entered, as the Court may think reasonable. The said Act does not clarify as to who is entitled to lodge a caveat against grant of probate or what amounts to caveatable interest.

21. The propositions laid down in the cases of **Swatantranandji v. Lunidaram Jangaldas (Supra) & Nabin Chandra Guha v. Nibaran**

Chandra Biswas and Ors. (Supra) relied upon by Learned Counsel for the caveator, have been noted above. In effect, both the said decisions lay down that if a person has a real interest in the estate of the deceased, however slight that interest may be, he would be entitled to contest a proceeding for obtaining probate of the Will of the deceased by filing caveat. In other words, if grant of probate of a Will in any manner affects the rights of a person, he would be having a caveatable interest.

22. In the case of **Brindaban Chandra Shaha vs. Sureswar Saha Pramanik : 10 CLJ 263** it was held that since grant of probate operates as a judgment *in rem*, it is of utmost importance that such grant should be made after full opportunity to enter appearance has been afforded to all persons who are likely to be affected by the grant. In that case the following passage from Williams on Executors Vol. I Page 245, was quoted:

“Any interest however slight and even it seems the bare possibility of an interest is sufficient to entitle a party to oppose a testamentary paper. Thus where a testator disposed of all his personal estate by his Will and gave his real estate but none of his personal, to his brother’s children, and by a codicil he gave them pecuniary legacies revoking the devise to them of the real estate which was of greater value than the legacies, it was held that they might oppose the codicil alone, notwithstanding their only right to a share of the personal estate was under it. Though a next-of-kin may as such oppose all the testamentary papers, he has not a right to oppose any

particular one he may think fit; for some interest in it however remote is necessary.”

The court went on to observe as follows:

*“This statement of the law is amply borne out by cases of the highest authority **Kipping v. Ash (1845) 1 Rob 270: 4 Cas 177; Bashcomb v. Harrison (1849) 2 Rob 118: 7 N Cas 275; Crispin v. Doglioni (1860) 2 S & T. 17; Dixon v. Allinson (1864) 3 S. & T. 572.** In more than one of these cases, it was stated that the bare possibility of an interest was sufficient to enable a person to oppose a testamentary instrument. Substantially the same rule has been adopted in the American Courts as consistent with the principles of reasons and justice. Thus in Encyclopedia of Pleading and Practice Vol.16 Pages 1009 and 1015, it is stated that a contestant must be a person interested though his interest may be very small and not entirely free from contingencies or doubts. Reference is made to the case of **Dower v. Church (1864) 3 Sw. & Tr. 572** in which it was held that where the interest of the plaintiff in a bill contesting a Will consists in his claim under an earlier Will not probated, the Court will not try the validity of the former Will, but it is sufficient if the contestant sets up a bonafide claim.”*

23. In **Krishna Kumar Birla v. Rajendra Singh Lodha & Ors.** (supra) a Division Bench of the Supreme Court held, inter alia, as follows:

“84. Section 283 of the 1925 Act confers a discretion upon the court to invite some persons to watch the proceedings. Who are they? They must have an interest in the estate of the deceased. Those who pray for joining the proceeding cannot do so despite saying that they had no interest in the estate of the deceased. They must be persons who have an interest in the estate left by the deceased. An interest may be a wide one but such an interest must not be one which would not (sic) have the effect of destroying the estate of the testator itself. Filing of a suit is contemplated inter alia in a case where a question relating to the succession of an estate arises.

85. We may, by way of example notice that a testator might have entered into an agreement of sale entitling the vendee to file a suit for specific performance of contract. On the basis thereof, however, a caveatable interest is not created, as such an agreement would be binding both on the executor, if the probate is granted, and on the heirs and legal representatives of the deceased, if the same is refused.

86. The propositions of law which in our considered view may be applied in a case of this nature are:

- (i) To sustain a caveat, a caveatable interest must be shown.*

- (ii) *The test required to be applied is: Does the claim of grant of probate prejudice his right because it defeats some other line of succession in terms whereof the caveator asserted his right?*
- (iii) *It is a fundamental nature of a probate proceeding that whatever would be the interest of the testator, the same must be accepted and the rules laid down therein must be followed. The logical corollary whereof would be that any person questioning the existence of title in respect of the estate or capacity of the testator to dispose of the property by will on ground outside the law of succession would be a stranger to the probate proceeding inasmuch as none of such rights can effectively be adjudicated therein."*

.....

94. *A will is executed when the owner of a property forms an opinion that his/her estate should not devolve upon the existing heirs according to the law governing intestate succession. When, thus, a person who would have otherwise succeeded to the estate of the testator, would ordinarily have a caveatable interest, any other*

person must ordinarily show a special interest in the estate.

95. Such a special interest may be a creditor of the deceased as was the case in **Sarala Sundari Dassya v. Dinabandhu Roy Brajaraj Saha (Firm) : AIR 1944 PC**

11. But, in our opinion, the same would not mean that even if the estate of the deceased is being represented by the legal heirs, caveat can be entertained at the instance of a person who has no real interest therein or in other words would merely have a contingent interest.”

24. In **G. Gopal v. C. Bhaskar & Ors.: (2010) 10 SCC 489** it was held, *inter alia*, that a person who has even a slight interest in the estate of the testator is entitled to file caveat and contest the grant of probate of the Will of the testator.

25. In **Jagjit Singh & Ors. v. Pamela Manmohan Singh (Supra)** another Division Bench of the Supreme Court noticed the conflicting views expressed by two earlier Division Benches of the Supreme Court in **Krishna Kumar Birla's** case (supra) and **G. Gopal's** case (supra) as regards what amounts to caveatable interest. The court referred the matter to the Hon'ble Chief Justice for having the issue decided by a Larger Bench and I am told by Learned Counsel for the parties that such matter is still pending before a Larger Bench.

26. In **Priyamvada Devi Birla v. Madhav Prasad Birla : (2005) SCC OnLine Cal 138 (Para - 39)** this Court held that the words 'all persons

claiming to have any interest' in Section 283 (1) (c) of the said Act, are to be understood in a liberal sense. The Court held:

".... for issuance of citation, the nature of claim or interest of the person concerned is not to be examined on the anvil of genuineness or legitimacy. Anyone's mere claim is sufficient to receive citation. For example, a person in occupation of a property being the subject matter of the estate in the Will irrespective of legitimacy of his right, can claim interest and such claim is good enough to receive citation. But the Court has to examine the nature and substance of the interest, if the person concerned decides to oppose the grant. On examination, if the Court finds that the interest or claim is of substance and further, the same is such that likely to be defeated by the grant, then his or her or its objection is considered."

27. From the above it is clear that generally a lenient test is applied to decide whether or not a person has locus standi to oppose the grant of probate in respect of a Will. Even going by the more stringent test indicated by the Supreme Court in **Krishna Kumar Birla (supra)**, I have no doubt in my mind that Gopal had caveatable interest and, as such, the standing to oppose the grant of probate of Saroj's Second Will. By reason of Saroj's First Will and subsequently Sabitri's Will being admitted to probate, the Rash Behari Avenue property of Saroj devolved upon and vested in Gopal. If Saroj's Second Will is probated, necessarily his First Will and the probate granted in respect thereof will stand annulled. This would mean that Sabitri

would stand divested of the said property and through a spiralling effect, Gopal would also stand divested of the said property. Hence, rights of Gopal and/or his legal heirs would be adversely affected if Saroj's Second Will is probated in the present proceedings. In that view of the matter it would be preposterous to hold that Gopal or his legal heirs do not have caveatable interest and are not entitled to contest the present probate proceedings.

28. The plaintiff argued that Gopal had only a contingent interest in the estate of Saroj. This argument is clearly fallacious. As noted above, by virtue of Saroj's First Will and subsequently Sabitri's Will being probated, a part of Saroj's estate vested absolutely in Gopal. The interest of Gopal or his legal heirs in such portion of Saroj's estate is real and *in praesenti*. There is nothing contingent about it. The fact that Gopal or his successors may stand divested of such portion of Saroj's estate if Saroj's Second Will is admitted to probate, does not make the interest of Gopal or his legal heirs contingent. 'Contingent Interest' has been defined in Black's Law Dictionary (11th Edition) as an interest that the holder may enjoy only upon the occurrence of a condition precedent. No such question arises in this case. The interest in the Rash Behari Avenue property that Gopal enjoyed was a vested one, albeit, the same being liable to be defeated or annulled if the Second Will of Saroj is probated.

29. Accordingly I hold that Gopal had caveatable interest and was entitled to, and after his death his legal heirs are entitled to, contest this testamentary suit.

30. Now coming to the real question, although four issues have been framed, essentially there is only one issue, i.e., whether or not Saroj's

Second Will should be admitted to probate? In other words, whether the plaintiff has been able to prove due execution of such Will.

31. Section 63 of the Indian Succession Act, 1925, prescribes the manner of execution of an unprivileged Will. The requirements are as follows:

- (a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.
- (b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.
- (c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

32. The burden of proving valid execution of a Will and that it is a genuine document is squarely on the propounder. He must establish that the testator has signed the Will within his free will and having a sound disposition of mind and understood the nature and effect of the instrument

on which he was appending his signature. The testamentary capacity of the propounder must also be established. The propounder must explain to the satisfaction of the Court suspicious circumstances, if any, surrounding the execution of the Will.

33. A Will has to be proved like any other document. Section 68 of the Indian Evidence Act provides that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and capable of giving evidence. The proviso to Section 68 clarifies that it shall not be necessary to call an attesting witness in proof of the execution of any document, **not being a Will**, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution is specifically denied by the person by whom it purports to have been executed. Section 69 of the Evidence Act provides for the manner of proof of execution of a document which is required by law to be attested, when no attesting witness is found. We are not concerned with such a situation.

34. The only question is whether or not the plaintiff has been able to prove due execution of the Second Will by Saroj. The plaintiff has examined four witnesses. They are, Purnendu Sarkar, one of the attesting witnesses; Kamallesh Bhattacharjee, the surviving executor; Swami Biswa Atma Nanda, a monk belonging to Bharat Sevashram order and Biplab Kumar Majumdar, a handwriting expert. The defendant examined one witness, namely Purushottam Chatterjee, another handwriting expert.

35. Both the handwriting experts were given copies of both the Wills of Saroj. They were asked to opine as to whether the signatures on the two Wills were of the same person. Both the handwriting experts unequivocally opined that the signature on the Second Will is not of the person whose signature appears on the First Will in the capacity of testator.

36. The First Will contained seven signatures of Saroj. The Second Will contained only one signature of Saroj. While examining the signatures, Biplab Majumdar marked the seven signatures on the First Will as Q.1 to Q.7 and marked the signature on the Second Will as Q.8. In his report the expert observed that the signatures marked as Q.1 to Q.7 contained good line quality as well as consistency in execution. He found no signs of unusual pen lifts or halts. All the pictures reflected sound pen control of the writer. He concluded that these signatures displayed all signs of genuineness. In respect of the signature marked as Q.8, he observed that the same displayed some unusual features, especially in respect of its line quality. He noted that the signature reflects a lifeless appearance having a number of significant defects in its execution. He concluded that the signature marked as Q.8 contained all signs of spuriousness. He further stated that the signature marked as Q.8 was imitation of the model of the signatures marked as Q.1 to Q.7.

37. From the evidence-in-chief of Biplab Majumdar it would appear that he has obtained a Diploma in a course of Document Examiner from National Institute of Criminology and Forensic Science, New Delhi and as on the date of deposition, he was attached to the QDCB (Questioned Documents Examination Bureau), CID, West Bengal. The Diploma obtained by him is

recognized by the Government of India (Qs.2, 3, 5, 7). In his evidence he stated that upon judging the line quality of the signatures on the Will dated August 31, 1988, it appeared that the said signature is spurious (Q.32). Upon being asked if there is any old age tremor detectable in the signature marked as Q.8 (signature on the Second Will), Mr. Majumdar answered in the negative (Qs.38-40). Although Mr. Majumdar stated (Q.22) that he did not have any admitted signature of Saroj Kumar Chatterjee before him, he was quite steadfast in his stand that the signature marked as Q.8 was spurious.

38. The other handwriting expert, Mr. Purushottam Chatterjee, arrived at the same conclusion. He marked the seven signatures on the First Will as 'A series' and the signature on the Second Will as 'Q series'. His conclusion is that the 'A series' signatures are not of the person who signed as testator on the Second Will. He has given his reasons in his Report dated September 17, 2009 which is a part of the record. The said report contains eight photographic enlargements of the 'A series' and 'Q series' signatures for illustration and demonstration of formation of loss and defects of writing habits in the signatures. In the report and in his deposition he has said that in the signatures marked as 'A series', there are no signs of forgery. However, in the signature marked as 'Q series' there are unusual pen lifts, hesitations, poor line quality and slow drawing motion. He stated that the signatures marked as 'A series' show a good amount of consistency and, as such, it can be concluded that all those signatures have been written by the same person. Further, the signature in the 'Q series' appears to be full of inconsistencies, and thus, may be forged. However, since he did not possess

any admitted signature of Saroj Kumar Chatterjee, he did not opine as to which one is actually Saroj's signature (Qs.3-11, 15, 16, 19, 20).

39. Mr Chatterjee clarified in his evidence that his duty was to compare the signatures present on the two documents. Upon doing so he has concluded that the signatures marked as 'A series' are not the same as the signature marked as 'Q series' (Q.21). He further opined that if a set of signatures are completely identical, then the same would suggest forgery. However, there are signs of natural variations and consistency in writing habits with respect to the signatures marked as 'A series' (Qs.22, 23). There are signs of forgery in the signature marked as 'Q series'. Although he has not used the word 'forgery' per se in his report, he has mentioned the word 'imitation' which according to him means and includes forgery (Qs.25, 26). He opined that while there may be some loss of pen control, unusual pen lifts, hesitations or poor line quality in the writing of an old person, any experienced handwriting expert can say whether these are imitation writing or writing of a genuine nature (Q.28).

40. Thus, both the handwriting experts, one being the plaintiff's witness and the other being the defendant's witness, have opined that the signatures on the First Will are not of the person who signed the Second Will as testator. Further, they have also expressed their views that the signatures of Saroj on the First Will appear to be genuine and Saroj's signature on the Second Will appears to be forged or an imitation.

41. Under Section 45 of the Indian Evidence Act, handwriting expert evidence is admissible in Court. The opinion of a handwriting expert, if proved by him in Court, becomes admissible as evidence. None the less, it

still remains an opinion of the handwriting expert and is not binding on the Court. In other words, the Court is not bound to accept such opinion as sacrosanct and is not obliged to base its decision solely on such opinion. The Court is entitled to come to its own conclusion on an issue like whether or not two signatures on two different documents are of the same person. However, since a handwriting expert is especially trained and skilled in the matter of ascertaining as to whether or not two signatures on two separate documents are of the same person, the Court would ordinarily give due weightage to his opinion.

42. It is the unequivocal view of both the handwriting experts who have been examined in this case, one at the instance of the plaintiff and the other at the instance of the defendant, that the signature of the testator on the Second Will is not of the same person who signed the First Will as testator. In other words, both the signatures are not of Saroj. By reason of this Court having puts its seal of approval on the First Will by admitting it to probate, Saroj's signature as testator on the First Will must be accepted to be the genuine or authenticate signature. Even if I keep aside for a moment the evidence of the two handwriting experts, to the naked eye of a non-expert like me, it clearly appears that the signature in the Second Will is definitely not of Saroj whose signature on the First Will is visibly different.

43. The plaintiff heavily relied on the evidence of Purnendu Sarkar. He deposed that the testator signed the Second Will in his presence and in the presence of **Sudhir Lal Roy** (other attesting witness, since deceased) and the two attesting witnesses appended their signatures on the Second Will in the presence of the testator and in the presence of each other. However, a few

points in Purnendu's evidence has created doubt in my mind as regards his credibility. They are:

- (i) He said that Saroj was a regular client of his employer, Anil Mitra. However, he also said that Saroj did not get any litigation or documentation work done through his employer. It is not clear, in what capacity Saroj was the client of Purnendu's employer.
- (ii) In cross examination Purnendu admitted that Anil Mitra was present at the time of execution of the Second Will. Without meaning any disrespect to Purnendu, it appears to be rather curious that instead of Anil Mitra himself acting as an attesting witness to the Will or asking a colleague or junior associate to be a witness to the Will, he would get the Will of a valued client attested by his clerk. Interestingly, Purnendu has admitted that apart from the said Second Will of Saroj, he has never attested anybody else's Will as witness.
- (iii) Purnendu has deposed that before signing the said Will as a witness, he read through the document and came to know that it was a Will. Assuming that Anil Mitra instructed Purnendu to act as a witness to the execution of the Second Will, it seems strange and quite improbable that Purnendu would first read a document to satisfy himself about the nature of the same when his master/employer asked him to be a witness to the execution of the document.

- (iv) There is nothing on record to show that in fact Purnendu was an employee of Anil Mitra, Solicitor.
- (v) Purnendu has deposed that in the office of Anil Mitra a daily log book was maintained recording which persons visited the office. However, on August 31, 1988, no entry was made in such log book.

44. The aforesaid are a few aspects of Purnendu's evidence which has made me reasonably suspicious about the truthfulness and reliability of his evidence.

45. There is another reason which makes me suspicious about the authenticity of the Second Will. On August 30, 1988, Saroj executed a Will. The sole executrix and beneficiary of such Will was Sabitri. Such Will having been probated by this Court, the authenticity thereof is a question which cannot be raised in this Court. The said First Will can only lose effect or be displaced by a Will subsequently executed by the testator following the requirements of law. Otherwise, genuineness of such Will stands confirmed. Attempts at having the probate of the said Will revoked, failed. The question is, having executed a Will on August 30, 1988, why would Saroj execute another Will on the very next day whereunder, the executors and beneficiaries are totally different? Although there is nothing illegal about executing two Wills on successive days, the same is definitely a little unusual, to say the least, especially when the substance of the two Wills are completely different – no common beneficiaries, no common executors. This is not ordinary human behaviour. Even assuming that a person executes two Wills on successive days, it is more probable than not that he would

mention in the Second Will that he had executed another Will the day before, which he is cancelling or annulling by execution of the Second Will. This is how, in my opinion, a reasonable man of ordinary prudence would normally act. The Second Will of Saroj is completely silent about the First Will. This is definitely a suspicious circumstance.

46. The evidence of the plaintiff/surviving executor or of Swami Biswa Atma Nanda, in my opinion, are not very helpful for deciding the issue involved one way or the other. Neither of them was present at the time of alleged execution of the Second Will. Further, the credibility of Swami Biswa Atma Nanda has been sufficiently dented in cross-examination. The wife of the plaintiff is a beneficiary under the Second Will. Of course this does not disqualify him as a witness. However, he being an interested party, I am not inclined to give much weightage to his evidence.

47. The plaintiff argued that the First Will was a manufactured document. It is wholly unnatural that Saroj would leave behind all his properties to Sabitri who was nothing more than a caretaker for Saroj. I do not agree with the plaintiff. Saroj was a widower. He had no children. It is admitted even by the plaintiff in his evidence that Sabitri used to live in the same house as Saroj and she was the wife of a predeceased cousin brother of Saroj. From the entire evidence on record it is quite clear that Sabitri looked after and took care of Saroj during his last years. In advanced age, any human being craves for care, affection and attention. It seems to me on an overall consideration of the facts of the case that Sabitri provided the comfort to Saroj that an elderly man requires and yearns for. Nobody else looked after

Saroj and hence I do not find it unnatural at all for Saroj to have left his entire estate to Sabitri. However, this is an academic discussion since authenticity of the First Will is not and cannot be an issue in the present proceedings.

48. A certain degree of solemnity attaches to a Will by reason of the fact that it contains the last wish of the testator as to how his properties will devolve upon his departure from this world and also because by the very nature of the document, the testator cannot be called as a witness to prove the Will. The Probate Court is a Court of conscience and unless its conscience is satisfied that a Will has been executed voluntarily by the testator following the requirements of law with full consciousness of mind and without undue influence and without being a victim of fraud, probate will not be granted. Such satisfaction will have to come from the entire conspectus of a particular case as is revealed by the pleadings and evidence on record.

49. In the present case, for the reasons discussed above, I am of the opinion that the document which the plaintiff claims is the last Will executed by Saroj, is not so. The signature that purports to be of Saroj is not of Saroj. In other words, Saroj did not execute the said document. Hence, the question of admitting the so-called second Will of Saroj to probate, cannot and does not arise.

50. TS 14 of 2006 is dismissed with costs assessed at Rs. 50,000/-. All interim orders/ interlocutory orders passed in the suit shall stand vacated.

Urgent certified copy of the judgment and order, if applied for be given to the parties upon compliance of necessary formalities.

(Arijit Banerjee, J.)