

(2005) 03 CAL CK 0013
In the Calcutta High Court
Case No : G.A. No"s. 2721 and 3878 of 2004

Priyamvada Devi Birla (Since Deceased)	Vs	APPELLANT
Madhav Prasad Birla (Since Deceased)		RESPONDENT

Date of Decision : 11-03-2005

Acts Referred:

Hindu Succession Act, 1956 — Section 14, 15, 15(1), 15(2), 15D
Probate and Letters of Administration Act, 1881 — Section 64
Succession Act, 1925 — Section 211, 213, 214, 218, 263

Citation : AIR 2006 Cal 6

Hon'ble Judges : Kalyan Jyoti Sengupta, J

Bench : Single Bench

Judgement

Kalyan Jyoti Sengupta, J.—The above application being G. A. No. 2721 of 2004 has been taken out by the propounder/executor of a testamentary document dated 18th April, 1999 of the above testatrix Priyamvada for discharge of Caveats lodged by one Krishna Kumar Birla, Basanta Kumar Birla, one Ganga Prasad Birla and one Yasha Bardhan Birla. Sri R. S. Lodha, applicant herein says that the aforesaid four persons have no caveatable interest in the estate of the Priyamvada Devi Birla since deceased (hereinafter referred to as the Lady)) as they do not have any slightest interest in the estate left by the Lady. Only Laxmi Devi Newar and Radha Devi Mohta the sisters of her late husband Madhab Prasad Birla, since deceased (hereinafter in short M.P.) are the heiresses and legal representatives to succeed the estate left by Lady in case of death intestacy. Obviously, it is the caveators at this stage who are to establish their right to maintain the caveats. In their affidavits in opposition in answer to the aforesaid charge four persons have separately stated as follows :

G.P. Birla stated in his affidavit that in 1981 both the deceased lady and her husband namely M. P. Birla pursuant to agreement had executed mutual Wills, both dated 10th May, 1981. On 13th July, 1982 by consent they revoked the said mutual Wills but agreed once again, each other, as to disposition of their respective estates on their death in favour of the public charities as ultimate

beneficiary and those Wills made pursuant to such agreement would be irrevocable and would remain unaltered. He says he is one of the surviving co-executors of the Will of the Lady. By this Will the Lady directed the executors to take possession of her entire estate and make over, donate or settle the same for the purpose of charity at their absolute discretion. That apart he has claimed that he is the paternal first cousin of late M. P. and if the genealogical table is looked into then it will appear that this deponent has possible chance of succeeding to the estate of the Lady in case of death intestacy. He is also co-owner of the disposed of property namely orchards at Kumaun. The deceased was the member of a larger Birla family so also this deponent. The Birla family at all material times carried on and still carries on several businesses through different companies. In some of these companies there is an interweaving shareholding in such a manner that they are part of complex pattern and thus evidence of involvement of the members of the Birla family is apparent in such companies in management thereof the different members of the Birla family. The deceased testatrix and the deponent are in reality co-trustees and/or in fiduciary capacity to all the shareholders of such companies and different members of the Birla family including those who are shareholders of such companies whether directly or indirectly, where both of them were in management. The deceased was a trustee and/or in a fiduciary relationship to the deponent and other members of the Birla Family including himself who has shares directly and/or indirectly where the deceased was in management.

2. Basant Kumar Birla being one of the caveators in his affidavit while explaining his caveatable interest has stated among others that he is the paternal first cousin of late M. P. Birla, the husband of the testatrix. He was one of the co-owners of the orchard along with said testatrix. The deceased and this caveator till the time of her death were directors of Century Textiles Industries Ltd. of which he is the Chairman and Pilani Investors and Investment Corporation Ltd. He is the member of the Birla Family along with the said testatrix. There is an interweaving of shareholdings in such a manner that they are part of well thought out pattern, and evidence of the involvement of members of the Birla Family in such companies and co-management thereof by different members of the Birla Family though a particular branch may be looking after a particular group of companies of the Birla family. The deceased testatrix and this caveator are in reality co-trustees and/or in a fiduciary capacity to all shareholders of such companies and different members of the Birla family including those who are shareholders of such companies, whether directly or indirectly, where both of them were in management of the deceased was a trustee and/or in a fiduciary relationship to him and other members of the Birla family including himself who held shares directly or indirectly in such companies where the deceased oversaw its operation" after the demise of her husband.

3. The Caveator Yashovardhan Birla in his affidavit in opposition has stated his caveatable interest amongst other as follows :

The Lady and his caveator at the time of her death were co-trustees in a charitable trust known as R. D. Birla Kalyan Nidhi Trust. The Lady and M. P. had voting rights in the Bombay Hospital Trust on account of donation made by them to the said hospitals and as per Rules and Regulations of the said Bombay Trust such voting right vests in the male descendant of the deceased. He (this caveator) being eldest surviving male descendant of the Lady, is entitled to such voting right and this voting right cannot be taken away by a testamentary disposition. The Lady and this caveator are members of the Birla family. The Birla family at all material times carried on and still carries on several businesses through different companies, in some of these companies there is interweaving of shareholding in such a manner that they are part of a complex pattern and evidence the involvement of members of the Birla family in such companies and co-management thereof by different members of the Birla family. The members of the Birla family in carrying on such business do act as trustees and/or in fiduciary capacity to all shareholders of the said companies as also the other members of the Birla family including those who hold shares directly or indirectly in such companies. The Lady and this caveator are in reality co-trustees and/or in fiduciary capacity to all shareholders of the said companies and different members of the Birla family including those who are shareholders of such companies. The properties sought to be bequeathed by and under the above testamentary instrument purport to include properties under the possession of the deceased which comprised of other ancestral properties of late M. P. or were acquired out of funds generated by the larger Hindu Family governed by the Mitakshara School of Law which had not been partitioned and/or comprised of undivided family properties governed by Mitakshara School of Hindu Law.

4. The caveator K.K. Birla say that he is one of the executors of one of the mutual Will dated 13th July 1982 executed by the said couple. It would appear from the Will of her husband that the Lady had a life interest in the estate of her husband. She had no competence to dispose of her own and combined estate by alienation or dissipation in a manner inconsistent with the terms and tenor of the mutual Wills. The subsequent disposition made in favour of R. S. Lodha under the alleged will dated 18th April 1999 and alleged codicil, dated April 15, 2003 is therefore, unlawful, unauthorized and penal, as the entire estate of the deceased stood impressed with trust in terms of the mutual wills. Accordingly on her death surviving executors of the mutual Will of the deceased and her late husband are entitled to take possession of entire estate and make over, donate or settle the same for the purpose of charity at their absolute discretion. This caveator has common ancestor namely Raja Baldev Das Birla and is male lineal descendant of the said Raja B. D. Birla. He is the paternal first cousin of late M. P. The husband of the testatrix. The deceased testatrix and this caveator till the time of her death were co-trustees of charitable trust known as Mahadebi Birla Memorial Charitable Trust and till the time of her death were directors inter alia of Pilani Investment and Industries Corporation Ltd. and Birla Brothers Pvt. Ltd. The properties sought to be bequeathed by or under the alleged last Will and

testament purport to include properties under the possession of the deceased which comprise of either ancestral properties of Late Madhab Prasad Birla or were acquired out of funds generated by the larger Hindu Undivided Family governed by Mitakshara School of Law which had not been partitioned and/or comprised of joint family properties.

5. Mr. A.K. Mitra learned senior counsel appearing with Mr. Pratap Chatterjee learned senior counsel, Mr. Malay Kumar Ghose learned Advocate, Mr. Abhrajit Mitra and Mr. Amitesh Banerjee appearing in support of the summons submits that the caveat lodged by four persons namely K.K. Birla, Y.B. Birla, G.P. Birla and B.K. Birla are liable to be dislodged as none of them has any interest in the estate left behind by the Lady.

6. On 3rd July 2004 the Lady died and she was pre-deceased by her husband on 30th July 1990. The couple left no issue. As such u/s 15(1)(b) and (2) of the Hindu Succession Act, 1956 her deceased husband's sisters namely Laxmi Devi Newar and Radha Devi Mohota would have inherited the estate had she died intestate. This rule of succession as provided in the schedule of this Act is applicable in the case of Hindu female estate both self-acquired and inherited from her husband side after commencement of the said Act. From the genealogical table it would be very clear that the above four Birlas have no interest in the estate of the said deceased Lady had she died intestate. Both the two sisters have large number of descendants already in existence including sons, grand sons, great grand sons etc. totalling 33 heirs and heiresses. There is no scope of conjectural interest even. The two sisters have already lodged their caveats and consequently the aforesaid application for grant of probate has already been set down as a contentious cause. Therefore, the probate proceedings has to be a contested one and other person not having interest should not be allowed for the sake of speedy trial of this matter to intervene and to make the matter complex and prolonged one. The Birla Groups have already demonstrated their intention of multiplying the proceedings as much as possible as they do not have any forum left for bringing this identical issue, right from Company Law Board up to the appropriate Criminal Court.

7. He urges that "caveatable interest" is distinct from "locus standi" to apply for revocation of probate. Revocation of grant of probate can be made on the grounds mentioned u/s 263 while caveatable interest is adjudged on the grounds mentioned in Section 283 of the Indian Succession Act 1925 (hereinafter referred to as the said Act). To be more precise u/s 263 of the said Act a person, although not having caveatable interest can still apply if his personal right in the estate of the deceased has been defeated by the alleged will on any of the grounds set out u/s 263. In support of his contention he has referred to a decision of the Supreme Court reported *Mrs. Elizabeth Antony Vs. Michel Charles John Chown Lengera*, .

8. He contends further that caveatable interest means real interest based on existing facts. The real test is whether the grant of probate will displace any right

to which the caveator would otherwise be entitled on existing fact in respect of the estate of the deceased. The judicial pronouncement on this aspect is consistent to say that only real interest, however, small, but the interest just be a real one not conjectural interest. Even a right may be established on mere possibility but this possibility should rest on existing facts. He has placed reliance on the following decisions in support of this portion of his argument. Dinabandhu Roy Brajaraj Saha, Firm Vs. Sarala Sundari Dassya, , Sm. Usharani Roy Vs. Sm. Hemlata Roy .

9. It is not difficult to ascertain real interest in the estate of a Hindu who dies after Hindu Succession Act 1956. Old law of reversionary right is no longer germane. Under Hindu Succession Act the interest vested in the intestate heirs on the death of the testator and vested in them cannot be defeated.

10. He submits that the alleged caveatable interest based on the alleged mutual Wills of the Lady and her pre-deceased husband dated 13th July 1982 is no right to contest grant of later Will.

11. He contends that the judgments cited by the Birla caveators have clearly decided that the mutual Wills do not prevent grant of probate of subsequent will. The survivor of two persons who were stated to have made mutual Wills is not prevented from making subsequent Will. He does not admit going by the provisions of the alleged Wills there is any mutuality. In order to establish mutual Wills the following conditions are to be established.

(i) Agreement between two testators that none of them will revoke his/her Will by making subsequent Will.

(ii) Surviving testator is given life interest and upon his/her death the estate would be dealt with as per the provisions of the mutual Will.

(iii) Surviving testator has taken benefit under the mutual Will.

12. He submits both Mr. K. K. Birla and Y. B. Birla qua executors of two alleged prior wills have no caveatable interest in the proceedings for probate of one of the rival wills. The executors do not have any beneficial interest, without the same, no caveatable interest can be inferred. The status of executors in the nature of Administrator. The bequest under the Will is to vest in the legatees on and from the date of death of the testator. The assent to legacy by the executor only perfects the title of the legatee. Executor has no real interest in the estate. Even the legatees of the prior Will of 1982 have no right to lodge caveat. The other executors of the Will of 1982 have not lodged any caveat. In any event going by the submission of Mr. P.K. Roy learned senior counsel (now deceased) assent to legacy having been given in favour of the said deceased Lady in relation to the 1982 Will of M.P. Birla. Nothing is left by the executors so their interest if at all is no longer subsisting.

13. Y. B. Birla and B.K. Birla at the initial stage could not explain their caveatable interest as they were not named executors by the testator or testatrix in respect

the alleged will of 1982. They claimed filing supplementary affidavit, to be nominated executors as per the provision of the said two alleged Wills of 1982. Both the appointments Mr. Mitra urges are ex facie bad. Power to appoint executor as given in the said two alleged Wills of 1982 is conditioned, namely cessation of office by any of the four named executors. In the alleged Will of 1982 of the Lady four executors have been nominated and M. P. was one of them. He died in 1990 and the Lady remained alive for 13 years. Hence there was no possibility and nobody has claimed that M. P. Birla ever became an executor under Will of 1982. The expression "cessation of office" means that one who has held office and thereafter ceased to hold office for some reason. In the deed of appointment also it is not mentioned that M. P. had ceased to be executor, nor that appointment of the fourth executor is necessary in the interest of the estate. He has in this context placed reliance on decisions of English Court reported in 1899 (1) Ch 775 .

14. The testator names the executor in his will. Whether any of the persons named as executor will ultimately get appointed an executor depends on two contingent factors: (i) The named persons surviving the testator, because Will does not become operative until the death of testator; (ii) The named person is willing to act and accepts the office of the Executor. Therefore, he argues making of Executor in a will does not materialize into an appointment as Executor until and unless the testator dies and the Executor outlives him and accepts the office of Executor. Caveators are seeking to change the language of the will. The alleged will does not say that any of the four persons ceasing to exist. There is material difference between "ceasing to exist" and "ceasing to hold the office of executor".

15. His next contention is that co-ownership of any person with the deceased Lady is not caveatable interest. In support of his contention he has referred to a decision reported in Kartick Chandra Shaw Vs. Sm. Ranjita Pal and Others, . Similarly claim of co-trusteeship and co-directorship with the Lady are also not caveatable interest. The office of the trust and directorship are governed by the respective laws of trust and/ or instrument of trust, and Articles of Association of the company. A member of the Hindu undivided family has no caveatable interest as the right of coparcener in Hindu undivided family always remains intact and the same cannot be disposed of by any will. So the contention of the larger Hindu family as promoted by the Birla group is of no value nor help, rather negatives caveatable interest. He refers to three decisions of High Court reported in 14 CWN 119, Bai Parvatibai Vs. Raghunath Lakshman, . Besides, the claim of existence of the Hindu undivided family (repeatedly termed as larger Birla family) is factually incorrect as Gajanan Birla, grand father of Y. B. Birla separated himself from Birla family and in fact transferred all his family assets in favour of his father R. B. Birla and this fact will be evidenced by the document dated 6th August 1934 and dated 2-8-1934 annexed to the affidavit in reply to the affidavit in opposition of Yash. Y.B. Birla Cannot be declared intestate heir of the Lady or her husband by any stretch of imagination.

16. Mr. Arun Jaitley the learned Senior Advocate appearing on behalf of one of the four caveators namely B. K. Birla explained his client's caveatable interest on fact and in law as follows :

17. He submits that his client claims interest in the estate left behind by the Lady as a nominee/executor under the will dated 13th July 1982 and as a member of the Birla family having reversionary interest in the estate of the said deceased Lady. He explained in details that the term "caveatable interest" is not defined in the Indian Succession Act. The Court therefore, has to approach the problem by analysis of and analogy from provisions of Sections 263 and 283 of this Act and other well-established principles of law of succession. In the process the Court has to adopt most liberal approach to examine caveatable interest. Section 283 of the Indian Succession Act vests the Court with wide discretion as to issue of citation to person "claiming to have interest". This is necessary because order granting probate is judgment in rem. Grant of probate may affect interest of large number of people whose interests may not be known to or foreseen by the Court while issuing citation. This has been clearly settled by an ancient decision of this Court by a judgment of Sir. Asutosh Mukherjee rendered in the case of Brindaban Chandra v. Sureshwar Chandra Saha reported in (1909) 10 Cal 263. He has demonstrated diverse kinds of caveatable interest citing the following decisions :

ILR (1881) 6 Cal 460 Nobeen Chandra v. Bhobo Sundori (Mortgagees and Creditors were held to be persons having caveatable interest)

;(1909) 10 Cal LJ 263 (Brindaban Chandra v. Sureshwar Saha (reversionary heirs of a Hindu is having interest in estate of the deceased))

Gourishankar Chatteraj Vs. Sm. Satyabati Debi, (person though not relative, claiming through a common ancestor)

2002 (1) Cal LT 260 Binoy Ranjan Banerjee v. Sadhanranjan Banerjee.

17. He contends that it emerges from the above decisions one principle that if a person on the known facts stands to have a possible claim or stake on the devolution of the estate of the deceased in the event of a probate to his/her will not being granted, such person would have a caveatable interest. Therefore, he contends not only heirs on intestacy, as per schedule of the Hindu Succession Act but also a wide range of persons, whose claims are subordinate and subject to prior claims of such heirs and those having a mere contingent and reversionary interest can maintain a claim to contest. He emphasizes further that only a probability of slight and barest interest would suffice. The word "interest" as referred to in many cases should not be understood in the narrow sense of beneficial interest in the estate, but in the sense of locus standi, having claim or stake or so in the matter of devolution of interest. To put it briefly any person affected by disposition of estate by a testamentary route by deceased or is likely to suffer displacement of claim in the estate would have caveatable interest.

18. His client claims to be an executor under the Will dated 13th July 1982 by reason of appointment by nomination in terms of the above will. Originally the Lady by her will dated 13th July 1982 of the deceased, appointed her husband Madhav Prasad Birla since deceased, Ganga Prasad Birla, Pradip Kumar Khaitan and Kashi Nath Tapuria as executors of the said Will. Under the terms of the said Will in case of any of the executors" ceasing to be an executor, the survivor executors were empowered to fill up the vacancy by nomination. Husband of the deceased, M. P. Birla died on 30th July 1990 and thus he ceased to be an executor. On or about 25th August 2004 the survivor executors have by a deed appointed his client B. K. Birla as an executor. His client has thus caveatable interest in the capacity of the Executor of the said Will on two fold basis : (a) on the basis of doctrine of mutual Wills (ii) As Executor of an earlier rival will. He says Lady's Will dated 13th July 1982 was executed in terms of agreement with her husband not to revoke the same and this could not dispose of assets and properties.

19. According to him in view of the mutual disposition and having taken benefit of her husband's Will the said deceased had no right to bequeath the property in derogation of the provisions of the earlier Will by executing later Will. In one word his client's right, power and duty qua executor pursuant to the earlier mutual Will is affected and displaced by the later Will. The doctrine of mutual Will is accepted and explained in the various judgments and he has cited the following judgment and authorities and the texts.

(i) Halsbury's Laws of England -- 4th Edn. Vol. 50 para 208 @ Page 96 :

(ii) 97 CJS Wills Section 1367 @ Page 307, 309. 315, 319.

(iii) Birmingham v. Renfrew 57 CLR 666.

(iv) Re. Dale Proctor v. Dale (1993) 4 All ER 129.

(v) Kuppaswami Raja and Another Vs. Perumal Raja and Others, .

(vi) Meera Dewan Vs. Shakuntala Dewan, .

(vii) Dilharshankar C. Bhachech Vs. Controller of Estate Duty, Ahmedabad, .

(viii) Vasant Narayan Khakharia v. Probhavati 1999 (2) Mah LJ 889.

20. The status of an executor whether appointed by the testatrix or testator himself or by way of nomination remains same and the same is not changed by the mode of appointment.

21. He contends that an executor can be nominated by other executors or even by a third party if the intention of the testator/ testatrix is clear or can be implied or gathered from the tenor of the Will. In support of his contention he has referred to the following authorities :-- (1929) 1 Hag 1 ECC 548, 62 Re. Report Page 673, Anne Hill Ryder (1861) 2 SW & Tr 127) 64 Revised Reports In Re: Durga Das Koosary, .

22. He urges that a person can acquire caveatable interest by way of assignment or purchase or even unsecured creditors can acquire caveatable interest. He has placed reliance in this connection on following authorities : Mokashadayini Dassi and Others Vs. Karnadhar Mandal, : Nabin Chandra Guha Vs. Nibaran Chandra Biswas and Others, : Dinabandhu Roy Brajaraj Saha, Firm Vs. Sarala Sundari Dassya, .

23. He further submits that apart from the aforesaid proposition of law relating to mutual wills and disposition therein his client being one of the executors of rival Will as a matter of course is entitled to come and contest later testamentary paper. He must have an opportunity to establish that the Will propounded by the Lady is not genuine nor is the last Will or testament. This proposition of law is well settled by the following decisions : ILR(1894) 17 Mad 373 : Draupadi Dasya Vs. Rajkumari Dasya and Another, , Shanti Devi Agarwalla Vs. Kusum Kumari Sarkar and Another, , Sm. Sima Rani Mohanti Vs. Puspa Rani Pal, .

24. He further contends that his client being a member of the larger Birla family is having preemption right in respect of joint property. By the document dated 18th April 1999 the said deceased Lady in fact has transferred her undivided share in joint immovable property in favour of stranger. This disposition amounts to transfer and thereby right of pre-emption has been affected. As such his client has got in totality caveatable interest.

25. Mr. S.B. Mukherjee learned Senior Advocate appearing for K.K. Birla supported the contention and submission of Mr. Jaitley. Over and above he has precisely put his client's caveatable interest contenting that having regard to the relationship of his client with M. P. and the Lady by virtue of the provision of Section 8, 15(D) of the Hindu Succession Act, 1956; his client has chance of succeeding estate of the said deceased as reversionary heir, by reason of the fact that the Lady had no class I heir/heirress as mentioned in the schedule of Hindu Succession Act. According to him bare chance of having interest in the property left behind by the deceased is good enough to maintain a caveat to oppose the grant of testamentary paper. He has relied on, in this context, decisions of various Courts reported in Gourishankar Chatteraj Vs. Sm. Satyabati Debi, G. Jayakumar Vs. R. Ramaratnam, Mt. Sheopati Kuer Vs. Ramakant Dikshit and Others, , Sm. Sima Rani Mohanti Vs. Puspa Rani Pal, .

26. His next contention is that apart from being one of the heirs in case of death intestacy as reversionary interest, K.K. Birla one of the surviving executors of the mutual Will executed on 13th July 1982 of M.P. Birla since deceased has caveatable right.

27. His submission is that in view of being executor the entire estate of the Lady would have vested unto him along with other executors/trustees, but for the last purported Will.

28. His further contention is that in view of existence of the earlier mutual Will the later document cannot be a valid one as the testatrix could not execute any

document of testamentary nature in breach of the agreement with her husband M.P. Birla in terms of the mutual Will. By the document of 1999 his client's right, title and interest in the estate has been seriously affected. His client has already applied for probate of the earlier rival Will and also has filed a suit for specific performance against the Lady on the strength of the mutual Wills. In support of his contention in addition to what has been relied on by Mr. Jaitley and other learned Counsel supporting the caveats he has relied on the decision of the Bombay High Court reported in Venidas Nemchand Vs. Bai Champabai, and other decisions reported in 2002 (1) Cal LT 260, Sm. Annapurna Kumar Vs. Subodh Chandra Kumar, , Lalmani Vs. Bejai Ram Chaudhari and Others, .

29. Mr. P. K. Roy learned Senior Counsel appearing on behalf of the Yasha Bardhan Birla aptly supporting the argument advanced by Mr. Jaitley and Mr. Mukherjee, submits that in terms of the Will of M.P. Birla since deceased his client claims interest in the estate left behind by the Lady as one of her possible heir and also executor/trustee under the mutual Wills of 1982 executed by the couple, as grant of probate of the alleged Will of 1999 would deprive his client's right to apply for probate of 1982 Will. His client's appointment as an executor has been made by the provision of the Will itself. In terms of her husband's Will dated 13th July 1982 on her death he has been appointed executor by the surviving executors. According to him vacancy occurs when the number of executors falls below four and such vacancy needs to be supplied. It is immaterial whether such vacancy occurred before or after the death of the testatrix. According to Mr. Roy joint Birla family still subsists and there has been no legal document to show that the separation of the joint family is effected. He summarize's his client's caveatable interest saying his client is coparcener heir in the estate of the Lady and executor to the estate of Madhab Prasad Birla since deceased who by virtue of intermixed and interdependent mutual Wills of husband and wife has an interest in due disposition of the estate of Pryamvada Devi Birla.

30. He has relied in support of his submission on the following decisions reported in :-- AIR 1930 Bom 29 Gourishankar Chatteraj Vs. Sm. Satyabati Debi, 1999 (2) Mah LJ 889 1997 (3) Mad LW 541 P.S. Sairam and Another Vs. P.S. Rama Rao Pisey and Others, .

31. Mr. Bhaskar Sen the learned Senior Advocate appearing on behalf of G.P. Birla submits that his client is an executor to the said Will of the said deceased Lady dated 13th July 1982. As an executor of the said Will of 1982 he is entitled to and in fact obliged to settle the entire estate in favour of the charities as mentioned therein. The document dated 18th April 1999 provides that the properties of the deceased Lady are to be devolved in a manner inconsistent with the direction given in her Will dated 13th July 1982. Therefore, by later document of 1999 his client's right, power and duty have been seriously affected, so, he has right to come in his proceeding and to establish that the subsequent Will of the said deceased Lady is a sham document and invalid. If he

succeeds to establish the case that the said document is a sham one and was not properly executed and could not have been executed in view of the mutual Will executed by her along with her late husband M.P. Birla, dated 13th July 1982 and that the said deceased Lady could not have settled the properties in favour of anybody other than the person or persons mentioned in the mutual Will, then the so-called second Will of 18th April 1999 Will not stand. Thus his client as an executor of that Will, will be entitled to settle the estate in a manner mentioned in the mutual Will dated 13th July 1982. In the alternative he says that leaving aside the claim of mutual Will in case of intestate succession his client has possibility of getting interest in the estate left behind by the deceased. He has placed the genealogical table how his client has got fair chance of succeeding in the property. G. P. Birla is the first paternal cousin of M. P. Birla who was the husband of the deceased Lady. The Lady died issueless, therefore, following the rule of succession as provided in Section 15 of Hindu Succession Act, 1956, read with schedule thereto the property will go firstly to the two sisters of M. P. Birla. But under the rule of succession G.P. Birla's chance to get share in the estate is fair. He explained how is it possible by saying none is available in class 1.

32. Therefore, according to him both on the strength of the said mutual wills and in case of intestate succession G.P. Birla has caveatable interest. He has pointed that no argument was advanced against maintaining caveat of G. P. Birla by the learned Counsel for the propounder. As such case made out by G.P. Birla is to be accepted, therefore question to discharge of his caveat does not and cannot arise.

33. I have heard the learned Counsel for the parties and have gone through the pleadings and documents placed before me. Having given great attention I find therefrom, in this application for discharge of caveat, the only question has arisen for consideration is, whether all the caveators whose caveats are questioned now, been able to establish any interest in the estate of the deceased testatrix. All the caveators' claim, can be classified in two ways; according to their submission and cases made out therein : (i) one common case advanced by all the four caveators is that they and each of them, are the possible heirs in a remote sense, in case of death intestacy, and as a member of the coparcenary Hindu family, they are the heirs of the deceased Lady by survivorship, under the provisions of Mitakshara School of Hindu Law. (ii) On the strength of prior mutual Wills of husband and wife, both since deceased, to elaborate this, two caveators, viz. K.K. Birla and G. P. Birla are claiming to be, in addition to their claim of possible intestacy succession as above, the named Joint executors of the two mutual rival prior Will dated 13th July, 1982, left behind by M.P. Birla, since deceased and Priyambada Devi Birla, since deceased, respectively. In case of the caveator, Yashobardhan Birla, represented by Mr. P.K. Roy and Basant Kumar Birla, represented by Mr. Jaitley, it has been claimed by them, in addition to their claim of intestacy succession as above, that they are also two executors appointed by the surviving executors, in terms of the prior mutual Wills of the said couple. Basant's appointment relates to the Will of the Lady dated 13th July 1982, while Yash's appointment relates to that of M. P.

34. That apart, their caveatable interest is sought to be established contending that they are co-owners and/or co-trustees, along with the aforesaid deceased couple in respect of various immovable properties and trusts.

35. I shall be dealing firstly, with caveatable interest in the context of death intestacy succession. This interest like other interest in my opinion has to come within the purview of the expression, as mentioned in Section 283 of the Indian Succession Act, 1925, read with Section 263 of the said Act. So, I deem it fit to set out the aforesaid two sections.

Section 263 : Revocation or annulment for just cause.

The grant of probate or letters of administration may be revoked or annulled for just cause,

Explanation, just cause shall be deemed to exist where --

- (a) the proceedings to obtain the grant were defective in substance; or
- (b) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case; or
- (c) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently; or
- (d) the grant has become useless and inoperative through circumstances; or
- (e) the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under the Chapter an inventory or account which is untrue in a material respect.

Section 283. Powers of District Judge.

(1) In all cases the District Judge or District Delegate may, if he thinks proper,--

- (a) examine the petitioner in person upon oath;
- (b) require further evidence of the due execution of the will or the right of the petitioner to the letters of administration, as the case may be;
- (c) issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see (emphasis supplied) the proceedings before the grant of probate or letters of administration.

(2) The citation shall be fixed up in some conspicuous part of the Court-house, and also in the office of the Collector of the district and otherwise published or made known in such manner as the Judge or District Delegate issuing the same may direct.

(3) Where any portion of the assets has been stated by the petitioner to be

situate within the jurisdiction of a district Judge in another State, the district Judge issuing the same shall cause a copy of the citation to be sent to such other District Judge, who shall publish the same in the same manner as if it were a citation issued by himself, and shall certify such publication to the District Judge who issued the citation.

36. In my view, the provisions of the aforesaid two sections are supplement to each other to adjudge and understand caveatable interest of a particular person.

37. It will appear from the said Section 263 that revocation is made on just cause, as mentioned therein. "Just cause" exists on various facts or situation and some of which have been illustrated inexhaustively in the explanation of the said Section. One of the factors is non-service of citation upon the persons interested in the estate left behind by the deceased, in reference to Sub-section (1)(c) of Section 283 of the said Act.

38. Question of "locus" in this respect, both in case of revocation of grant and maintaining caveat to oppose the grant, stand on the same degree or standard. So, the judgment cited at the bar on the question of non-service of citation are also appropriate in case of discharge of caveat, at the time of granting probate or letters of administration with the copy of the Will annexed, as the case may be.

39. The words mentioned in Section 283 Sub-section (1)(c) of the said Act, "all persons claiming to have any interest" are to be understood in slightly liberal sense. In my considered opinion, for issuance of citation, nature of claim or interest of the person concerned is not to be examined, on the anvil of genuineness or legitimacy. Anyone's mere claim is sufficient to receive citation, for example, a person in occupation of a property being the subject matter of the estate in the Will irrespective of legitimacy of his right, can claim interest and such claim is good enough to receive citation. But the Court has to examine the nature and substance of the interest, if the person concerned cited, decides to oppose the grant. On examination, if Court finds that interest or claim is of substance and further, the same is such that is likely to be defeated by, the grant, then his or her or its objection is considered. The Courts of our country have decided in various cases, the types of interest to term locus" and the same will appear from the discussion made by me of large number of decisions cited at the bar, as follows :

In an old decision of this Court rendered in the case of Nabeen Chandra Sil v. Bhabosoondari Dabee reported in ILR (1881) 6 Cal 460, Justice Field delivering separate judgment, observed at page 470 the meaning of the expression "person claiming to have any interest" as the person must be a person having, for example such an interest as, according to the practice of the Court of the Chancery would entitle them to file a bill in Court of equity. In this concurrent judgment of Division Bench the attaching creditor and the two mortgagee of the heirs of the deceased (sons) in case of death intestacy of the testator, were held to be persons interested so much so they were entitled to maintain caveat.

40. Madras High Court in the case of Rahamatullah Sahib v. Rama Rau reported in ILR (1894) 17 Mad 373 referring to large number of earlier decisions of various High Courts, held that a creditor of the testator has no right to contest the Will for the reason that it is indifferent to him whether she received the debt from an executor or an administrator. The appellant/defendant qua creditor was thus held not to have any right to contest the grant. However, the legatee of prior Will on proof thereof, was held to have sufficient interest to contest the grant of the later Will. Their Lordships while deciding the case as above accepted, rather followed, the legal principle laid down in English case, Kipping v. Ash reported in 1 Robertson's reporter 270 that "bare possibility of interest is sufficient. But this possibility would (emphasis supplied) rest on existing fact not on mere conjecture. Their Lordships quoted with approval of the earlier legal principle laid down in case of Crispin v. Doglione, by Sir C. Cresswell that the possibility of filling a character which would give the party concerned an interest was not sufficient, but that there must be a possibility of having interest in the result of setting aside the will.

41. His Lordship Justice Mukherjee in the case of Brindaban Saha v. Sureshwar Saha Paramanick (1909) 10 Cal LJ 263 speaking for the Division Bench held that the reversionary heir not having alienable interest at the time of objection, is substantially interested in protection and devolution of the estate and as such is entitled to appear and contest any probate proceeding. His Lordship while observing principle laid down by English Court in the cases, Kipping v. Ash, Baskcomb v. Harrison, Crispin v. Doglioni and Dixon v. Allison reported in 1845 (1) Rob 270, (1849) 2 Rob 118. 1860 (2) SW Tr 17 respectively, has held in principle, that the grant of probate operates as a judgment in rem and such grant should be made after full opportunity to enter appearance has been afforded to all the persons who are likely to be affected by the grant. The above English cases laid down in gist that any interest however, slight and even, it seems, the bare possibility of interest is sufficient to entitle a party to oppose the testamentary paper.

42. The purchaser who purchased a part of the estate of the deceased subsequent to his death, was held to be person interested to oppose the grant by this Court in the case of Mokshadyini Dassi v. Karnadhar Mondal reported in ILR (1892) 19 Cal 1108.

43. It is noted in the case of Draupadi Dasya Vs. Rajkumari Dasya and Another, the Division Bench of this Court held the legatee of prior rival Will is having locus standi to contest or to revoke the grant of probate of a later Will, irrespective of grant of probate of the prior Will.

44. Yet in the judgment of Division Bench of this Court reported in Gourishankar Chatteraj Vs. Sm. Satyabati Debi, this Court allowed to maintain a caveat of a person who was neither a sapinda nor samanidaka not to speak of any heir, in an application for grant of Letters" of Administration of a deceased u/s 218 of the said Act made by a stranger. It appears therein that this was allowed on the

premise that the caveator had relationship with the family of deceased. Therefore, it was held, this relationship itself is sufficient interest to enable him to appear in this proceedings.

45. In the case of Nabin Chandra Guha Vs. Nibaran Chandra Biswas and Others, the proposition that any interest however, slight and even the possibility of an interest is sufficient to enable a party to oppose a testamentary paper which was the rule of English practice, came to be examined for application in India in the context of the provision of Section 283 of the said Act. It was opined by their Lordships interpreting the words in Section 283, that it was real interest implied therein which is likely to be prejudicially or adversely affected by the Will. The Court in this case held that a purchaser from an heir after the death of the testator had locus standi, to contest the grant. The principle enunciated is that interest to be shown at the time of the grant not necessarily at the time of death of the testator.

46. In the case of Dinabandhu Roy Brajaraj Saha, Firm Vs. Sarala Sundari Dassya, Division Bench of this Court held amongst others that the creditor of heir-at-law of the deceased had interest or locus to apply for revocation of grant enunciating broad proposition of law that "interest" mentioned in Section 283(1) (c) means "real interest" however, small, must be a real one, and this entitles the man to oppose the grant or to apply for revocation of grant for "just cause".

47. The learned single Judge of Madras High Court in the case reported in AIR 1972 Mad 72 examined the meaning and scope of the words "all persons claiming to have any interest in the estate of the deceased" employed in Clause (c) of Section 283(1) of the said Act. Upon comparative study of Section 64 of Probate and Letters of Administration Act (since repealed) the above Section, and Section 61 of the Court of Probate Act 20 and 21 Vict. C 77 being the corresponding English Act, His Lordship found therein the meaning and effect of the above words is the same to hold and it was indeed held, that all that is necessary to entitle a person to enter 4 caveat is the claim of interest in the estate of the deceased. The word "interest" in the estate do not necessarily convey the idea that the interest should be claimed through testator. In the process the learned Judge held a person claiming paramount title over the testatrix had no caveatable interest to contest the grant.

48. In the case of Sm. Sima Rani Mohanti Vs. Puspa Rani Pal, the Division Bench of this Court repeated earlier proposition that any interest however, slight and even the bare possibility of interest is sufficient to entitle a person to make an application for revocation of grant. It does not appear however, that Their Lordships had occasion to consider earlier cases of Nabin Chandra Guha Vs. Nibaran Chandra Biswas and Others, , Dinabandhu Roy Brajaraj Saha, Firm Vs. Sarala Sundari Dassya, which held it is not mere theoretical interest, it must be a real one. In this case legatee of prior rival Will was held to have sufficient interest to establish locus standi to apply for revocation of grant.

49. In Orissa case reported in Shanti Devi Agarwalla Vs. Kusum Kumari Sarkar and Another, the purchaser of Legatee vendor relying on first Will, was held to have locus to enter caveat to contest grant of probate of the second Will disposing the same property. In the case of Binoy Ranjan Banerjee 2002 (1) Cal LT 260 the Division Bench of this Court adopting pedantic theory that interest however slight, even bare possibility of interest would be sufficient to entitle a person to enter caveat and contest the probate proceedings, held that the brothers of the deceased spinster testatrix, despite mother being alive, have interest to contest the grant of probate as mother was not contesting the same.

50. This Court in case of Dinanath Shah v. Suromoni Devi 2002 (4) CHN 583 has not decided any new principle of law relating to locus standi to maintain a caveat, rather merely, repeated the earlier theory on the fact. In that case a Lady found to be legally married with the deceased testator, was allowed to contest the grant of probate.

51. In an unreported decision rendered in the case of Santhi Bhusan Basu in Application No. 1985 of 1991 the learned single Judge of this Court without having any reference to any of the earlier cases as above has in substance applied the above legal theory that interest however, slight, even bare possibility of interest which would be sufficient to entitle a person to enter caveat and contest the probate proceedings. It would be useful to quote His Lordship's language to understand how this principle was applied :

Even though Mr. Sen is right in the above submission the same does not call for discharge of the Caveat. This is because a caveat is to be discharged if and only if the caveator can be shown to have no possible real interest in the estate of the deceased in any facts and circumstances that might come to prevail. However, remote those circumstances might be.

52. Having regard to the normal course of human affairs, the probability of likely events in that case caveat lodged by son of a predeceased brother of the deceased testator to oppose the grant of probate sought to be obtained by two brothers of the deceased who were the executors, was allowed to be sustained, on the legal principle that the caveator had the possibility of having interest under the law in the event the brother and sister of the deceased are wiped out along with other families living no heirs of their own save and except Alope Kumar Basu (caveator).

53. It is to be noted that His Lordship has used the expression of "real interest" in stead of "interest".

54. In the case reported in 1996 (1) CHN 205 the same learned single Judge in paragraph 26 had held amongst others that locus standi for challenging the Will cannot be founded upon such shifting stand. Interest in the estate of the deceased must be shown to be present within bundle of rights already available to the lodger of the caveat in such manners that is not defeasible in all ordinary and normal circumstances". In the case under reference the caveator wanted to

contest the grant on the plea that he did not get 2,44,000 shares owned by the deceased in a Limited Company. So the caveat was discharged having found no interest in the estate.

55. From all the aforesaid decisions it is very clear that to maintain a caveat existence of real interest on even bare possibility of real interest in the estate of the deceased is the precondition. In my view term "possibility of real interest" is not synonymous with the term "conjectural interest" nor can it be intention of the legislature as such. The correct intent and purpose of the Legislature has to my mind, been explained in the case of Rahammatullah Shaeed reported in XVII ILR (1894) 17 Mad 373. Their Lordships held that the possibility of interest would rest on existing fact not on mere conjecture. Actually this legal theory has its origin as it will appear from aforesaid line of decisions, from the English principle laid down for the first time in case of Kipping v. Ash. From then onwards all the Courts both in England as well as our Courts have followed this principle uniformly. In the case of Nabin Chandra Guha Vs. Nibaran Chandra Biswas and Others, it is again explained that the word interest mentioned in Section 283 is the real interest which is likely to be prejudiced or adversely affected by the Will.

56. Similarly in the case reported in Dinabandhu Roy Brajaraj Saha, Firm Vs. Sarala Sundari Dassya, the interest in Section 283(1)(c) is the real interest howsoever small, must be real one. Therefore, I am of the view that in order to maintain caveat a person has to establish his real interest or possibility of real interest on the existing fact. This interest may be claimed either on the basis of succession of both intestacy and testamentary or as a creditor or otherwise.

57. A civilized and welfare nation by itself with law ensure compactness and bondage of family of its people with scientific and workable rule of succession of the properties. On death of owner of the property it is the natural right of the heirs or heiress to see that property is handed down or devolved in accordance with normal rule of succession. In normal course of events the property of the owner is to devolve upon the natural heirs on his death, however, this can be deviated or departed from by disposing the same before his death, either by instrument inter vivos or by testamentary one. Therefore, the person claiming either testamentary or intestate succession in real sense, certainly has lawful right to see that, the devolution of the same takes place in accordance with law. In case of grant of probate the person having real interest in intestacy succession has been conferred with the right to see in Court whether testamentary instrument is being accepted lawfully or not.

58. In the context of the above proposition of the law and my discussion on law in this case it has to be examined whether the four persons who have lodged their caveats have been able to demonstrate their real interest or possible real interest in the estate of the deceased Lady. I think unless the genealogical table (at page 35 of this judgment) is set wills to see the relationship of the Lady with the caveators their real interest or possible interest cannot be ascertained.

LATE RAJA BALDEO DAS BIRLA (d. 01-04-56) (Late Rani Chhogi Devi) _____

_____ | | | | Late J.K. Birla Late R.D. Birla (d. Late G.D. Late B.M. Birla-(d. (d. June, 1967) 21-04-1973) Late Birla (d. 11.01.1982) (Late (Late Johari Devi) Gulab Devi (Late 11-06-19563) Rukmani Devi) (Late Radha | Sarda Devi - D. 14- Devi) (Late Shri G.P. Birla (DOB 04-1972) Mahadevi) : 2-8-1992) (Late | (Late Durga Smt. Bimla Devi | Devi) Birla) (Smt. Nirmala | | Birla) _____ |

_____ | | | |
| | | | Late Savi- Late Sat- Late G.N. Late M.P. Smt. Laks- Smt. | Sri C.K. Birla-
DOB: yatri Devi yavati Birla Birla hmi Radha | 2-8-1922) Thirani Mohta (d.
21-08 (d. 30-07 Newar Mohta Late L.N. (Smt. Amita Birla) (d. 01-10- (DOB.
-1969) -90) (D.O.B. (DOB: (d. 29-08- (07-12-1956) 1971) 17-02- Late Gopi Late
Smt. 16-10- 18-10 1994 Late _____ 1914) Kumari
Priyambada 1916) -1922) Sushil Sri K.K. Sri B.K. Birla Devi d. (Babulal | Devi
Birla Birla | 03-07-2004 Newar) | Birla (DOB: 12- (DOB:16- | | (DOB: 10-1918)
02-1921) | | | 10-10- (Smt. (Smt. _____ | _____ | 1912)
Manorama Sarla | | | _____ Birla Birla) | _____ | |
| | | | | | | | _____ | Ajay Arvind Uma Veere- Rajen- | _____
| | Newar Newar Goenka ndra dra | | | | | (Shiela) (Manju) (JP. Mohta Mohta |
| | | | | Goenka)(Rekha)(Kusum)| | | | | | | | Smt. Smt. Smt. | | | |
| | | Nadini Jyot- Sho- | | _____ | | | | | Nopany sana bha- | | | | | | Pod-
na | | | | | | dar Bha- | | | | | | rtia | _____ | | | |
| | | | | _____ | | | | | Smt. Asha Late Ashok | | | | | | Mohta (DOB:
Birla (d.14 | Swati Manish | | | | 16-12-1937) -02-1990) | Biyani Newar | | | |
| (Late Sun- | | | | | _____ | anda Birla) | | | | | (d.14-02- | | | _____ | Sri
S.K.Birla Late Aditya 1990 | | | | _____ (DOB: 16-12- Vikram | | | | |
1934) (Smt. Birla (d. _____ | | _____ | | Vandana Ranjana
Sumangala 01-10-1995) | _____ | | | | _____ | Devi Birla) Smt.Raja- | | Avaneesh
Yashovardhan | | (7-7-1939) shree Yashovardhan Birla | Newar Newar | | | Birla)
(DOB 29-09-1967) | | | _____ | (22-9-1947) (Smt. Avanti Birla) | | | | |
_____ | | | Sri Kumar | | | | | Mangalam | Rajesh Smita Seth
Yashodhara | Sri Sidharth Birla | Newar | (DOB:17-7- (DOB: 14 | | -1957
(Smt. -6-1967) | | | Anusari (Smt. Neer- |
_____ | Birla) rja Birla) | | | | | (DOB: 07-03
| | Arvind Sujata Shivani Vrinda Moulshree 1959) Aryaman | Goenka Vikram

_____ | | | Vedant Vardhana Nirvaan
Shaloka Sujata (25-12-1991) (16-03-1994) (27-01-2000) 59. It would appear
from the old cases decided prior to Hindu Succession Act 1956 came into
operation that the interest of the reversionary heirs was real if not a vested one,
only difficulty was the reversionary heir had no alienable right during lifetime of
limited owner. In that context the reversionary heirs of women having limited
ownership were held to have real interest or possible real interest.

60. According to me after commencement of the Hindu Succession Act 1956

there is no concept in expressed terms reversionary interest of any heir of a female save and except as mentioned in the Act itself. Provision of Section 6 read with Section 14 of this Act make it clear that even in Mitakshara Coparcenary family a female heir succeeding property of male, on his death after commencement of this Act acquires indefeasibly absolute and vested right. These two sections need to be reproduced hereunder :

6. Devolution of interest of coparcenary property.-- When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act.

Provided that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation 1.-- For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not;

Explanation 2.-- Nothing contained in the proviso to this Section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein.

14. Property of a female Hindu to be her absolute property.-- (1) Any, property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation.-- In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.

(2) Nothing contained in Sub-section (1) shall apply to any property acquired by way of gift or under a Will or any other instrument or under a decree or order of a civil Court or under an award where the terms of the gift, Will or other instrument or the decree, order or award prescribe a restricted estate in such property.

61. Therefore, real interest or possible real interest now has to be adjudged in the context of the provision of the aforesaid Hindu Succession Act, 1956 not otherwise. Here the Lady died without leaving any class 1 heirs of schedule either of her own or of her husband. The property, whether self acquired or acquired from her husband therefore, has to go to the heirs of her husband, who fall in class (ii) being the two sisters of her husband who have already lodged caveats, are the natural and normal successor in interest in case of death intestacy, of the estate left behind by said deceased, to the exclusion of others.

62. Assuming it is a case of death intestacy the property had already devolved upon the said two ladies Laxmi Devi & Radha Devi and in their absence or after them the property will certainly not go back to the heirs of their father and brother. The property will inevitably go to their respective husbands and their sons and daughter. This line of succession available on this existing fact for these two ladies at present have husbands, sons, daughters, grand sons, and even great grand sons alive as it appears from genealogical table. If the argument of the learned Counsel for the caveators that the families of the two sisters are wiped out is accepted then that would be a worst than conjecture or even fiction and it is unlikely to happen in ordinary circumstances. This far-fetched possibility is not the real possibility on this existing fact as it is difficult, as on today, to imagine that these two ladies, their respective husbands sons and daughters, and their grant sons and grand daughters would die to clear the path of present caveators to succeed the property. There must be limit to imagine the possibility to apply the law. Possibility cannot be equated with fiction and must not lead to an absurdity. The application of law is not really meant for bringing in absurdity or impracticability.

63. Therefore, I hold that none of the caveators has got any interest nor possible interest in the estate of the said deceased under any circumstances in case of death intestacy.

64. As far as the argument of joint Hindu family is concerned I find there are documentary evidences to show that long time back joint family had been splitted. No acceptable evidence is to be found to hold joint family subsists in any sense. Moreover I am of the view that the shares and interest of the co-parcenary are not at all affected by the disposition by will for a testator/testatrix cannot bequeath what he/she does not have under law. Even if they do the same is not enforceable under law.

65. The office of the co-trustee or the co-director of the company cannot be disposed of by any instrument unless otherwise provided in the instrument itself. Another co-trustee or co-directors cannot have any right of succession on death of one of the co-trustees and directors. Similar is the position of co-shareholder of the company.

66. Next claim as a co-owner and/or co-sharer in the properties, share of which has been dealt with by the Will is concerned, I think, there is no substance in this

argument as bequeathing the interest of the testator or the testatrix of the undivided property, does not extinguish the right of the co-owner, only the testator's right or interest. The testator's right devolves upon his or her representative, in terms of the Will. Similarly, co-trustee cannot maintain a caveat, in connection with estate left by another co-trustee on his death. Office of the trustee is not ordinarily heritable, unless otherwise provided in the trust instrument, rather it devolves by survivorship or in case of death, new trustee is appointed depending upon provision of trust deed in this regard. No document has been furnished to suggest that office of the trustee is a heritable one, either by way of succession or by way of devolution by survivorship. The right of preemption is not caveatable interest. Right of pre-emption crystallizes, when co-sharer/ co-owner transfers on consideration his share to stranger. In my view it does not apply in case of testamentary disposition. Executor or the legatee is not a transferee to be resisted with assertion of right of preemption, rather they come into the shoes of the testator or testatrix. So, whatever obligation or covenant is attached to the property, the same may be enforced against the representative of the deceased.

67. Now coming to the question of interest qua executors in terms of the Will of the said deceased Lady dated 13th July 1982, four persons have to be dealt with separately as their status and position are not identical. G. P. Birla is undisputedly named executor appointed by the said Lady. Similarly K. K. Birla is named executor in the Will of her husband. Whereas Y. B. Birla and B. K. Birla are appointed executor by way of nomination by the surviving executors of both the deceased. It is settled position of the law the property on death of the testator/testatrix vest unto the named executor of the Wills (see Section 211 of the Indian Succession Act, 1925) and they have their specific power and duty to perform in terms of the Will and under the law.

68. The legatee cannot derive benefit from the Will unless assent to legacy, is given. The executor's duty has been specified in Chapter VII. Similarly his/her power As specified in Chapter VI of the Indian Succession Act 1925. In this case going by the apparent reading of the rival earlier Will undisputed executors are also the trustees in real sense for the benefit of the member of public for charitable purpose, of the estate left behind by the said deceased Lady. In terms of this Will they have been given wide discretion and right to choose the class and nature of the beneficiaries. This right, title and interest had indeed been vested unto the Lady along with other surviving trustees so far the will of M.P. Birla is concerned. After death of the Lady surviving executors' right are there. As far as the deceased Lady's Will is concerned executors appointed by the Lady and they being alive have above right undisputedly. I think applying legal principle as above surviving executors of prior Will of the Lady have possible real interest in the estate. The Courts have already recognized the legatee's and/or his assignee's interest of prior rival Will as having locus to contest grant (see ILR (1894) 17 Mad 373, Draupadi Dasya Vs. Rajkumari Dasya and Another, and Sm. Sima Rani Mohanti Vs. Puspa Rani Pal, respectively). All these rights will be

defeated if not displaced, if probate to last instrument is granted. Accordingly I hold this interest of G. P. Birla being one of the executors above is sufficient to maintain his caveat in relation probate proceedings of Lady's Will. So far K.K. Birla is concerned he is not one of the executors of the Lady's Will his claim is based on executorship of the mutual Will of her husband. His interest is not at all affected by the Will of the Lady rather remain intact and can be enforced against Lodha.

69. As far as B. K. Birla is concerned he has been appointed in the vacancy allegedly arose on death of M. P. Birla in terms of the Will of the said deceased Lady, on the plea that he ceases to be executor.

70. Mr. Mitra has rightly stated that cession of office presupposes event of assumption. Unless there is assumption of office question of cessation does not arise. M. P. Birla predeceased the deceased Lady. Therefore, her husband had no occasion to assume the office of executor as the Will becomes operative on the death of the testator/testatrix, so this office got life on death of testatrix. If this appointment is accepted to be valid, then it is to be held that in effect the Lady appointed a dead person as one of the executors. The power of appointment can be exercised by the surviving executors when there arises vacancy due to cessation of being duly appointed executor. In my opinion appointment of executor during lifetime of testator is always inchoate, it becomes absolute on death for it is possible for testator to revoke such appointment at any time: or automatic revocation on death of the executor before death of testator/testatrix. Three surviving executors are only competent persons to apply for probate and they do not and did not have any right to make fresh appointment of executor, nor to fill in vacancy when such appointment was not made by the testatrix. Had it been the intention of the testatrix to keep the number of the executors for all the time then she would have by a subsequent document, appointed immediately after death of M. P. Birla another person of her choice. In effect they have made fresh appointment. So I hold that the appointment of Basanta Kumar Birla as executor is no appointment, either in law or otherwise. A decision of Chancery Court rendered in case of *Salton v. New Beesfar Cycle Co.* reported in (1899) 1 Ch D 775 is very useful to have interpretation of words "ceases to hold" while adjudging the due qualification in matter of director" as shareholding in the limited company under the provision of Articles of Association. It has been clarified at page 779. "It seems to me, however, that is an unnatural interpretation of Article 92 to say that Lord Norneys "ceased to hold" the due qualification, when in fact, he never had any qualification. That Article contemplates the case of a qualification once possessed and subsequently lost, but not the case of a qualification never possessed." So applying and accepting above interpretation in this case I repeat M.P. Birla, since deceased did not cease to hold office.

71. Now comes the question of relevancy of existence of mutual Will and the devises thereunder (two Will date 13th July 1982). The concept of mutual will

and its legal implication or applicability thereof has now been almost settled in our country. The fundamental features of the mutual Wills have been explained by our Supreme Court after considering English case, American jurisprudence and also the Court of Australia.

72. In the case reported in Kochu Govindan Kaimal and Others Vs. Thayankoot Thekkot Lakshmi Amma and Others, the Supreme Court after considering and examining the, English cases and American Laws and Australian cases quoted therein elucidated meaning of mutual Wills as follows :

A Will is mutual when two testators confer upon each other reciprocal benefit, as by either of them constituting the other is legatee, that is to say when the executants; fill the role of both the testator and legatee towards each other. But if the legatees are distinct from the testator there can be no question of mutual Will". Of course in an English case reported in 1993 (4) All ER 129 (Proctor v. Dale) it has been accepted as statement of law that mutual benefit of two testators is not precondition to constitute mutuality in Wills. However, in view of the Supreme Court pronouncement as above, the ratio of the English case as quoted above is not accepted by this Court. In the case of Dilharshankar C. Bhachech Vs. Controller of Estate Duty, Ahmedabad, considering all the cases decided earlier, of English, American and Australian Courts as well as our Supreme Court quoted above it has been held by the Apex Court in paragraph 54 (AIR) 55 (SCC) as follows :

...Before the death of the first executants the agreement remained contractual one in consideration of mutual promises. It could have been at that stage revoked by mutual agreement or even by unilateral breach, giving rise at the most to an action for damages. But after death of the first one without revoking his or her own Will makes the joint Will irrevocable by the survivor. But there must be an agreement that the Wills would not be revoked after the death of one of the executants or disposition will not be made contrary to the will after the death of one of the executants or disposition Will not be made contrary to the Will after the death of one of the executants. Such an agreement may appear from the Will or may be proved outside the Will but that is not established by the mere fact that the Wills are in identical terms. If such an agreement is shown each party remains bound. A different and separate agreement must be spelled out not to revoke the Will after the death of one of the executants. That agreement must be clear though need not by a separate writing but must follow as a necessary implication, which would tantamount to an express agreement.

The predominant intention of the executants at the time of the execution, after the acceptance of the benefit of the execution makes the Will in this case irrevocable by the survivor of the executants....

73. In case of Kuppuswami Raja and Another Vs. Perumal Raja and Others, the Division Bench of Madras High Court has also discussed and considered the old English case on this subject, of Dufour v. Pereira (1769) 21 ER 332 has held in

paragraph 32 amongst other that :

...But after a careful consideration of all the aspects of the matter, we are inclined to take the view that a joint mutual Will becomes irrevocable on the death of one of the testators if the survivor had received benefit under the mutual Will, and that those need not be a specific contract prohibiting revocation when the arrangement take the form of not two simultaneous mutual Wills but one single document. In fact in some of the cases referred to above this aspect that if the two testators had executed one single document as one single mutual Will the position may be different is actually adverted to. In our opinion, if one single document is executed by both the brothers using the expression "our property" "our present wishes", "our will" and such similar expression, it is strong cogent evidence of the intention that there is no power to revoke except by mutual consent.

74. It will be appropriate to quote para 221 of Halsbury's Laws of England (4th Edn.) Vol. 50 (para 108) dealing with legal implication of revoking mutual Will by the surviving contestor after death of another, which is as follows :--

Mutual Wills may be made, either by a joint Will or by separate Wills, in pursuance of an agreement that they are not to be revoked. Such an agreement may appear from the Wills, or may be proved outside the Wills, but it is not established by the mere fact that the Wills are in identical terms. If no such agreement is shown, each party remains free to revoke his Will, if there are separate Wills, or to revoke the joint Will, so far as it disposes of his property, and the fact that one party has died without revoking the disposition of his property does not prevent the survivor from revoking the disposition which he has made notwithstanding that he has received benefits out of the estate of the deceased party. Even when there is such an agreement and one party has died after departing from it by revoking or altering the Will, the survivor having notice of the breach cannot claim to have the latter Will set aside, since the notice gives him the chance of altering the Will as regards his own property; and the death of the deceased party is itself sufficient notice for this purpose. If, however, the deceased revoked or altered his Will, the survivor is bound by it, and although probate will be granted of a latter Will made by him in breach of the agreement, since a Court of probate is concerned with the last Will, the personal representatives of the survivor nevertheless hold his estate in trust to give effect to the provisions of the joint Will or mutual Wills....

75. From all the decisions and the exposition of the laws on the subject as above it appears to me in this country in order to constitute valid, irrevocable, enforceable mutual Wills the following conditions are to be satisfied.

Both the executors must be mutual beneficiaries in both the wills, such beneficial interest may be absolute or limited.

The mutual Wills may be a joint Will meaning thereby in one single document and may be by separate instrument, but making mutual reciprocal disposition.

There must be an agreement between the two testator and/or testatrix either written or oral or by such necessary implication as good as expressed one, to the effect that there shall not be revocation of their Will after death of either of them, by the survivor.

It further appears from the above principle of law as settled and accepted in this country that the agreement of irrevocability of the mutual Will may be inferred, if such disposition has been made by the executants in one single document. But in case of a separate document the proof of agreement of irrevocability has to be established, before the Court of law accepts the document being mutual Will. Upon reading of the documents if the agreement cannot be inferred by any stretch of imagination proof of agreement outside the Will is permissible.

76. In the case on hand the documents are separate. If the two documents are read in isolation of each other then agreement of irrevocability between the executants cannot be deduced. It is the case of the caveator if both the documents are read together agreement of irrevocability will be a matter of certainty and this irrevocable nature of the prior Wills, itself is a caveatable interest to contest the grant of probate of the later Will on the question of testamentary incapacity of the deceased Lady. I have already observed that mere existence of the prior rival Will whether mutual or not if it is probated or is sought to be probated is good enough to maintain caveat as according to me the executors have got real possible interest in the estate within the expression of Section 283(1)(c) of the said Act, for right of executor/trustee to manage, control of the trust property with absolute discretion, is sufficient interest and this right will be displaced by grant of probate of the later Will. The meaning and expression of the "interest" is not so restricted or narrow to hold that the same would be of a legatee and/or beneficiary of the Will as has been urged by Mr. Mitra. It is noticed at least in three cases viz. ILR (1894) 17 Mad 373, AIR 1919 Cal 1912 & Sm. Sima Rani Mohanti Vs. Puspa Rani Pal, , that interest of legatee in the prior rival Will held to be caveatable to contest grant of probate of later Will. Here Mr. Jaitley, Mr. Mukherjee, Mr. Roy, Mr. Sen want me to hold that this agreement of irrevocability is another facet of caveatable interest I would have been relieved if I could accept the above proposition for it would have been easier to deal with the testamentary suit in relation to the later instrument of the deceased Lady. Unfortunately the law in this respect is stated to be otherwise as by virtue of the provision of Section 62 of Indian Succession Act 1925. The Will is always revocable or alterable. I have not been able to lay my hands on any decision of our country on this issue. I have been immensely assisted by the learned Counsel to see and examine the laws of England, America and Australia on this subject. I find that the existence of valid mutual Will and the enforcement of agreement of irrevocability is neither relevant nor the matter of concern of the Probate Court. The Probate Court having limited jurisdiction is always concerned with the last testamentary instrument. It is concerned with due and lawful execution of the last Will, once it is found to be last Will, probate is granted, whether disposition therein is in breach of earlier agreement or not to execute

subsequent Will. If there be any breach of equity or obligation, can be enforced by the Court of law having unlimited jurisdiction. The Regular Court of law and equity Will enforce such agreement against personal representative engaged by the testatrix or testator by the later instrument.

77-78. In this connection a judgment of the Supreme Court of Colorado, En Banc, (USA) rendered in case of Hoff v. Aram Bruster reported in 226 Pacific reporter 2d Series page 312 is useful in this case. At page 315 it is explained about the remedy in case of breach of an agreement in the matter of revocation of mutual Wills. By this judgment the extent and scope of jurisdiction of Probate Court vis-a-vis the regular Court in a problem of this nature, has been clearly laid down, as follows :

Where issues are framed in probate Court upon petition for probate of an alleged Will and caveat thereto, does the probate Court, or the District Court on appeal have power to enforce an agreement between two testators to make Will which are mutual and reciprocal in their provisions, by ordering probate of Will which was revoked in breach of such agreement ?

The question is answered in the negative. There are numerous cases dealing generally with the rule, which is applicable to this phase of the case. An extended annotation covering the question appears in 169 ALR 53, From the cases there cited we quote from Farley v. Brainard 237 IOWA 1969 : 24 NW 2d 453, 457 as follows. The rule seems to be well established that such revocation constitutes a breach of the contract, relief is to be afforded on that basis but the revoked Will cannot be probated. In Doyle v. Fischer 183 Wis 599, 198 v. Fisher 183 Wis, 599 : 198 NW 763 : 33 ALR 733 the Court stated : "It should be borne in mind that it is the Contract not the Will that is irrevocable. The authorities generally hold that the Will may be revoked, but the contract stands, and will be enforced by equity if it be valid contract and such enforcement is necessary for the prevention of fraud". In 57 American Jurisprudence page 485 Clause 716, we find the following :

A probate Court whose jurisdiction is limited to the determination of the issue whether the instrument propounded is the last Will of the decedent (deceased?) lacks power to enforce an agreement between the two testators to make wills which are mutual and reciprocal in their provisions. Likewise the rule is that a Will, which has been revoked, cannot be probated even though revocation was in violation of contract for the execution of separate Wills containing reciprocal bequest.

Likewise the rule is that a Will which has been revoked cannot be probated even though the revocation was in violation of a contract for the execution of separate Wills containing reciprocal bequests.

79. In Willam v. Pollard 101 COLO, 262 72 P, 2nd D, 476-479, we followed the above rule. In that case a similar situation: was involved. We stated :

The enforcement of rights under mutual reciprocal Will is grounded entirely upon equitable theories. Where there has been a violation of the agreement upon which the mutual Wills were based, a Court of equity, by reason of its extraordinary power to enforce specific performance of contracts and to prevent fraud, in an appropriate suit and proper case enforces such agreement in an equitable manner by decreeing a specific performance of the agreement or by impressing a trust upon the property in favour of the parties aggrieved by the violation of the agreement. It is apparent, therefore, that the rights of the parties based on the alleged mutuality of these Will could not be determined upon a petition or proceedings of the character of one here under consideration. In the instant case, as also made clear in *Williams v. Pollard*, supra, we express no opinion upon the issues of the alleged mutuality of the Wills nor upon the authority of *Minnie S. Philips* to revoke her Will leaving these matters to be determined if and when they are raised in an appropriate proceedings.

80. Again in another American case decided by the Supreme Judicial Court of Massachusetts (*Summer v. Grane* reported in *North Eastern Reporter*, volume 29 page 1151 the above principle has been explained and I find a very appropriate passage of the observation of the learned Judges at page 1152 which is quoted hereunder :

81. In *Holman v. Perry*, Mr. Justice Dewey states the rule of law to be as follows :

The probate of a Will does not necessarily settle any question of title to real estate, arising under such Will. It establishes the due execution of the Will of the testator, and is conclusive thus far; but as to his title, or his right to devise the property named in the Will, it binds nobody who has any adverse interest. Question of that character are to be settled by proper proceedings, at law or in equity.

In *Pohlman v. Wntzellman* 2 Re, ECC 319 one Pitter Wntzellman on October 6, 1747 made a Will by way of provision for his in-tended wife and for any children he and she might have, nominated her as sole executrix and gave her all his estate. In 1755 he made a new Will giving his wife \$ 5 only, and, having no children, left the residence to his sisters. It was contended on behalf of the widow of that the Will of 1747 was a settlement in consideration of marriage, and was a bar to any other Will and that the Will of 1755 was void. The widow also contended that she was entitled to probate of the first Will. Sir, George Lee in delivering judgment said "But I was of the opinion, if the first Will could operate as marriage articles or deed she must go to the Court of Chancery to have it enforced there; that the question before me was only upon the factum of the two Wills; that, considered as Wills, latter being fully proved, did clearly revoke the former and I could not determine that the deceased had by the act of the 6th October 1747 disabled from himself from making any subsequent Will. See also, *Hughes v. Turner* 4 Hugg Ecc, 30, 52, *Bremchley v. Lynn* 2 Rob, Ecc 30, *Hobson v. Blackburn Addams*, Ecc 274. We must assume that the Will of 1849 was recorded by the subsequent Will. If so, appellant was not entitled to delay for the

purpose of offering that Will for probate, even he could show any excuse for not presenting it before, because if the former Will was revoked by valid Will, it was not entitled to be admitted to probate. The rights of the appellant, if any would however, be fully protected either by way of a contract or trust; and the ruling was right.

82. The aforesaid judicial pronouncement makes it abundantly clear that it is later Will that has to be probated and in my opinion there is no procedure laid down by the above Court how the mutual Will is to be enforced. The mutual and reciprocal Wills are held to be valid and enforceable when it is found there has been agreement between the two testators not to revoke their respective mutual Wills by the survivor if any benefit from the mutual Wills has been obtained by him or her. If the valid Wills are found or the agreement to the effect is found then it can be enforced by the Court of equity. The probate Court does not enforce any agreement unless the instrument itself affords the same as a disposition of the property by the testator. Therefore, I do not wish to make any observation as to whether two Wills dated 13th July 1982 said to have been executed by the Birla couple are mutual or reciprocal or the same are product of an agreement not to revoke the same as these issues must be cropping up at the time of the trial of the suit.

83. However, it may be contended as to whether unprobated Will can be taken as an evidence for enforcement of the right or not. I think this problem can be solved in the way it has been solved by the American Courts. In *Corpus, Juris Secundum* (Vol. XC VII) at page 315 (s/s. 1367) it is stated as law that "proof of the agreement may expressly appear in the language of the Wills, but proof aliunde the Wills is also admissible as being on the question whether an agreement or compact (contract) had been made and whether it was supported by a valid consideration. Proof of agreement may be supplied by the competent witnesses who testify to admissions or declaration of the testators or to the agreement or an express promise may be shown. The Court may consider extrinsic fact. Evidence is also admissible on such facts and circumstances and such relations of the parties has to give rise of implication that such an agreement was made and such implication may have reinforcement from evidence of the acts or conduct of the parties...." Then again at page 316 it is stated that even though a will, made under a contract for mutual Wills has been revoked by a later Will, and so is not admissible to probate, it still stands as evidence of the contract and is admissible as such. In an action on an agreement, oral testimony is properly admitted even where the Will is introduced in evidence since the Will is not the agreement sued on. In this connection provisions of Section 213 and Section 214, of the Indian Succession Act 1925 needs to be noted to think how far it is a bar. The said Section prohibits enforcement of any right emanating from the Will itself. In order to enforce the mutual Will one has to enforce the agreement of irrevocability, when the agreement is sought to be enforced unprobated Wills Can be admitted as an evidence in this suit for collateral purpose (see *Jogendranath Banerjee Vs.*

Makhan Lal Banerjee and Others, .

84. The judgment cited by the learned Counsel for the Caveators of Australia High Court and our (Courts do not help in these probate proceedings at all, for all those cases were decided in relation to the Civil proceedings in getting relief in connection with or arising out of the provisions of the mutual wills.

85. It will appear from the facts in the cases cited that to the Civil suits agreement of mutuality was sought to be established and in that context the decision was rendered enforcing the mutual agreement between the two testators. I have already observed that the caveators have already filed Civil suit against Lodha for enforcement of the: agreement for not revoking one of the mutual Wills by the surviving testator. Those Judgments, in my view, will be relevant at the time of hearing of the aforesaid suits. Accordingly, I do not think those judgments will be applicable in this case.

86. In view of the above discussion I hold that the existence of mutual Will (assuming the said two Wills dated 13th July, 1982 are mutual Wills) and bequest thereunder are not by themselves caveatable interest meaning thereby this right of enforcement of agreement of mutuality is not an interest at all to receive citation of the probate proceedings in deciding the last Will of the same testator. As such I hold that none of the caveators has any locus standi to maintain caveat in this respect.

87. Yasha Bardhan Birla has been appointed by way of nomination by surviving trustees in terms of the Will of Madhav Prasad Birla, since deceased. On death of Madhav Prasad Birla. Priyamvada Devi Birla along with other three executors assumed and/or was deemed to have assumed the office of executor (assuming the will of Madhav Prasad Birla is valid and subsisting) with all rights and obligation qua executor trustees. On death of Priyamvada Devi Birla, naturally the office of executor-ship held by Priyamvada Devi Birla ceased, on cessation the remaining executors appointed Yasha Bardhan Birla in her place, and stead. I have examined the instrument of appointment and also the, power of appointment, given by the testator, Madhav Prasad Birla. I do not find any illegality and infirmity in such appointment. The feeble objection raised By Mr. Mitra that such an appointment is not in terms of the power conferred upon the surviving executors as in the deed of appointment no necessity of appointment is spelt out. I think this argument is too hypertechnical and farfetched. This argument is not accepted by this Court. I therefore, hold that appointment of Yasha Bardhan Birla as an executor is lawful and valid. So, he is accordingly entitled to be added as a party propounder along with existing executors; in the proceeding for grant of probate of the Will of Madhav Prasad Birla, since deceased.

88. But because of his appointment it cannot be said that he has caveatable interest in the estate of Priyamvada Devi Birla. Admittedly he is not claiming any interest in the estate of Priyamvada Devi Birla in terms of the Will. He is not able

to demonstrate any right to be defeated if probate is granted to the Will of Priyamvada Devi Birla of 1999 though it is contended by Mr. Roy that the estate of Madhav Prasad Birla has devolved on and merged with the estate of Priyamvada Devi Birla and it is very difficult to segregate such an interest I think this is not an impossible task to segregate the properties of both the testators. Therefore, I hold that Yasha Bardhan Birla has no interest in the estate of Priyamvada Devi Birla, since deceased. A suit has already been filed for enforcement of mutual Wills and in that suit if it is proved that aforesaid-two Wills are mutual then Lodha as the executor of the last Will, will be bound by this mutual Will. Thus, the caveat lodged by Yasha Bardhan Birla is accordingly discharged.

89. In view of the discharge of the caveat of the aforesaid three persons viz. Krishna Kumar Birla, Yasha Bardhan Birla and Basanta Kumar Birla and further allowing the caveat to be retained by Ganga Prasad Birla I direct the department concerned to treat the affidavit in support of caveat filed by Ganga Prasad Birla as another written statement. I accordingly add Ganga Prasad Birla as party defendant along with other two defendants. Let the amendment, of the probate petition be carried out within a period of fortnight from the date of communication of this order on the signed copy of the operative portion of the order.

90. As far as the caveat lodged by Lodha in the probate petition in relation to the Will of Madhav Prasad Birla is concerned, I am of the view, applying all the aforesaid discussions of law and fact, that Lodha has interests the estate of Madhav Prasad Birla, since deceased Lodha now (assuming Will of 1999 read with codicil is valid and subsisting) being sole executor and legatee of this Will is the representative or successor-in-interest and is vitally interested in the estate of Madhav Prasad Birla as it is the contention of Lodha that Madhav Prasad died intestate. By the Will of Madhav Prasad Birla, the said deceased Lady has been given life interest so far his estate is concerned. In the event probate is granted to the Will of Madhav Prasad Birla, then there shall not remain any interest of the Lady. Consequently, Lodha's right in respect of estate of M.P. Birla will be displaced and/or defeated. If no probate is granted there shall be an automatic devolution of interest by way of intestate succession upon the deceased Lady who has already got the benefit during her lifetime, so far her husband's estate is concerned. Consequently, Lodha will not be deprived of his right and interest, in relation to the estate of Madhav Prasad Birla. Judging therefore, by these tests there cannot be any doubt that Lodha has real interest in the estate of the said Madhav Prasad Birla, since deceased.

91. I, therefore, reject the application for discharge of caveat and direct the department concerned to treat this application for probate being P.L.A. No. 241 of 2004 as a contentious cause and, the affidavit filed in support of the caveat by Lodha shall be treated to be a written statement and he be treated as defendant. I am of the view that this application for probate in relation to the Will of Madhav

Prasad Birla dated 13th April, 1982 shall be heard first and immediately thereafter the application filed by Lodha in relation to the latter will of Priyamvada Devi Birla shall be heard, but the matter will appear in the list one after another.

92. There shall be cross order for discovery of the documents in relation to both the proceedings within four weeks from date, inspection forthwith thereafter. Both the suits should appear in the list for hearing eight weeks hence.

93. Mr. Sarkar appearing for all the caveators upon instruction prays for stay of operation of this judgment and order for a period of four weeks from date. Mr. Chatterjee appearing for Lodha opposes the prayer for stay.

94. Having considered the respective contentions of the learned Counsel I grant stay of operation of this judgment and order for a period of four weeks from (Sate since I feel that there are substantial questions of law involved in this matter and chance should be given to the parties to agitate them before the higher forum.

95. Xerox certified copy of this judgment and order shall be made available to the parties as expeditiously as possible.