

(2014) 07 BOM CK 0146

In the Bombay High Court

Case No : Chamber Summons No. 64 of 2014 in Suit No. 103 of 2013 in Testamentary Petition No. 1462 of 2011 and Notice of Motion No. 50 of 2014 in Testamentary Suit No. 103 of 2013 in Testamentary Petition No. 1462 of 2011

Jagdish Asarpota

APPELLANT

Vs

Jagdish Damodardas Asarpota

RESPONDENT

Date of Decision : 08-07-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115, 92
Constitution of India, 1950 — Article 136

Citation : (2014) 07 BOM CK 0146

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

Bench : Single Bench

Advocate : Abhijit Kadam, Advocate for the Appellant; Rohan Cama, a/w. Manik Jathi, Nimisha Rao and Pragya Khaitan, i/b. Crawford Bayley and Co, Advocate for the Respondent

Judgement

R.D. Dhanuka, J.—Applicants in the chamber summons are the original defendants (caveators). Applicant in the notice of motion is original petitioner (plaintiff). The applicants in the chamber summons have prayed for leave to place on record an additional affidavit dated 6th April, 2014 in support of the caveat on their behalf. Applicant in the Notice of Motion has prayed for dismissal of caveat dated 9th July, 2012 and affidavit in support of caveat dated 13th July, 2012 of the caveators and seeks declaration that the caveat as well as affidavit in support are not maintainable. By consent of parties both the proceedings were heard together and are being disposed of by a common order. Some of the relevant facts for the purpose of deciding these two proceedings are as under:-

2. Smt. Kusum Bharat Asarpota is widow of the deceased late Mr. Bharat Ladharam Asarpota who has alleged to have executed a Will dated 15th June 1996 and had appointed the plaintiff as the executrix of the said Will. The plaintiff also claims to be the sole legatee to the properties of her late husband

under the said Will. On 12th March, 2009 the testator expired. On 20th November, 2011 the plaintiff herein filed a petition inter alia praying for probate of the Will and Testament of the deceased dated 15th June, 1996. Alongwith the said petition, the plaintiff filed consent affidavit of her two sons Mr. Aashish Bharat Asarpota and Mr. Vinayak Bharat Asarpota giving their full and free consent in favour of the plaintiff for grant of probate without service of any citation upon them. It was stated in the petition that the said deceased had left the plaintiff and her two sons only as the surviving next of kin according to the Hindu Succession Act, 1956. It was also stated that the deceased had no daughter and the father and mother are predeceased the deceased.

3. On 24th May, 2012 and 28th May, 2012 the plaintiff filed affidavit of Mr. Raju Vithaldas Jangla and Mr. Jayraj Damodardas Gajaria endorsing the signatures of Mr. Bhagwan Asarpota and Govind L. Parmanand as attesting witnesses to the alleged Will. On 9th July, 2012 the applicants to the chamber summons filed two separate caveats. Mr. Jagdish Asarpota affirmed an affidavit in support of caveat on 13th July, 2012.

4. On 10th September, 2012 this court made an observations that the plaintiff had made false statement that the mother of the said deceased was predeceased. On 9th October, 2012 mother of the said deceased expired. Applicant No. 1 in the chamber summons (caveator) is son of Mr. Damodardas P. Asarpota who was brother of Mr. Ladharam P. Asarpota. The applicant No. 1 was cousin of the said deceased and admittedly is not class I heir.

5. On 28th August, 2013 the caveator No. 2 filed a chamber summons in this court inter alia praying for permission to adopt the affidavit in support of caveat filed by caveator No. 1. On 30th July, 2013, probate petition is converted into a suit by an order of this court. On 19th August, 2013 this court directed the plaintiff to file affidavit in lieu of examination in chief of the first witness which is filed by the witness of the plaintiff on 12th September, 2013. On 19th September, 2013 caveator No. 2 affirmed in support of caveat in Bahrain. On 28th October, 2013, this court in the Chamber Summons (L) No. 104 of 2013 condoned the delay in filing affidavit in support of caveat by the caveator no. 2. Caveator No. 2 is a partnership firm in which the two alleged attesting witnesses were partners alongwith the said deceased and other family members.

6. This court permitted the plaintiff to file additional affidavit in lieu of examination in chief which came to be filed on 5th February, 2013. On 2nd March, 2014, caveators filed affidavits of admission and denial. On 23rd March, 2014 and 27th March, 2014 the alleged attesting witnesses Mr. Govind Ladharam Asarpota and Mr. Bhagwan Ladharam Asarpota filed affidavit respectively denying existence of the alleged Will of the deceased and stating that they had not witnessed the execution and that the alleged signature on the Will was forged and fabricated.

7. On 7th April, 2014, plaintiff filed this notice of motion seeking dismissal of

caveat and served a copy thereof upon the caveators on 8th April, 2014. The caveator No. 1 served additional affidavit upon the plaintiff's advocate on 9th April, 2014. On 21st April, 2014 caveators filed chamber summons inter alia praying for leave to file additional affidavit in support of caveat.

8. Mr. Cama, learned counsel appearing for the applicants in the chamber summons submits that the plaintiff had made false and incorrect statement in the plaint that the mother of the said deceased had predeceased the deceased. My attention is invited to the order passed by Smt. Roshan Dalvi, J. making such observation in the order dated 10th September, 2012. It is submitted that the applicant No. 1 i.e. Mr. Jagdish Asarpota is the first cousin of the said deceased and has interest in the estate of the said deceased sought to be bequeathed. Reliance is placed on the Memorandum of Understanding dated 31st January, 1996 and addendum to the said documents dated 26th May, 2005. It is submitted that the properties which are joint family properties as recorded in the memorandum of understanding and addendum thereto are purported to have been bequeathed by the said deceased to the plaintiff in which property the applicant No. 1 to the chamber summons claims right and interest. It is submitted that applicant No. 1 was also a party to the said memorandum of understanding. Learned counsel submits that the Will in question is a forged and fabricated document and the applicants would not be able to set up the plea of forgery of the Will in any other proceedings and the same can be agitated only in the affidavit in support of caveat proposed to be filed in this proceedings.

9. It is submitted by the learned counsel that the filing of additional affidavit in support of caveat is necessitated in view of the plaintiff having filed an additional affidavit in lieu of examination in chief bringing on record the new facts and additional documents. It is submitted that due to inadvertence at the time of filing of the earlier affidavit in support of the caveat and due to paucity of time, certain relevant averments and contentions were not raised by the erstwhile advocates representing the applicants which the applicants desire to place on record and the same being crucial for the purpose of deciding the suit, this court shall grant an opportunity to the applicants to place such additional facts on record by filing additional affidavit in support of caveat. Learned counsel submits that it is also necessary to bring on record the affidavits filed by the alleged attesting witnesses Mr. Govind L. Asarpota and Mr. Bhagwan L. Asarpota on record by which affidavits they have disputed their signatures on the alleged Will and have also alleged that the said Will is forged and fabricated.

10. Mr. Cama, learned counsel then submits that the said two alleged attesting witnesses have filed separate caveats and affidavit in support in this proceedings being the legal heirs of Mrs. Meera Ladharam Asarpota, their mother who expired on 15th September, 2012.

11. In reply to the submissions made by Mr. Cama, learned counsel for the applicants in the chamber summons, Mr. Kadam, learned counsel appearing for plaintiff and for applicants in support of the notice of motion invited my attention

to the properties described in Schedule I and Schedule III and would submit that the deceased had neither bequeathed any of the properties of joint family which are alleged to be part of memorandum of understanding and supplementary agreement nor are described as estate of the said deceased in those two schedules annexed to the petition. It is submitted that plaintiffs is not concerned with the alleged properties of caveator No. 2 at all.

12. Learned counsel invited my attention to the affidavit in support of the caveat dated 13th July, 2012 filed by the applicant No. 1 to the chamber summons and affidavit in support of caveat filed by applicant No. 2 to the chamber summons on 26th August, 2013 adopting the submissions made in affidavit in support dated 13th July 2012 filed by applicant No. 1 in this proceedings. Learned counsel submits that in the affidavit in support of caveat, none of the caveators have disputed the legality and/or validity of the Will dated 15th June, 1996. It is submitted that the only objection raised in the said affidavit is that the testator was not the exclusive owner or did not have exclusive right, title or interest over the properties mentioned in the schedule annexed to the petition. Learned counsel submits that the caveators having set up title adverse to the interest of the testator, the caveat itself cannot be maintained. Learned counsel submits that applicant No. 2 which consist of various partners including Mr. Bhagwan L. Asarpota and Mr. Govind L. Asarpota, the applicant No. 2 having adopted the averments and contentions raised in the affidavit in support of caveat filed by applicant No. 1, applicant No. 2 has deemed to have accepted the factum of the affixation of their signatures on the said Will thereby accepting the legality and validity of the said Will.

13. Learned counsel submits that the plaintiff already having filed affidavits in lieu of examination in chief and the applicants to the chamber summons having filed their statement of admission and denial in respect of documents, applicants cannot be allowed to file any additional affidavit in support of caveat at this stage and that also when the applicants themselves have no caveatable interest in the estate of the said deceased. It is submitted that even if this court refuses to grant probate as prayed by the plaintiff and the property of the said testator devolves by intestacy, the applicants (caveators) will not be entitled to any share in the property of the deceased. Learned counsel submits that the caveators do not fall in class I of the Schedule to the Hindu Succession Act. Legal heirs of the said deceased falling under class I are alive. Learned counsel submits that in view of the demise of Mrs. Meera Asarpota, citations have been already served upon her legal heirs who have already filed separate caveats and affidavit in support thereof.

14. Learned counsel invited my attention to the affidavit in support of chamber summons filed by the caveators and would submit that there is no averment in the affidavit that any new facts are introduced by the plaintiff in evidence. It is submitted that chamber summons for seeking permission to file additional affidavit in support of caveat came to be filed only after 14 days after service of

notice of motion seeking dismissal of caveat of the applicants, filed by the plaintiffs. It is submitted that even in the additional affidavit the applicants propose to file, applicants have not claimed any caveatable interest. It is submitted that though the caveator No. 2 has filed affidavit in support of caveat after one year of the affidavit filed by the caveator No. 1, caveator No. 2 has simplicitor adopted the averments made in the said affidavit and did not raise any plea claiming caveatable interest. Even in the affidavits now proposed to be filed, the caveators have not explained as to why Will could not be disputed in earlier affidavit in support of caveat.

15. Learned counsel placed reliance on the judgment of the Supreme Court in case of Heeralal Vs. Kalyan Mal and Others, and in particular paragraphs 9, 10 and 12 in support of the submission that by amendment proposed to be made by the caveators to the affidavit in support of caveat, the caveators seek to withdraw the earlier admission made in respect of existence of Will and/or not having disputed the existence of Will and now proposes to dispute the existence of Will which cannot be permitted by this Court. Paragraphs 9, 10 and 12 of the said judgment reads thus:-

9. Now it is easy to visualize on the facts before this Court in the said case that the defendant did not seek to go behind his admission that there was an agreement of 25th January 1991 between the parties but the nature of agreement was sought to be explained by him by amending the written statement by submitting that it was not agreement of sale as such but it was an agreement for development of land. The facts of the present case are entirely different and consequently the said decision also cannot be of any help for the learned counsel for the respondent. Even that apart, the said decision of two learned judges of this Court runs counter to a decision of a Bench of three learned Judges of this Court in the case of Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co., In that case Ray, C.J., speaking for the Bench had to consider the question whether the defendant can be allowed to amend his written statement by taking an inconsistent plea as compared to the earlier plea which contained an admission in favour of the plaintiff. It was held that such an inconsistent plea which would displace the plaintiff completely from the admissions made by the defendants in the written statement cannot be allowed. If such amendments are allowed in the written statement plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. In that case a suit was filed by the plaintiff for claiming a decree for Rs. 1,30,000 against the defendants. The defendants in their written statement admitted that by virtue of an agreement dated 7th April 1967 the plaintiff worked as their stockist-cum-distributor. After three years the defendants by application under Order VI Rule 17 sought amendment of written statement by substituting paragraphs 25 and 26 with a new paragraph in which they took the fresh plea that plaintiff was mercantile agent-cum-purchaser, meaning thereby they sought to go behind their earlier admission that plaintiff was stockist-cum-distributor. Such amendment was rejected by the Trial Court

and the said rejection was affirmed by the High Court in revision. The said decision of the High Court was upheld by this Court by observing as aforesaid. This decision of a Bench of three learned Judges of this Court is a clear authority for the proposition that once the written statement contains an admission in favour of the plaintiff, by amendment such admission of the defendants cannot be allowed to be withdrawn if such withdrawal would amount to totally displacing the case of the plaintiff and which would cause him irretrievable prejudice. Unfortunately the aforesaid decision of three member Bench of this Court was not brought to the notice of the Bench of two learned judges that decided the case in *Akshaya Restaurant* (supra). In the latter case it was observed by the Bench of two learned Judges that it was settled law that even the admission can be explained and even inconsistent pleas could be taken in the pleadings. The aforesaid observations in the decision in *Akshaya Restaurant* (supra) proceed on an assumption that it was the settled law that even the admission can be explained and even inconsistent pleas could be taken in the pleadings. However the aforesaid decision of the three member Bench of this Court in *Modi Spinning* (supra) is to the effect that while granting such amendments to written statements no inconsistent or alternative plea can be allowed which would displace the plaintiffs case and cause him irretrievable prejudice.

10. Consequently it must be held that when the amendment sought in the written statement was of such a nature as to displace the plaintiffs case it could not be allowed as ruled by a three member Bench of this Court. This aspect was unfortunately not considered by latter Bench of two learned Judges and to the extent to which the latter decision look a contrary view qua such admission in written statement, it must be held that it was per incuriam being rendered without being given an opportunity to consider the binding decision of a three member Bench of this Court taking a diametrically opposite view.

12. In our view, therefore, on the facts of this case and as discussed earlier, no case was made out by the respondents, contesting defendants, for amending the written statement and thus attempting to go behind their admission regarding 5 out of 7 remaining items out of 10 listed properties in Schedule-A of the plaint. However, so far as Schedule-B properties are concerned from the very inception the defendants' case qua those properties was that plaintiff had no interest therein. By proposed amendment they wanted to introduce an event with reference to those very properties by submitting that they had been in possession of trespassers. Such amendment could not be said to have in any way adversely or prejudicially affected the case of the plaintiff or displaced any admission on their part qua Schedule-B properties which might have resulted into any legal right in favour of the plaintiff. Therefore, so far as Schedule-B properties were concerned, the amendment could not be found fault with. Hence exercising the powers under Article 136 of the Constitution of India we would not be inclined to interfere with that part of the decision of the High Court allowing the amendment in the written statement, even though strictly speaking High Court could not have interfered with even this part of the order u/s 115, CPC.

16. In support of the same submission, learned counsel also placed reliance on the judgment of this court in case of Shri Tertuliano Renato de Silva and Another Vs. Shri Francisco Lourenco Bettencourt de Silva and Another,

17. Learned counsel also placed reliance on the judgment of Supreme Court in case of Krishna Kumar Birla Vs. Rajendra Singh Lodha and Others, in support of the submission that the caveators have no caveatable interest and in any event the caveators having set up claim adverse to the title of the deceased in the properties, cannot maintain such caveat.

18. In rejoinder, Mr. Cama learned counsel for the applicants to the chamber summons submits that since applicants claim interest in the estate which is sought to be bequeathed by the said deceased, applicants have caveatable interest. It is submitted that it is not required to be stated in the affidavit in support of caveat that the caveator has caveatable interest. No sooner this issue is raised in the affidavit in support of notice of motion by the plaintiff, caveators have disclosed their caveatable interest in the affidavit in reply.

19. Mr. Cama, learned counsel placed reliance on the judgment of the Supreme Court in case of G. Gopal Vs. C. Baskar and Others, and in particular paragraph 5 in support of the submission that a person who has even a slight interest in the estate of the testator is entitled to file caveat. Paragraph 5 of the said judgment of the Supreme Court in case of G. Gopal (supra) reads thus:-

4. The only question that was agitated before us by Mr. Thiayagarajan, 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. Thiayagarajan, learned Counsel appearing on behalf of the appellant only for the simple reason that admittedly the respondents were grand children 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.

20. Learned counsel also placed reliance on the judgment of the Supreme Court in support of the same proposition in case of Shri Jagjit Singh and Others Vs. Mrs. Pamela Manmohan Singh, and in particular paragraphs 15, 17, 18, 19 to 21 which reads thus:-

15. In Krishna Kumar Birla Vs. Rajendra Singh Lodha and Others, a two-Judge Bench of this Court categorized caveatable interest, referred to the dictionary meanings of the words "caveat" and "interest" and large number of precedents

including Mrs. Elizabeth Antony Vs. Michel Charles John Chown Lengera, , Kanwarjit Singh Dhillon Vs. Hardyal Singh Dhillon and Others, , Basanti Devi Vs. Raviprakash Ramprasad Jaiswal, and held that the probate court exercises a limited jurisdiction and is not concerned with the question of title. If the probate is granted, an application for revocation can be filed.

17. The two-Judge Bench then referred to some judgments relating to caveatable interest of the reversioners and held:

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.

18. However, the propositions culled out in paragraph 86 were substantially diluted by making the following observations in paragraph 103:

103. What would be the 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.

19. The Bench then discussed the judgments of Calcutta High Court and observed:

92. In the context of the laws governing inheritance and succession, as they then stood, the widest possible meaning to the term "interest" might have been given in a series of decisions which the learned Counsel for the appellants rely upon ranging from Nobeen Chunder Sil to Radharaman Chowdhuri v. Gopal Chandra Chakravarty so as to hold that a caveat would be maintainable even at the instance of a person who had been able to establish "some sort of relationship" and howsoever distant he may be from the deceased which per se cannot have any application after coming into force of the Hindu Succession Act. Ordinarily, therefore, a caveatable interest would mean an interest in the estate of the deceased to which the caveator would otherwise be entitled to, subject of course, to having a special interest therein.

106. The decisions which were rendered prior to coming into force of the Hindu Succession Act, thus, may not be of much relevance. Now, if on the interpretation of law, as it then stood, a reversioner or a distant relative who could have succeeded to the interest of the testator was entitled to file a caveat, they would not be now, as the law of inheritance and succession is governed by a parliamentary Act.

109. It is in that backdrop the question which is required to be posed is: Did the Calcutta High Court or the other High Court opine that even a busybody or an interloper having no legitimate concern in the outcome of the probate proceedings would be entitled to lodge a caveat and oppose the probate? The answer thereto, in our opinion, must be rendered in the negative. If anybody and everybody including a busybody or an interloper is found to be entitled to enter a caveat and oppose grant of a probate, then Sections 283(1)(c) and 284 of the 1925 Act would have been differently worded. Such an interpretation would lead to an anomalous situation. It is, therefore, not possible for us to accede to the submission of the learned Counsel that caveatable interest should be construed very widely.

110. A caveatable interest is not synonymous with the word "contention". A "contention" can be raised only by a person who has a caveatable interest. The dictionary meaning of "contention", therefore, in the aforementioned context cannot have any application in a proceeding under the 1925 Act.

20. A little later another two-Judge Bench expressed an apparently contrary view in G. Gopal Vs. C. Baskar and Others, This is evinced from paragraph 5 of the judgment, which is reproduced below:

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)

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.

21. Learned counsel also placed reliance on the judgment of Calcutta High Court in case of Gourishankar Chatteraj Vs. Sm. Satyabati Debi, in support of the same submission. Learned counsel submits that since the caveators are claiming share in the estate of the deceased which properties are joint family properties, caveators can raise this issue only in this proceedings and not in any other proceedings.

22. Learned counsel submits that the notice of motion for dismissal of caveat was served upon the caveators on 9th April, 2014 at 11.50 a.m. whereas additional affidavit proposed to be filed by the caveators was served on the plaintiffs' advocate on 9th April, 2014 at 11.45 a.m. There is thus no delay in filing chamber summons for seeking permission to file additional affidavit in support of caveat. It is submitted that no prejudice would be caused to the plaintiffs if the caveators are permitted to file additional affidavit in support of caveat.

23. A perusal of the affidavit in support dated 13/7/2012 filed by the caveator No. 1 indicates that in the said affidavit the caveator No. 1 has not disputed the existence and validity of the Will of the deceased. The entire affidavit in support of the caveat proceeds on the premise that the deceased had executed a memorandum of understanding with his brothers in the year 1996 in which it was recorded that all business worldwide, movable and immovable properties, shares, stocks, investments, bank deposits etc. will continue to be jointly owned by all the five brothers (partners) in the ratio of 20% share each irrespective of the fact that some of those were run in individual's name for convenience. It is

alleged in the affidavit in support of caveat that notwithstanding the said memorandum of understanding, the plaintiff had started withdrawing funds from the joint account wherever her name was there whereas as per written understanding all those funds belong to caveator No. 2 firm only and five brothers have 20% share each. The said affidavit is filed through an advocate practicing in this Court. The caveator No. 1 is also one of the partner in caveator No. 2. On 26/07/2013 the caveators signed vakalatnama in favour of M/s. Crawford Bailey & Co. The said vakalatnama is filed in this proceedings on 20/09/2013.

24. On 26/08/2013, one of the partner of the caveator No. 2 affirmed an affidavit in support of the caveat at Bahrain. It is stated in the said affidavit that the deponent of the said affidavit had perused the papers and proceedings in the matter and the office records in relation thereto and being conversant with the facts and circumstances of the petition, the caveator No. 2 was filing the said affidavit in support of caveat. Caveator No. 2 adopted the submissions made in the affidavit in support dated 13/07/2012 filed by caveator No. 1 while opposing issuance of probate to the petitioner. In view of the gross delay in filing the said affidavit in support of caveat, caveator No. 2 filed a chamber summons in the Testamentary Suit inter alia praying for condonation of delay of 425 days in filing that affidavit. This Court condoned the said delay and granted leave to amend to the plaintiff and accepted the said affidavit on record. In view of the affidavit of caveator No. 2 having taken on record after more than one year of the affidavit in support of caveat filed by the caveator No. 1, this court granted liberty to the plaintiff to file additional affidavit in lieu of examination in chief. The plaintiff had already filed affidavit in lieu of examination in chief on 12/09/2013.

25. Pursuant to the said liberty granted by this Court, plaintiff filed additional affidavit in lieu of examination in chief on 5/2/2014. On 2/3/2014 the caveators filed affidavit of admission and denial in respect of the documents proposed to be relied upon by the plaintiff. A perusal of record indicates that the plaintiff filed the notice of motion on 07/04/2014 for seeking dismissal of caveat. The said notice of motion was served upon the advocate of defendants on 09/04/2014. It is case of the caveators that an additional affidavit on behalf of the defendants in support of the caveat which they proposed to file was affirmed in Behrain on 09/04/2014 almost at the same time when the notice of motion was served upon their advocate. After 14 days of the service of the notice of motion for dismissal of caveat, defendants filed chamber summons to file additional affidavit in support of caveat.

26. A perusal of the affidavit in support of chamber summons indicates that the grounds raised for seeking permission to file additional affidavit are (i) plaintiff has filed additional affidavit in lieu of examination in chief dated 05/02/2004, (ii) Mr. Bhagwan and Mr. Govind Asarpota have made affidavits disputing their signature on the alleged Will and that they were not the witnesses to the alleged Will (iii) Due to inadvertence at the time of filing the earlier affidavit in support of

caveat and due to paucity of time, certain relevant averments and contentions were not raised by their erstwhile advocates which the caveators desire to place on record the facts being crucial for the purpose of adjudication in view of the new facts having emerged from the additional affidavit of the plaintiff.

27. A perusal of the additional affidavit which the caveators proposed to file indicates that the caveators now propose to dispute the existence and validity of the Will on the ground of forgery and fabrication. Reliance is once again placed on the memorandum of understanding dated 31/01/1996 and addendum dated 26/05/2000. The caveators also seek to place reliance on the affidavits filed by Mr. Govind Asarpota and Mr. Bhagwan Asarpota and also seek to dispute the correctness of the affidavits filed by Mr. Raju Vitthaldas Jangala and Mr. Jayraj D. Gajaria and their affidavits dated 24/05/2012 and 28/05/2012 respectively alleging that they were present at the time alleged Will was executed by the deceased. It is alleged in the proposed affidavit that the plaintiff had introduced new facts in additional affidavit in lieu of examination in chi dated 4/02/2014 and relied up[on two new documents i.e. (1) the death certificate of Mrs. Meera L. Asarpota and (2) letter dated 15/09/2008 along with annexures.

28. It is not in dispute that the caveator No. 1 is not a class I heir of the said deceased testator. Plaintiff and her two sons who admittedly fall in class I are alive. Two sons of the plaintiff have filed consent affidavits. The mother of the said deceased expired after the death of the deceased and her two sons are served with citation and they have already filed separate affidavits. Question thus arises for consideration of this Court is that in these circumstances whether caveator No. 1 who is cousin of the said deceased has caveatable interest and whether caveator No. 2 which is a partnership firm also has a caveatable interest and whether both these caveators can oppose the grant of probate.

29. Supreme Court in case of Krishnakumar Birla Vs. Rajendra Singh Lodha (supra) has held that 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. 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. It is held that the person who seeks to file a caveat must have an interest in the estate left by the deceased. An interest must be wide one but such an interest must not be one which would have the effect of destroying the estate itself. Supreme court in the said judgment has held 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 in as much as none of such rights can effectively be adjudicated therein. It is held that a probate proceedings should not be permitted to be

converted into a title suit and should not be permitted to become an unchartered field to be trespassed into by persons even if he is not affected by testamentary disposition. A contention can be raised only by a person who has a caveatable interest. Supreme Court has held that if there are heirs intestate who are alive, entertaining of a caveat on the part of another family of a reversioner or an agnate or cognate would never arise.

30. Supreme court has also held that right of a co-owner is not affected by testamentary disposition. Supreme Court also compared the suit contemplated u/s 92 of the CPC with a probate. It is held that a suit contemplated u/s 92 of the Code of Civil Procedure, cannot be equated with a probate. In a suit u/s 92 of the Code of Civil Procedure, the title of the donor may be disputed. Such a question as of necessity must be gone into by Court which however is a forbidden moment for the probate Court. A perusal of an affidavit in support of caveat filed by the caveator No. 1 clearly indicates that the caveator has disputed the testamentary disposition of the property by the testator and has set up title adverse to the estate of the deceased. In my view, a party who has set up title adverse to the estate of the deceased is not entitled to maintain his caveat. Title in respect of any property is not the subject matter of the testamentary petition. The testamentary Court has only to decide the existence and validity of the Will and that the deceased was of sound and disposing mind at the time of execution of Will.

31. In the original affidavit in support of caveat the caveator No. 1 did not raise any other dispute other than the title dispute. In my view, even if the probate petition is rejected for any reasons, even on intestacy the caveator No. 1 or 2 would not inherit any property forming part of the estate of the deceased testator. On both the grounds the caveators are not entitled to maintain the caveat. In my view, the caveator No. 1 as well as caveator No. 2 have no caveatable interest and thus question of allowing the caveators to raise any issue of forgery and or fabrication and that also by filing an additional affidavit at this stage did not arise. In my view only a person having caveatable interest can raise an issue of forgery and fabrication in the Will by filing affidavit in support of caveat and not a stranger to the estate of the deceased. Be that as it may, Caveator No. 2 has adopted the affidavit in support of caveat filed by caveator No. 1 after more than a year of filing such caveat. The caveators had already engaged new advocate to represent them. I am thus not inclined to accept the submissions of the learned counsel appearing for the caveator that the grounds disputing the validity of Will could not be raised in the earlier affidavit in support of caveat inadvertently or due to any paucity of time. No such allegations have been made in affidavit in support of caveat filed by caveator No. 2 though the same was filed after more than one year.

32. A perusal of the affidavit in support of chamber summons does not indicate any sufficient reasons for not raising such issues in the earlier affidavit in support of caveat which was filed through an advocate practicing in this Court. Even in

the affidavit proposed to be filed, the caveators have not shown any caveatable interest though the chamber summons came to be filed after service of notice of motion filed by the plaintiff for dismissal of caveat on the ground that caveators have no caveatable interest. In my view, no case is thus made out for permitting the caveators to file additional affidavit in support of caveat.

33. It is not in dispute that the plaintiff has already filed two affidavits in lieu of examination in chief. Caveators have already filed affidavit of admission and denial. Even if this Court would have taken a view that the caveators have any caveatable interest, filing of additional affidavit thereby seeking amendment to the earlier affidavit in support of caveat would not have been permitted by this Court at this stage.

34. A perusal of the additional affidavit proposed to be filed by the caveators indicates that the caveators now seek to raise the dispute about the existence and validity of the Will and seek to challenge the said Will at this stage. In my view, the caveators having no caveatable interest and also having set up title adverse to the title of the testator in the estate are not entitled to maintain their caveat and thus can not raise new issue at this stage.

35. In so far as judgment of Supreme Court in case of G. Gopal (supra) relied upon by the learned counsel appearing for the caveators is concerned, it is clear that the Supreme Court did not notice the judgment in case of Krishnakumar Birla Vs. Rajendra Singh Lodha (supra) in the said judgment. In any event the facts of the case before the Supreme Court in the said case are different.

36. In so far as Judgment of Supreme Court in case of Jagjitsingh (supra) relied upon by the learned counsel for the caveators is concerned, the Supreme Court has held that in view of the conflicting views on the interpretation of the expression "caveatable interest" in case of Krishnakumar Birla (supra) and in case of G. Gopal (supra), the said issue deserves to be considered and decided by a larger bench. In my view the judgment of Supreme Court referring the issue to larger bench in case of Jagjit Singh (Supra) is of no assistance to the caveators.

37. In so far as submission of the caveators that the filing of additional affidavit is necessitated in view of the plaintiff having filed an additional affidavit in lieu of evidence and introducing new facts and additional documents is concerned, in my view the caveators having no caveatable interest cannot be permitted to raise such issue. Be that as it may, if the Court comes to the conclusion before commencement of cross examination that the affidavit contains any deposition which is not in consonance with the pleadings and if any new and/or additional document is sought to be relied upon for the first time in the affidavit of evidence, Court can always consider such objections at the instance of the party having caveatable interest.

38. In so far as the submission of the caveators that the additional affidavit is also required to be filed in view of the alleged attesting witnesses having filed

affidavits disputing their signatures on the alleged Will is concerned, both the alleged attesting witnesses have been served with citation and can agitate this issue before this Court and not the present caveators.

39. As far as submission of the learned counsel appearing for the plaintiff that the caveator No. 2 having adopted the affidavit of the caveator No. 1 who had not disputed the existence and validity of the Will is thus deemed to have admitted that the Will is valid and exists is concerned, I do not propose to go into this issue at this stage. The rival plea of Mr. Govind Asarpota and Mr. Bhagwan Asarpota who are also partners of caveator No. 2 would be considered independently by this Court while considering the caveats any if filed by them.

40. In my view, the plaintiff has made out a case for dismissal of caveats filed by the caveators (applicants in the chamber summons). I therefore pass the following order:-

(a) Chamber Summons No. 64 of 2014 is dismissed.

(b) Notice of Motion No. 50 of 2014 is made absolute in terms of prayer (a) and (b).

(c) No order as to costs.