
(2007) 05 CAL CK 0057

In the Calcutta High Court

Case No : P.L.A. No. 158 of 2000, G.A. No's. 3997 of 2000 and 931 of 2005,
A.P.O.T. No. 180 of 2005 and A.P.O. No. 362 of 2005

Jagdish Prasad Tulshan, since deceased Saroj Agarwalla

APPELLANT

Vs

Yasheel Jain

RESPONDENT

Date of Decision : 04-05-2007

Acts Referred:

Succession Act, 1925 — Section 263

Citation : AIR 2007 Cal 218 : (2007) 3 CHN 27

Hon'ble Judges : Kishore Kumar Prasad, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Abhrajit Mitra, Sakya Sen, S.R. Kakrania and D.N. Malik, for the Appellant; S.P. Sarkar, Dhren Sharna, Vineeta Meharia and R.N. Ghosh, for the Respondent

Final Decision : Dismissed

Judgement

Bhaskar Bhattacharya, J.—This appeal was heard along with a cross-objection filed by the respondent and those arise out of an application for grant of Probate in which the learned Single Judge by the order impugned has refused to discharge the caveat lodged by the respondent.

2. It appears from the record that the appellant, the propounder of the Will, allegedly executed by one Jagdish Prasad Tulshan, happens to be the only surviving sister of the testator at the time of his death. She prayed for grant of the Probate of the Will alleged to have been executed by Jagdish. In such proceedings, the respondent, namely, Yasheel Jain, who is the son of a predeceased sister of the testator, lodged a caveat claiming that he had interest in the estate of the deceased on two-fold grounds. First, he was the nephew of the testator and secondly, he was the sole beneficiary under an alleged prior Will executed by the testator in respect of the self-same estate.

3. The learned Single Judge by the order impugned in this appeal has turned down the objection raised by the propounder on the ground that the caveat filed

by the respondent could not be discarded, as he was also an heir. According to the learned Single Judge, the respondent had undisputedly no right as an heir so long the propounder was alive but that did not mean that Yasheel had no right at all. According to the learned Single Judge, the object of the provision incorporating the right to file a caveat is that the person who wanted to lodge caveat should not be a rank-outsider and Yasheel being not an outsider but an heir, the caveat filed by him cannot be discharged. The learned Single Judge further observed that the span of life was uncertain, God forbade, if anything happened to the propounder even subsequently, the objection taken by her would cease to exist.

4. The learned Single Judge, however, did not discuss anything about the alleged claim of Yasheel by virtue of an earlier Will.

5. Yasheel has filed a cross-objection against the aforesaid order complaining that apart from the reason assigned by the learned Single Judge, His Lordship ought to have also held that being armed with an earlier Will conferring absolute benefit in the estate, he was entitled to lodge a caveat.

6. We have heard the appeal and the cross-objection together.

7. Mr. Mitra, the learned Advocate appearing on behalf of the appellant, has vehemently contended before us that the learned Single Judge erred in law in holding that Yasheel is an heir. According to Mr. Mitra, his client being the sole sister alive at the time of death of the testator, was the sole heir according to the Hindu Succession Act. According to Mr. Mitra, the testator being a childless divorcee, his client is the natural heir and the mother of Yasheel, another sister, being dead at the time of death of the testator, he cannot, by any stretch of imagination, contend that he was an heir; moreover, even if the propounder dies today, Mr. Mitra proceeds, the estate left by the testator in case of intestacy will devolve upon the heirs of the propounder and not on the respondent.

8. As regards the claim of the respondent that the testator executed an earlier Will in his favour, Mr. Mitra contends that so long any application for Probate is not filed by the respondent asserting the right under the said earlier Will, on the ground of existence of such a Will, the respondent cannot acquire any caveatable interest. Mr. Mitra contends that if a person wants to lodge a caveat on the basis of right accrued in his favour through an earlier Will, he must be prepared to apply for Probate or Letters of Administration of such Will and in that case, both the proceedings should be decided together. Mr. Mitra, therefore, prays for setting aside the order passed by the learned Single Judge.

9. Mr. Sarkar, the learned senior Advocate appearing on behalf of the respondent, on the other hand, supports the order impugned herein not only on the ground assigned by the learned Single Judge but also on the ground that simply on the basis of the earlier Will executed in favour of his client, he was entitled to lodge a caveat. Mr. Sarkar submits that in such a situation, it is not necessary that his client should apply for Probate of the earlier Will; according to him, all that is

necessary is that prima facie existence of the Will should be shown. Mr. Sarkar further submits that in this case, his client has already filed a photocopy of the Will that was sent to him by the testator during his lifetime. Mr. Sarkar, therefore, prays for maintaining the order passed by the learned Single Judge.

10. Therefore, the first question that arises for determination is this appeal is whether the respondent was entitled to lodge caveat simply on the ground that he was a nephew of the testator. In the case before us, another lady, named Malati, has claimed to be the second wife of the testator and has lodged a separate caveat. If we assume for sake of argument that Malati was the second wife, the respondent cannot be the heir as the said Malati would be the sole heir; similarly, if we disbelieve the case of Malati, it is the propounder who became the sole heir as she was the only surviving sister of the testator who was alive at the time of his death, his parents and other brother and sister having predeceased him and the respondent cannot be said to be an heir and the learned Single Judge definitely committed an error of law in maintaining his caveat on that ground.

11. The next question is whether a caveatable right accrues in favour of a person on the ground that the testator by an earlier Will has made him either the executor or a beneficiary even if the said person does not apply for grant of Probate or Letters of Administration of such Will in the meantime. In this connection, Mr. Mitra contended that in order to claim a right to lodge caveat on the strength of either a prior or a subsequent Will, the caveator must be prepared to apply for grant of Probate or Letters of Administration of that Will and so long such application is not filed, merely by asserting the right from a so-called Will, a person cannot derive the authority to file a caveat. Mr. Mitra submits that the respondent, not having applied for grant of Probate or Letters of Administration claiming any beneficial interest based on any earlier Will, cannot maintain his caveat on that basis.

12. Mr. Sarkar, the learned senior Advocate appearing on behalf of the respondent/cross-objector has, however, submitted that it is not necessary that for the purpose of getting a right to lodge caveat on the basis of an earlier Will, the caveator must show that he has already applied for grant of Probate or Letters of Administration of the earlier Will.

13. Therefore, the next question is whether in order to assert a caveatable interest based solely on a Will alleged to have been executed by the testator by either a subsequent or an earlier Will, it is necessary for such a person to file an application for either the grant of Probate or Letters of Administration of the said Will before the caveat.

14. After hearing the learned Counsel for the parties and after going through the provisions contained in the Indian Succession Act, we are of the view that in a case, where a person claims caveatable interest only by virtue of a subsequent Will alleged to have been executed by the testator, he must establish the fact

that he has already asserted his right arising out of the subsequent Will by filing either an application for grant of Probate or Letters of Administration. In such a case, he cannot contend that he would not apply for Probate or Letters of Administration, as the case may be, of the subsequent Will, nevertheless, would like to oppose the grant of the earlier Will on the basis of his right alleged to have accrued by dint of the subsequent Will. There cannot be any legitimate ground of not applying for the Probate or Letters of Administration of the subsequent Will merely because an application for Probate has been filed for an earlier Will because a subsequent Will automatically supersedes the earlier Will. If an application for grant of Probate or Letters of Administration of the subsequent Will has already been filed, both the proceedings should be heard analogously by permitting the persons claiming conflicting interest through the two Wills to contest the other's claim.

15. The position, however, will be different if a person claims caveatable interest solely on the strength of a prior Will alleged to have been executed by the testator. In such a case, he can reasonably contend that no purpose would be served by applying for Probate or Letters of Administration of the prior Will if a subsequent Will has been really executed. In such a situation, without applying for Probate or Letters of Administration, the executor of the beneficiary, as the case may be, can claim right to oppose the subsequent Will provided he proves prima facie existence of the prior Will. If the Probate Court is satisfied about the prima facie existence of a prior Will, the beneficiary or the executor under the prior Will should be permitted to file caveat in the proceedings for grant of probate of the subsequent Will notwithstanding the fact that he had not applied for grant of Probate or Letters of Administration of the earlier Will. However, by merely setting up a right under a prior Will without producing the prima facie evidence of existence of such a Will, a person should not be permitted to intervene unless the subsequent Will, the Probate of which is applied for itself specifically admits execution of such Will.

16. In the case before us, the caveator has filed a photocopy of the prior Will allegedly executed by the testator and the same time, has also produced the registered envelop through which such copy was sent to him by the testator along with the forwarding letter written by him. From those materials, we are prima facie convinced about the genuineness of the said Will and accordingly hold that the caveat lodged those materials, we are prima facie convinced about the genuineness of the said Will and accordingly hold that the caveat lodged by the respondent should not be discharged. We must not lose sight of the fact that the judgment given in the Probate proceedings is a judgment in rem and as such, for judging the caveatable interest in this type of a case, conclusive proof of the right claimed by the caveator is not necessary but. an arguable claim is sufficient.

17. We now propose to deal with the decisions cited by the learned Advocates appearing on behalf of the parties.

18. In the case of Sri Benoy Ranjan Banerjee and Anr. v. Sri Sadhan Ranjan Banerjee reported in (1) 2002 CLT 260, a spinster executed a Will in respect of her estate and in the proceedings for grant of Probate of such Will, her brother lodged a caveat. Such application filed by brother was opposed by the propounder on the ground that as the mother of the testatrix was alive, the brother had no locus standi to file an application for caveat. Such objection was overruled on the ground that although, the mother of the testatrix was alive, the brother can inherit the property through his mother and therefore, he has a possibility of succeeding an interest which was sufficient to entitle a person to enter a caveat. In the case before us, the mother of the caveator having already died, the propounder became the heir in case of intestate succession. If we assume for the sake of argument that the testator died as a divorcee, in such a situation, even after the death of the propounder, the estate would devolve on her children and not on the caveator. On the other hand, if the marriage with Malati is proved, even the propounder would not be a natural heir and consequently, the caveator will not inherit anything. Therefore, the said decision cannot help us in resolving the dispute before us.

19. In the case of Rahamtullah Sahib v. Rama Rau and Anr. reported in ILR 17 Madras 373, it was held that in order to contest a Will, one must show that he had some interest in the testator's estate and the fact that he was a legatee under the Will in question, or a creditor of the testator, does not amount to such an interest. We approve the aforesaid proposition laid down by the Madras High Court but the said decision cannot help the propounder before us as the caveator is not claiming any right through the Will sought to be probated but her case is based on an interest created under an earlier Will which is going to be extinguished by the subsequent Will. The said decision, thus, cannot have any application to the fact of the present case.

20. In the case of Mrs. Elizabeth Antony Vs. Michel Charles John Chown Lengera, , the Supreme Court was dealing with an application for revocation of grant of a Probate and in the said case a party sought to establish a caveatable interest on the basis of a Will though the said Will or the copy thereof was not filed before the Court. In such a case, the Supreme Court was of the view that it was not expedient to reopen the matter. In the said case, the Supreme Court, however, held that for the purpose of revocation of a grant within the scope of Section 263 of the Indian Succession Act, the absence of caveatable interest does not stand in the way. In the case before us, we are not concerned with a case of revocation of grant. Therefore, the principle laid down in the said decision, cannot have any application to the case before us. Moreover, in that case, even the copy of the purported Will was not produced.

21. In the case of Usharani Roy v. Hemlata Roy reported in AIR 1946 Calcutta 40, a Division Bench of this Court was dealing with a case where the caveatrix exerted her right on the basis of a subsequent Will set up by her and the question was whether such subsequent Will should be proved in order to give a

right to lodge caveat. In such a case, the said Division Bench was of the view that where in a petition for Probate, the caveator puts forward another Will of the testator revoking the Will set up by the propounder, it was obligatory for the caveator to file a separate petition for Probate of the Will relied upon by him and on such application being filed, the two separate proceedings should be heard analogously by giving opportunities to the contesting claimants to contest those proceedings by lodging separate caveat in the proceedings. The Division Bench, however, pointed out that there may be exceptional cases where the second Will revoking the earlier one has also been revoked by the testator and in such a case, no application for grant of Probate of the subsequent Will should be filed at the instance of the caveator.

22. In our opinion, in the exceptional case, cited by the Division Bench, the moment the subsequent Will revoking the earlier one is itself revoked, the person, claiming interest solely on the basis of the second one mentioned above, will automatically lose interest in the estate of the testator and consequently, will also be deprived of the right to lodge caveat in the proceedings for grant of Probate of the first one referred to above although he can pray for revocation of grant of Probate of the first Will, inasmuch as, in order to apply for revocation of grant, the existence of a caveatable interest in the estate of the testator is unnecessary. We, therefore, respectfully disagree with the observation of the said Division Bench so far the same relates to the said exceptional circumstance mentioned; however, the view we have taken is in conformity with the overall one taken in that decision; but the case we are dealing with, being based on a prior Will, the principles laid down in that case do not strictly apply to the present one.

23. In the case of *Draupadi Dasya Vs. Rajkumari Dasya and Another*, a legatee by a prior Will applied for revocation of the grant on the allegation that her interest had been considerably cut down by the disputed Will said to have been subsequently executed by the testator revoking the earlier one and she was entitled to citation. In such a case, the Division Bench held that it was not necessary for the legatee by earlier Will to obtain Probate of the earlier Will for enabling her to apply for revocation of the grant. We have already pointed out that in the proceedings for revocation of a Probate, the question of caveatable interest is immaterial and therefore, the said decision is of no avail to the parties in this proceeding.

24. In the case of *Haripada Saha and Another Vs. Ghanasyam Saha and Another* it was merely held that any interest, however slight, and even the bare possibility of an interest was sufficient to enable a person to file caveat in a Probate proceeding. There is no dispute with the said proposition. In the case before us, there is even no bare possibility of succeeding the estate left by the testator by intestate succession at the instance of the caveator, but being prima facie satisfied about existence of an earlier Will creating interest in his favour, we have permitted the respondent to lodge caveat and contest the claim.

25. On consideration of the entire materials on record, we, therefore, approve the conclusion arrived at. by the learned Single Judge on different reasons assigned by us in this appeal.

26. The appeal, thus, is dismissed and the cross-objection filed by the respondent against the finding of the learned Trial Judge is allowed to the extent indicated above. In the facts and circumstances there will be however no order as to costs.

Kishore Kumar Prasad, J.

27. I agree.