



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

SANTOSH
SUBHASH
KULKARNI

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**INTERIM APPLICATION NO. 332 OF 2023
IN
CAVEAT (L) NO. 21133 OF 2021
IN
TESTAMENTARY PETITION NO. 2121 OF 2021**

Surya Prakash S. Makharia ...Applicant
In the matter between
Surya Prakash S. Makharia ...Plaintiff
Versus
Pramod Kumar Makharia ...Defendant

Mr. Vikram Goel, i/b Ashok Goel, for the Applicant - Plaintiff.
Mr. Jitesh Agarwal, for the Caveator.

CORAM: N. J. JAMADAR, J.
DATED: 4th JULY, 2024

ORDER:-

1. The petitioner has preferred this application to reject the Caveat in TP/2121/2021.

2. Shorn of superfluities, the background facts necessary for the determination of this application can be stated as under:

(a) This petition is filed for grant of Probate of the purported last Will and testament dated 14th April, 2014 of Dhruva Kumar Makharia (the deceased). The petitioner

claims to have been appointed as the sole executor under the said Will. The petitioner is the nephew of the deceased.

(b) In the petition it is averred that the deceased had left behind the heirs and next-of-kin mentioned in paragraph 7 of the petition. All the heirs of the deceased have filed affidavits giving consent for the grant of Probate. Under said Will, the deceased had *inter alia* bequeathed his 30% interest in a building to be constructed and developed on the land bearing Plot No.A14 CTS No.685 of Oshiwara Taluka, Andheri, admeasuring 1021.02 Sq. Mtrs. (the subject property).

(c) Mr. Pramod Kumar Makharia, the Caveator, is the brother of the deceased. The Caveator has lodged the Caveat on 17th September, 2021. The substance of the Caveat is that the Caveator also had an interest in the subject property. A Family Arrangement was executed between the deceased, Caveator, other siblings and the mother of the Caveator. As disputes arose, the Caveator filed Suit No.2743 of 2007 against his mother, the deceased (D2), another brother and legal representatives of a deceased sibling, as well as their firms and entities. Consent Terms were filed in the said suit on 5th December, 2007. The said Consent Terms, *inter alia*,

provided that defendant Nos.2 to 4 therein would discharge several liabilities of various banks and settle the claims of Mr. Gaurav Gupta.

(d) The Caveator alleges, defendant Nos.2 to 4 did not discharge the said liabilities, as undertaken. Execution applications were filed by the Caveator. Reference is made to the award passed in Arbitration Case No.52 of 2010 in favour of City Financial Consumer Finance India Ltd., one of the creditor's, whose debt was liable to be discharged by defendant Nos.2 to 4, and the liability towards Bank of India.

(e) An additional affidavit has been filed on behalf of the Caveator, wherein there is reference to the alleged liabilities incurred by the deceased with regard to the subject property to revenue and other entities. It is, *inter alia*, contended that the subject property belonged to M/s. Energy Bakery and Foods (India) Pvt. Ltd. of which the deceased was a Director. Thus, the deceased could not have bequeathed the interest in the subject property. In these circumstances, the grant of Probate of the Will in question would cause grave prejudice to the Caveator as it would affect the interest of the Caveator irretrievably.

3. The petitioner has preferred this application with the assertion that the Caveator is not one of the legal heirs of the deceased. Thus, the Caveator has no caveatable interest. It is contended that the deceased had complied with the stipulations in the Consent Terms to the fullest. The Caveator has filed the Caveat with intent to delay the grant of Probate as the endeavour of the Caveator to reopen the said issue by resorting to various proceedings has not yielded any result.

4. I have heard Mr. Goel, the learned Counsel for the applicant - petitioner and Mr. Agarwal, the learned Counsel for the Caveator, at some length. With the assistance of the learned Counsel for the parties, I have perused the pleadings and material on record.

5. Mr. Goel strenuously submitted that the Caveat has been filed with a view to create an impediment in the grant of Probate. It is not the claim of the Caveator that he would be entitled to succeed to the estate of the deceased in the event of intestacy. Nor the Caveator had questioned the due execution and attestation of the Will by the deceased. The alleged interest claimed by the Caveator in the subject property is non-est as the consent decree passed in Suit

No.2743 of 2007 precludes the Caveator – plaintiff therein from asserting such claim.

6. Mr. Goel further submitted that the Caveator has made umpteen unsuccessful attempts to resurrect the issue of non-compliance of the stipulations in the said Consent Terms by defendant Nos.2 to 4 therein. The last of such attempts was repelled by this Court in Interim Application No.4835 of 2021 in Execution Application No.1265 of 2019 in Suit No.2743 of 2007. By an order dated 19th April, 2022, this Court declined to grant ad-interim relief clearly observing that the Consent Terms do not contemplate payment by defendant Nos.2, 3 and 4 therein (for and on behalf of the plaintiff and his family members) to any other bank apart from the banks listed in clause (2) of the Consent Terms. Therefore, the Caveat deserves to be rejected.

7. To bolster up this submission, the learned Counsel for the applicant, placed reliance on a decision of this Court in the case of *Ashokkumar Krishnakumar Shukla vs. Mohammed Fafiq Haji Usman Momin*¹.

8. As against this, Mr. Agarwal submitted that the Caveator has a definite caveatable interest. The Caveator

¹ 2015(7) Bom. CR 351.

cannot be non-suited at the threshold when the Caveator had an underlying interest in the subject property. The interest of the Caveator therein was to be divested under the Consent Terms subject to the compliance of the undertakings by defendant Nos.2 to 4 therein. If the deceased committed default in the discharge of the said liability, the deceased could not have laid claim over the subject property. And, therefore, the grant of probate would affect the vested interest of the Caveator. Attention of the Court was invited to the provisions contained in Section 325 of the Succession Act, which mandates that debts of every description must be paid before any legacy. Since the liability to pay the debts of the plaintiff, in accordance with the Consent Terms, was not fully discharged by the deceased, the estate cannot be said to be free from the liability to pay of the debts of the testator, urged Mr. Agarwal.

9. To begin with, it is necessary to note that there is not much controversy over the fact that the deceased left behind the heirs mentioned in paragraph 7 of the petition as the only Class-I heirs. The Caveator neither claims to be such an heir of the deceased who is entitled to succeed to the estate of the deceased in the event of intestacy nor the Caveator questions

the due execution and attestation of the Will. On the contrary, the Caveator opposes the grant of Probate only in respect of the subject property on the premise that the property did not vest in the deceased as the deceased had committed default in the discharge of the liability under the Consent Terms. In essence, the Caveator questions the title of the deceased to the subject property and also claims that certain liabilities have been incurred by the deceased which are annexed to the subject property.

10. The moot question that wrenches to the fore is, whether in the facts of the case, the Caveator has a ‘caveatable interest’?

11. To start with, it may be necessary to appreciate as to what constitutes a caveatable interest. Chapter IV of the Indian Succession Act, contains a fasciculus of the provisions under the heading “of the Practice in Granting and Revoking Probates and Letters of Administration”. Section 283 of the Indian Succession Act, 1925, inter alia, provides that in all cases, the District Judge or District Delegate may, if he thinks proper – inter alia, issue citation calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of

probate or letters of administration. This expression 'all persons claiming to have any interest' refers to a caveatable interest.

12. Section 284 of the Indian Succession Act, 1925 provides for filing of caveats against the grant of probate and administration with the District Judge or District Delegate. Once the caveat is lodged, the proceedings become contentious and the right to probate and letters of administration has to be decided in a testamentary suit.

13. A caveatable interest denotes the interest in the estate of the testator which may be affected by grant of Probate of the Will of the deceased. By its very nature, the existence or otherwise of a caveatable interest, would depend upon the facts of a given case. Whether the grant of Probate or Letters of Administration would prejudice the right of the caveator would be a barometer on which the existence of a caveatable interest can be tested. For that purpose, the law governing intestate succession qua the deceased also needs to be kept in view. If the caveator is likely to succeed in case of intestacy, the existence of caveatable interest can hardly be put in contest.

14. It is trite law that the Court exercising Testamentary jurisdiction cannot delve into the question of title to the subject property. Whether the deceased had the title to the subject property is a question that ought to be agitated before a Civil Court. The case of a person who claims an adverse title in himself to the estate of the testator, stands on an even weaker foundation. The proper remedy for the person asserting such interest adverse to that of the testator would be to institute a suit for declaration and adjudication of title to the estate.

15. A profitable reference, in this context, can be made to a decision of the Supreme Court in the case of *Krishna Kumar Birla V/s. Rajendra Singh Lodha and Ors.*² wherein the Supreme Court after an elaborate analysis of the provisions and precedents, culled out the propositions as under :

“57. The jurisdiction of the Probate Court is limited being confined only to consider the genuineness of the Will. A question of title arising under the Act cannot be gone into the proceedings. Construction of a Will relating to the right, title and interest of any other person is beyond the domain of the Probate Court.

58. A person to whom a citation is to be issued or a caveator, must have some interest in the estate of the testator. Any person claiming any interest adverse to the testator or his estate cannot maintain any application before the Probate Court. His remedy would be elsewhere. The question with regard to the degree of interest or the right which a caveator must show to establish his or her

2 (2008) 4 Supreme Court Cases 300.

caveatable interest before the Probate Court should be considered having regard to the aforementioned legal propositions.

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67. In the recent judgment of Kanwarjit Singh Dhillon v. Hardayal Singh Dhillon and others [2007 (12) SCALE 282], this court inter alia relying upon Chiranjilal Shrilal Goenka v. Jasjit Singh and Ors. [(1993) 2 SCC 507] and upon referring to a catena of decisions of the High Court and this Court, held that Probate court does not decide any question of title or of the existence of the property itself.

.....

73. Strong reliance has been placed by Mr. Jethmalani on Nobeen Chander Sil and others v. Bhobosoondari Debee [ILR 6 Calcutta 460]. Therein, Field, J. interpreting Section 242 of the 1925 Act opined that if any person can show that he was entitled to maintain a suit in respect of property over which probate would have effect, he possesses a sufficient interest to enter a caveat and oppose the grant of probate.

74. Such a suit, however, in our opinion must have a direct nexus with the estate of the testator and not to enforce a right in respect of the application of the estate of the testator under another will. Right to maintain a suit must be independent of the wills sought to be probated. No legal right accrues under an unprobated Will except in case where taking of probate is not mandatory. In Nobeen Chander Sil (supra) the appellants therein had a direct interest in disputing the Will. He had obtained a money decree against the testator. His share was under attachment. In the aforementioned factual backdrop, it was held :

“..... What is the meaning of the expression "persons claiming to have any interest ?" It appears to me that the persons claiming to have any interest must be persons having such an interest as would entitle them to maintain a suit in respect of the subject matter of such estate - persons having, for example, such an interest as, according to the practice of the Court of Chancery, would entitle them to file a bill in a Court of Equity.”

It contains two competing passages. One rendered by White, J. and another by Field, J. White, J. stated: (ILR p.461)

"It is not necessary to consider whether the case cited by the District Judge is good law, for it does not determine the question with which we have to deal.

In that case the parties opposing the probate were simple creditors of a person who was the heir of the deceased, supposing the testator had died without a will, and supposing also that he had not adopted a son. In the present case the appellants have a claim upon the immoveable property left by the testator - two of them as mortgagees of the persons who, if the testator left no will, are entitled to create the mortgage, and one of the appellants as the attaching creditor of one of these persons."

Field, J., however, expanded the ambit of 'caveatable interest'.

75. A suit which would be maintainable must have something to do with the estate of the testator. Inheritance by Will itself may be a subject matter of contention. Whether the interest claimed by the caveator is an established one or a bare claim must satisfy the test that there exists an interest in the estate of the testator and the same is not adverse thereto.

.....

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.

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89. While determining the said question, the law governing the intestate succession must also be kept in mind. The right of the reversioner or even the doctrine of “spes successionis” will have no application for determining the issue in a case of this nature.

.....

103. What would be caveatable interest would, thus, depend upon the fact situation obtaining in each case. No hard and fast rule, as such, can be laid down. We have merely made attempts to lay down certain broad legal principles.

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135. It is too far fetched a submission that a person having a remote family connection or as an agnate is entitled to file a caveat. A reversioner or an agnate or a family member can maintain a caveat only when there is a possibility of his inheritance of the property in the event the probate of the Will is not granted. If there are heirs intestate who are alive, entertaining of a caveat on the part of another family member or a reversioner or an agnate or cognate would never arise.”

(emphasis supplied)

16. A conjoint reading of the propositions culled out in clauses (ii) and (iii) of paragraph 86 spells out the test which is to be applied to ascertain the existence of a caveatable interest, namely, “the Caveator ought to be in a position to show that if the grant of Probate or Letters of Administration

is made it will defeat his claim of succession or inheritance to the estate of the deceased for the reason that it defeats some other line of succession. If the Caveator is likely to inherit a very small part of the estate of the deceased in the event the Probate or Letters of Administration, as the case may be, is not granted, it can be said that the Caveator has a caveatable interest. Conversely, if the Caveator questions the existence of title in respect of the estate or capacity of the testator to dispose of the property by Will on a ground outside the law of succession, ordinarily, he can be termed as a stranger to the Probate proceeding. If the Caveator opposes the grant of Probate or Letters of Administration by setting up an adverse title in himself or by disputing the very existence of the estate, professed to be disposed by the deceased, the Caveator cannot be said to have a caveatable interest as that would be a matter of adjudication of title; clearly beyond the remit of the jurisdiction of the Testamentary Court.

17. On the aforesaid touchstone, reverting to the facts of the case, it appears that the resistance of the Caveator wavered from one end to another. Initially, in the affidavit in support of the Caveat an endeavour was made to contend that the Caveator had a preexisting interest in the subject

property and the failure on the part of the deceased to discharge the liability under the Consent Terms entailed the consequence of the interest of the Caveator in the subject property not being divested, which the consent terms otherwise provided for. In the additional affidavit, however, the Caveator asserted that the subject property did not vest in the testator and, therefore, he had no power to dispose of the property by Will. In addition, it was contended that the testator had incurred various liabilities which were annexed to the estate.

18. In either case the Caveator is claiming an interest which is adverse to that of the testator. The contention that either the Caveator was not completely divested of the interest in the subject property or that the subject property did not vest in the testator, on account of the failure of the testator to discharge the liabilities under the consent terms, is in the nature of assertion of an adverse title. Conversely, the Caveator, being a Class-II heir of the deceased, does not and cannot claim that the grant of Probate prejudices his right because it defeats some other line of succession.

19. A submission was also sought to be canvassed on behalf of the Caveator that the Caveator stands in the

position of a creditor and under the provisions of Section 325 of the Succession Act debts of every description must be paid before any legacy. I am afraid to accede to this submission.

20. Even if the case of the Caveator is taken at its face value, the interest which the Caveator claims in the subject property appears to be of a contingent nature. To sustain the claim, it warrants an adjudication that the consent terms have not been complied with in letter and spirit. It would be contextually relevant not note that in the additional affidavit, the Caveator has further asserted that Smt. Bhuvaneshwari Makharia had also filed IA/15578/2023 in Appeal No.483/2023 seeking the quashing of the consent terms dated 5th December, 2007. This contention also makes the claim contingent.

21. Though it is not at all warranted to delve into the aspect of the compliance of the Consent Terms dated 5th December, 2007, in this proceedings, it would be suffice to note that this Court in IA(L)/4835/2021 in Execution Application (L) No.1265/2019 in Suit No.2723/2007 taken out by the applicant declined to grant the relief observing *inter alia* as under:

“9. When one reads Clause 10 in its entirety along with the other Clauses of the Consent Terms, prima facie it would appear that the liability of Defendant Nos.2, 3 & 4 to discharge the dues of the Banks, were the dues of the Banks listed in Clause 2 of the Consent Terms. The Consent Terms do not contemplate payment by Defendant Nos.2, 3 & 4 (for and on behalf of the Plaintiff or his family members) to any other Bank. If the Plaintiff has to pay the dues of any Bank, other than what is mentioned in Clause 2, then, for those debts/outstandings, the Plaintiff is liable. I say this for more than one reason. Firstly, Clause 10 itself contemplates that Defendant Nos. 2, 3 and 4 were to discharge the liability to various Banks as more particularly referred to earlier in the Consent Terms. Secondly, the claim which is now made by the Plaintiff in relation to the dues owed to Kotak Mahindra Bank Ltd. (in the sum of Rs.3.65 Crores), was admittedly a loan taken by the Plaintiff in the year 2006 not from any Bank but from City Financial Consumer, Finance India Limited. This entity is certainly not a Bank. These debts owed by the Plaintiff were thereafter assigned by the said entity to Kotak Mahindra Bank Ltd. sometime in the year 2013. It is therefore clear that on the date of the signing of the Consent Terms the dues payable by the Plaintiff to City Financial Consumer, Finance India Limited were not any dues owed to any Bank. This is another factor which goes to indicate that the Banks referred to Clause 10 of the Consent Terms were the Banks which are listed in Clause 2 thereof and not any other Bank. If the Plaintiff has taken loans from any other Banks or other entities, the liability to discharge those loans would fall upon the Plaintiff and the Consent Terms do not contemplate that those loans are to be paid by Defendant Nos. 2 to 4.”

22. It is true the aforesaid order was passed at an ad-interim stage. However, the fact remains that the claim of the Caveator was not *prima facie* found tenable, and the said order underscores the contingent nature of the claim of the Caveator. A profitable reference, in this context, can be made to a Division Bench Judgment of this Court in the case of ***Purushottam Vishandas Raheja vs. Asha Shrichand Raheja***

*and anr.*³, wherein, in a somewhat similar fact-situation of a brother testator therein claiming to have a caveatable interest in the capacity of the creditor, the Division Bench enunciated the law as under:

“17. In the case of Krishna Kumar Birla, the Apex Court has considered the decision of the Privy Council in the case of Sarla Dassya. We must note here that the Privy Council was dealing with the issue of locus standi to apply for revocation of Probate on the ground that the grant was obtained fraudulently. It in this context that the Privy Council held that a creditor of the deceased has a locus to apply for revocation of the Probate proceeding.

18. Coming back to the decision in the case of **Krishna Kumar Biral**, in paragraphs 94 and 95 the Apex Court held thus:

“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 Brajaraf 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.”
(emphasis added)

19. In the present case, strictly speaking, the contention raised in the affidavit-in-sur-rejoinder to the Notice of Motion cannot be termed as a pleading of the Appellant in support of the caveat. There is a vague plea in the affidavit-in-sur-rejoinder of the Notice of Motion that the Appellant is claiming to be a creditor. As stated earlier, the plea that the Appellant is a creditor of the deceased cannot be considered

3 Appeal No.598/2011 in NMS/22/2011 in Petition/1172/2010, dtd.26/7/2016.

to decide whether he has a caveatable interest. Even assuming that the said plea can be taken into consideration, we are of the view that the Appellant does not have a caveatable interest. Learned Senior Counsel for the Appellant pointed out that a suit for recovery filed by the Appellant is pending. Thus, the claim of the Appellant is a contingent claim which depends on the outcome of the suit. Therefore, in the light of what is observed in paragraph 94 of the decision in the case of **Krishna Kumar Birla**, the Appellant will have to show a special interest. However, what is held in paragraph 95 completely defeats the case of the Appellant. In the present case, the estate of the deceased is being represented by the legal heirs and the interest claimed by the Appellant is a contingent interest. As stated earlier, the Apex Court has reiterated the well settled law that the issue of title cannot be gone into in the Probate petition.

(emphasis supplied)

23. The aforesaid pronouncement is on all fours with the facts of the case. At best, the caveator can claim that on account of the default in discharging the liability under the consent terms, he is entitled to recover the amount from the estate. That, by itself, cannot be a ground to hold that the Caveator has a caveatable interest, even if the contingent nature of the caveator's claim is discounted.

24. I am, therefore, inclined to hold that the Caveator has no caveatable interest and resultantly, the Caveat deserves to be rejected.

25. Hence the following order:

: O R D E R :

(i) Interim Application No.332 of 2023 stands allowed.

(ii) Caveat (L) No.21133 of 2021 stand rejected.

(iii) The Testamentary Petition be now processed in accordance with law.

[N. J. JAMADAR, J.]