

(2010) 02 CAL CK 0009

Calcutta High Court

Case No: G.A. No. 1960 of 2005, P.L.A. No. 204 of 2004 and T.S. 6 of 2004

In the Goods of Priyamvada Devi
Birla (Since Deceased) R.S. Lodha

APPELLANT

Vs

Laxmi Devi Newar

RESPONDENT

Date of Decision: Feb. 12, 2010**Acts Referred:**

- Succession Act, 1925 - Section 295, 311, 312

Citation: (2010) 2 CALLT 289**Hon'ble Judges:** Kalyan Jyoti Sengupta, J**Bench:** Single Bench

Judgement

K.J. Sengupta, J.

The Court: The above application was originally taken out by one Kashinath Tapuriah and one Pradip Kumar Khaitan for adding themselves as party defendants to the aforesaid Testamentary Suit. Subsequently by an order dated 20th February 2009 on the prayer of Pradip Kumar Khaitan his name was deleted, as he did not wish to proceed with this application. Hence the present application was pressed by Kashinath Tapuriah alone on the ground that he is one of the co-executors to a rival prior will dated 13th July 1982 said to have been executed by the aforesaid lady Priyamvada Devi Birla, since deceased (hereinafter referred to as the deceased Lady). It is the contention that one Ganga Prasad Birla who was also appointed Co-executor by the deceased lady in the said Instrument dated 13th July 1982 lodged Caveat to contest the grant of the last Testamentary Instrument said to have been executed by the said deceased Lady dated 18th April 1999 and the Caveat lodged by Ganga Prasad Birla sustained by the learned single Judge of this Court, thereafter by the Division Bench of this Court and ultimately by the Hon'ble Supreme Court. In the judgment of the learned single Judge as affirmed by both the aforesaid Courts, it was held that Ganga Prasad Birla who is one of the Co-executors has caveatable interest and as such he was allowed to file affidavit in support of

Caveat. Thereafter the aforesaid suit was set down as contentious cause and marked as the Testamentary Suit as above. It is the claim of the applicant that his right, title and interest is exactly the same as that of the said Ganga Prasad Birla, under such circumstances he went to department to lodge Caveat, however the same was refused to be accepted by the department in view of said application for grant of probate having been set down for contentious hearing.

2. This application is opposed by filing affidavit by the Plaintiff namely Rajendra Singh Lodha (since deceased) contending that this application is misconceived and harassing. He cannot come forward at this stage to join as a party defendant as he did not lodge caveat in spite of citation being issued within the time stipulated in the Chapter XXXV of Original Side Rules. According to him that once, the suit is set down for contentious cause, Caveat cannot be allowed to be lodged. Moreover it is also said that he is claiming adverse interest to the estate of the said deceased lady. He could have come to lodge Caveat at early stage and he has chosen not to seize this opportunity.

3. Mrs. Nalini Chidamvaram learned senior counsel appearing in support of this application submits that when Ganga Prasad Birla who is one of the Co-executors and is in the same footing with that of the present applicant has been treated to be defendant in the present suit, he is also having caveatable interest to contest the grant hence he should be allowed to be added as a party as a matter of course. He is one of the Co-executors and his right is emanating from the earlier mutual will of the said deceased lady. She further submits that apart from his testamentary right and title in the estate of the said deceased lady her client is also the heirs from the side of the parents of the said deceased lady as her assets namely ornaments, jewelleryes and other estate which she had acquired from her parents would revert back to her parents' heirs and legal representatives and he being one of the heirs and legal representatives of her parents is also entitled to contest the grant. This intestacy right was not claimed in the present petition and it is brought for the first time in written additional argument. Therefore, at the outset I reject this contention as it is essentially fact which was not pleaded and the Plaintiff did not have the chance to counter the same. Consequently I would consider what is stated in the petition earlier namely his testamentary right and interest.

4. Mr. Anindya Kumar Mitra learned senior counsel submits that this application is legally misconceived as testamentary suit is not a suit in substance as it is known in case of civil matters. It is a special type of proceeding. In this connection he has relied on an unreported decision of the learned single Judge of this Court on the Application being GA No. 1940 of 2005 in Testamentary Suit No. 6 of 2004 (R.S. Lodha v. Laxmi Davi Newar and Others).

5. He submits further that if a person wants to contest the grant he has to lodge caveat as mentioned in Rule 24 of Chapter 35 of the Original Side Rules. In this case this applicant did not lodge any caveat. He despite being one of the Co-executors

stayed away when time came for lodging caveat and also to file affidavit in support of caveat which is also to be done within the time stipulated in the Rules 25 and 26 as the case may be of the said Chapter. In one words any one and everyone cannot come to contest the Testamentary Suit unless he or she lodges his or her Caveat and disclosing his or her caveatable interest to contest the grant by filing affidavit in support of Caveat. The persons whose Caveats are retained and affidavits in support of caveat is accepted by the Court as being written statement are only entitled to contest. In this case Ganga Prasad Birla being one of the Co-executors lodged caveat and such Caveat was sustained and as such he filed affidavit in support of Caveat and he qua executor alone is entitled to contest the grant. In this Testamentary Suit he has no special interest apart from the right of Executorship which is fully represented by Shri Ganga Prasad Birla. Mr. Mitra in support of his submission has relied on the three decisions, one of the Supreme Court and two of this Court reported in: AIR 2004 SC 1238, [Gopi Debi Memani Vs. Chunilal Kothari](#),

6. I have considered the respective submission of the learned Counsels for the parties. I am of the view the present application for addition should not be allowed for the following reasons:

7. Mr. Mitra has rightly pointed out the Testamentary Suit is not like a ordinary Civil Suit and it is nomenclatured as such but it is a proceeding for grant of Probate or Letters of Administration with the Will annexed. It has been elaborately discussed in the judgment of the learned single Judge dated 12th September 2008 in this Testamentary Suit, considering a large number of judgments the learned single Judge held as a proposition of law as follows.

While summing the principles of law laid down by the several High Courts including this Court it appears to me that once application for grant of Probate is filed it does not lose its original character and remains the same only the method of trial is changed. When there has been contest section 295 as well as Rule 28 of Chapter XXXV of the Original Side Rules only facilitate the Court to deal with the matter following the procedure for trial of application for grant and nothing else.

8. I find substance in the submission of Mr. Mitra that any person cannot come at any time even if having caveatable interest as Chapter 35 of the Original Side Rules of this Court has provided the method of hearing of an application for grant of probate. Rule 24 of Chapter 35 provides for lodging of caveat in anticipation by any person interested in the event any application for grant of Probate or Letters of Administration. The person who has lodged Caveat is entitled to file affidavit in support of Caveat within eight days as mentioned in Rules 25 and 26. Under Rule 28 once it is found that affidavit in support of Caveat is filed the same is treated as contentious cause and treated as a suit. Rule 27 provides for consequence of not filing affidavit. The applicant has lost his chance to establish his right to contest the grant as he neither lodged Caveat nor filed affidavit in support of Caveat. According to me in order to contest the grant a person has to lodge a caveat disclosing his

interest which is commonly known as caveatable interest, and if the Caveat is not discharged Caveator is allowed to file affidavit in support of caveat. Then the matter is treated as contentious cause which is then described as Testamentary Suit. Sequeally application for grant is formally registered as plaint and affidavit in support of Caveat as written statement. To put it otherwise the person(s) whose Caveat is accepted on filing affidavit in support of Caveat come(s) to be necessary party Defendant he and they alone will remain in the proceedings, of course so long they (he) want (wants).

9. The argument of Mrs. Nalini Chidambharam that her client's right to apply for addition of party has crystallized only on delivery of judgment of this Court when Caveat lodged by Ganga Prasad Birla who is the Co-executor of previous rival will was sustained. I am not impressed with this contention that just because this applicant is a Co-executor along with Ganga Prasad Birla he can join at any time whenever he thinks. It appears to me this gentleman was sitting at the fence, watching the fate of the Caveat lodged by Ganga Prasad Birla and having found Ganga Prasad Birla being successful he now wants to take the benefit of the said judgment. Such fortuitous circumstance cannot be a foundation to claim right to contest the grant of his own.

10. Office of the executor manned more than one person is an office of compendium body. Ganga Prasad Birla being Co-executor is not representing himself, rather office of the Executors in terms of the earlier rival Will. So long Ganga Prasad Birla will be contesting the grant, this applicant, though one of the Co-executors, cannot come in and join the proceeding as he is being represented by Ganga. He may come in the circumstance and situation when for any reason Ganga Prasad Birla is not contesting nor it is possible for him to contest, then he, as one of the Co-executors, having surviving right can come in and join (see sections 311, 312 of Indian Succession Act 1925) Therefore, his right to join in this proceeding is inchoate one at present. As such prayer for addition is refused at this stage. However, it would be open for this applicant to watch the proceedings remaining in Court and not to participate in the hearing, and the moment it is found Ganga Prasad Birla is not willing to contest or for any reason he is unable to contest he will have opportunity to make application afresh.

There will be no order as to costs.