
(2013) 08 BOM CK 0110

In the Bombay High Court

Case No : Notice of Motion No. 166 of 2012 in Suit No. 13 of 2007 in Probate
Petition No. 948 of 2006

Daya Subhash Tiwari

APPELLANT

Vs

Mr. Kashinath Lalta Tiwari and Others

RESPONDENT

Date of Decision : 23-08-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 54(2), Order 21 Rule 67, Order 21 Rule 67(1), Order 21 Rule 90, Order 6 Rule 4
Contract Act, 1872 — Section 17
Evidence Act, 1872 — Section 68
Succession Act, 1925 — Section 180, 220, 222, 232, 275

Citation : (2013) 5 ABR 1016 : (2014) 1 ALLMR 359 : (2013) 6 BomCR 848 :
(2013) 6 MhLj 535

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : Pradeep Sancheti and Mr. Simil Purohit, instructed by Mr. Yogesh K. Deshpande, for the Appellant; D.D. Madon, Mr. K.T. Thomas, S. Joseph, instructed by . M/s. Lawwell and Chartered, for the Respondent

Judgement

R.D. Dhanuka, J.—By this Notice of Motion, applicant who was original petitioner in probate petition seeks dismissal of caveat and affidavit in support dated 5th February, 2007 filed by Mr. Lalta Prasad Ram Nihor Tiwari, the original caveator and seeks grant of probate of the Will dated 24th July, 1995 of the Rajbali Ram Nihor Tiwari alias Rajbali R.N. Tiwari. Some of the relevant facts for the purpose of deciding this Notice of Motion are summarised as under:-

2(a) Mr. Rajbali Ram Nihor Tiwari (hereinafter referred to as the said "deceased") was brother of Mr. Jarda Prasad Ram Nihor Tiwari and Mr. Lalta Prasad Ram Nihor Tiwari. The said deceased died on 21st September, 2006. The said deceased was bachelor at the time of his death. It is the case of the applicant that the said deceased left a Will on 24th July, 1995 and appointed the applicant as the sole executrix under the said Will of the deceased. On 15th November, 2006, the applicant filed a probate petition (948 of 2006) in this court inter alia praying for

grant of probate having effect throughout the State of Maharashtra. Names of the next of kin are disclosed in paragraph 8 of the petition. The said deceased died leaving behind him Mr. Jarda Prasad Ram Nihor Tiwari and Mr. Lalta Prasad Ram Nihor Tiwari, both the brothers of the said deceased. The parents and wife predeceased the deceased. The said deceased died issueless and had no sister. In the said alleged Will, the said deceased bequeathed all his assets, properties, moveables and immoveables, right, title of whatsoever nature in all the assets to his nephew Mr. Subhash Tiwari, son of Mr. Jarda Prasad Ram Nihor Tiwari to the exclusion of all others. It is provided in the said alleged Will that the original caveator Mr. Lalta Prasad Ram Nihor Tiwari, his son Mr. Kashi Nath Tiwari, Mr. Dilip Tiwari, wife of Mr. Kashi Nath Tiwari and their son Mr. Bipin Tiwari had always held by him in contempt due to their abrasive and violent tempers and accordingly absolutely disinherited and disqualified each of them from inheriting or acquiring any property or any part thereof.

2(b) Mr. Lalta Prasad Ram Nihor Tiwari, brother of the said deceased filed caveat on 29th January, 2007 and affidavit in support thereof on 5th February, 2007. In view of filing of such caveat and affidavit in support, the said probate petition was converted into suit (13 of 2007). On 2nd October, 2007, the said caveator Mr. Lalta Prasad Ram Nihor Tiwari expired leaving behind the present defendants as his only heirs and successors. The applicant took out Chamber Summons (19 of 2008) to bring the present defendants on record in the said suit. Applicant served the amended copy of the probate petition/plaint upon the defendants herein. The probate petition appeared before this Court on 25th August, 2011. Defendants made a statement that they would file affidavit objecting to the grant of probate. This court granted time to the defendants to file affidavit. Defendants however did not file any affidavit. By an order dated 23rd September, 2011, this Court recorded that in spite of order dated 25th August, 2011 granting liberty to the defendants being heirs of the original defendant to file further affidavit objecting to the grant of the probate, affidavit was not tendered. It was however made clear that the suit shall proceed without any further affidavit.

2(c) On 19th April, 2011, this court framed issues in the suit. Plaintiff has not filed any affidavit in lieu of examination in chief and did not submit any list of documents which she seeks to rely so far.

2(d) On 4th July, 2012, the applicant filed this Notice of Motion inter alia applying for dismissal of caveat dated 29th January, 2007 and affidavit dated 5th February, 2007 filed by caveator. Defendants have filed affidavit in reply on 7th September, 2012 opposing the Notice of Motion. Applicant has filed rejoinder to the said affidavit.

Mr. Sancheti, learned senior counsel appearing on behalf of the applicant submits that in spite of opportunity given by this court and statement made by the defendants that they would file affidavit objecting to the grant of probate, no such affidavit has been filed. Suit has to be proceeded without any further affidavit as directed by an order dated 23rd September, 2011 passed by this

court. It is submitted that defendants cannot be permitted to raise any other objections.

2. Mr. Sancheti invited my attention to few paragraphs of affidavit in support of the caveat dated 5th February, 2007 filed by the caveator. Mr. Sancheti submits that the said deceased as well as the original caveator had already filed proceedings against each other in respect of the properties forming part of the estate of the deceased which clearly shows the strained relationship between the said deceased and the original caveator. It is submitted that the original caveator raised vague plea of forgery in respect of the Will in question. Mr. Sancheti, learned senior counsel submits that unless particulars of fraud and forgery are given in affidavit in support of caveat, this court cannot look into such allegations. Mr. Sancheti placed reliance on the judgment of the Madras High Court in case of S. Kaliyammal and Others Vs. K. Palaniammal and Others, and in particular paragraphs 11, 12 and 15 in support of his submission that general allegation are insufficient even to amount to an averment of fraud of which any court ought to take notice, however strong the language in which they are couched may be. Learned counsel placed reliance upon Order 6 Rule 4 of the Code of Civil Procedure, 1908. paragraphs 11 and 12 of the said judgment read thus:-

11. When the specific plea of the plaintiffs is that the husband of the defendants 3 and 4 has got the will executed by Nanjammal under fraud and undue influence, then naturally the burden is on the plaintiffs to establish the same. But unfortunately there is absolutely no evidence to prove the averments made in the plaint. In fact except the averments made in the plaint that the will was executed by Nanjammal by fraud and undue influence, there is no other material to come to the conclusion that the will has been executed under undue influence. Even in the evidence, P.W. 1 has stated as follows:--

(Vernacular matter omitted)

Even as per the evidence it is admitted that the will has been executed by Nanjammal but it was only under fraud and undue influence.

12. In fact it may be worth to refer some of the judgments on this aspect. In the judgment reported in Bishundeo Narain and Another Vs. Seogeni Rai and Jagernath, it has been held as follows (at page 283):

We turn next to the question of undue influence and coercion. Now it is to be observed that these have not been separately pleaded. It is true they may overlap in part in some cases but they are separate and separable categories in law and must be separately pleaded.

It is also to be observed that no proper particulars have been furnished. Now if there is one rule which is better established than any other, it is that in cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can

be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any Ct. ought to take notice, however strong the language in which they are couched may be, and the same applies to undue influence and coercion. See Order 6, Rule 4, Civil P.C.

3. Learned senior counsel also placed reliance upon the judgment of the Kolkatta High Court in case of Tarit Kumar Chatterjee vs. Tapan Kumar Chatterjee, CDJ 2009 Cal HC 494 and in particular paragraphs 11 and 13 in support of his submission that person making allegations of fraud and forgery has to prove such allegations by adducing evidence. Paragraphs 11 to 13 of the said judgment reads thus:-

11. It is now settled law that the person who alleges fraud, undue influence or coercion must prove such fact. Mere allegation in the pleading that a particular transaction was vitiated by those elements will not be sufficient. Some particulars of fraud, undue influence and coercion should be given. In this case, we find that although those elements were put forward as defence on behalf of the appellant, no particular evidence of fraud, undue influence or coercion was given at the time of deposition.

12. We find that the husband of the testatrix was alive and he figured as the first attesting witness. The married daughter was totally excluded by virtue of the said Will but in spite of such fact, she figured as attesting witness of the Will and at the same time, gave evidence in support of execution of the Will. It further appears from the Will itself that the testatrix did not exclude any of her sons and all of them were given specific allotment in the residential house at Behala. The grievance of the appellant is that his allotment was not up to the standard and in comparison to his allotment, other two brothers have been given more number of rooms.

13. After taking into consideration the facts and circumstances of this case and having regard to the fact that no evidence has been adduced alleging any particular instances of the undue influence, fraud or coercion, we are unable to accept the contention of Mr. S.P. Mukherjee appearing on behalf of the appellant that the learned Trial Judge should not have granted probate of the said Will for the above reason. A Probate Court cannot refuse grant of probate merely because the deviation of the property was not equitable.

4. Learned senior counsel also placed reliance upon the judgment of the Supreme Court in case of the Saheb Khan Vs. Mohd. Yusufuddin and Others, and in particular paragraph 14 in support of his submission that the charge of fraud must be specifically made with sufficient particulars and bald allegations would not do. Paragraph 14 of the said judgment reads thus:-

14. A charge of fraud or material irregularity under Order XXI Rule 90 must be specifically made with sufficient particulars. Bald allegations would not do. The facts must be established which could reasonably sustain such a charge. In the case before us, no such particulars have been given by the respondent of the

alleged collusion between the other respondents and the auction purchaser. There is also no material irregularity in publishing or conducting the sale. There was sufficient compliance with the orders of Order XXI Rule 67(1) read with Order XXI Rule 54(2). No doubt, the Trial Court has said that the sale should be given wide publicity but that does not necessarily mean by publication in the newspapers. The provisions of Order XXI Rule 67 clearly provide if the sale is to be advertised in the local newspaper, there must be specific direction of Court to that effect. In the absence of such direction, the proclamation of sale has to be made under Order XXI Rule 67(1) "as nearly as may be in the manner prescribed by Rule 54, Sub-rule (2)". Rule 54 Sub-rule (2) provides for the method of publication of notice and reads as follows:

54. (2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court-house, and also where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate and, where the property is land situate in a village, also in the office of the Gram Panchayat, if any, having jurisdiction over that village.

5. Mr. Sancheti, learned senior counsel submits that under order 6 Rule 4 of the Code of Civil Procedure, 1908 party alleging forgery has to give particulars. It is submitted that Order 6 Rule 4 would apply to other cases also mentioned therein. It is submitted that forgery is one of the ingredient of fraud. Learned senior counsel submits that u/s 17 of the Contract Act, definition of fraud includes fabrication. Mr. Sancheti, learned senior counsel invited my attention to paragraphs 5, 9, 10 to 15 of the affidavit in support of the caveat dated 5th February, 2007 and would submit that the caveator has disputed the title of the said deceased and has claimed that the entire property and businesses was started by fund of Hindu undivided family and deceased has no right to execute any such Will. Mr. Sancheti also invited my attention to paragraph 12 of the affidavit in reply filed in this Notice of Motion in support of his submission that the defendants have not disputed the execution of the Will in question and have claimed adverse to the estate of the deceased. It has been alleged that the properties forming part of the estate were acquired by joint earning. Original caveator had already filed a suit against the said deceased for declaration that the properties were Hindu undivided family properties. Mr. Sancheti would submit that such a person would not be entitled to maintain a caveat in support of this submission. The learned senior counsel placed reliance on the judgment of the Madras High Court in case of Komalangi Ammal by her Father and Guardian, Kandasami Chettiar Vs. M.K. Sowbhagiammal and Another, and in particular paragraph at page 38 in support of his plea that if a person is claiming that properties in question does not form part of the estate of the deceased, such person has no interest in the estate of the deceased. It is submitted that the person who lodges the caveat must have an interest in the estate of the deceased and there must be no dispute as to the title of the deceased to the

estate. Relevant part of the said judgment of the Madras High Court at page 38 reads thus:-

I agree that the appeal should be dismissed. The interest which entitles a person to lodge a caveat must be an interest in the estate of the deceased, that is to say, there must be no dispute as to the title of the deceased to the estate [see *Pirojshah Bikhaji v. Pest omji Merwanji and Kalajit Singh v. Parmesher Singh*. But here the caveator is alleging that the jewels which the testator has disposed of by his will are her own property. In other words, she is setting up a title adverse to the testator's title to the property. It is impossible to say that she has an interest in the deceased's estate when she is claiming that the property in question does not form part of the deceased's estate. It has long been settled that it is not the province of a Court of Probate to determine questions of title to a property which a testator purports to dispose of by his will, the reason being that the grant of probate does no more than establish the factum of the will and the appointment of the executors (if any) named in the will. The grant of probate will not, therefore, prevent the appellant from bringing a suit, if she should be so advised, to recover from the executors, or any other persons in possession, the jewels which she claims as her own property.

6. Mr. Sancheti, learned senior counsel also placed reliance upon the judgment of the Madras High Court in case of *In Re: N. Narasimhan and Another*, and in particular following portion:-

2..... Once caveat is entered, no further steps should be taken without notice to the caveator. Our attention has been invited to Sections 220, 222, 232, and certain other provisions dealing with probate and letters of administration. But we do not think that except that they contain general provisions, they have any direct decisive application in deciding the question before us. The answer to the question will depend upon the interpretation to be placed on the words "any interest in the estate of the deceased" in Clause (c) and Section 283(1). From *M.K. Sowbagiammal and Another Vs. Komalangi Ammal by guardian Kandaswami Chetti and Another*, which was decided by Venkatasubba Rao J., and which was affirmed by *Komalangi Ammal by her Father and Guardian, Kandasami Chettiar Vs. M.K. Sowbhagiammal and Another*, , the law has always been that in a probate proceeding a caveator will not be entitled to raise title in himself to the whole or any part of the estate of the deceased. The interest in the estate of the deceased mentioned in Section 283 is but that interest which by citation a person called upon may claim to have in the estate of the deceased and not the interest which the deceased did not own, but the claimant coming into the picture by citation claims to be vested in himself. In other words, title of the testator or testatrix to the whole or any part of the property which is the subject-matter of disposition is entirely and necessarily outside the scope of probate proceedings and that question will have to be settled by a regular trial. That was what was pointed out to be the principle and practice of this Court by Venkatasubba Rao J. in *M.K. Sowbagiammal and Another Vs. Komalangi Ammal by guardian*

Kandaswami Chetti and Another, . That was a fully considered, judgment in which all the relative decided cases including Jammi Hanumantha Rao Vs. Aratla Latchamma, were noticed and the learned Judge summed up the test for purposes of Section 283(1)(c), as being that a person disputing the right of a testator to deal with property as his own, cannot be properly regarded as having an Interest in the estate of the deceased. This view of the statutory provision was accepted to be the right view by two learned Judges in Komalangi Ammal by her Father and Guardian, Kandasami Chettiar Vs. M.K. Sowbhagiammal and Another, who had occasion to consider Jammi Hanumantha Rao Vs. Aratla Latchamma, . That being so, Maharajan J. in G. Jayakumar Vs. R. Ramaratnam, was bound by Komalangi Ammal by her Father and Guardian, Kandasami Chettiar Vs. M.K. Sowbhagiammal and Another, and was not free to follow Jammi Hanumantha Rao Vs. Aratla Latchamma, , Though the question was not directly posed and answered in Kunjilal and Another Vs. The State of Madhya Pradesh, , the observation below is of some utility in the present context-

The Court of probate is only concerned with the question as to whether the document put forward as the last will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the Probate Court.

The practice on the probate side of the Original Side of this Court was really based on that of the English Probate Court. There is a clear cut distinction between the various types of the Probate Court and as pointed out in 16 Halsbury's Laws of England, 3rd Edn., Lord Simonds Edition, page 160 "the person cited to see proceedings is neither a plaintiff nor a defendant in the action, but he is brought before the Court in order that his interests may be bound." A caveator is in no better position and by mere entry of caveat, a proceeding for probate cannot be and should not be allowed to be converted into a suit for resolving disputed title.

7. Mr. Sancheti, learned senior counsel placed reliance upon the judgment of the Calcutta High Court in case of Abhiram Dass vs. Gopal Dass 17 Indian Decisions 48 and in particular paragraph 51 which reads thus:-

On the merits of this appeal, we think that the order of the District Judge must be set aside. Admittedly the caveator has no interest in the estate of the deceased testator, but it is contended on his behalf that, inasmuch as he lays claim to the properties dealt with by the will, he is entitled to come in and oppose the grant of probate or letters of administration. The District Judge relies on the case of Kamona Soondury Dassee v. Hurra Lall Shah as authority for holding that the caveator has an interest in the estate of the deceased, because he disputes the title of the deceased to dispose of the particular property which he says is his. He lays no claim to succeed to any part of the estate of the testator, but claims some of the property said to form portion of that estate. We cannot agree in the rule laid down in that case which is that expressed by Mr.

Justice Field in the case of *Nobeen Chunder Sil v. Bhobosoondun Dabee*, but not adopted by Mr. Justice White. A person disputing the right of a deceased testator to deal with certain property as his own cannot be properly regarded as having an interest in the estate of the deceased. His action is rather that of one claiming to have an adverse interest. The cases of *Behary Lall Sandijal v. Juggo Mohun Gosmin*: and *Nanhu Koer v. Somirun Thakur* proceed on the principle which we think should be adopted. If" any further argument he necessary, we would refer to the terms of Section 69 which require the District Judge to issue citations calling upon all persons claiming to have any interest in the estate of the deceased." The term used does not necessarily refer to any particular property, but to the claim of any person to succeed by inheritance or otherwise to any portion of the estate of the deceased by reason of an interest, not on an adverse title to the testator to any particular property, but in the estate itself whatever that may consist of. The form of the caveat too, would seem to show that the person who enters a caveat admits that the particular property forms a portion of the estate of the testator but objects either to the execution of the will or to the proposed manner of dealing with any portion of the estate. We therefore set aside the order of the District Judge admitting the respondent as caveator in these proceedings. The appellant will be entitled to his costs.

8. Mr. Sancheti placed reliance upon the judgment of the Patna High Court in case of *Kashi Nath Singh Vs. Dulhin Gulzari Kuer*, in support of his plea that the persons who claims outside and independently of a will or claims adversely to the testator and the disputes his right to the deal with the properties can in no sense be deemed to claim an interest in the estate of the deceased within the meaning of section 283 of the Succession Act. Relevant portion of said judgment at page 477, 478 relied upon by the learned senior counsel for the plaintiffs reads thus:-

It was pointed out that a person who claims outside and independently of a will or claims adversely to the testator and disputes his right to deal with the property, can in no sense be deemed to claim an interest in the estate of the deceased within the meaning of Section 283, Succession Act. That was a ease in which the daughter of a Hindu had executed a will disposing of property which she claimed to have inherited from her father and the contention put forward on behalf of the objector was that she had really taken no more than a life interest in the estate and was, therefore, not competent to dispose of it by will. The reasoning, it is obvious, applies a fortiori to the present case.

16. In the written statement, which was put in by Kashi Nath Singh, there occurs this:

The properties mentioned in schedule A never belonged to Mt. Barta Kuar nor did she ever get possession over them rather the properties belonged to Chariter Singh and they have all along been in his possession.

17. In an application for probate of a will or for the grant of letters of administration with a copy of the will annexed the sole question that arises is

whether or not the will is a true one. It is not open to the probate Court to decide whether or not the property with which a testator has purported to deal, in fact, belonged to him. In *Birj Nath De v. Chandra Mohan Banerji* Sir John Edge said this:

It has been contended that where an application for probate of a will is contested and it is alleged that the property dealt with by the will was not of the testator or was not property over which the testator had a power of testamentary disposal, it is the duty of the Court to try an issue raising this question. All we can say is that it would be exceedingly inconvenient if Courts in this country had to try such issues. A Court could never be quite sure that it had got the proper parties before it. It would be difficult always to be sure that there was no collusion in the case. It is much safer in the interests of the public that issues as to the title to property should be decided when the issues are raised in a regular suit, and not on an application for a grant of probate.

9. Mr. Sancheti, learned senior counsel for the petitioner/plaintiff also placed reliance upon the Judgment of Supreme Court in case of *Krishna Kumar Birla Vs. Rajendra Singh Lodha and Others*, . Mr. Madon also placed reliance upon two paragraphs of the said Judgment. Mr. Sancheti placed reliance on the Judgment of Supreme Court in case of *Krishna Kumar* (supra) in support of his submission that Testamentary Court cannot decide the title of the testator in respect of any property and no person can question the existence of title in respect of the estate or capacity of the testator to dispose of the property by Will on the ground outside the law and if any such question raised, he would be a stranger to the probate proceedings. Paragraphs 55 to 57, 60, 69 to 71, 82, 84 and 86 of the said Judgment read thus:

55. The 1925 Act is a self contained Code. An application for grant of probate is to be filed in terms of Sections 275 and 276 thereof. Particulars stated in the said provisions are to be furnished by the applicant. The petition for grant of probate is to be signed and verified. Citations in terms of Section 283(1)(c) are to be issued calling upon all such persons who claim to have any interest in the estate of the deceased. Citations are issued in order to enable such persons to see the proceedings before the grant of probate and if necessary to oppose the same.

56. Such persons to whom citations have been issued whether general or special, may file a caveat. All proceedings are required to be taken only upon service of notice to the caveator(s). Section 286 uses the word "contention" to mean appearance of any one in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf, to oppose the proceeding. In the contentious cases the procedures which are required to be adopted are specified in Section 295. Only because neither in Section 284 nor Section 295 a caveator is required to show any interest in the estate of the deceased, whether the same would mean that anybody and everybody who intends to oppose the grant of probate would be entitled to lodge caveat, is the question.

57. The 1925 Act in this case has nothing to do with the law of inheritance or succession which is otherwise governed by statutory laws or the custom, as the case may be. It makes detailed provisions as to how and in what manner an application for grant of probate is to be filed, considered and granted or refused. Rights and obligations of the parties as also the executors and administrators appointed by the court are laid down therein. Removal of the existing executors and administrators and appointment of subsequent executors are within the exclusive domain of the court. 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.

60. Before dealing with each of the aforementioned contentions, let us consider what is meant by the term "Caveatable interest". It has not been defined under the Act. We may, therefore, notice the dictionary meaning of both the terms "caveat" and "interest".

69. *Abhiram Dass Vs. Gopal Dass*, is a decision of the Division Bench of the Calcutta High Court. In that case, the District Judge admitted the objection. It was held that rival titles set up by the caveator can be gone into. Setting aside the said judgment of the District Judge, the Division Bench of the High Court held:

...A person disputing the right of a deceased testator to deal with certain property as his own cannot be properly regarded as having an interest in the estate of the deceased. His action is rather that of one claiming to have an adverse interest...

70. *Abhiram Dass (supra)* was followed by a Division Bench of the Bombay High Court in *Pirojshah Bhikaji Vs. Pestonji Merwanji*, stating:

...the interest which entitles a person to put in a caveat must be an interest in the estate of the deceased person, that is, there should be no dispute whatever as to the title of the deceased to the estate, but that the person who wishes to come in as caveator must show some interest in that estate derived from the deceased by inheritance or otherwise.

71. Madras High Court also took the same view in *Rahamtullah Sahib Vs. Rama Rau and Another*, opining:

this possibility should rest on existing facts and not on mere conjecture.

82. The Madras High Court, we may notice, in a recent judgment in *M.S. Saraswathi (supra)* had a snapshot of a large number of decisions of various High Courts operating in the field including the decisions of Calcutta, Bombay, Madras and Kerala High Courts. It followed a Division Bench Decision In *Re: N. Narasimhan and Another*, wherein it was held that Section 8 of the Hindu

Succession Act would apply and the caveator being an heir alone could claim a share and his son and, thus, the applicant therein could not claim any share as he had no present interest in the property. It was emphasized that a caveator if he denied the testator's title was liable to be discharged.

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 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.

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.

10. Mr. Madon, learned senior counsel appearing on behalf of the defendants submits that defendants are claiming through their father who was original caveator who died intestate. Father of the defendants was admittedly one of the legal heirs and next of kin of the said deceased. It is submitted that the father of the defendants herein had filed a caveat opposing the grant of probate in favour of the petitioner. It is submitted that a reversioner or a family member can maintain the caveat when there is a possibility of his inheritance in the property in the event the probate of the Will is not granted. It is submitted that if for any reasons, the petitioner is unable to prove the execution and attestation of alleged Will in question, the properties of the said deceased would devolve intestate. The original caveator in that event would have inheritance of the property. The original caveator had thus caveatable interest. On the demise of the caveator, the defendants herein would have caveatable interest. It is submitted by the learned senior counsel that under the alleged Will in question, certain property alleged to have been bequeathed by the said deceased to Mr. Subhash tiwari son of one of the brother of the deceased and no property has been bequeathed in

favour of the original caveator or these defendants. Mr. Madon, learned senior counsel invited my attention to paragraphs 6, 7 and 10 of the alleged Will in question. Mr. Madon also invited my attention to various paragraphs of the affidavit in support of caveat and also affidavit in reply filed by these defendants in this notice of motion. It is submitted that it is the case of the caveator as well as the defendants that the properties which are claimed to be estate of the said deceased were not self acquired property of the said deceased but were Hindu undivided family properties in which caveator also had interest in the property. Learned senior counsel submits that if case of the defendants as well as original caveator is accepted, the caveator would have 50% share in the said properties. It is thus submitted that neither the caveator nor these defendants have disputed the 100% ownership of the said deceased in such properties. Learned senior counsel submits that affidavit in support of caveat only can be considered as pleadings and not other affidavits and even affidavit in support of caveat was filed by Mr. Kashinath Tiwari as constituted attorney of his father who was original caveator. It is submitted that merely because on demise of original caveator, additional affidavit is not filed by the legal heirs of the original caveator on service of citation, they would still be entitled to raise objection for grant of probate and can seek reliance on affidavit in support of caveat already filed by the caveator. Mr. Madon invited my attention to the order passed by this Court making this position clear.

11. Mr. Madon, learned senior counsel invited my attention to paragraphs 14, 15 and 17 of affidavit in support of caveat to demonstrate that caveator had alleged forgery in execution of Will and had disputed the execution of Will. Learned senior counsel submitted that averments made in affidavit in reply to notice of motion are not relevant for the purpose of considering the prayer for dismissal of caveat and affidavit in support of caveat. Learned senior counsel invited my attention to paragraph 12 and 13 of the affidavit in which the defendants have disputed the signature of the deceased on the alleged Will. It is submitted that no other pleadings are required. Once the execution and attestation of Will itself is disputed by the caveator, onus is on the executor or propounder of the Will to prove execution and attestation of the alleged Will. Once the caveator is found to have caveatable interest, such caveat and affidavit in support cannot be dismissed at the threshold. Execution and attestation of the Will has to be proved by the executor.

12. Learned senior counsel placed reliance on the Judgment of this Court in case of Sarla Kapur and Another Vs. Sanjay Sudesh Kapur, and in particular paragraph 8 of the said Judgment in support of his submission that if defendant has a caveatable interest and has denied the existence of any legal and valid Will left by the deceased, his caveat cannot be dismissed and it cannot be prevented upon contesting the Will. Paragraph 8 of the Judgment of this Court in case of Sarla Kapur (supra) reads thus:

8. Submission of Mr. Madon that the caveat is liable to be dismissed as the

defendant has not specifically denied in his affidavit the existence, legality and validity of the Will dated 4th April, 2005 cannot be accepted. It may be noted that even before the plaintiff filed the testamentary petition for grant of the probate of the alleged Will of the deceased, the defendant has filed the Suit bearing No. 302 of 2006 for letters of administration to the estate of the deceased on the ground and allegation that the deceased had died intestate. The defendant in his suit has specifically stated: "he believes that the deceased died intestate". The defendant has thus impliedly, if not expressly, denied the existence of any valid Will. In my view, since the defendant has a caveatable interest and since he has denied the existence of any legal and valid Will left by the deceased, his caveat cannot be dismissed and he cannot be prevented from contesting the Will.

13. Mr. Madon, learned senior counsel also placed reliance on the Judgment of Supreme Court in case of Yumnam Ongbi Tampha and Ibemma Devi Vs. Yumnam Joykumar Singh and Others, in support of his plea that once execution of the Will is disputed, propounder of such Will has to show satisfactory evidence that the Will was signed by the testator and that the testator at the relevant time was in sound position of mind. Paragraphs 11, 12 and 13 of the said Judgment read thus:

11. As per provisions of Section 63 of the Succession Act, for the due execution of a Will:

- (1) the testator should sign or affix his mark to the Will;
- (2) the signature or the mark of the testator should be so placed that it should appear that it was intended thereby to give effect to the writing as a Will;
- (3) the Will should be attested by two or more witnesses, and
- (4) each of the said witnesses must have seen the testator signing or affixing his mark to the Will and each of them should sign the Will in presence of the testator.

12. The attestation of the Will in the manner stated above is not an empty formality. It means signing a document for the purpose of testifying of the signatures of the executant. The attested witness should put his signature on the Will *animo attestandi*. It is not necessary that more than one witness be present at the same time and no particular form of attestation is necessary. Since a Will is required by law to be attested, execution has to be proved in the manner laid down in section and the Evidence Act which requires that at least one attesting witness has to be examined for the purpose of proving the execution of such a document.

13. Therefore, having regards to the provisions of Section 68 of the Evidence Act and Section 63 of the Succession Act, a Will to be valid should be attested by two or more witnesses in the manner provided therein and the propounder thereof should examine one attesting witness to prove the will. The attesting witness should speak not only about the testator's signature or affixing his mark to the

will but also that each of the witnesses had signed the will in the presence of the testator.

14. Mr. Madon also placed reliance upon the Judgment in case of Shri Jagjit Singh and Others Vs. Mrs. Pamela Manmohan Singh, in support of his submission that in view of the conflicting view of the Supreme Court on interpretation of "caveatable interest" in Krishna Kumar Birla Vs. Rajendra Singh Lodha and Others, and in case of G. Gopal Vs. C. Baskar and Others, , Supreme Court has referred the issue to be decided by larger Bench. Paragraphs 11, 21 and 22 of the said Judgment in case of Jagjit Singh (supra) read thus:

11. The term "caveatable interest" has not been defined in the Act, but the same has been used and interpreted in some of the judicial decisions. In Nobeen Chunder Sil and Ors. v. Bhobosoonduri Dabee, a two-Judge Bench of Calcutta High Court considered whether the persons who had obtained money-decree and got attached share of one of the heirs of the deceased and mortgagees of the immovable property left by the testator were entitled to oppose the grant of probate on the basis of Will executed by the owner in favour of his wife purporting to grant his entire property for her life and after her death to his sons. The respondent applied for grant of probate of the Will of Nobo Coomar Ganguli, who had died on 21.10.1877 leaving behind his widow and two sons. The appellant Nobeen Chunder Sil, who had obtained money-decree against one of the sons and Brojo Mohun Ghose and Obhoy Churn Sen in whose favour mortgage was executed by two sons filed caveat against the grant of probate. The District Judge refused to allow them to take part in the proceedings or oppose the grant. The appeal preferred against the order of the District Judge was allowed by the High Court of Calcutta.

21. It is thus evident that apparently conflicting views have been expressed by coordinate Benches of this Court on the interpretation of the expression "caveatable interest". In Krishna Kumar Birla's case, the Bench did not approve the judgments of Calcutta High Court in Bhobosoonduri Dabee's case and Madras High Court in G. Jayakumar's case wherein it was held that any person having some interest in the estate of the deceased can come forward and oppose the grant of probate. As against this, in G. Gopal's case, the dictum that a person who is having a slight interest in the estate of the testator is entitled to file caveat and contest the grant of probate has been reiterated. This being the position, we feel that the issue deserves to be considered and decided by a larger Bench.

22. The Registry is directed to place the matter before Hon'ble the Chief Justice for appropriate order.

15. Paragraph 5 of the Supreme Court Judgment in case of G. Gopal (supra) reads thus:

5 The only question that was agitated before us by Mr. Thiagarajan, learned Counsel appearing for the appellant challenging the judgment of the High Court

revoking the probate granted in respect of the will executed by the testator, was that the respondents having no caveatable interest in the estate of the deceased, the application for revocation filed by them could not be allowed. We are unable to accept these submissions made by Mr. Thiagarajan, learned Counsel appearing on behalf of the appellant only for the simple reason that admittedly the respondents were grandchildren of the testator and they have claimed the estate of the deceased on the basis of a settlement deed executed by the testator himself which admittedly was revoked by the testator. That being the position, we must hold that the respondents had caveatable interest in the estate of the testator and, therefore, they are entitled to be served before the final order is passed. It is well settled that if 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.

(Emphasis supplied)

16. Mr. Madon, learned senior counsel distinguished the Judgment of Madras High Court in case of S. Kaliyammal and others Vs. K. Palamiammal & Ors. (supra) relied upon by Mr. Sancheti. Mr. Madon submitted that even in that matter, the caveator had disputed the execution of Will and had alleged fabrication. It is submitted that in the said matter oral evidence was led and after considering the same, Madras High Court came to conclusion that there was no evidence led by the party alleging fraud and undue influence. Mr. Madon laid emphasis on para 15 of the said Judgment in which Madras High Court adverted to the Judgment of Supreme Court in case of Bhagwan Kaur v. Kartar Kaur, (1994) 5 SCC 135 in support of his submission that decision on the due execution of the Will is not primarily arriving at a finding of fact as it has a admixture of law due to specific requirement of Section 63 of the Indian Successions Act, 1925 towards due execution. It is submitted that when execution of Will is denied by a party, the burden is on the party who relies upon the Will to prove the execution of the said Will.

17. Mr. Madon learned senior counsel also distinguished the Judgment of Kolkatta High Court in case of Tarit Kumar Chatterjee vs. Tapan Kumar Chatterjee (supra) by pointing out that the said Judgment was also delivered on consideration of oral evidence led by the parties. That stage has not arisen in this matter so far. Mr. Madon also distinguished the Judgment in case of Saheb Khan vs. Mohd. Yousufuddin & Ors. (supra) on the ground that there was no allegation of fraud or material irregularity in execution of Will. In so far as Judgment of Kolkatta High Court in case of Abhiram Dass (supra) is concerned, Mr. Madon distinguished the said Judgment on the ground that caveator in the said matter was not related to the deceased but was a servant and outsider, whereas in this case, the caveator was a real brother of the deceased and had caveatable interest. In so far as Judgment of Supreme Court in case of Krishna K. Birla (supra) is concerned, it is submitted by Mr. Madon, learned senior counsel for defendants that in that matter, there was no submission made by the caveator

that if probate was not granted, caveator would not succeed in the estate. Reliance is placed on paragraphs 55 and 84 to 86 of the said Judgment. Mr. Madon also placed reliance on Section 180 of Indian Succession Act which reads thus:

Section 180: Circumstances in which election takes place.-Where a person, by his will, professes to dispose of some thing which he has no right to dispose of, the person to whom the thing belongs shall elect either to confirm such disposition or to dissent from it, and, in the latter case, he shall give up any benefits which may have been provided for him by the will.

18. It is submitted that caveator has elected to challenge the Will and thus onus is on the plaintiff to prove execution of attestation of such Will in accordance with law. During the course of arguments, I invited the attention of learned counsel of both the parties to the Judgment of this Court (R.D. Dhanuka, J) delivered on 16th July 2013 in Notice of Motion No. 151 of 2012 in Testamentary Suit No. 11 of 2011 in case of Dhirendra @ Bitu Ranjit Thakkar Vs. Mahendra Balbhadra Thakkar. Both the learned counsel made their submissions on the said Judgment. Paragraphs 7 to 10 of the said Judgment read thus:

7. Mr. Jain also placed reliance upon an unreported judgment of this court delivered on 15th December, 2006 in Notice of Motion No. 122 of 2006 in Testamentary Suit No. 33 of 2006 in the case of Kaikhosrow Aspendiar Oshtori Vs. Dr. Meherji Aspendiar Oshtori and anr. and another in support of his plea that the affidavit filed in support of the caveat must give rise to the issue between the parties. It is submitted that except making some vague allegations of fraud and collusion, no particulars in support of such vague allegations are given by the caveator in the affidavit in support. Reliance is placed on paragraph 3 of the said judgment in the case of Kaikhosrow (supra) which reads thus:

3. I have heard the learned counsel appearing for both sides. The purpose of filing the caveat in a probate petition is to challenge the validity of the Will. The consequence of filing of a caveat is that the caveator is added as a defendant and the probate petition is converted into testamentary suit. The affidavit filed in support of the caveats is treated as a written statement filed by the Defendant-caveator. Obviously, therefore, the affidavit filed in support of the caveat must give rise to an issue between the parties. In a probate petition the only issue that can be raised and that can be decided by the court is whether the Will of which the probate is sought is legal and valid Will. Therefore, it is absolutely necessary for maintaining the caveat in a probate petition to dispute the validity and legality of the Will in the affidavit filed in support of the caveat. In paragraph 4 of the affidavit filed in support of the caveat, the caveator says that the Will of which the probate is sought is invalid, illegal and fraudulently prepared and is not forcible in law. No where in the affidavit filed in support of the caveat, the caveator says that when the Will supposed to have been signed by the deceased testator, he was not in right frame of mind to dispose of his property, that the testator has not signed the Will, that it is not attested as per law. Merely making

a vague statement that the Will is invalid and illegal will not amount to challenging the validity of the Will. Perusal of paragraph (5) of the affidavit filed in support of the caveat, on the contrary, shows that both the caveators have acted pursuant to the Will. In paragraph (6), they have stated that after the Will was disclosed a meeting of the members of the family was held on 22-2-2005 and the memorandum of understanding was arrived at between the members of the family for implementation of the Will on 23-12-2005. Paragraph (6) of the affidavit read as under:-

6. I say that after due deliberation on the Will between the beneficiaries and executors/beneficiaries, the memorandum of understanding was arrived at and duly signed by all the present in presence of each other. A copy of which was given to each other of the above present.

8. Mr. Damle, learned counsel for defendant/caveator submits that on the death of the father of the caveator who was legal heir of the said deceased and had interest in the estate of the deceased, caveator will also have interest in the estate of the deceased. It is submitted that on the date of death of the father, the caveator would be entitled to make claim in the estate of the said deceased testator and accordingly would have interest in the estate of the said deceased testator. It is submitted that merely because father of the caveator did not challenge the Will, it would not affect the rights of the caveator. The caveator is entitled to claim share in the estate of the deceased independently after demise of his father. It is submitted by Mr. Damle that in affidavit in support of the caveat petitioner has though taken a plea that the property of the deceased was ancestral property, it would not mean that the other objections raised by the caveator in the affidavit in support has to be ignored. Attention of this court is invited to paragraph no. 7 of the affidavit in support of the caveat to demonstrate that the caveator has disputed execution of Will itself on the ground that the testator was blind on the date of execution of the said Will.

9. It is not in dispute that the father of the caveator was attesting witness to the Will and has filed affidavit which was annexed to the petition in which affidavit the attesting witness has deposed that he was one of the attesting witness and was present at the time of execution of the Will. He has also deposed that the deceased was of sound mind at the time of execution of the said will. It is not in dispute that after demise of the father of the caveator, citation came to be served upon the caveator in response to which affidavit in support has been filed by the caveator claiming rights independently. It is not in dispute that the probate has not been issued by this court and the testamentary petition filed by the petitioner has been converted into suit. In my view, merely because the father of the caveator who was also legal heir of the said deceased had filed affidavit confirming attestation of Will, it would not put an end to the caveatable interest of the son of attesting witness/beneficiary on his demise. The present caveator is entitled to independently contest the Will by raising objections permissible in law. If during the life time of the father of the caveator, if any evidence would have

been led, the situation would have been different. In my view, if the executor of the Will is unable to prove the execution of Will of the testator for any reasons, the caveator will have right in the estate of the deceased testator. In my view, thus caveator has caveatable interest and is entitled to challenge the said Will.

10. In so far as the issue raised by Mr. Jain that in the affidavit in support of the caveat, the caveator has set up title adverse to the title of the deceased and thus not entitled to maintain his caveat is concerned, on perusal of the affidavit in support of the caveat, it is apparent that the caveator has set up title contrary to the interest of the deceased. However, on perusal of the affidavit, it is also clear that the caveator has also disputed the Will on various other grounds including the ground that the deceased was blind at the time of execution of the Will. If this court comes to the conclusion that at the time of the trial that some of the objections raised by the caveator in affidavit in support which has to be treated as written statement are not tenable, obviously court will reject such objections made in the affidavit in support of the caveat. In my view merely because one of the objections raised in the affidavit in support of the caveat is untenable and contrary to law, this court cannot discard the entire affidavit at this stage. In my view, the matter will have to be proceeded with for trial and thus caveat filed by the caveator cannot be dismissed at this stage. There is no dispute in the proposition of law enunciated in the judgments relied upon by Mr. Jain, learned counsel for the plaintiff.

19. Mr. Madon also invited my attention to the affidavit in support of notice of motion filed by the plaintiff to demonstrate that no ground has been raised in notice of motion though the caveator has set up title adverse to that of the testator. The only ground raised in affidavit is that question as to whether property belongs to deceased cannot be decided in this proceeding and that no particulars of fraud are furnished by the caveator in affidavit in support of caveat or that no further affidavit has been filed by the defendants though opportunity was given by this Court. It is submitted that in view of no such issue raised in affidavit in support of motion inter alia praying for dismissal of caveat, plaintiff cannot be allowed to raise such plea across the bar. In any event, it is submitted that petition was filed in 2006. Issues are already framed as far back as in 2011. Plaintiff has not chosen to file any affidavit in lieu of examination-in-chief since last two years. In view of various contentious issues raised by caveator and these defendants, caveat as well as affidavit in support cannot be dismissed at this stage and would require trial. It is submitted that there is no substance in the notice of motion and the same deserves to be dismissed.

20. As far as submission of Mr. Sancheti, the learned senior counsel that inspite of opportunity given by this court to the defendants to file additional affidavit upon service of citation, no such affidavit has been filed by the defendants and thus defendants cannot be permitted to raise any objection is concerned, on perusal of order passed by this court on 25th August, 2011 read with order dated 23rd September, 2011, it is clear that this court had made it clear that the suit

shall proceed without any further affidavit. On perusal of the affidavit in support of caveat, filed by the caveator, it is clear that the said affidavit was filed by Mr. Kashinath Tiwari, first defendant herein as constituted attorney of the caveator. The defendants are brought on record in view of the demise of the caveator and are entitled to adopt the affidavit already filed by the caveator. Merely because, the defendants have not filed any additional affidavit, upon service of citation, the defendants are still entitled to rely upon the affidavit filed by the caveator. In my view there is thus no substance in the submission of Mr. Sancheti, learned senior counsel that in view of the defendants not having filed any additional affidavit, defendants cannot be allowed to raise any objection.

21. The next submission of Mr. Sancheti, is that the relationship between the said deceased and the original caveator was strained and both the parties had filed separate suits against each other in respect of the said properties. In my view, even if both the parties had filed suit against each other, it cannot be disputed that the caveator had caveatable interest. Once the caveator has disputed the execution of the Will, the onus is on the propounder of the Will and in this case the alleged executor to prove the execution and attestation of the said alleged Will in accordance with law.

22. Mr. Sancheti, the learned senior counsel relied upon various judgments in support of his plea that the allegations of forgery made by the caveator in the affidavit in support in respect of the Will in question are totally vague and without particulars. Reliance is placed on order VI rule 4 of the Code of Civil Procedure, 1908 in support of his submission that the person alleging the fraud, fabrication and or undue influence has to give particulars and details in support of such plea and if any such allegations are general in nature and are insufficient, such averments would not be considered as averment of fraud and or fabrication and the court cannot take notice of such allegations. There is no dispute about this proposition canvassed by Mr. Sancheti, the learned senior counsel that the allegations of fraud and/or fabrication has to be with particulars and details and can not be general in nature.

23. The question that arises in this proceeding is that whether the allegations made by the caveator in affidavit in support of caveat alleging fabrication are general in nature or are sufficient for not dismissing the caveat at the threshold. On perusal of the affidavit in support of caveat dated 5th February, 2007 and in particular paragraphs 15 and 17 it is clear that the caveator had categorically stated that the said deceased had neither executed any Will nor transferred any property to Subhash Jarda Prasad Tiwari or Smt. Daya Subhash Tiwari. It is also alleged that the said Will is forged and the witnesses are relatives and interested witnesses of the petitioner. In affidavit in reply to this proceedings, the defendants have alleged that the authenticity of the Will which the plaintiff is trying to propound is questionable. The signature on the Will does not tally with other signatures of the said deceased. It is also stated that the plaintiff did not take any steps to prove the authenticity of the Will. In paragraph 12 of the said

affidavit it is stated that the wording in the said Will specially in clauses 7 and 9 clearly shows that the deceased was not in stable mind at the time of execution. In Paragraph 10 of the said affidavit it is stated that if at all the deceased had executed such Will, it shall not have legal sanctity and it cannot be probated. There is no rejoinder filed by the plaintiff to the said affidavit in reply filed by the defendants.

24. On perusal of the affidavit in support of the caveat it is clear that the execution of the alleged Will is disputed by the caveator. In that context, the caveator had made allegation of alleged fabrication. Even if averments made in affidavit in reply filed by the defendants are not considered for the purpose of deciding this notice of motion, in view of the dispute raised by the caveator in the affidavit in support of caveat, disputing the alleged Will and alleging forgery of documents, these allegations can not be brushed aside at the stage of notice of motion and caveat cannot be dismissed at this stage. Whether the Will is executed or not, once execution thereof is disputed, onus will be always on the propounder of the Will and or executor to prove due execution of such propounded Will. At the same time, the caveator who has alleged forgery, the onus to prove such forgery would be on the caveator or the person claiming through him. All these facts are matter of evidence and thus cannot be decided conclusively at the stage of Notice of Motion.

25. On perusal of the record, it is clear that the affidavit in support of caveat alleging forgery by the caveator was filed as far back as on 5/2/2007. This Notice of Motion has been taken out by the plaintiff on 4th July, 2012 much after demise of the caveator and after bringing the defendants on record as legal heirs and representatives of the original caveator. There is gross delay on the part of the plaintiff to file this notice of motion for dismissal of the caveat on the ground that the allegations of forgery made by the caveator are without particulars and are vague. Perusal of the record shows that on 19th April, 2011, issues have already been framed by this court. The Plaintiff was directed to file affidavit in lieu of examination in chief of contesting witnesses and affidavit of documents if any. The suit was adjourned to 9th June, 2011 for admissibility of documents of the plaintiff. The matter thereafter appeared before this court on 18th August, 2011 for recording evidence. On 23/09/2011, this court clarified that since the affidavit was not filed by the heirs of the original defendant objecting to grant probate, the suit to proceed without any further affidavit. Instead of filing affidavit in lieu of examination in chief as directed by the order of this court on 19th April, 2011, Plaintiff chose to file this notice of motion in the month of July, 2012 inter alia praying for dismissal of caveat and affidavit in support. Neither any affidavit in lieu of examination in chief nor any document in support thereof, is filed by the plaintiff though directed by this court and though the matter was adjourned on various occasions for recording evidence. In my view, at this stage, it would not be appropriate to dismiss the caveat and/or affidavit in support. The onus will be on the plaintiff to prove the due execution and attestation of the Will. At the same time, onus would be on the defendants to prove whether the

said will has been forged. This court has already framed issues in that regard as far back as on 19th April, 2011. In my view on the ground of gross delay in filing notice of motion also, Plaintiff is not entitled to any relief in this notice of motion.

26. The next submissions of Mr. Sancheti is that the caveator in affidavit in support of the caveat has disputed the title of the said deceased in respect of the various properties which are bequeathed by the deceased by his Will in question. Reliance is placed on various judgments including the judgment of the Supreme Court in the case of Krishna Kumar Birla (supra). The learned senior counsel submits that the question of title arising under the Indian Succession Act cannot be gone into the testamentary proceedings. It is submitted that the caveator who claims interest in the property, cannot raise any dispute whatsoever as to the title of the estate of the deceased who must show some interest in the estate derived from the deceased by inheritance or otherwise. It is submitted that defendants and/or caveator are not entitled to maintain caveat and affidavit in support.

27. Mr. Madon, the learned Senior Counsel on the other hand submits that the plaintiff has not raised any such plea in the affidavit in support of the notice of motion as ground for dismissal of the caveat and affidavit in support alleging the caveator had set up title adverse to the title of the said deceased and thus cannot maintain the said caveat. Without prejudice to this submission, Mr. Madon submits that the caveator had not disputed the title of the said deceased completely but had pleaded that the said property which are alleged to have been bequeathed to the said deceased was property of the Hindu Undivided Family and the testator could not have executed any Will in respect of the entire property. In my view Mr. Madon the learned senior counsel is right in his submission that the plaintiff did not raise any such issue in the affidavit in support of his notice of motion for dismissal of caveat alongwith affidavit in support of the ground that caveator had set up title adverse to the title of the deceased in the property. In my view the plaintiff not having raised such plea in the affidavit in support of notice of motion, the caveat and affidavit in support cannot be dismissed on that ground raised across the bar.

28. Even if, such ground raised across the bar by Mr. Sancheti, the learned senior counsel is considered, on perusal of the affidavit in support of the caveat, it is clear that the caveator had not disputed the title of the said deceased in the property absolutely but had pleaded that the said properties were not HUF properties and in those properties the caveator also had equal right. On perusal of the affidavit in support of the caveat, it is also clear that the caveator had also disputed execution of the Will in question and had alleged fabrication. This court has considered similar facts in the case of Virendra @ Bittu Ranjit delivered on 16th July, 2013 in Notice of Motion No. 151 of 2012 in Testamentary Suit No. 11 of 2011. This court has already held that if the executor of the Will is unable to prove the execution of the Will of the testator for any reasons, the caveator who was grandson will have right in the estate of the deceased testator and would

have caveatable interest. It is also held that the caveator had also disputed the Will on various other grounds and if this court comes to the conclusion at the time of trial, that some of the objections raised by the caveator in affidavit in support which has to be treated as written statement are not tenable, obviously the court will reject such objections made in the affidavit in support of caveat. Merely because some of the objections raised in the affidavit in support of the caveat would be found untenable and contrary to law, the entire affidavit in which various other objections are required to be adjudicated upon, cannot be discarded at the stage of notice of motion. The matter will have to be proceeded with for trial. In my view, the judgments thus relied upon by Mr. Sancheti, the learned senior counsel for the plaintiff are distinguishable in the facts of this case.

29. In my view, Mr. Madon, the learned senior counsel is right in his submission that in the matter before the Supreme Court in the case of K.K. Birla, the caveator did not have any interest in the estate of the deceased and it was not case of the caveator that if the alleged will was not proved, on intestacy the caveator would have share in the property. In the facts of this case, the caveator was brother of the said deceased. The deceased died issueless. The parties are governed by the provisions of Hindu Succession Act. If the will is not probated for any reasons whatsoever, the caveator would have share in the estate of the deceased on intestacy. On the demise of the caveator, the defendants who are legal heirs and representatives of the caveator, would also have share in the estate of the said deceased through the caveator.

30. As far as judgments in the case of S. Kaliyammal and Others (supra) relied upon by Mr. Sancheti is concerned, Mr. Madon, the learned senior counsel has rightly distinguished the said judgment on the ground that the parties in that matter had led oral evidence and after considering the oral evidence on record, the Madras High Court had come to the conclusion that there was no evidence on record led by the party alleging any undue influence. Madras High Court had adverted to the judgment of the Supreme Court in the case of Bhagwan Kaur (Supra) holding that the decision of due execution of the Will has not been primarily arrived at the finding of fact as it is admixture of law due to the specific requirements of Section 63 of the Indian Succession Act towards due execution. It has been held that when the execution of will is denied by the parties, then the burden is on the party who relies upon the will to prove the execution of the same. Similarly the judgment of the Calcutta High Court in the case of Taritkumar Chatterjee (supra) and Saheb Khan (supra) are rightly distinguished by Mr. Madon on the ground that the said judgment in the case of Saheb Khan, there were no allegations of fraud or material irregularity in execution of the will and in case of Abhiram Das, decided by Calcutta High Court, caveator in the said matter was not related to the deceased but was servant and outsider whereas in this case, the caveator was real brother of the deceased and had admittedly caveatable interest and was served with citation.

31. In my view no case is made out by the plaintiff for dismissal of caveat and

affidavit in support. Plaintiff is accordingly directed to file affidavit in lieu of examination in chief along with documents within four weeks from today with advance copy thereof to be served on defendant's advocate. The defendants are directed to file statement of admission and denial within one week from the date of service of documents by the plaintiff. Matter to be placed on board for deciding the admissibility of documents relied upon by the plaintiff after two weeks from the date of the defendant filing statement of admission and denial of documents. I, therefore, pass the following order:

- (a) Notice of motion is dismissed.
- (b) There shall be no order as to costs.