

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION**

**INTERIM APPLICATION NO. 364 OF 2023
IN
TESTAMENTARY PETITION NO. 3700 OF 2021**

Savita Kamta Prasad Tiwari ... Applicant
Versus
Padma Kamta Prasad Tiwari
(deceased) & Tarun Suresh Sarathe ... Respondent

**WITH
TESTAMENTARY PETITION NO. 3700 OF 2021
WITH
CAVEAT NO. 125 OF 2023
WITH
TESTAMENTARY SUIT NO. 90 OF 2023
IN
TESTAMENTARY PETITION NO. 3700 OF 2021
WITH
WILL NO. 1497 OF 2021
IN
TESTAMENTARY PETITION NO. 3700 OF 2021**

Mr. Hare Krishna Mishra a/w Kailash Rathod for the Applicant/
Petitioner.
Mr. Abhishekh Sawant i/by Swatantri Waghmare for Caveator/
Respondent.

**CORAM: MANISH PITALE, J.
DATE : 13th FEBRUARY, 2024**

P.C. :

- . Heard learned counsel for the parties.
2. This application was heard on 2nd January, 2024, when there was no appearance on behalf of the caveator/respondent, despite

the fact that an advocate was representing the caveator.

3. On the said date of hearing, the learned counsel appearing for the applicant (original petitioner) invited attention of this Court to the affidavit filed in the support of the caveat, to contend that the caveator cannot claim any caveatable interest, *inter-alia*, for the reason that although the caveator claims to be the adopted son of the deceased, there is no reference to any adoption deed in the affidavit filed in support of the caveat. This Court took note of the said contentions and also the other contents of the affidavit in support of the caveat and reached a *prima facie* finding that the caveator may not be having any caveatable interest.

4. In the interest of justice, the application was kept for formal orders today, as there was no appearance on behalf of the caveator on 2nd February, 2024.

5. Today, when the application is taken up for consideration, it is brought to the notice of this Court that the advocate representing the caveator has changed. The learned counsel appearing for the caveator tendered an affidavit in reply and he submitted that an opportunity may be granted to the caveator, to demonstrate that in the peculiar facts of the present case, even if the caveator is to be treated as a stranger, caveatable interest can be demonstrated.

6. In that light, the learned counsel appearing for the caveator

once again invited attention of this Court to the affidavit filed in support of the caveat, particularly, Exhibit 'A' filed along with the said affidavit. At Exhibit 'A' filed along with the affidavit in support of the caveat, is copy of a Will dated 6th October, 2015, purported to have been executed by the deceased whereby an immovable property was bequeathed in favour of the caveator. Two persons were appointed as executors and while the Will deed stated that the caveator was the adopted son of the deceased, he was shown as a beneficiary under the said Will deed.

7. According to the learned counsel for the caveator, since the caveator is shown as a beneficiary under the said Will deed dated 6th October 2015, he has caveatable interest and therefore, the present application for discharge of the caveat ought not to be allowed.

8. The learned counsel for the caveator placed reliance on the judgment of the Supreme Court in the case of ***Krishna Kumar Birla v/s. Rajendra Singh Lodha & Ors., (2008) 4 SCC 300***, particularly paragraph 191 thereof. He has tendered affidavit in reply on behalf of the caveator in the present application, which is taken on record. The learned counsel for the applicant has also tendered an additional affidavit cum declaration by the husband of the deceased. It is submitted that the said additional affidavit supports the case sought to be made out in the application. The said additional affidavit is taken on record.

9. The learned counsel appearing for the applicant (original petitioner), on the other hand, submitted that if the contentions raised on behalf of the caveator are accepted then any person can approach this Court, relying upon a document styled as a Will executed in favour of such a person and then claim caveatable interest in the probate proceedings. It is submitted that in the present case, the emphasis in the affidavit filed in support of the caveat, is on an assertion by the caveator that he is the adopted son of the deceased, while there is no reference to any adoption deed or even to any custom whereby the caveator could be said to have been adopted by the deceased. It is submitted that the caveator admittedly has not instituted any probate proceedings in the context of the aforesaid Will dated 6th October, 2015 and that therefore, the subject Will in the present Testamentary Petition dated 4th February, 2021 is the latest and the last Will executed by the deceased. The learned counsel for the applicant also relied upon the aforesaid judgment in the case of *Krishna Kumar Birla* (supra), to contend that first requirement for maintaining a caveat in such proceedings is the existence of caveatable interest of the caveator. It is submitted that even if the contents of the affidavit in support of the caveat are to be accepted, no caveatable interest has been demonstrated and hence, the application ought to be allowed.

10. This Court heard the rival parties in the context of the material placed on record. Before considering the facts of the

present case, it would be appropriate to refer to the said judgment of the Supreme Court in the case of ***Krishna Kumar Birla*** (supra). In paragraph 86 of the said judgment, the Supreme has laid down the propositions of law in respect of the maintainability of a caveat.

11. Paragraph 86 of the said judgment reads as follow :-

“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.”

12. In the facts of the said case, the Supreme Court found that a person who was a stranger to the family had propounded a Will, said to have been executed prior in point of time, and on that basis the said person had filed caveat in a proceeding initiated by the family members pertaining to a purported subsequent Will executed by the deceased. The Single Judge as well as the Division Bench of the Calcutta High Court found that such a caveat by a stranger to the family was maintainable. The Supreme Court

considered the said question and after applying the principles identified in the said judgment, as regards the maintainability of the caveat, held that the stranger to the family had caveatable interest, being a beneficiary under a Will purported to have been executed prior in point of time.

13. The only point of the distinction in the present case appears to be that although the caveator has relied upon the aforesaid purported earlier Will dated 6th October, 2015, till date, he has not filed probate proceedings in respect of the said Will deed. But, this Court is of the opinion that mere filing of the probate proceeding would not make any difference on the principles enunciated by the Supreme Court in the said judgment. In such circumstances, when the caveator claims to be a beneficiary under the Will said to have been executed by the deceased, he has caveatable interest.

14. In present case, a perusal of the document at Exhibit 'A' along with the affidavit in support of the caveat, shows that in the purported Will dated 6th October, 2015, apart from stating that the caveator was adopted son of the deceased, he was clearly shown as the beneficiary, particularly, in respect of the immovable property.

15. Considering the position of law laid down by the Supreme Court in the case of *Krishna Kumar Birla* (supra), this Court is of the opinion that the caveator in the present case can be said to have caveatable interest and therefore, the present application

filed for discharge of caveat cannot be granted.

16. In view of the above, the application is dismissed.

17. The learned counsel for the applicant (original petitioner) expressed serious concern about the delay that may now occur in the progress of the present proceedings, which would be prejudicial to the interest of the petitioner. In that regard, appropriate directions can be issued so that the proceedings move to the next stage and they are taken up expeditiously.

18. It is noted that the present proceedings are already registered as Testamentary Suit No.90 of 2023. Hence, list the Suit for framing of issues on 22nd February, 2024, on supplementary board.

MANISH PITALE, J.