

(2010) 08 CAL CK 0083

In the Calcutta High Court

Case No : G.A. No's. 3714, 3718, 3731 and 3732 of 2008, PLA No. 242 of 2004 and T.S. No. 6 of 2004

**In Re: Smt. Priyambada Devi Birla, deceased
 Rajendra Singh Lodha**

Date of Decision : 27-08-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1, Order 40 Rule 2, Order 40 Rule 3, Order 40 Rule 4, Order 9 Rule 1
Companies Act, 1956 — Section 108, 108(1), 87
Presidency Towns Insolvency Act, 1909 — Section 17
Provincial Insolvency Act, 1920 — Section 28(2)
Succession Act, 1925 — Section 211, 227, 247

Citation : (2010) 3 CALLT 577

Hon'ble Judges : Kalyan Jyoti Sengupta, J

Bench : Single Bench

Judgement

Kalyan Jyoti Sengupta, J.—Aforesaid two applications being G.A. 3714 of 2008 and G.A. 3718 of 2008 have been filed in connection with PLA No. 242 of 2004. The first one has been filed by one G.P. Birla and one Pradip Kumar Khaitan in the capacity of the executors of the testamentary document said to be last Will of Priyambada Devi Birla executed in 1982 and the second one has been filed by one Debendra Kumar Mantri and one Smt. Radha Devi Mohata.

2. In G.A. 3714 of 2008 the applicants have prayed for the following reliefs:

(a) The petitioner herein being the executors of the Will of Priyambada Devi Birla dated 13th July 1982 be authorized to take possession or capacity of the estate and to act as such executors in accordance with the law,

(b) An Administrator Pendente lite and/or Receiver be appointed to take over possession of all movable and immovable assets and properties of the deceased.

3. In G.A. 3718 of 2008 the following interlocutory reliefs are claimed

(a) An Administrator Pendente lite and/or Receiver be appointed to take over possession of all movable and immovable assets and properties of Priyambada Devi Birla, the deceased above named including the shareholding of those

companies as specified in the schedule Annexure marked "B" by substituting his name in stead and place of the deceased abovenamed R.S. Lodha wherever his name appears in place of the deceased abovenamed.

(b) Such Administrator Pendente lite and/or Receiver be directed to take all decisions and exercise all rights in regard to shareholdings of Priyambada Devi Birla in the Companies referred to in Annexure "C". Both the aforesaid first mentioned two applications were filed on or about 20th November 2008.

4. The aforesaid two applications were made at a point of time when sole executor R.S. Lodha in connection with the testamentary instrument of 1999 died and there was no person to take control and possession of the estate left behind by the Priyambada Devi Birla, since deceased (hereinafter referred to the said deceased). The said applications were being heard and in course of hearing one Harsh Vardhan Lodha, Aditya Vikram Lodha, Sushila Devi Lodha, Meenakshi Periwal made aforesaid application G.A. No. 3731 of 2008 in connection with said Testamentary Suit No. 6 of 2004. They are claiming themselves to be the heirs and legal representatives of one R.S. Lodha who died intestate, prayed for following reliefs:

(a) The petitioner No. 1, Harsh Vardhan Lodha, be a specifically authorized/empowered to carry out, discharge the following acts and functions relating to the estate of Priyambada Devi Birla as Administrator Pendente lite thereof.

(i) Operation of bank accounts pertaining to an estate of late Priyambada Devi Birla including the Bank Account No: 0100002100579690 opened by late Rajendra Singh Lodha in Punjab National Bank, Brabourne Road Branch, Kolkata,

(ii) Collection of dividend and all other incomes of the estate of late Priyambada Devi Birla and deposit of the same in the said account No. 0100002100579690,

(iii) Submission of Income Tax and Wealth Tax returns pertaining to estate of late Priyambada Devi Birla during pendency of the above T.S. No. 6 of 2004,

(iv) Submission of account to the estate of late Priyambada Devi Birla in terms of the order of the Hon"ble Division Bench dated 11th October 2007.

All the aforesaid three applications were opposed by the respective parties by filing affidavit opposing mutual prayers of the respective parties. It appears to me that all the respective persons are not opposing to appointment of Administrator Pendente Lite in respect of the estate left behind by the said deceased. The applicants in the first two mentioned applications are praying for appointment of Receiver in connection with and on the strength of the first testamentary instrument of 1982 left behind by the same person, while the third mentioned application has been filed for appointment of one of the applicants, Harsh Vardhan Lodha (hereinafter HVL) as Administrator Pendente Lite with the power and duty to the extent as mentioned in the prayer portion as well as in the body of the petition. This application is made by the heirs and legal representative of Rajendra Singh Lodha, since deceased (hereinafter in short

R.S.L.).

5. In view of the aforesaid factual position all the three applications were heard by this Court and the learned Counsel of the respective parties advanced argument.

6. Mr. A.K. Mitra learned Senior Advocate appearing with Mr. Pratap Chatterjee, Senior Advocate and other learned Advocates in support of the application being G.A. No. 3731 of 2008 submits that no-one is now disputing that upon death of R.S.L., the executor appointed by the last Will of 1999, there is necessity for appointment of Administrator Pendente Lite (in short APL) for protecting and preserving the estate of Priyambada Devi Birla (hereinafter referred to as the said deceased).

7. He submits that the estate left behind by the said deceased were and still are well preserved and protected and for this purpose no third party is required to be appointed. He informs this Court that there are three Special Officers appointed by this Court over the gold coins and other valuable items. The gold coin and other valuable items have been kept in a Bank Locker by the joint Special Officers. The main estate of the said deceased are the shares held by her, of the various companies. He submits that "APL" is to be appointed for preservation and protection of these shares. Besides shares in every Birla Group of Companies there are some bonds, fixed deposit, mutual funds and investment shares which are all recorded in the name of said deceased. Since the death of the said deceased a bank account was opened by "RSL" in the name of the estate of said deceased and therein all interest, income, dividends from mutual funds and dividends from all the shares both investment companies and share in M.P. Birla Group of Companies are regularly deposited. There is no cash collection in respect of the said deceased. Dividends and other incomes are all paid by cheques and deposited in the said bank account out of which no amount has been paid except the amount for payment of Wealth Tax, Income Tax of the said deceased and separate accounts for all payments including payment of premium for maintaining insurance were to be maintained by the said deceased during the life time of "RSL", Executor.

8. In the aforesaid factual context, he submits that appointment of "APL" should be made conferring power and duties and responsibilities to the extent and mentioned in prayer (b) and paragraph 52 of his client's application. The necessity for appointment of "APL" is to protect and preserve the controlling block of shares and not to make the estate vulnerable to risk, loss and deterioration of M.P. Birla Group of Companies which have been performing satisfactorily. Though there are allegations in the affidavit-in-opposition of mismanagement of the company but no argument was advanced at the time of hearing. In any event, those charges of mismanagement are proved to be false as recorded in the judgment of the Hon'ble Learned Single Judge and the Division Bench on earlier occasion.

9. With the following authorities, he submits that the Court will not interfere with running company by appointing Receiver reported in State Bank of India Vs. Jayshree Ceramics Pvt. Ltd. and Others, .

10. He urges when there is no mismanagement why appointment of "APL" in effect to manage M.P. Birla Group of Companies should be made. Other Birla's are business rivals and they have cement companies and Birla Corporation Limited which is one of the M.P. Birla Group of Companies, is a cement manufacturing company and it is their intention to ruin rival companies through the method of appointment of "APL".

11. He submits that there are complete safeguards against dilution of controlling block of shares in M.P. Birla Group of Companies as the regulation framed under the SEBI and other provision of SEBI clearly safeguard the interest of the shareholders. As such, there is no possibility of clandestine dilution of M.P. Birla Group of Companies. Interim measure taken by this Court in the judgment and orders of this Court reported in 2005 WBLR (Cal) 311 and confirmed by the Division Bench, will be good enough during pendency of the testamentary suit, as this injunction order is adequate for protection and preservation of M.P. Birla Group of Companies. According to him, "APL" cannot lawfully be authorized to take steps for exercising of voting rights in respect of the shares held by the deceased. The companies are not and cannot be made party to the above probate proceedings, therefore, no direction can be given for registration of shares in those companies who are strangers to the proceedings. This proposition of law has now been well settled by following decisions of the Supreme Court:

(i) Mathalone Vs. Bombay Life Assurance Co. Ltd., , (ii) Balkrishan Gupta and Others Vs. Swadeshi Polytex Ltd. and Another,).

Indeed in the judgment of this Court reported in Priyambada Debi Birla (deceased by LR) Vs. Ajoy Kumar Newar and Others, it has been held that probate Court has no jurisdiction to pass such orders because the companies are not parties to the proceedings before it. The Division Bench of this Court in the decision reported in ILR 2007 Cal 377 in this matter noting the judgments of the Hon"ble Supreme Court as above held that shares cannot be registered in the name of "APL".

12. He submits that status of "APL" is analogous to that of a Receiver as has been held by both the Hon"ble Single Judge Priyambada Debi Birla (deceased by LR) Vs. Ajoy Kumar Newar and Others, and also in the Division Bench ILR 2007 Cal 377 in the earlier application for "APL". This legal proposition had been settled way back in 50's by the Supreme Court in the decision reported in Mathalone Vs. Bombay Life Assurance Co. Ltd., . According to him if "APL" is allowed to exercise voting right there will be a serious consequences for any reason APL's decision in this regard goes wrong. So, the Court will not allow the "APL" to do anything, which will invite destruction and dissipation of the estate.

13. His next contention is that the power and duties of the executor as well as the Administrator appointed u/s 211 of the said Act is not the same as that of "APL" unlike executor APL is court appointee. By reason of his appointment, "APL" does not become owner nor is vested with any right of ownership of the property. Transfer of shares will purport to vest "APL" with ownership of the shares which do not otherwise vest him.

14. He advances legal argument that when the Court appoints Receiver it is not normal course of law to ask the property to be recorded in the name of Receiver. In other words, "APL" is not authorized to represent the estate and only an Administrator who is granted Letters of Administration, can do so. Hence, it is submitted that there is no necessity for passing orders conferring more power on "APL" and it would not subserve the necessity of protection and preservation of the estate. "RSL" during his lifetime had never exercised voting right in respect of the shares recording in the name of the said deceased. In spite of that, M.P. Birla Group of Companies were preserved and remained intact and significant profits were earned. Same situation continues even after the death of "RSL".

15. His client "HVL" in his application has been able to make out a special case for his appointment though under the law a party to the proceedings is not appointed Receiver. The experience of "HVL" in business management and his standing have been made out in the petition. Moreover, he submits that in the Will itself vide Clause 6 provides that in absence of "RSL", "HVL" will take up the management. This desire of testatrix should be considered for appointing "HVL".

16. According to him the "APL" should not be appointed in any proceeding or any application save and except on the application made by his client and in the Testamentary Suit 6 of 2004. The applicants of G.A. No. 3718 of 2008 in connection with PLA No. 242 of 2004 have no locus standi to make any application. Similarly, the application in G.A. No. 3714 of 2008 in connection with the Will of 1982 cannot be entertained at this stage for one of the executors namely G.P. Birla died and another executor Pradip Kumar Khaitan who was joint applicant has taken an adverse stand hence this application cannot be entertained and considered by this Court.

17. The decision rendered by the Division Bench earlier reported in ILR 2007 Cal 377 on the question of APL over shares, will operate as precedent in this case. He submits referring to a decision of Supreme Court reported in AIR 2005 SC 2377 that the judgment will not be precedent only if the point was not raised or no consideration was given to that point.

18. He submits that such point was raised and argued by the learned Counsel Mr. S.B. Mookherjee for Birla and also by Mr. S. Pal before Appeal Court earlier and also raised in the memorandum of cross-objection. The Hon'ble Division Bench decided and held that direction for registration of the share in the name of "HVL" cannot be given and consequently "APL" should not be given voting power. Hence the said Division Bench judgment reported in ILR 2007 Cal 377 on that issue

operate as *res judicata*. The other portion of the argument advanced by Mr. Mitra in my view is not material or relevant for deciding this application.

19. Mr. S. Pal, Mr. Sarkar learned Senior Advocates appearing on behalf of the defendants Nos. 1a, 1b and 1c while opposing the prayer for appointment of HVL as APL, contend that on death of "RSL" the estate of the said deceased is in *medio*.

20. He submits that there is no dispute that there exists necessity for appointment of "APL" over the estate of PDB which includes controlling block of shares held by the said deceased in the M.P. Birla Group of Companies. According to him u/s 247 of the said Act "APL" can be appointed over the whole estate of the deceased with all rights and powers of a general Administrator other than distribution of estate. "APL" acts subject to immediate control and direction of the Court. On his appointment "APL" takes possession and control of all assets as nature of which warrants.

21. He further submits that observation of the Division Bench in the decision reported in ILR 2007 Cal 377 is not binding precedent, since, the contention of "HVL" is not supported by any principle of law or by any precedent. His legal submission is that there is no impediment either in Section 247 or otherwise in the said Act or under any other law in appointing an "APL" over shares held by deceased, be it a controlling block or minority. There cannot be truncated rights and privileges attached to shares while appointing "APL" over shares held by the deceased. More so because an "APL" has been given wide rights and power u/s 247 of the general Administrator other than right of distribution of the estate for the purpose of protection of the estate.

22. He submits Supreme Court has consistently held that voting rights is an essential and impartible adjunct of the share. He cited the following Supreme Court decision in support of his contention:

(i) Chiranjit Lal Chowdhuri Vs. The Union of India (UOI) and Others, , (ii) (1985) 5 SCC 167 , (iii) Kesoram Industries and Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, (Central) Calcutta, , (iv) Doypack Systems Pvt. Ltd. Vs. Union of India (UOI) and Ors, (v) (1989) 6 Comp Cas 5 and (vi) M/s. World Wide Agencies Pvt. Ltd. and another Vs. Mrs. Margarat T. Desor and others,

He submits that it is also settled law that voting right attached to a share can be exercised by a person other than a shareholder in given situations. In this context he refers to two decisions of English Court reported in 1982 (1) All ER 449 : 1955 (2) All ER 330 at 332.

23. He submits that there is fundamental distinction between transfer of shares and transmission of shares. The former is an act of *inter vivos* between two persons, while the latter by operation of law.

24. The moment transmission of shareholding takes place by operation of law no rectification is necessary as has been held so in a decision of the Supreme Court

reported in *Doypack Systems Pvt. Ltd. Vs. Union of India (UOI) and Ors*, While citing a decision of the Kerala High Court reported in *The Star Tile Works Ltd., Kallai and Others Vs. N. Govindan and Others*, he submits that if the Articles of Association of a company provides for transmission of shares, the legal representative of the deceased shareholder is the only person recognized by company as having title and interest in the shares, since, the Articles of Association of company is a binding contract between the company and its shareholders as well as between members inter se as has been decided by Supreme Court reported in *H.P. Gupta Vs. Hiralal*, . He further contends that it is legally settled when a lower Court is faced with judgment of an immediately higher Court, which is in conflict with judgment of Apex Court, the lower Court must follow the principle laid down by Apex Court. In other words, the decision of Court in second tier stands impliedly overruled to the extent of such inconsistency. This legal principle is well settled in the decision of Bombay High Court reported in 1905 (7) BLR 995. Thus, he contends, the observations of the Division Bench in paragraphs 275, 280 of the report ILR 2007 Cal 377 are totally inappropriate and irrelevant in the changed and present situation.

25. The observations were made in the light of prayer (b) of earlier application for appointment of APL, such prayer has not been made in the present application being No. 3714 of 2008 filed by the Birlas. His alternative argument is that at any rate the said observation of the Division Bench do not constitute the ratio of the judgment. It would appear that the ratio of the said judgment was whether there was any necessity at that point of time for appointment of APL and further in the absence of any damning evidence of waste, mismanagement and misconduct on part of the RSL, alleged executor, the Court came to conclusion that there was no necessity for appointing APL. The decision of the Division Bench of not appointing "APL" was purely question of fact. The ratio in the decision would be reflected in paragraphs 239, 240, 262 of the said judgment. All other observations of the Division Bench including those contained in paragraphs 275 to 280 are thus not the ratio, and are obiter.

26. He submits that it is settled law of precedent what is binding is the ratio of judgment and not the obiter dicta or other observation that are not necessary for arriving at conclusive decision and this has been explained by the Supreme Court in the judgment reported in *Municipal Corporation of Delhi Vs. Gurnam Kaur*,

27. He further submits that the judgment cannot be read as a statute it has to be read in its proper perspective and this is also settled by the Supreme Court in the following decisions *Union of India (UOI) and Others Vs. Dhanwanti Devi and Others*, , *Zee Telefilms Ltd. and Another Vs. Union of India (UOI) and Others*, .

28. Hence, he submits that "APL" should be appointed over the entire estate including controlling block of shares held by the said deceased along with all the rights that are attached to such shares. There is no question of appointing "APL" for the limited and misconceived purposes as has been contended by "HVL" in para 52 of the instant application. As to the personnel of "APL" it is settled

principle that a party to the suit should not be appointed as an "APL". In this connection he has relied on the following decisions:

Narandas Sunderlal Rathi Vs. Ghanashyamdas B. Dalal, , In the Goods of Borendra Nath Mitter and Sudhirendra Nath Mitter Vs. Arunendra Nath Mitter and Others, , AIR 1952 253 (Nagpur) .

He concludes urging that "HVL" being a party to the testamentary suit should not be appointed as "APL".

29. Mr. Hirak K. Mitra, learned Senior Counsel appearing on behalf of the defendant Nos. 1(b) and 2 submits that while opposing the prayer for appointment of HVL as APL to the extent and the purpose as mentioned in the prayer portion of the application submits that, all parties now contend on death of RSL appointment of APL has become necessity.

30. He submits that such appointment shall be made from and amongst the competent independent persons. According to him HVL has no right as incorrectly claimed in his application, on the strength of the alleged Will. In spite of everything the said deceased did not insert any clause in the will stating that failing RSL, HVL should be appointed as executor. In Clause 6 (i) of her 1999 Will, the said deceased has only expressed her wishes that RSL may consider HVL to succeed him in case RSL chooses not to continue. Induction of HVL in place of RSL as the executor was left to the sole discretion of RSL which however was never exercised during her life time. As such there has been no office of Executor. In this connection he has relied on Lewin on Trusts 18th Edition page 1106, and referred to a English decision in case of Tempest v. Lord Camoys (1862) All E.R. 21 : Ch.D. 571 578. HVL does not and cannot have any claim for being appointed APL or even being considered as APL to administer the estate of the said deceased.

31. He contends further that HVL should not be appointed also because of the fact that if he is appointed then there will be a conflict between his duty and interest, by reason of the facts that HVL is claiming to be the universal legatee being an heir of RSL. He contends that aforesaid claim has no basis, if such Will of the said deceased is read carefully, one would find that there is no legacy in favour of the RSL, at the highest in terms of the alleged 1999 Will RSL was given power to manage and control, therefore, RSL himself was not a legatee at all. The subject matter of legacy must be a res that is a thing and that is an existence.

32. It is his contention that it is an admitted and undisputed fact that estate of the said deceased was so vast that during her life time the said Lady had appointed RSL to administer the estate. Hence appointment of more than one APL would be necessary, who would have to be selected from different disciplines for the purpose of administering and managing vast estate of the said deceased.

33. He submits that the main estate is the controlling block of shares of the M. P.

Birla Group of Companies as such APL has to be appointed over the same also.

34. He points out during the period when RSL was administering changes had been brought in the Board of Directors of the M.P. Birla Group of Companies by RSL even after the death of RSL family members of RSL would continue to exercise control over the company of MP Birla Group behind. He has referred to Section 211 of the Indian Succession Act and submits that the Administrator of a deceased person is his legal representatives for all purpose and all properties of the deceased.

35. His contention is that powers of the Administrator on certain properties is the same as the power of an executor, although the source of such power are different as the executor derives his power from the will and whereas the APL derives his power from the statute. In this case immediately after death of the said deceased RSL transferred shares of the said deceased in the investment companies in his own name RSL. To justify the said action of RSL it was submitted by the learned Counsel for the Lodha before the Division Bench that RSL was duty bound and obliged as executor, to take control of the shares and transmission was applied, not in his personal name but as executor to the estate. He has drawn my attention to paragraph 69 of the Judgment of the Hon'ble Division Bench reported in ILR vol (2) Cal. 277. He submits if the Executor is entitled to have the share transferred as above then there is no embargo for APL to do the same thing. Hence APL to be appointed by this Court is not only to get the controlling block of shares held by the deceased, transferred in his personal name as aforesaid but also voting right in respect thereof if it is necessary for the betterment of the estate of PDB.

36. I have carefully considered the contention and rival contention of all the parties before me. I propose to dispose of all these applications without specifically mentioning on which application this order is passed as all the applications for appointment of APL had been made in relation to the same estate left behind by the deceased couple. Therefore, it is not necessary to observe whether the application being GA No. 3714 of 2008 or GA being No. 3718 of 2008 in connection with PLA 242 of 2004 are entertainable or maintainable or not, as these are now academically technical issues.

37. This judgment with all certainties will address the issues raised by all the parties. On considering the contention of all the learned Counsels representing respective parties, now it does not appear that there is any dispute that it has become absolute necessity for which this Court is to take step for appointment of APL for RSL, the sole executor mentioned in 1999 Testamentary Instrument died intestate. Under the provision of Indian Succession Act, 1925 even before grant of probate the executor can lawfully function by virtue of Section 211 read with Section 227 of the Indian Succession Act, 1925 as estate of the deceased vests in him/her. In view of passing away of RSL there is none to look after the estate left by the said deceased, till the aforesaid Testamentary Suit is disposed of and also the other proceedings are decided immediately thereafter in terms of the

judgment and order of the Supreme Court. Before any order is passed following issues need to be addressed:

- (1) Who is to be appointed as APL in respect of the estate?
- (2) To what extent the appointment of APL should be made? ? Should it be restricted to the power and duties as alleged by Mr. Mitra's client in paragraph 73 of his petition and the prayer made therein?
- (3) Will APL be appointed to function as Administrator for amongst other to take possession of the share scripts held by the said deceased and also to exercise all rights and discharge obligations arising from the share holding?

38. It is contended by Mr. Mitra that Division Bench of this Court in its judgment reported in ILR 2007 Cal 377, while rejecting the prayer for appointment of APL specifically held in paragraph 280 at page 562 of the report that without giving notice to the share holders of the company in the probate proceedings the Court has no power to appoint APL over the shares owned by the said deceased.

39. He, therefore, submits that the aforesaid findings of the Division Bench not only operates as binding precedent but issue raised herein is hit by the principle of res judicata. In order to hold a particular judgment to be precedent it must be seen amongst other that the same is not an obiter. In case of Municipal Corporation of Delhi Vs. Gurnam Kaur, the Supreme Court in paragraph 10 has laid down proposition of law amongst others that:

...Quotability as "law" applies to the principle of a case, its ratio decidendi. The only thing in a judge's decision binding as an authority upon a subsequent judge is the principle upon which the case was decided. Statements which are not part of the ratio decidendi are distinguished as obiter dicta and are not authoritative....

40. In paragraph 11 it has been stated:

Pronouncements of law, which are not part of the ratio decidendi are classed as obiter dicta and are not authoritative.

41. Subsequently in case of M/s. World Wide Agencies Pvt. Ltd. and another Vs. Mrs. Margarat T. Desor and others, in paragraph 20 it was held that before a judgment is accepted a precedent, it must be seen the points must have been raised and decided.

42. In case of Commissioner of Income Tax Vs. M/s. Sun Engineering Works (P.) Ltd., in paragraph 39 Supreme Court explained when a judgment would be binding precedent as follows:

...The judgment must be read as a whole and the observation from the judgment have to be considered in the light of the questions which were before this Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the Courts must carefully try to ascertain the true principle laid down by the decision of this

Court not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court to support their reasoning.

43. In the case of Zee Telefilms Ltd. and Another Vs. Union of India (UOI) and Others, almost same statement of law is reiterated in the manner as follows:

...A decision is an authority for the questions of law determined by it. Such a question is determined having regard to the fact situation obtaining therein. While applying the ratio, the Court may not pick out word or a sentence from judgment divorced from the context in which the said question arose for consideration....

44. A division Bench of the Bombay High Court in a decision reported in 1905(7) Bom. LR 995 at page 997 as appropriately cited by Mr. Pal on the concept of precedent that when a lower Court is faced with a judgment of a immediately higher Court, which is in conflict with the judgment of Apex Court the lower Court must follow the principle laid down by the Apex Court.

45. In the context of the aforesaid legal proposition I have carefully examined the decision of the Division Bench cited above, rendered refusing to affirm the appointment of APL earlier in respect of the same estate. To my mind the ratio decided by the Division Bench is that in order to pass order of appointment of APL removing executor there must be a case of necessity being made out and this will appear from paragraphs 240, 242, 244, 245, 262, 287, 288, 290, 282, 293 and 308 of the report wherein diverse situations have been referred relying on a number of the decisions of the Courts. It was further ratio of the decision that principle for appointment of Receiver should be followed in case of appointment of APL.

46. In my reading no specific argument was advanced on earlier occasion from either side before the learned trial Judge nor it was issue that the Probate Court has no power to appoint APL over shares rather it appears from the said judgment that the Division Bench has accepted and recognized that the controlling block of shares do form the major asset and estate of the said deceased. The observation in paragraph 280 cannot be said to be ratio decidendi for in the previous application it was not the issue whether appointment can be made over shares without serving any notice to other share-holders. Hence it is merely obiter of the Court. In any event factual position on earlier occasion was different from the present one. On earlier occasion in view of executor being alive and available above observation were appositely rendered. Such observation in present fact and situation is in my view inappropriate. In this context it would not be inapposite to bear in mind a decision of the Supreme Court in case of Union of India Vs. Annam Ramalingam and Others, wherein at page 448 in paragraph 8 it ruled as statement of law?

In the absence of parity of situation or circumstances the doctrine of parity of reasoning cannot be invoked.

47. The plea of *res judicata* in this case is not applicable as the parties are not same for HVL and others cannot be accepted to be successor-in-interest qua executor to hold them or any of them litigating under the same title within the meaning of Section 11 of Code of Civil Procedure. Therefore, I overrule the contention that the said judgment is binding precedent or operate as *res judicata* on this issue. I consequently, hold that APL can be appointed over the estate of the deceased including shares of the companies, owned and held by the deceased under the provision of Section 247 of Indian Succession Act. In order to appreciate my above view scope of Section 247 of the said Act is to be examined and the said section is set out hereunder:

247. Administration, *pendente lite*.- Pending any suit touching the validity of the Will of a deceased person or for obtaining or revoking any probate or any grant of letters of administration the Court may appoint an administrator of the estate of such deceased person, who shall have all the rights and powers of a general administrator, other than the right of distributing such estate, and every such administrator shall be subject to the immediate control of the Court and shall act under its direction.

48. It is plain from above provision that all the powers of General Administrator are conferred upon APL, only exception that unlike executor and Administrator, APL cannot give assent to legacy or distribute assets or estate in terms of the Will.

49. It would further appear from the said Section that the Probate Court has power to appoint APL over the estate of the deceased pending any proceedings in which the validity of the will of the deceased person is questioned, or for obtaining or revoking probate or grant of Letters of Administration. The said section also provides that power of appointment of APL is not only conferred upon the probate Court, but the Civil Court too is clothed with power to appoint in any suit adjudging the validity of the will of a deceased person. The aforesaid power has been supplied by the legislature to the Court undoubtedly to take interim measure pending final disposal of the proceeding.

50. It is contended by Mr. Mitra that APL can take possession of the sharescripts only for limited purpose viz. to collect dividends and to meet the outgoings of the estate, and not for any other purpose. In other words APL cannot have any right, as ownership of shareholding does not vest in him, unlike official assignee in case of insolvency of any person. This contention is advanced with the support of the judgment of the Supreme Court reported in *Balkrishan Gupta and Others Vs. Swadeshi Polytex Ltd. and Another*, . This judgment of the Supreme Court is clearly distinguishable as it has been rendered examining power of the Receiver under the provision of Section 182-A of the U.P. Land Revenue Act, 1901 and Civil Procedure Code.

51. In this judgment on fact the Collector of Kanpur passed an order u/s 182A of the U.P. Land Revenue Act, 1901 read with Section 5 of the U.P. Electricity

Undertaking dues Recovery Act, 1958 appointing Receiver over Swadeshi Cotton Mills Company for a period of 6 months with various powers specified therein and in particular to seize 1 lack shares of the Polytex Company of the face value Rs. 10/- each out of ten lacks held by the Cotton Mill Company, and to pledge in favour of the State Government of U.P. against loan for the purpose of meeting the dues payable to the employees of the Cotton Mill Company. By this order the Collector empowered the Receiver inter alia to exercise supervision over the sale of products of the said Mill and to collect day to day receipts, and disburse, to run the said mills, borrow money from the State Government and other financial institution and make other appropriate arrangement in this behalf for the repayment of the loan and recovery thereof as arrears of land revenue.

52. The Receiver was also empowered to take all action amongst other viz. to take part in management and administration of the Companies and to attach 9 lakhs out of ten lakhs share. In view of appointment of Receiver with power of seizure and attachment of shares, point was taken Cotton Mills, holder of shares had ceased to enjoy the privileges of a member of Polytex Company as such it could not call or join in any meeting of the said Polytex Company resulting to render minority shareholder being disqualified to call any meeting. Overruling this contention, the Supreme Court while interpreting Section 182A and Section 149 of the Land Revenue Act held in paragraph 20 as follows:

We shall first consider the effect of appointment of a Receiver in respect of the shares in question. A perusal of the provisions of Section 182A of the Land Revenue Act shows that there is no provision in it which states that on the appointment of a person as a Receiver the property in respect of which he is so appointed vests in him similar to the provision in Section 17 of the Presidency Towns Insolvency Act, 1909 where on the making of an order of adjudication the property of the insolvent wherever situate would vest in the official assignee, or in Section 28(2) of the Provincial Insolvency Act, 1920 which states that on the making of an order of adjudication, the whole of the property of the insolvent would vest in the court or in the Official Receiver. Sub-section (4) of Section 182-A of the Land Revenue Act provides that Rules 2 to 4 of Order XL of the Code of Civil Procedure, 1908 shall apply in relation to a Receiver appointed under that section. A Receiver appointed under Order XL of the CPC only holds the property committed to his control under the order of the court but the property does not vest in him. The privileges of a member can be exercised by only that person whose name is entered in the Register of Members. A Receiver whose name is not entered in the Register of Members cannot exercise any of those rights unless in a proceeding to which the company concerned is a party and an order is made therein. In *Mathalone Vs. Bombay Life Assurance Co. Ltd.*, it has been laid down clearly that a Receiver appointed by a court in respect of certain shares which had not been duly entered in the Register of Members of the company concerned as belonging to him could not acquire certain newly issued shares which could be obtained by the members of the company.

53. Thus it appears from reading above paragraph of the said judgment it nowhere lays down that Receiver under no circumstances can exercise any of the rights as shareholder. The ratio of the said judgment is that unless a Receiver's name is entered in the register of shareholders he cannot exercise any of those rights. The above judgment of course did not deal with the power of APL. The same was cited undoubtedly as analogy with regard to appointment of APL.

54. I am not unmindful that consistent judicial pronouncements have laid down that while discharging duty APL is to follow legal principle governing discharge of duty by the Receiver appointed under the Code. Power to discharge duty is one thing and the mode and manner of discharge of duty is another topic. I think that just because legal principle for discharging duty by the Receiver applies to discharge of duty by Administrator, it cannot be concluded that power of Receiver and that of APL are same. In my view provision of Section 247 of Act 1925 is independent of Order 40 Rule 1 of Code and it will appear from juxtaposition reading of Order IX Rule 1 of Code and Section 247 of Act 1925. We therefore set out Rule 1 of XL of the Code:

1. Where it appears to the Court to be just and convenient, the Court may by order?

(a) appoint a receiver of any property, whether before or after decree;

(b) remove any person from the possession, custody of the property;

(c) commit the same to the possession, custody or management of the receiver; and

(d) confer upon the receiver all such powers, as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit.

2. Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.

55. Duties of the Receiver is provided in Rule 3 of the same order and the same is set out hereunder:

3. Duties.- Every receiver so appointed shall-

(a) furnish such security (if any) as the Court thinks fit, duly to account for what he shall receive in respect of the property;

(b) submit his accounts at such periods and in such form as the Court directs;

(c) pay the amount due from him as the Court directs; and

(d) be responsible for any loss occasioned to the property by his wilful default or

gross negligence.

It is plain from Rule 1 of XL of the Code it provides for creation of office of Receiver, but he can not get all powers with the appointment axiomatically, he may be conferred with all or any of the powers mentioned therein, by the Court. Naturally the Receiver acts in terms of the power conferred by the Court. But in case of APL, his power emanates from Section 247 of Act 1925 itself meaning thereby with the appointment he is to administer the estate with all the rights and powers of general administrator subject to exception mentioned therein, without any specific empowerment by the Court unlike Receiver. This views of mine find support of an old English decision in case of *In re Toleman (Westwood v. Booker)* reported in (1897) 1 Ch 866 at page 870. He has power to file suit or can be sued without any leave from the Court. However his duty is like Receiver to be accountable to Court.

56. General Administrator means to look after and to take all steps as a reasonable prudent man being an owner ought to take for the benefit, preservation, protection, accretion of the estate. In the concise Oxford English Dictionary the meaning of the word "Administration", in legal sense is the management and disposal of the property of a deceased person or debtor, or of an insolvent company by a legally appointed Administrator. In the Black's Law Dictionary (16th Edition) general administration means the grant of authority to administer upon entire estate of a decedent, without restriction or limitation, whether under the intestate laws or with the will annexed. According to me as rightly contended by Mr. Pal the APL has wide power than that of a Receiver and indeed all rights and privileges vested in him temporarily, with a rider that he shall be subjected to immediate control of the Court and shall act under its direction.

57. In view of this discussion as above I am unable to accept the contention of Mr. Mitra that APL cannot have any privileges of the owners of the shareholders. If this argument is accepted then the APL cannot take any measure, in a situation when the price of the shares of the company will be falling steadily in the market he will not be to sell the same or to take appropriate measure to arrest loss.

58. I accept the legal principle as argued by Mr. Mitra that the position of the APL cannot be equated with the executor or the administrator to whom Probate or Letters of Administration has been granted finally by the Probate Court by reason of the fact that by virtue of Section 211 of the Indian Succession Act they become the de-jure owner of the estate of the deceased until and unless administration of the Estate is complete. In my view the APL has to take all lawful steps as an Administrator till the decision of the proceedings is taken finally by the Court but his status would be akin to administrator appointed by the Court u/s 211 of the Indian Succession Act with exception mentioned in Section 247.

59. Law is now well settled by the Supreme Court by a large number of decisions that voting right is essentially impartible adjunct to the share as correctly pointed out by Mr. Pal. This proposition of law cannot be disputed nor has been disputed by Mr. Mitra, still I feel to quote some authorities.

60. In the case of Balkrishan Gupta and Others Vs. Swadeshi Polytex Ltd. and Another, the apex Court in paragraph 17 has explained legal position amongst other, that a person who is a shareholder, has the right to vote at all meetings u/s 87 of the Companies Act 1956. In Life Insurance Corporation of India Vs. Escorts Ltd. and Others, in paragraph 84 it is almost exhaustively laid down what is the nature of the property resides in share holding and rights attach thereto which includes to participate in the Board meetings to elect Directors, to vote on resolutions at meetings of the Company.

61. In two English decisions reported in 1982 (1) All. E.R. 449 and 1955 (2) ALL ER 330 it is held that voting right attached to a share can be exercised by a person other than shareholder in certain given situation including when devolution takes place. One of such instances is transmission of share which is quite distinct and different from transfer of shares. The distinction between transfer of shares and transmission of shares has been clearly explained by judicial pronouncement. Transmission is a devolution by operation of law when death of the shareholder takes place and compulsory acquisition of shares by legislature. Second proviso of Sub-section 1 of Section 108 of the Companies Act, 1956 provides for acceptance of transmission of shares by operation law.

62. The Supreme Court in its judgment reported in Doypack Systems Pvt. Ltd. Vs. Union of India (UOI) and Ors, held that when there is a transmission by operation of law no rectification is necessary. In paragraph 74 of the said judgment it has been observed amongst other "...in view of the provision of law u/s 108 of the Companies Act as there was a transmission of shares by operation of law, rectification is not necessary...."

63. Besides Article 47 of the Articles of Association of the East India Investment Company Private Ltd. provides automatic rectification on account of transmission. The Articles of Association of a company is binding contract between the Company and its shareholders as well between members inter se. This proposition has been legally settled by the Supreme Court in its judgment reported in H.P. Gupta Vs. Hiralal, . In paragraph 7 of the said judgment it is held as follows:

It is well established that Articles of Association constitute a contract between company and its members in respect of their ordinary rights as Members.

64. Hence the right of voting and incidental rights in connection with the shareholding automatically passes on to the successor holder of the share, whether by way of transfer or by transmission. In the circumstances it is impossible to accept the contention that the APL while taking custody of shares will have the limited right and obligation namely to receive the dividend only and

will not be entitled to participate in the voting at any meeting of the Company as shareholder.

65. I am of the view provision of Section 247 of the said Act cannot be read in isolation of Section 211 of the said Act, for word Administrator owes its origin to Section 211, which undisputably provides vesting, hence, incident of vesting inheres in Section 247 temporarily.

66. Thus, I think that the appointment of APL as suggested by Mr. Mitra's client, HVL, in his prayer or in the body of the petition for limited purpose is neither acceptable nor tenable under law. When the statute provides for the power of general administration it encompasses all powers and it cannot be truncated as suggested. No authority has been cited as APL will act for limited purpose to represent the estate in a situation like this when no one can legally take charge of the estate. It is legally incorrect to urge that appointment of Administrators over estate including shares of deceased amount to appointment to take control of the companies for Board of Directors of each and every company run the company. Apprehension of the affectation of business of running company with appointment of Administrator during analogy of Receiver is in my opinion misplaced here at the moment. Hence decisions reported in State Bank of India Vs. Jayshree Ceramics Pvt. Ltd. and Others, are inapplicable in this case. I accordingly answer second and third issues in the negative. I repeat appointment would be over entire estate.

67. Next point is that who is or are to be appointed as APL being the first issue. Mr. Hirak Mitra in this connection urges that even in terms of the 1999 Will HVL has no right in any sense. So he will be stranger without interest. It is his contention that it is incorrectly projected HVL as legatee became heirs and legal representative of RSL who is also incorrectly projected as universal legatee cum executor. According to him RSL had no legacy and he was simply given the right to control and manage the estate left by the said deceased and it was also the intention of the said deceased that HVL may act as an executor as and when RSL will think fit and proper. Therefore, until and unless HVL was appointed executor by RSL during his life time he cannot have any interest in the estate.

68. I think it would not be proper at this stage to consider argument of Mr. Mitra deeply for it needs critical reading and examination of the will. In this proceedings this Court cannot go to that extent, the Court will at this stage read plainly the document of 1999 and the pleadings. When an application for grant of Letters of Administration has been made and the same is being considered, his prayer, even as a stranger for argument sake, cannot be thrown out of consideration.

69. Presently the Court has to go by what is stated in the petition and the claim and contention of HVL that he is one of the heirs and legatees of the estate of the said deceased and he has inherited the same through his father who was the sole beneficiary in terms of 1999 Will. Naturally he can make a claim before the

Court for appointment. It is settled law in a fit case third party or stranger can be appointed if the Court so thinks fit.

70. The extent of the estate left by the said deceased has already been discussed and this Court merely restate the position of the law that ordinarily a party who is claiming interest in the estate cannot be appointed as APL as rightly contended by Mr. Pal. In an old decision of Bombay High Court reported in Pandurang Shamrao Laud Vs. Dwarkadas Kalliandas, it is ruled "It is however a general principle, though not an absolute rule of law, not to put a litigating party in position by granting administration pending the suit unless by consent of all parties,..." It was further observed at page 347 of report in this decision, "It is, in my opinion, in the interests of all parties to appoint an impartial person as an administrator pendente lite,..."

71. Similar view has been taken by Nagpur High Court in the decision reported AIR 1952 Nag. 253 in paragraph 12 independent person should be appointed for administration of estate pending final disposal of the proceedings. This Court in the case of In the Goods of Borendra Nath Mitter and Sudhirendra Nath Mitter Vs. Arunendra Nath Mitter and Others, of the report has taken view with following expression of law:

But the general rule is that a party unconnected with the suit is the most proper person to be appointed Administrator pendente lite. A party to the suit is not, as a rule, appointed, unless, all other parties consent....

72. In the application HVL has stated that he is experienced and having expertise in the working and he has also mentioned that he is the trusted person of the said deceased as mentioned in the 1999 Will, and this factor entitle HVL for appointment of APL. I am of the view that whatever may be his capability as claimed, but it does not automatically as a matter of course entitle him to be appointed as APL after all he is claiming right as legatee so he has interest. Moreover this suit is seriously contested. Even if letters of administration is granted, the same would be subject to result of the application for probate in respect of the 1982 Will which is described to be a mutual one. It is settled law if it is established the said documents of 1982 are mutual will and if it is probated then obviously he as grantee of Letters of Administration may have to discharge obligation in terms of the disposition of 1982 Will as legal representative of the said deceased. These are seriously debatable questions and issues. When both parties are interested in the estate and raising serious disputes mutually it is right situation that demands, neither of the parties should be chosen.

73. It would be rather just and proper as suggested by Mr. Hirak Mitra that the estate for the time being should be put in the custody of the independent person/ persons. The major portion of the estate consist of large number of shares of the number of companies which consists of majority share holding in leading company. Hence smooth and effective running of all these companies largely dependent upon lawful, proper and prudent functioning of the general

administrators and this can only be achieved not only with the appointment of legal person alone but the experts in relevant field have to be brought in. under such circumstances I appoint (1) Mr. Prodosh Kumar Mullick, Senior Advocate and Barister-at-Law of this Court, (2) Dr. Asish Kumar Bhattacharyya, Flat B, Floor-9, Tower 26, Genexx Valley, Thakurpukur, Joka, Kolkata 700104 and (3) Mr. Sukumal Chandra Basu, Ex CMD, Bank of Maharastra, DL 126, Flat No. 6, Sector-II, Salt Lake City, Near Tank No. 10 as Joint Administrators pendente lite in and over all the estates left by the deceased. They will make inventory of the estate and take possession of the same except the properties which are under possession of the Joint Special Officer for the time being. They shall submit report of inventory within four weeks from the date of assumption of charges. They will take custody of all original share scripts of all the companies and other valuable documents viz. Boards, fixed deposits" receipts etc. which belonged to and held by the said deceased, shall operate the bank account or accounts and collect dividends, and meet outgoings both statutory and non-statutory which are due and payable by the estate of the said deceased. In one words they will take all lawful steps for general Administration of the estate left by the said deceased. In the process they will take steps in accordance with law for their participating in all the meetings of Shareholders of the companies and also take all lawful steps as shareholders in accordance with law. However while exercising voting rights for the purpose of appointment of any Director or Constitution or reconstitution of Board of Directors they shall give prior intimation to this Court in the form of report indicating the reason and need for appointment of new Director and constitution or reconstitution of Board of Directors of the Companies in which the deceased had shareholdings wherever possible under law. They shall submit accounts of receipts and outgoing, arising out of and in connection with the property of the said deceased in every three months in the Court. All the persons concerned who are (is) in custody of the original share scripts and other documents relating to Bank Account are directed to hand over the same to the Joint Administrations. The Joint Administrator will act ordinarily jointly, but in case of non-availability of any of the Joint Administrators remaining Administrators or Administrator will act however ratification of the Court is to be obtained later at the earliest. They will be entitled to following initial remuneration:

Mr. P.K. Mullick Rs. 90,000/- Dr. Asish Kumar Bhattacharyya without remuneration for the time being Mr. Sukumal Chandra Basu Rs. 60,000/-

74. Above remuneration shall be paid by all the parties in this suit in the manner as follows:

Plaintiffs jointly 75,000/- Defendants jointly 75,000/-

75. However, the same shall be reimbursed by the Joint Administrator out of the fund of the estate if available.