A KRISHNA KUMAR BIRLA

v.

RAJENDRA SINGH LODHA AND OTHERS

(Civil Appeal No. 2277 of 2008)

MARCH 31, 2008

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(S.B. SINHA AND HARJIT SINGH BEDI, JJ.)

Succession – Indian Succession Act, 1925 – Section 2(c), 2(h), 283, 284, 285 & 286 – Calcutta High Court Rules, 1940 C *– Rule 4, 5(a), 24, 25, 26, 27, 28, 29 & 30 – Indian Trusts Act, 1882 – Section 73 – Probate And Administration Act, 1881 – Section 69, 70, 71, 72, 73 & 83.*

Caveatable interest means an interest in the estate of the deceased to which the caveator would otherwise be entitled D *to and having a special interest therein – Caveatable interest may arise only after suit for enforcement of mutual Will is decreed.*

Manner of filing an application for grant of probate – Jurisdiction of Probate Court – Discussed.

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Construction of a Will relating to the right, title and interest of any other person to whom a citation is to be issued or a caveator, must have some interest in the estate of the testator.

Judgment rendered in a probate proceedings - Not F *determinative of the question of title.*

Scope and applicability of Section 284 of Indian Succession Act.

Interpretation of Statutes:

G

Purposive construction to be resorted to having regard to the purport and object of the Act.

While interpreting the provisions of a statute, one must also bear in mind the admitted legal position that a probate

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proceeding should not be converted into a title suit. A

Code of Civil Procedure, 1908 – S.122 – High Court could frame Rules under the power conferred to it – Constitution of India, Article 227.

Precedent – What could be done and has not been done by a Court of equity does not create precedent. B

Words & Phrases:

"Ceasing to be" – "contention" – Meaning of.

PDB and MPB were very wealthy persons and owned an industrial empire known as Birla Group of Industries. Both of them had executed mutual wills on identical terms on or about 10.5.1981 bequeathing his/her respective estate(s). Later, the wills were revoked and another set of mutual wills were executed on 13.7.1982 and four executors were appointed in each set of will. C D

MPB died on 30.7.1990. On or about 18.4.1999, PDB executed her last will bequeathing her entire estate to the first respondent RSL, appointing him as the sole executor. PDB died on 3.7.2004. E

RSL filed an application for grant of probate. The appellants in the connected appeals filed caveats. RSL took out an application seeking discharge of caveats entered into by KKB, BKB, GPB and YB before the High Court. F

A suit was filed by the surviving executors of the 1982 wills for a declaration that RSL was not entitled to deal with the assets of PDB in any manner contrary to and inconsistent with terms of the 1982 will. G

Single Judge of the High Court allowed the application of discharge of caveats filed by KKB, BKB and YB; caveat filed by GPB was retained. Application filed for discharge of caveat of RSL was also dismissed. H

A Appeals were filed before the High Court. Cross objections were filed by RSL against retaining the caveat filed by KKB, SKB and YB as also the appointment of YB as the executor of MPB. The appeals and the cross objections were dismissed. Hence the appeals.

B On the basis of the contentions raised by the parties, the question involved in the appeals is what is a cavetable interest within the meaning of the Indian Succession Act vis-à-vis the rules framed by the Calcutta High Court in the year 1940.

C Allowing Civil Appeal No. 2278 of 2008 filed by RSL challenging the appointment of YB, and dismissing the other appeals, the Court

HELD: 1.1 A suit in respect of property over which D probate would have effect, must have a direct nexus with the estate of the testator and not to enforce a right in respect of the application of the estate of the testator under another will. Right to maintain a suit must be independent of the wills sought to be probated. No legal E right accrues under an unprobated Will except in case where taking of probate is not mandatory. [Para 76] [683-D-E]

1.2 A suit which would be maintainable must have something to do with the estate of the testator. Inheritance F by Will itself may be a subject matter of contention. Whether the interest claimed by the caveator is an established one or a bare claim must satisfy the test that there exists an interest in the estate of the testator and the same is not adverse thereto. [Para 78] [684-D]

G *Elizabeth Antony v. Michel Charles John Chown Lengera* (1990) 3 SCC 333; *Kanwarjit Singh Dhillon v. Hardayal Singh Dhillon and others* 2007 (12) SCALE 282; *Chiranjilal Shrilal Goenka v. Jasjit Singh and Ors.* (1993) 2 SCC 507 and *Basanti Devi v. Raviprakash Ramprasad Jaiswal* (2007) 12 SCALE H 542 – relied on.

Abhiram Dass v. Gopal Dass **ILR 17 Calcutta 48**; *Prijoshah Bhikaji v. Pestonji Merwanji* **12 Bom LR 366**; *Rahamtullah Sahib v. Rama Rau & Anr.* **ILR 17 Madras 373**; *Nikunj Kumar Lohia v. Narayan Prasad Garodia & Others* **1996 (1) CHN 205**; *Goods of Mohammad Bashir (deceased)* **AIR 1964 Cal 34**; *Smt. Namita Singha v. Joydeb Chandra Paul* **AIR 2006 Cal 230**; *M.S. Saraswathi v. M.S. Selvadurai & Anr.* **(1997) 3 LW 541 (Mad)**; *Mrs. Perviz Sarosh Batliwalla & Anr. v. Mrs. Viloo Plumber & Anr.* **AIR 2000 Bom 189**; *Rajiv Ramprasad Gupta v. Rustom Sam Boyee* **AIR 2003 Bom 242**; *Nobeen Chander Sil and others v. Bhobosoondari Debee* **ILR 6 Calcutta 460**; *G. Jayakumar v. R. Ramaratnam* **AIR 1972 Mad 212**; *Nabin Chandra Guha v. Nibaran Chandra Biswas and others* **AIR 1932 Calcutta 734 and** *Gourishankar Chattoraj v. Smt. Satyabati Debi* **AIR 1931 Calcutta 470 – referred to.**

2.1 Two sisters of MPB being alive (one of them is since deceased), indisputably in the event the application for grant of probate of RSL in respect of the 1999 Will is refused they will have an interest in the estate of the testatrix. The right of the said sisters of MPB being definite and clear, it is not a case where it is necessary to apply the bare possibility or the common ancestor test. [Para 93] [689-C-D]

2.2 Both MPB and PDB claimed their interest in certain companies. The subject matter of the Will is not the ancestral property over which the caveators claim any interest. It is one thing to say that the subject matter of the will is 'coparcenary' or a 'joint family property' in which case the larger concept of interest in the agnates would apply, but it is another thing to say that if people are available who would otherwise represent the interest of the estate and against whom citations have been issued, others who have no interest would also be entitled to enter a caveat. [Para 94] [689-D-F]

A *Brindaban Chandra Shaha v. Sureshwar Shaha Parmanick and others* **10 Cal. LJ 263 and** *Gourishankar Chattoraj v. Smt. Satyabati Debi* **AIR 1931 Cal 470 – held inapplicable.**

B *Dinabandhu Roy Brajaraj Saha v. Sarala Sundari Dassya w/o Haralal Saha* **AIR 1940 Calcutta 296 – referred to.**

3. A Will is executed when the owner of a property forms an opinion that his/ her estate should not devolve upon the existing heirs according to the law governing C **intestate succession. When, thus, a person who would have otherwise succeeded to the estate of the testator, would ordinarily have a caveatable interest, any other person must ordinarily show a special interest in the estate. Such a special interest may be a creditor of the** D **deceased. But, the same would not mean that even if the estate of the deceased is being represented by the legal heirs, caveat can be entertained at the instance of a person who has no real interest therein or in other words would merely have a contingent interest. [Para 97, 98] [689-C-F]**

E *Radharaman Chowdhuri and others vs. Gopal Chandra Chakravarty* **AIR 1920 Calcutta 459 and** *Sarala Sundari Dassya v. Dinabandhu Roy Brajaraf Saha (Firm)* **AIR 1944 PC 11 – referred to.**

4. A transferee pendente lite without the leave of the F **court would not have a caveatable interest and as such cannot be impleaded as a party. A person cannot also be impleaded as a party even on an apprehension that those who have a caveatable interest and to whom citations have been made would not take any interest in the** G **litigation. [Para 99] [689-F-G]**

Jagdish Chander v. State & Anr. **1988 RLR 678 and** *Sunil Gupta v. Kiran Girhotra & Ors.* **2007 (12) SCALE 59 – referred to.**

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5. A statute must be interpreted having regard to the purport and object of the Act. The doctrine of purposive construction must be resorted to in a case of this nature. The court must place itself in the chair of a reasonable legislator. In so doing, it would not be permissible for the court to construe the provisions in such a manner which would destroy the very purpose for which the same was enacted. The principles in regard to the approach of the Court in interpreting the provisions of a statute with the change in the societal condition must also be borne in mind. [Para 104] [693-B-C; 694-F]

New Indian Assurance Co. v. Nusli Neville Wadia and Anr. 2007 (14) SCALE 556; *Bharat Petroleum Corporation Ltd. v. Maddula Ratnavalli & Ors.* (2007) 6 SCC 81, para 22 and *Anuj Garg & Ors. v. Hotel Association of India & Ors.* (2007) 13 SCALE 762 – relied on.

6.1 The decisions which were rendered prior to coming into force of the Hindu Succession Act, thus, may not be of much relevance. Now, if on the interpretation of law, as then stood, a reversioner or a distant relative who could have succeeded to the interest of the testator was entitled to file a caveat, they would not be now, as the law of inheritance and succession is governed by a Parliamentary Act. [Para 106] [695-E-F]

6.2 Directly or indirectly the appellants and in particular KKB is questioning the title or disposing power of the testator, which is impermissible in a probate proceeding. Appellants, in fact, have been prevaricating their stand from proceeding to proceeding. They have been raising various contentions which are wholly impermissible in law. [Para 107] [695-G]

6.3 If anybody and everybody including a busy body or an interloper is found to be entitled to enter a caveat and oppose, grant of a probate, then Sections 283(1)(c) and 284 of the 1925 Act would have been differently

worded. Such an interpretation would lead to an anomalous situation. It is, therefore, not possible to accede to the submission that caveatable interest should be construed very widely. [Para 109] [696-C]

6.4 A caveatable interest is not synonymous with the word 'contention'. A 'contention' can be raised only by a person who has a caveatable interest. The dictionary meaning of 'contention', therefore, in the aforementioned context cannot have any application in a proceeding under the 1925 Act. While interpreting the provisions of a statute, one must also bear in mind the admitted legal position that a probate proceeding should not be permitted to be converted into a title suit. It should not be permitted to become an unchartered field to be trespassed into by persons even if he is not affected by testamentary disposition. [Para 110 and 111] [696-D-F]

7. Section 284 of the 1925 Act only provides for a forum and nothing more. It has nothing to do with qualification. Drawing attention to the decisions prevailing prior to coming into force of the 1925 Act, as also the decision of the Bombay High Court it was contended that the legislature having not changed the wordings of the earlier statute despite judicial interpretation of the terminologies thereof, must be held to have not intended to rectify the same. It is not necessary to go into the said question as the decisions upon which reliance has been placed are either not good law or not relevant for the present purpose. [Para 113, 114] [696-H; 697-A-C]

Pirajshah Bikhaji & Others v. Pestonji Merwanji (1910) ILR 34 Bombay 459 – referred to.

8. The Rules framed by the Calcutta High Court provide for determination of the issue of caveatable interest as a preliminary issue. There is no reason as to why the High Court, in exercise of its powers conferred upon it under Section 122 of the Code of Civil Procedure,

could not frame such Rules. After coming into force of the Constitution such Rules can also be framed by the High Court in exercise of its supervisory jurisdiction under Article 227 of the Constitution of India. If the contention is to be accepted that there being no such provision in the Act for determination of such an issue as preliminary issue, the High Court could not have framed the Rules, This Court is of the opinion that in a similar situation this Court also could not direct listing of the writ petitions under Article 32 of the Constitution of India for preliminary hearing in terms of the Supreme Court Rules. The Court having regard to its general power as also the power under Order XIV Rule 1 of the Code of Civil Procedure can decide the matter by framing preliminary issues in regard to the maintainability or otherwise of the application. It is a rule of procedure and not of substance. A court is entitled to dismiss a lis at the threshold if it is found not maintainable. The Court even in absence of any rule must take the precaution of not indulging in wasteful expenditure of its time at the instance of the litigants who have no case at all. Therefore, there is no legal infirmity in the Rules. [Para 115] [697-D-H; 698-A]

9.1 A Will by its nature is revocable. It is the last desire of the testator. Till he breathes his last, he will have a final say. In short, the latter Will revoking the earlier Will would be probated. It is one thing to say that the agreement between the parties to the purported mutual Will would not affect any agreement or arrangement on the application of the latter Will or the estate of the testator must be administered in terms of such agreement. [Para 116] [698-C-D]

9.2 Despite the existence of a mutual Will, the representative under the latter Will will take the property. He, however, takes the property subject to the terms of the Mutual Will. Whether there exists any such agreement enforceable either in equity or by way of a suit for specific

A performance, will have to be considered only in the event the probate is granted and not prior thereto. [Para 116] [698-E-F]

Halsbury's Laws of England, Fourth Edition, Volume 50, page 108; *Lewin on Trusts,* Seventeenth Edition, pages 270-271; ***Theobald on Wills,*** Sixteenth edition, pages 26, 27 (Paras 2.09 & 2.11) and *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate,* 18th edition, pages 131-132 – referred to.

C 10. What could be done and has not been done by a court of equity does not create a precedent. It does not even have a persuasive value. In this country, we are bound to follow the law laid down under the statute or the decision which create binding precedents. An D observation made by a Court of Probate would not persuade this Court to hold that the High Court should have taken recourse to "advance from the region of testamentary disposition into that of contracts and trusts and to declare certain trusts upon the footing of contract" which could be done by the Chancery Division. E [Para 123] [701-C-D]

Kuppuswami Raja and another v. Perumal Raja and Others AIR 1964 Madras 291 – distinguished.

Walker and Another v. Gaskill and Others [1914] P. 192 F – referred to.

American Jurisprudence, Second Edition, Vol. 79, page 850 and *Corpus Juris Secundum,* Vol. XCVII, pages 304 to 312 – referred to.

G 11. A Will made in prejudice of an agreement will nevertheless be effective as a Will as it is by its very nature and by its very essence a revocable instrument. A subsequent infringing Will would be valid even if it revokes an earlier Mutual Will. Similarity of the terms would H not be enough to establish the necessary agreement.

Whether a legatee has taken any benefit under the alleged Wills of 1982 would, however, be relevant. [Para 132] [705-E-H]

Dilharshankar C. Bhachech v. Controller of Estate Duty (1986) 1 SCC 701 and *Shiva Nath Prasad v. State of W.B. and Others* (2006) 2 SCC 757 – referred to.

Branchflower et al v. Massey 208 P. 2d 341; *Birmingham and Others v. Renfrew and Others* 57 C.L.R. 666 and *Re Dale (deceased) Proctor v. Dale* (1993) 4 All ER 129 – referred to.

12.1 It is too far fetched a submission that a person having a remote family connection or as an agnate is entitled to file a caveat. A reversioner or an agnate or a family member can maintain a caveat only when there is a possibility of his inheritance of the property in the event the probate of the Will is not granted. If there are heirs intestate who are alive, entertaining of a caveat on the part of another family member or a reversioner or an agnate or cognate would never arise. The Hindu Succession Act, 1956 has brought about a sea change in the matter of inheritance and succession. Agnate or cognates are, thus, recognized as heirs. They may be the erstwhile members of a nuclear family. So far as heirs and legal representatives of the family are concerned, the Hindu Succession Act clearly lays down five classes of heirs, Sisters of husband belong to Class II heir. They succeeded to the interest of MPB in 2004 on the death of PDB. Appellants accepted the said fact but contended that as the life of the said heirs was uncertain they, thus, have a caveatable interest. It has been accepted that there would be no difficulty in ascertaining the successors of PDB. It is an indisputable case of intestacy having regard to Section 15 of the Hindu Succession Act. [Para 133, 134, 135] [706-A-F]

12.2 Inheritance to an estate never remains in abeyance. In the event of death of the sisters of MPB, their heirs and legal representatives would inherit the property

A in their own right and not as the heirs of MPB. The dispute regarding intestacy does not change the law of succession and inheritance. As Agnates KKB, BKB, YB and GPB also claimed caveatable interest as agnates. Entry 2 of Class II of the Schedule appended to the Hindu B Succession Act in this case would not bring them into the picture, as agnates will acquire an interest only when there is no heir of either Class I or Class II. When there exists Class II heirs, the appellants would not have any real interest in the property. The property upon the death of Smt. Laxmi Devi Newar and Smt. Radha Devi Mohatta C would pass on to their legal heirs. Appellants being not the heirs of MPB or PDB have no caveatable interest. [Para 137, 138] [707-A-D]

13.1 The theory of looking after the spiritual well-D being of the deceased soul by the near relatives has no application for the purpose of judging the validity or otherwise of a Will; more so, after coming into force of the Hindu Succession Act, 1956 as in terms thereof the concept of succession to the estate of a deceased on the said consideration has lost its relevance. [Para 139] E [707-E]

13.2 The doctrine of 'larger circle of the caveators as being members of the Birla family' and to protect the spiritual interest does not convert a non-existent interest F into a caveatable interest. Such a question had not been raised even in the affidavits of the appellants. [Para 140] [707-F-G]

14. The affidavit of KKB also reiterates the contents of the plaint. No contention, however, has been raised that G they have a caveatable interest keeping in view the spiritual life of MPB and the testatrix as a member of the family or otherwise. Similar affidavits have been filed by others. The sisters are also supporting the Birla family. The claim of acquiring cavetable interest on the said basis, H thus, is wholly unacceptable. [Para 141] [709-H; 710-A-B]

15.1 A right to claim pre-emption is not a right in the estate. It creates an interest in the property. It does not create an interest in succession. If such a right has been created by an agreement, the same can be enforced only in the event any contingency in that behalf takes place. A Will is not a transfer for enforcement of a right of pre-emption under a contract. It must be enforced by a suit. [Para 142] [710-C-D]

15.2 KKB, BKB and GPB claimed caveatable interest as co-owners of 1/5th share in Kumaon Orchards, two other co-owners being PB and SKB. SKB does not claim any caveatable interest in the estate of PDB. Even a person claiming an interest in the property of the testator by reason of an agreement for sale would not have a caveatable interest on the premise that such an agreement would be binding both upon the executor as also upon the heirs of the deceased (in the event, probate is not granted). The same principle would apply herein. Right of pre-emption, if any, is not affected by grant of probate. A right of pre-emption would arise only when a voluntary transfer is made for consideration in favour of a stranger and not prior thereto. [Para 143] [711-D-F]

15.3 Right of a co-owner is not affected by testamentary disposition. Indisputably, the object of conferring the right on a co-sharer or owner of an adjacent immovable property is to exclude strangers from acquiring interest in an immovable property as a co-sharer or to keep objectionable strangers away from the neighbourhood. The same by itself does not constitute a caveatable interest. [Para 145] [711-G-H; 712-A]

Atam Prakash v. State of Haryana & Ors. (1986) 2 SCC 249, *Bhoop v. Matadin Bhardwaj* (1991) 2 SCC 128 and *Sri Audh Behari Singh v. Gajadhar Jaipuria & Ors.* AIR 1954 SC 417 – referred to.

16.1 Will takes effect after the death of testator. Rights

A and obligations of an executor of a Will arise only then. No right is created in the executor during the life time of the testator. Appointment of a testator and appointment of a trustee stand completely on different footings. [Para 150] [713-B]

B 16.2 A person named as an executor under a Will cannot claim any right to act as an executor until the death of the testator. He has to survive him. He has to accept the office as an executor expressly or by conduct. The term "ceasing to be" thus necessarily means assumption C of office of executor and thereafter ceasing to hold such office, by renouncement or removal or death, etc. [Para 151] [713-C-D]

16.3 An executor must first become an executor. As D MPB predeceased PDB, he never became an executor. If he did not become an executor, the question of filling up of any vacancy would not arise. For the aforementioned purpose, it may be assumed that the 1982 Will was valid. As MPB could never become an executor, BKB's appointment does not confer on him a caveatable interest. E An appointment of an executor ordinarily is the function of a court in terms of Section 301 of the 1925 Act. This Court, need not go into the question as to whether his appointment was legal or not, but, only notice that even in the deed of appointment, there is nothing to show that F the necessary ingredients for appointment of B.K. Birla by the surviving executors had been made out as it was not stated that the original executor had seized to hold office. [Para 160, 161] [718-A-C]

G 16.4 The office of executor under the 1982 Will does not carry any remuneration therewith. The power to appoint an executor was dependent upon any executor ceasing to be one. The condition precedent has not been fulfilled. In the instant case, MPB had never become the executor, hence, the question of his "ceasing to be an H

executor" does not arise. [Para 162] [718-D-E] A

16.5 Appellants are not the legatees of the said Will. They are not the beneficiaries thereunder. They being merely executors, would not clothe them with a right to lodge a caveat as by reason thereof they did not derive any caveatable interest in the estate of PDB. [Para 163] [718-F] B

Jnanadndra Nath Mukherjee and another v. Jitendra Nath Mukherjee and others **AIR 1928 Cal. 275;** *Sri Raja Kakadapudi Venkata Sudarshana Narasayyamma and others v. Andhra Bank Ltd., Vijayawada and others,* **AIR 1960 AP 273;** *Ramautar Singh v. Ramsundari Kur.,* **AIR 1959 Pat 585;** *Leo Sequiera v. Magdalene Sequiers Bai and others,* **AIR 1971 Mysore 143 and** *Smt. Usharani Roy v. Smt. Hemlata Roy* **AIR 1946 Cal. 40 – relied on.** C

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Salton v. New Beeston Cycle Company **(1899) 1 LR.Ch.D. 775;** *Re Lighton* **ER (1 HAGG. ECC) 569 and** *RE Henrietta Johnson* **ER (1 SW&TR-18) 609 – referred to.**

Williams on Executors, **15th Edition page 34 – referred to.** E

17. GPB was held to have caveatable interest on the premise that he was named as an executor. He, therefore, has rightly been held to have a caveatable interest. An application for grant of probate of 1982 Will is also pending. Therein a contention has been raised by the first respondent that the said Will was not genuine. If respondent No.1 has a caveatable interest in respect of 1982 Will, GPB would not have any right in respect of 1999 Will. [Para 164, 165] [718-G-H; 719-A] F

18.1 So far as the case of YB is concerned, his appointment as an executor has been upheld by the High Court. It was, however, opined that by reason thereof, he did not acquire any caveatable interest. RSL has filed an appeal against that part of the judgment whereby his appointment as an executor of the Will of MPB of 1992 in G H

A place of PDB has been upheld. For the reasons stated in regard to the legal position governing the filling up of vacancy of one of the named executors by the others, the appointment of YB as an executor of the Will of MPB in place of PDB cannot be sustained. It is not a case of YB B that PDB had assumed office or the purported Will of MPB had been given effect to. Genuineness of the said Will is in question. KKB has already filed an application for grant of probate in respect of the said Will. As there is nothing to show that any vacancy has been created by reason of C death of PDB, YB could not have been appointed in her place at this stage. The vacancy has to be filled up in terms of the instrument or in accordance with law. It cannot be directed to be filled in equity by a Court of Law. [Para 166, 167] [719-B-F]

D 18.2 Only because YB has a right to maintain a suit for purported enforcement of the Mutual Wills, the same by itself cannot confer upon him a caveatable interest. There exists a distinction between an executor named by the testator in the Will and an executor who is appointed E on a purported vacancy arising out of death of another executor. In the latter case such an appointment may not be valid. In a case of this nature YB could not be held to have caveatable interest only by reason of such an appointment as here is nothing on record to show that F PDB had enjoyed the benefit under the said Will and not as an heir of MPB. If the Will had not been given effect to for such a long time, there is no reason as to why the terms thereof should be directed to be acted upon at this juncture and/or in terms thereof dispute between the G parties in this behalf cannot be adjudicated upon at an interlocutory stage. [Para 168, 169] [719-G-H; 720-A-B]

18.3 The affidavit of assets annexed by the Birlas to their petition for grant of probate in respect of 1982 Will of MPD and the affidavit of assets annexed by them to the H petition for grant of probate of 1982 Will of PDB show that

the assets held by the former mentioned in the petition for probate of his Will of 1982 are also shown as assets of PDB. [Para 172] [721-H; 722-A-B]

Mrs. Hem Nolini Judah (since deceased) and after her legal Representative Mr. Marlean Wilkinson v. Isolyne Sarojbashini Bose and others AIR 1962 SC 1471 – referred to.

19. A suit contemplated under Section 92 of the Code of Civil Procedure cannot be equated with a probate. In a suit under Section 92 of the Code of Civil Procedure, the title of the donor may be disputed. Such a question as of necessity must be gone into by the court which, however, is a forbidden domain for the Probate Court. [Para 173] [722-B-C]

Sirajul Haq Khan & Others v. The Sunni Central Board of Waqf, U.P. and Others 1959 SCR 1287 – referred to.

20. Provisions of Section 73 of the Indian Trust Act have limited application. Applicability thereof would arise when a trustee disclaims, dies or is absent from India for a period of more than six months or leaves India for the purpose of residing abroad or is declared an insolvent etc. Prima facie BKB or YB were not appointed as trustee. They were only appointed as executors. An executor becomes a trustee only upon completion of administration of trust. This proposition does not appear to be in dispute. Administration of trust being incomplete, MPB did not become an executor. He, therefore, was not a trustee. Provisions of Section 73 of the Indian Trusts Act will, therefore, have no application. In the Will of PDB executed in the year 1982 he was merely named as an executor. It is also difficult, at this stage, to construe the Will of 1982 of PDB as an instrument of trust. The question in regard to the administration of the estate of PDB only arose after her death which took place in 2004. MPB died in 1990. The said provisions, therefore, have no

A application. [Para 174, 175] [722-E-H; 723-A]

21. Why an owner of the property executes a Will in favour of another is a matter of his/her choice. One may by a Will deprive his close family members including his sons and daughters. She had a right to do so. The court
B is concerned with the genuineness of the Will. If it is found to be valid, no further question as to why did she do so would be completely out of its domain. A Will may be executed even for the benefit of others including animals. Various documents have been placed on behalf of the
C first respondent to show that MPB was not happy in regard to management of Birlas' Group of Companies and by the division thereof which took place after the demise of G.D. Birla in 1983. Indisputably, however, they were separate. They were in the control and management of
D their respective companies. The group of companies managed by MPB and PDB were known as M.P. Birla Group of Companies. There are other companies, named separately, in the name of individual group of Birlas. According to the first respondent he had closely been
E involved in the M.P. Birla Group of Companies and had been inducted as Director/Co-Chairman/Chairman of various M.P. Birla Group of Companies during the lifetime of PDB. Other persons belonging to Birla family were not so involved. In fact according to the appellants
F themselves, the first respondent was a man of trust so far PDB is concerned. Thus, the submission that RSL is an outsider does not appeal to this Court to determine the issues in favour of Birlas. [Para 176, 177, 178 and 179] [723-B-G; 724-F]

G 22. It has already held that GPB has caveatable interests as executor of MPB in respect of his Will of 1982. Therefore, there is no reason why RSL would not have a caveatable interest being a beneficiary under the 1999 Will in the proceedings for grant of probate of the Will of MPB
H dated 13th July, 1982. If the grounds taken in the appeal

are to be upheld, the same ex facie would destroy the case of the appellants in the other cases. [Para 181] [724-H; 725-A-B]

23.1 Filing of Civil Suit No.221 of 2004 does not bar considering the caveatable interest and as this Court is not called upon to decide the maintainability of the said suit at this stage, no observation is made thereupon. [Para 182] [725-C]

23.2 The High Court was right in opining that a caveatable interest may arise only after suit for enforcement of mutual Will is decreed and not prior thereto. [Para 183] [725-D]

24. Keeping in view the facts and circumstances of the case, the probate proceedings should be taken up for hearing by the High Court as expeditiously as possible. The High Court is requested to consider this aspect of the matter. Probate proceedings may also be taken up for hearing one after the other. Probate proceeding of RSL in respect of Will of PDB executed in the year 1999 should be taken up first. The hearing of the probate proceeding of Will of MPB of 1982 may be taken up immediately thereafter. Judgments may be delivered, if possible, at the same time. The suit filed by the executors of the two 1982 Wills being Civil Suit No. 221 of 2004 may be taken up for hearing only after the disposal of the probate proceedings, if necessary. [Para 185, 186, 187] [725-G-H; 726-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2277 of 2008.

From the Judgment and Order dated 21.12.2006 of the High Court of Judicature at Calcutta in G.A. No. 1429 of 2005 in A.P.O.T. No. 284 of 2005 in A.P.O. No. 242 of 2005.

WITH

Civil Appeal Nos. 2278, 2274, 2276, 2279 and 2275 of 2008.

A Ram Jethmalani, Shyam Sarkar, Mahesh Jethmalani, K.K. Venugopal, Dushyant Dave, Arun Jaitley, Bhaskar P.Gupta, Harish N. Salve, A.K. Mitra, Indira Jaisingh, P.H. Parekh, Pratap Chatterjee, Anindya Kumar Mitra, Abnhrajit Mitra, Nand Gopal Khaitan, Ajay Bhargava, Atul Shankar Mathur, Vanita Bhargava, B Akhil Sibal, D.N. Sharma, Nupor Mukherjee (for M/S. Khaitan & Co.), B.A. Ranganadhan, Amit Sibal, Abhradt Mitra, D. Mandal, Sanjiv Trivedi, Sameer Parekh, E.R. Kumar, Ankur Chawla, Minakshi Grover, Ranjeeta Rohatgi, Mary Mitgy, Sumit Goel, Arjun Garg, Pallavi Srivastava, Pawan, Rukmini Bobde, C Meenakshi Chatterjee (for M/s P.H. Parekh & Co.), Ashish Jha, Pratap Chatterjee, Indraneel Ghosh, Sangeeta Mandal, D. Mandal, Sanjiv Trivedi, Jayasree Singh and Swati Sinha (for M/ s Fox Mandal & Co.) for the appearing parties.

The Judgment of the Court was delivered by

D

S.B. SINHA, J. 1. Leave granted.

INTRODUCTION

2. What is a caveatable interest within the meaning of the Indian Succession Act, 1925 (1925 Act) vis-a-vis the Rules E framed by the Calcutta High Court in the year 1940 is the question involved herein.

BACKGROUND FACTS

3. Smt. Priyamvada Devi Birla (PDB) and her husband F Madhav Prasad Birla (MPB) were admittedly very wealthy persons. They owned an industrial empire known as the MP Birla Group of Industries. They were issueless and known for their charitable disposition. They used to run several charitable institutions.

G

4. Both MPB and PDB are said to have executed mutual wills on identical terms on or about 10th May, 1981 bequeathing his/her respective estate(s) barring certain specific legacies to the other and on the death of the survivor to the 'charities' to be nominated by the executors. However, the said wills were

H

revoked and another set of mutual wills were executed on 13th July, 1982 in terms whereof, four executors were appointed in each set of Will (1982 Will).

The executors nominated in MPB's Will were :-

1. Smt. Priyamvada Devi Birla (PDB)

2. Krishna Kumar Birla (KKB)

3. Kashinath Tapuria and

4. Pradip Kumar Khaitan ;

Whereas the executors nominated in PDB's will were :-

1. Madhav Prasad Birla (MPB)

2. Ganga Prasad Birla (GPB)

3. Kashinath Tapuria

4. Pradip Kumar Khaitan

5. MPB died on 30th July, 1990.

6. On or about 18th April, 1999, PDB executed her last Will (1999 Will) bequeathing her entire estate to the first respondent i.e. Rajendra Singh Lodha (RSL). He was also appointed as the sole executor. She executed a codicil on 15th April, 2003.

7. PDB died on 3rd July, 2004.

PROCEEDINGS BEFORE THE HIGH COURT

8. KKB, BKB, and Yashovardhan Birla (YB), the appellants herein, having come to learn of the execution of the said Will filed caveats on 14th July, 2004 to oppose the grant of probate of the 1999 Will. Ganga Prasad Birla (GPB) and Smt. Laxmi Devi Newar also entered caveats on 19th July, 2004.

9. In his application for grant of probate, GPB accepted that Smt. Laxmi Devi Newar and Smt. Radha Devi Mohatta were the heirs and legal representatives of PDB. In the said

application, Pradip Kumar Khaitan and Kashinath Tapuria were also parties.

10. On or about 19th July, 2004 the first respondent, RSL filed an application for grant of probate of 1999 Will (P.L.A. No. 204 of 2004) before the High Court of Calcutta showing Smt. Laxmi Devi Newar and Smt. Radha Devi Mohatta, the two sisters of MPB, as the only heirs and legal representatives of the testatrix.

11. Smt. Radha Devi Mohatta also entered a caveat on 22nd July, 2004.

12. First respondent took out an application which was marked as GA No.2721 of 2004 seeking discharge of caveats entered by or on behalf of KKB, BKB, GPB and YB before the High Court of Calcutta. Appellants as also Smt. Laxmi Devi Newar filed their respective affidavits in support of the respective caveats filed on 30th July, 2004. An affidavit in support of her caveat was also filed by Smt. Radha Devi Mohatta.

13. The executors of the 1982 Wills filed two applications being P.L.A. No. 241 of 2004 for grant of probate of the Will of MPB dated 13th July, 1982 and P.L.A. No. 242 of 2004 for grant of probate of the Will of PDB dated 13th July, 1982 before the Calcutta High Court on 17th August, 2004 purported to have been executed by MPB and PDB, indisputably on the premise that even if the probate of the 1999 Will executed by PDB is granted in favour of the first respondent, he would be under an obligation to abide by the directions contained in the purported mutual Wills.

14. A suit was filed by the surviving executors of the two 1982 Wills before the Calcutta High Court which was numbered as C.S. No.221 of 2004 claiming inter alia for a declaration that the first respondent as the alleged executor and sole beneficiary of the 1999 Will of PDB is not entitled to deal with the assets of PDB in any manner contrary to and inconsistent with the terms of the 1982 Will. The cause of action for the said suit was founded on the doctrine of mutual Wills.

15. Two deeds of appointments dated 23rd August, 2004 and 24th August, 2004 were also executed appointing YB and BKB as surviving executors of the Wills of MPB and PDB (1982 Wills) in place of PDB and MPB respectively. Whereas appointment of YB was accepted; that of BKB was not.

16. An application (G.A. No. 2721 of 2004) was filed by the first respondent to discharge the caveators viz. KKB, BKB, GPB and YB before the Calcutta High Court.

HIGH COURT JUDGMENTS

17. A learned Single Judge of the High Court allowed the said application of discharge of the caveats filed by KKB, BKB and YB. However, the caveat filed by GPB was retained. It may be placed on record that the first respondent, RSL, also entered into a caveat in the proceedings arising out of an application for grant of probate of 1982 Wills. Application for discharge of caveat of RSL was also dismissed.

18. Appeals were filed under clause 15 of the Letters Patent of the Calcutta High Court before the Division Bench of the Calcutta High Court thereagainst. Cross-objections were filed by RSL in the said appeal against retaining the caveat filed by KKB, BKB and YB as also the appointment of YB as the executor of MPB. The appeals as also the cross-objections have been dismissed by the Division Bench of the Calcutta High Court by reason of the judgment impugned herein.

PROCEEDINGS BEFORE US.

19. We may, at the outset, notice the details of the SLPs filed by the parties herein :-

1. SLP (Civil) No.2089 of 2007 has been filed by Krishna Kumar Birla (KKB) against the order of discharge of his caveat in P.L.A. No.204 of 2004.

2. SLP (Civil) No. 2090 of 2007 has been filed by Basant Kumar Birla (BKB) against the order of discharge of his caveat in P.L.A. No.204 of 2004.

3. SLP (Civil) No. 2091 of 2007 has been filed by Yashovardhan Birla (YB) against the order of discharge of his caveat in P.L.A. No. 204 of 2004.

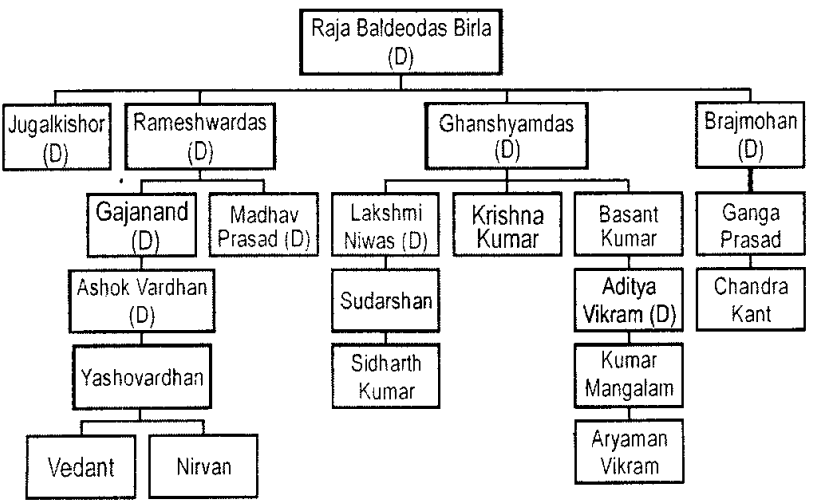
4. SLP (Civil) No. 10571 of 2007 has been filed by Rajendra Singh Lodha (RSL) against the refusal of order of discharge of caveat filed by Ganga Prasad Birla (GPB) in P.L.A. No. 204 of 2004.

5. SLP (Civil) No. 19040 of 2007 has been filed by Krishna Kumar Birla (KKB) against non-discharge of caveat of Rajendra Singh Lodha in the goods of MPB.

6. SLP (Civil) No. 10176 of 2007 has been filed by Rajendra Singh Lodha (RSL) challenging appointment of Yashovardhan Birla (YB) as an executor of the Will of Madhav Prasad Birla of 1982 in place of Priyamvada Devi Birla (PDB).

FAMILY OF BIRLAS

20. Before embarking on the questions raised in these appeals we may notice the genealogy of the family of the testatrix-



21. Krishna Kumar (KKB) and Basant Kumar (BKB) are the cousins of Madhav Prasad (MPB); whereas Yashovardhan (YB) is the grand son of sister of MPB.

22. It is stated that PDB was also related to KKB through his wife.

23. Relationship between the parties is not in dispute. It is also not in dispute that MPB left behind two sisters Smt. Laxmi Devi Newar and Smt. Radha Devi Mohatta, who are his as also PDB's heirs and legal representatives.

STATUTORY PROVISIONS

24. Provisions relating to grant of 'Probate' is contained in Chapter IV of the 1925 Act.

25. Section 283 of the 1925 Act enumerates the powers of the District Judge. Section 283(1)(c) of the 1925 Act confers power upon the District Judge to issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of 'Probate' or 'Letters of Administration'. Sub-section (2) of Section 283 postulates that the citation shall be fixed up in some conspicuous part of the court-house, and also the other spaces as specified therein. Section 284 of 1925 Act provides for the lodging of caveats against grant of Probate or Letter of Administration with a copy of the Will annexed with a District Judge or a District Delegate.

26. The form in which caveat is entered has been prescribed in Schedule V appended to the Act, is to the following effect :-

"SCHEDULE
[See section 284 (4)]
FORM OF CAVEAT

Let nothing be done in the matter of the estate of A, B,, late of _____ deceased, who died on the day of ____ at _____ without notice to C.D. of _____"

A 27. The Calcutta High Court framed rules laying down the procedure for dealing with the applications filed before it in its testamentary and intestate jurisdiction.

28. It is contained in Chapter XXXV thereof. Rule 4 provides for "Application for probate or letters of administration, B or a certificate". Rule 5(a) inserted in the year 1948 provides that in all applications for grant of Probate or Letters of Administration with the Will annexed, the names of the members of the family or other relatives upon whom the estate would have devolved in case of an intestacy together with their present place C of residence shall be stated. Rule 24 provides for filing of caveat on the same terms as contained in Section 284 of the 1925 Act. Rule 25 provides for "Affidavit in support of the caveat" in the following terms :-

D "25. Affidavit in support of caveat. – Where a caveat is entered after an application has been made for a grant of probate or letters of administration with or without the will annexed, the affidavit or affidavits in support shall be filed within eight days of the caveat being lodged, notwithstanding the long vacation. *Such affidavit shall state* E *the right and interest of caveator, and the grounds of the objections to the application."* (emphasis added).

29. Rule 26 provides for "Notice to caveator to file affidavit". It reads as under:—

F "26. Notice to caveator to file affidavit. – Where an application for grant of probate or letters of administration with or without the will annexed is presented after a caveat has been filed,, the Registrar shall forthwith issue notice to the caveator, calling upon him to file his affidavit or G affidavits in support of his caveat within eight days from the service of such notice."

30. Rule 27 provides for the "Consequence of not filing the affidavit". Rule 28 provides that upon the affidavit being filed in support of the caveat (Notice whereof shall immediately be H

given by the caveator to the petitioner), the proceedings shall, by order of the Judge upon application by summons be numbered as a suit in which the petitioner for probate or letters of administration shall be the plaintiff and the caveator shall be the defendant, the petition for probate or letters of administration being registered and deemed as a plaint filed against the caveator, and the affidavit filed by the caveator being treated as his written statement in the suit.

31. Rule 29 provides for service of "Notice to prove will in solemn form" in the following terms :-

> "29. Notice to prove will in solemn form, - The party opposing a will may, with his affidavit, give notice to the party setting up the will that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall not, in any event, be liable to pay the costs of the other side, unless the Court shall be of opinion that there was no reasonable ground for opposing the will."

32. Rule 30 provides for "Trial of preliminary issue" as under :-

> "30. Trial of preliminary issue. – The Court may, on the application of the petitioner by summons to the caveator before making the order mentioned in rule 28, direct the trial of an issue as to the caveator's interest. Whereupon the trial of such issue, if it appears that the caveator has no interest, the Court shall order the caveat to be discharged, and may order the issue of probate or letters of administration, as the case may be."

33. We may also take note of Section 73 of the Indian Trusts Act, 1882, which reads as under :-

> "Section 73 - Appointment of new trustees on death, etc. Whenever any person appointed a trustee disclaims, of any trustee, either original or substituted, dies, or is for a

A continuous period of six months absent from India, or leaves India for the purpose of residing abroad, or is declared an insolvent, or desires to be discharged from the trust, or refuses or becomes, in the opinion of a principal civil court of original jurisdiction, unfit or personally B incapable to act in the trust, or accepts an inconsistent trust, a new trustee may be appointed in his place by—

(a) the person nominated for that purpose by the instrument of trust (if any), or

C (b) if there be no such person, or no such person able and willing to act, the author of the trust if he be alive and competent to contract, or the surviving or continuing trustees or trustee for the time being, or legal representative of the last surviving and continuing trustee, or (with the consent of the court) D the retiring trustees, if they all retire simultaneously, or (with the like consent) the last retiring trustee.

Every such appointment shall be by writing under the hand of the person making it.

E On an appointment of a new trustee the number of trustees may be increased.

The Official Trustee may, with his consent and by the order of the court, be appointed under this section, in any case F in which only one trustee is to be appointed and such trustee is to be the sole trustee.

The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a G continuing trustee include a refusing or retiring trustee if willing to act in the execution of the power."

SUBMISSION :

34. Mr. Ram Jethmalani, the learned senior counsel H appearing on behalf of the Appellant, KKB would submit

(i) A caveat being maintainable at the instance of common ancestors and near relatives of the testator, the impugned judgment discharging the caveat is wholly unsustainable.

(ii) Appellant being an executor of the 1982 Will executed by the husband of PDB namely MPB, has a caveatable interest.

(iii) Both the learned Single Judge and the Division Bench of the High Court although recognized such a right, but, committed a serious error in opining that the same does not constitute a caveatable interest without considering the legal position, namely, that the caveaters had obligations to see that the will of MPB be made effective in letter and spirit so that all the bequeathed properties are applied towards charitable disposition, particularly when a suit for the said purpose has been filed.

(iv) The High Court committed a manifest error in ignoring the effect of the suit despite holding that if the suit succeeds, a caveatable interest would accrue to them.

(v) Appellants having a two fold duty to see that RSL, (1) in the event the probate is granted, applies the estate of the deceased subject to charitable disposition; and (2) that he will not take it as his absolute properties; the same thus gave rise to a right and interest under and through which a caveat could be maintained by them.

(vi) The caveators, being co-sharers of the testatrix in respect of Kumaon Orchards wherefor an agreement had been entered into on 15th July, 1997 conferring a right of pre-emption against any co-sharer, must be held to have sufficient interest in the estate.

(vii) As the properties were to be applied for charitable

A disposition, Section 92 of the Code of Civil Procedure would be attracted in terms whereof interest must be shown to be exiting in relation to the trust and not the trust property. Our attention in this behalf has been drawn to the fact that the words "direct interest" B occurring therein were substituted by the word "interest" only.

(viii) Rule 30 of the Calcutta High Court Rules is ultra vires Section 295 of the 1925 Act in so far as it lays down a purported qualification for entering into a C caveat, although no such requirement is provided thereunder.

(ix) As the judicial precedent prior to 1925 would apply even in the post-1925 era, the High Court should have proceeded on the basis that the qualifications D which are necessary for the purpose of having a caveatable interest would be the same even for revocation.

(x) The resultant trust involved in execution of mutual E Wills must be construed having regard to the surrounding circumstances, as in all such cases the person making the latter Will was a party to the earlier one. As the testatrix in this case purportedly has gone back on her agreement and the case of the appellant F being that she never changed her mind as she did not execute the 1999 Will, the right of the appellants had a right to enter a caveat in the probate proceedings.

(xi) In the proceeding for grant of the Probate of the 1982 G Will of MPB, RSL did not have any caveatable interest as he has no interest in his property.

35. Mr. K.K. Venugopal, learned senior counsel appearing for BKB, supplementing the argument of Mr. Jethmalani submitted : H

(i) The High Court has committed a serious error in holding that the appointment of BKB in place of MPB in his Will could not have been filled up as he expired during the life time of PDB.

(ii) In view of the contention of the appellants that the 1999 Will is a bogus one, the vacancy could be filled up in equity.

(ii) BKB having a special interest in the charitable disposition of the properties of PDB has, a caveatable interest in terms of Section 232 of the 1925 Act.

(iii) As by reason of the agreement dated 15th July, 1997, the parties agreed that a stranger to the family should not enjoy any property, there being a clog on the right to sell the same, the same must be held to be applicable also in a case of gift or will.

(iv) Appellants being the cousins and, thus, being interested in the spiritual wellbeing of the trustee, were also entitled to enter their respective caveats.

(v) Since the extent of right of a person for lodging a caveat had not been laid down under a statute, the decisions rendered from time immemorial holding that only a bare right (which would also mean a bare contention, i.e., which would give rise to an arguable point at the hearing constitutes a caveatable interest) should be held to be still a good law.

(vi) Section 283(1)(c) of the 1925 Act should not be treated to be the sole repository for the purpose of determining the right of a caveator. The interpretation of the word "caveat", if given its natural meaning, the same would mean a right to oppose.

36. Mr. Arun Jaitley, learned senior counsel appearing on behalf of YB urged :-

A (i) YB being a grandson of the brother of MPB and his appointment as the executor in terms of the deed of appointment dated 24th August, 2004 having been accepted, the High Court must be held to have committed a manifest error in holding that he had not
B acquired a caveatable interest.

(ii) YB being a party to the suit could oppose execution of the Will having regard to the fact that he has shown existence of an interest in all the three sets of proceedings, viz, grant of Probate of 1982 Wills,
C grant of Probate of 1999 Will and the suit filed by the members of the Birla family to enforce the agreement of MPB and PDB in terms of the 1982 Wills executed by them.

D (iii) Determination of validity of the Wills being interdependent, inasmuch as, in the event probates are granted in respect of the 1982 Wills, then the 1999 Will could not be implemented; and even in the event, probate in respect of 1999 Will is granted, the suit can still be decreed so as to give effect to the
E mutual wills.

(iv) YB had a right to maintain the suit on the premise that the properties should be given to charity, thus, had a right to challenge the 1999 Will at the threshold.

F (v) The High Court committed a manifest error in opining that caveatable interest would depend upon the decree to be passed in the suit instead of a right to maintain the suit.

G (vi) In any view of the matter, when there exists two Wills, a person who can challenge a rival will, will have a caveatable interest in respect thereof.

37. Mr. Harish N. Salve, learned senior counsel appearing on behalf of RSL, on the other hand, would contend :

H

(a) A caveatable interest having regard to phraseology used in Section 284 of the 1925 Act would mean a real interest which the caveator could have derived in the estate of the deceased in the event the grant of probate is refused.

(b) In view of the provisions of Hindu Succession Act, 1956 that there being no possibility of any person other than heirs to derive a remote interest in the estate of the deceased, the decisions of various High Courts to the effect that the reversioner and/or distant relatives would have a caveatable interest are no longer good law.

(c) A caveatable interest being different from the right of a person to oppose grant of probate on the basis of title, the impugned judgments should not be interfered with.

(d) Consideration in regard to locus standi to maintain a Public Interest Litigation or a suit under Section 92 of the Code of Civil Procedure is irrelevant for determination of issues arising in a probate proceeding. The said contention having not been raised in the affidavit filed by any of the appellants herein before the High Court, should not be permitted to be raised before this Court for the first time. In any event by taking recourse to the said provision, the nature and character of a probate proceeding cannot be changed.

(e) The claim of the appellants to have a caveatable interest in their capacity as agnates is wholly unsustainable as the sisters of MPB are alive. They do not have a caveatable interest even as executors of the Will of MPB of 1982 or otherwise.

(f) 1982 Will of MPB is not affected by the 1999 Will, particularly, when appellants are not the legatees

A thereunder and as such the question of surviving executor deriving any interest in his place would not arise.

(g) An executor under a Will would not remain an executor upon his ceasing to hold the said office or by a renouncement or his removal or death, but, such contingencies having not taken place, no purported vacancy had arisen, and thus, the question of filling up the same does not arise.

C (h) As mutual Wills are not rival Wills, persons claiming as executors of the Will of MPB did not derive any caveatable interest, as they remained unaffected by subsequent Wills.

(i) In regard to the SLP filed by R.K. Lodha, for refusing D him to be impleaded as a party on the plea that he had no caveatable interest, it was submitted that having regard to the contention that MPB did not execute any Will, he should have been impleaded as a party as representative of PDB.

E (j) Reference to Section 263 of the 1925 Act and the decisions rendered thereupon are wholly irrelevant as considerations for applications thereof have nothing to do with the application under Sections 283 and 284 thereof.

F 38. Mr. Anindya Kumar Mitra, learned senior counsel appearing in some of the matters for RSL urged:

(i) The 1925 Act having retained the phraseologies used in the earlier as well as the successor Acts, the same G meaning to the words as was earlier operating, should be assigned.

(ii) Rules of the Calcutta High Court, having been framed in terms of Section 122 of the Code of Civil Procedure, 1908, are valid in law.

H

(iii) Theory of mutual Wills do not stand in the way of grant of probate of a later Will.

COMPARATIVE PROVISIONS OF THE 1881 ACT AND THE 1925 ACT

39. Grant of probate or Letters of Administration with a copy of the Will annexed, used to be governed by the Probate and Administration Act, 1881 (for short "the 1881 Act") Rules were framed by the Calcutta High Court in terms of the provisions thereof.

40. We may briefly notice that Section 69 of the 1881 Act corresponds to Section 283 of the 1925 Act. Section 70 of the 1881 Act corresponds to Sub-sections (1), (2) and (3) of Section 284 of the 1925 Act, whereas Section 71 of the 1881 Act corresponds to sub-section (4) of Section 284 of 1925 Act.

41. The statement required to be made as envisaged in Schedule V of the 1925 Act was a part of Section 71 of the 1881 Act. Section 72 of the 1881 Act corresponds to Section 285 and Sections 73 and 83 of the 1881 Act correspond to Sections 286 and 295 of the 1925 Act.

42. The validity of the Rules framed by the Calcutta High Court will have to be considered having regard to the provisions of the 1881 Act.

We shall advert to the said question a little later.

THE WILLS

43. The Relevant terms of Will of MPB executed on 13th July, 1982 as also those of the Will executed by PDB may be noticed at this juncture.

44. MPB by his Will appointed four executors including his wife. By reason thereof, he bequeathed all his properties to his wife and only in the event of his wife predeceasing him, the executors were to make over and/ or donate and/or settle for public charitable purposes the estate as they might think fit and

A proper.

Clause 3 of the 1982 Will reads as under:

"3. Subject to the provisions of Clause 2 above, the Executors will have power to donate the estate to one or
B more public charitable trusts, societies or institutions and/ or establish one or more public charitable trusts, societies or institutions for public charitable objects as they may think fit."

45. The Will purported to have been executed by PDB was
C on the same terms except that one outsider executor named therein was different, which we have noticed hereinbefore. She also bequeathed her properties in favour of MPB. She, however, sought to bequeath all ornaments and jewelleries, gold coins and articles to the three daughters of K.K. Birla absolutely in
D equal proportion. Clause 4 of the said Will is on similar basis to Clause 3 of the Will of MPB.

46. It is of some significance that Shri P.L. Agarwal and Shri S.J. Khaitan are attesting witnesses to the said Wills.

E 47. PDB executed the disputed Will on 18th April, 1999, in terms whereof any Will made prior thereto stood cancelled. In the said Will, she categorically stated that she had been running several business concerns and also managing properties and institutions, bequeathed to her, in the true and sincere spirit of a
F trustee for the larger benefit of the country and of the interest of shareholders and workers.

48. She nominated the first respondent as her legatee. Except the fact that Shri P.L. Agarwal of Khaitan and Company is also an attesting witness, it is not necessary for us to notice
G the other stipulations made therein.

49. On or about 15th April, 2003, a Codicil was executed with a view to avoid any confusion or ambiguity in the 1999 Will. By reason thereof, certain declarations were made and some
H directions were also issued to the first respondent.

THE SUIT (CS NO. 221 OF 2004)

50. The suit was instituted by the purported three executors of both the Wills. Both the said Wills were said to have been made over to Kashinath Tapuria; one of the appointed executors thereunder. He is said to have produced the same only after the death of PDB. It is stated that upon the death of MPB on 30th July, 1990, PDB as a beneficiary of her husband's Will came to possess, own and control his estate and, thus, had taken and enjoyed the benefit under the said Will until her death on 3rd July, 2004.

51. The averments in the plaint of the said suit proceeded on the basis that the Will dated 18th April, 1999 and Codicil dated 15th April, 2003 were not genuine. It was contended that PDB had only a life interest in the estate and, thus, she was incompetent to dispose of her own or the combined estate by alienation or dissipation in a manner inconsistent with the terms and tenor of the mutual Wills. The validity of the said Will was also questioned.

Paragraph 15 of the plaint reads as under:

> "15. Even on the footing that the said purported will dated 18th April 1999 is genuine and valid and had to the effect of revoking the earlier will of Smt. Priyamvada Devi Birla dated 13th July, 1982, the plaintiffs would contend that on her death, the defendant as alleged executor of the said purported will must hold the estate of Smt. Priyamvada Devi Birla, now representing the combined estates of Madhav Prasad Birla and Smt. Priyamvada Devi Birla, in trust for the agreed ultimate beneficiaries of the mutual wills viz. charities which might be set up or nominated by the executors of the will dated 13th July 1982 of Smt. Priyamvada Devi Birla."

52. According to the plaintiffs, they, as executors of the said Wills, became entitled to take possession of the entire estate, make over, donate or settle the same for public charitable

A purposes or to establish any public charitable trust at their absolute discretion. A plea of constructive trust on the basis of the said Wills was also raised.

53. The defendant's right of sole beneficiary of the said Will dated 18th April, 1999 was questioned, stating:

B

"17. The defendant as alleged executor and sole beneficiary of the said purported will dated 18th April, 1999 is not entitled to put any impediment to or interfere with the implementation of the said trust."

C

54. The reliefs prayed for in the said suit inter alia are:

"a) Declaration that the defendant as the alleged executor and sole beneficiary of the purported will dated 18th April 1999 and/ or purported Codicil dated 15th April 2003 allegedly made by Smt. Priyamvada Devi Birla is not entitled to deal with the estate of Smt. Priyamvada Devi Birla in a manner inconsistent with the provisions of the Will dated 13th July, 1982 executed by Smt. Priyamvada Devi Birla, save to the extent of making over the said estate to the Plaintiff for the purpose of implementing the provisions of the said Will dated 13th July, 1982 made by Smt. Priyamvada Devi Birla."

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55. The plaint was drawn by Khaitan and Company. One of its parties is also a defendant in the probate proceedings. Pradip Kumar Khaitan is a party in the suit. He is an executor. Witnesses to the said Will are Khaitans. They are also working as Advocates in the proceedings instituted by or against Birlas.

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ANALYSIS OF THE 1925 ACT

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56. The 1925 Act is a self contained Code. An application for grant of probate is to be filed in terms of Sections 275 and 276 thereof. Particulars stated in the said provisions are to be furnished by the applicant. The petition for grant of probate is to be signed and verified. Citations in terms of Section 283 (1)(c) are to be issued calling upon all such persons who claim to

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have any interest in the estate of the deceased. Citations are issued in order to enable such persons to see the proceedings before the grant of probate and if necessary to oppose the same.

57. Such persons to whom citations have been issued whether general or special, may file a caveat. All proceedings are required to be taken only upon service of notice to the caveator(s). Section 286 uses the word "contention" to mean appearance of any one in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf, to oppose the proceeding. In the contentious cases the procedures which are required to be adopted are specified in Section 295.

58. Only because neither in Section 284 nor Section 295 a caveator is required to show any interest in the estate of the deceased, whether the same would mean that anybody and everybody who intends to oppose the grant of probate would be entitled to lodge caveat, is the question.

59. The 1925 Act in this case has nothing to do with the law of inheritance or succession which is otherwise governed by statutory laws or the custom, as the case may be.

It makes detailed provisions as to how and in what manner an application for grant of probate is to be filed, considered and granted or refused. Rights and obligations of the parties as also the executors and administrators appointed by the court are laid down therein. Removal of the existing executors and administrators and appointment of subsequent executors are within the exclusive domain of the court. The jurisdiction of the Probate Court is limited being confined only to consider the genuineness of the Will.

A question of title arising under the Act cannot be gone into the proceedings. Construction of a Will relating to the right, title and interest of any other person is beyond the domain of the Probate Court.

60. A person to whom a citation is to be issued or a caveator, must have some interest in the estate of the testator.

A Any person claiming any interest adverse to the testator or his estate cannot maintain any application before the Probate Court. His remedy would be elsewhere. The question with regard to the degree of interest or the right which a caveator must show to establish his or her caveatable interest before the Probate
B Court should be considered having regard to the aforementioned legal propositions.

CAVEATABLE INTEREST

61. Appellants herein have raised a large number of
C contentions to show that they have a caveatable interest.

We may categorize them as under:

(i) Mutual Will;

(ii) Family interest;

D (iii) Spiritual well-being of the testatrix

(iv) Pre-emption : Future domain doctrine;

(v) Preferential right - being executors of 1982 Will;

(vi) Executor appointed in place of original Executor;

E (vii) Executor appointed in place of MPB in purported conformity with the 1982 Will of PDB, viz., YB.

Before dealing with each of the aforementioned contentions, let us consider what is meant by the term "Caveatable interest".

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62. It has not been defined under the Act. We may, therefore, notice the dictionary meaning of both the terms "caveat" and "interest".

Legal Thesaurus Regular Edition by William C. Burton
G defines "interest" as under :-

"**Interest** (Ownership), noun

Assets, belongings, claim, dominion, droit, holding lawful possession, part, participation, percentage of ownership,
H portion, possession, property, proprietorship, right, right

of ownership, rightful possession , seisin, share, stake, title

Associated Concepts : accounts bearing interest, assignable interest, beneficial interest, common interest, contingent interest, continuity of interest, controlling interest, future interest, interest in hand, joint interest, legal interest, legal rate of interest, life interest, person interested in a will, property interest, qualified interest, remainder interest, remaining interest, transit of interest, undivided interest.

63. "Caveat" has been defined in Random House Webster's Dictionary of the Law as under :-

"**caveat,** n. 1, a warning or caution; admonition.

2. In certain legal contexts, a formal notice of interest in a matter or property; for example, a notice to a court or public officer to suspend a certain proceeding until the notifier is given a hearing ; a caveat filed against the probate of a will.

64. Whereas the counsel for Birlas want us to take a liberal approach as contrasted to real interest, submission of Mr. Salve is that all caveators must have a real interest in the subject matter of the property.

SOME PRECEDENTS

65. What would be a caveatable interest in the facts and circumstances of the present case is the principal issue involved herein. With a view to find out an answer thereto, let us notice some precedents operating in the field.

66. A large number of decisions principally of the Calcutta, Bombay and Madras High Courts have been cited by the appellants to show as to what constitutes a 'caveatable interest'.

67. We may, however, at the outset, notice a decision of this Court in *Elizabeth Antony v. Michel Charles John Chown Lengera* [(1990) 3 SCC 333] which is binding on us. Therein,

A the testatrix, viz., one Mary Aline Browne, was the wife of one Herbet Evander Browne, the eldest son of John Browne. Mary died on 28th March, 1972. She had executed a Will on 12th March, 1962. An application for grant of a Letter of Administration with a copy of the Will annexed was filed by
B Michel. Petitioner Elizabeth Antony and her husband Zoe Enid Browne filed caveats on the plea that the said Will was a forged document. The petitioner therein also claimed that her daughter Browne had executed a Will on 23rd June, 1975 and she had executed a deed of gift in favour of the petitioner. She also
C claimed herself to be a trustee of John Browne Trust.

68. The Probate Court held that they had no caveatable interest. Caveatable interest, therefore, was claimed as an executor and legatee of the Will executed by Ms Zoe Enid Borwne as also a deed of gift in respect of one item of the estate
D executed in their favour. Caveatable interest was also claimed on the premise that the petitioner was appointed a trustee of John Browne Trust. This Court noticed a large number of High Court judgments. It was, however, opined that the petitioner therein failed to establish a caveatable interest stating:

E "...We have perused the entire order of the trial court in the context. Admittedly neither the original nor a copy of the will said to have been executed by Zoe Enid Browne, was filed. Now coming to the trust, it is in the evidence of PW 1 that John Browne Trust has come to an end in March
F 1972 and the same was not in existence. The trial court has considered both the documentary and oral evidence in this regard and has rightly held that the petitioner has no existing benefit from the trust. Likewise the registered gift deed or a copy of it has not been filed. Before the learned
G Single Judge of the High Court also same contentions were put forward. The learned Judge observed that from the objections filed by the caveator she desires the court in the probate proceedings to uphold her title on the strength of a gift deed and the trust deed. It is observed:

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"Equally, the petitioner has not placed before the court the will dated June 23, 1975 stated to have been executed by Zoe Enid Browne to establish that under the will dated March 12, 1962 stated to have been executed by Mary Aline Browne some interest given to the petitioner under the will dated June 23, 1975 of Zoe Enid Browne, is liable to be in any manner affected or otherwise displaced, by the grant of letters of administration in respect of the will dated March 12, 1962 stated to have been executed by Mary Aline Browne."

Accordingly the learned Judge held that the petitioner has not established that she has a caveatable interest justifying her opposition to the probate proceedings for grant of letters of administration. In this state of affairs, we are unable to agree with the learned counsel that the petitioner has caveatable interest."

69. This Court, thus, categorically opined that while granting a probate, the court would not decide any dispute with regard to title. A separate suit would be maintainable therefor. If probate is granted, they have a remedy in terms of Section 263 of the 1925 Act also.

70. In the recent judgment of *Kanwarjit Singh Dhillon v. Hardayal Singh Dhillon and others* [2007 (12) SCALE 282], this court inter alia relying upon *Chiranjilal Shrilal Goenka v. Jasjit Singh and Ors.* [(1993) 2 SCC 507] and upon referring to a catena of decisions of the High Court and this Court, held that Probate court does not decide any question of title or of the existence of the property itself.

In *Basanti Devi v. Raviprakash Ramprasad Jaiswal* [(2007) 12 SCALE 542], it is stated :

"21. The Probate Court, indisputably, exercises a limited jurisdiction. It is not concerned with the question of title. But if the probate has been granted subject to compliance of the provisions of the Act, an application for revocation

A would also lie."

71. *Abhiram Dass v. Gopal Dass* [ILR 17 Calcutta 48] is a decision of the Division Bench of the Calcutta High Court. In that case, the District Judge admitted the objection. It was held that rival titles set up by the caveator can be gone into. Setting
B aside the said judgment of the District Judge, the Division Bench of the High Court held:

> "... A person disputing the right of a deceased testator to deal with certain property as his own cannot be properly
C regarded as having an interest in the estate of the deceased. His action is rather that of one claiming to have an adverse interest..."

72. *Abhiram Dass* (supra) was followed by a Division Bench of the Bombay High Court in *Prijoshah Bhikaji v. Pestonji*
D *Merwanji* [12 Bom LR 366] stating:

> "...the interest which entitles a person to put in a caveat must be an interest in the estate of the deceased person, that is, there should be no dispute whatever as to the title of the deceased to the estate, but that the person who
E wishes to come in as caveator must show some interest in that estate derived from the deceased by inheritance or otherwise."

73. Madras High Court also took the same view in
F *Rahamtullah Sahib v. Rama Rau & Anr.* [ILR 17 Madras 373] opining:

> "this possibility should rest on existing facts and not on mere conjecture".

G 74. It is also of some significance to note that *Abhiram Dass* (supra) has been noticed by the Calcutta High Court in *Nikunj Kumar Lohia v. Narayan Prasad Garodia & Others* [1996 (1) CHN 205], *In the Goods of Mohammad Bashir (deceased)* [AIR 1964 Cal 34] and *Smt. Namita Singha v. Joydeb Chandra Paul* [AIR 2006 Cal 230]; by the Madras High
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Court in *M.S. Saraswathi v. M.S. Selvadurai & Anr.* [(1997) 3 LW 541 (Mad)]; and by the Bombay High Court in *Mrs. Perviz Sarosh Batliwalla & Anr. v. Mrs. Viloo Plumber & Anr.* [AIR 2000 Bom 189] and *Rajiv Ramprasad Gupta v. Rustom Sam Boyee* [AIR 2003 Bom 242].

75. Strong reliance has been placed by Mr. Jethmalani on *Nobeen Chander Sil and others v. Bhobosoondari Debee* [ILR 6 Calcutta 460]. Therein, Field, J. interpreting Section 242 of the 1925 Act opined that if any person can show that he was entitled to maintain a suit in respect of property over which probate would have effect, he possesses a sufficient interest to enter a caveat and oppose the grant of probate.

76. Such a suit, however, in our opinion must have a direct nexus with the estate of the testator and not to enforce a right in respect of the application of the estate of the testator under another will. Right to maintain a suit must be independent of the wills sought to be probated. No legal right accrues under an unprobated Will except in case where taking of probate is not mandatory. In *Nobeen Chander Sil* (supra) the appellants therein had a direct interest in disputing the Will. He had obtained a money decree against the testator. His share was under attachment. In the aforementioned factual backdrop, it was held:

> "What is the meaning of the expression "persons claiming to have any interest ?" It appears to me that the persons claiming to have any interest must be persons having such an interest as would entitle them to maintain a suit in respect of the subject matter of such estate – persons having, for example, such an interest as, according to the practice of the Court of Chancery, would entitle them to file a bill in a Court of Equity."

77. It contains two competing passages. One rendered by White, J. and another by Field, J.

White, J. stated:

"It is not necessary to consider whether the case cited by

A the District Judge is good law, for it does not determine the question with which we have to deal. In that case the parties opposing the probate were simple creditors of a person who was the heir of the deceased, supposing the testator had died without a will, and supposing also that
B he had not adopted a son. In the present case the appellants have a claim upon the immoveable property left by the testator – two of them as mortgagees of the persons who, if the testator left no will, are entitled to create the mortgage, and one of the appellants as the attaching
C creditor of one of these persons."

78. Field, J., however, expanded the ambit of 'caveatable interest'.

A suit which would be maintainable must have something
D to do with the estate of the testator. Inheritance by Will itself may be a subject matter of contention. Whether the interest claimed by the caveator is an established one or a bare claim must satisfy the test that there exists an interest in the estate of the testator and the same is not adverse thereto.

E The said decision has been followed by other High Courts as for example *G. Jayakumar v. R. Ramaratnam* [AIR 1972 Mad 212] wherein it was held :-

14. In support of this view, their Lordships quoted the observations of Field J., in the matter of the petition of
F Bhobosoonduri Dabee, ILR (1881) 6 Cal 460 to the following effect:—

> "As to the test of what constitutes a sufficient interest to entitle any particular person to be made a party,
G according to the view which I have already stated, I think it comes to this that any person has a sufficient interest who can show that he is a entitled to maintain a suit in respect of the property over which the probate would have effect under the provisions of Section
H 242 of the Indian Succession Act."

To the same effect is a decision of Calcutta High Court in *Nabin Chandra Guha v. Nibaran Chandra Biswas and others* [AIR 1932 Calcutta 734].

As would appear from the discussions made hereinafter, the said view, to our mind, is not entirely correct.

A caveatable interest was claimed therein on the basis of acquisition of a subsequent interest from the daughter of the testator. The District Judge held that he did not have a caveatable interest. The Calcutta High Court, interpreting Section 283 (1)(c) of the 1925 Act, held:

> "...And possibility of an interest does not apply to possibility of a party filling a character which would give him an interest but to the possibility of his having an interest in the result of setting aside the will..."

As the caveator acquired an interest from the daughter, he was said to have a caveatable interest.

79. Although we may not be very much concerned with the caveatable interest of the reversioners, a large number of decisions of the Calcutta and Madras High Courts were cited by Mr. Jethmalani to show that such an interest was held to be a caveatable interest.

80. One of the judgments relied upon was *Brindaban Chandra Shaha v. Sureshwar Shaha Parmanick and others* [10 Cal. LJ 263]. In that case, the caveator was found to have been entitled to inherit the property of the testatrix, if the court refused to grant probate. Noticing the statement of law that the interest of a Hindu reversioner expectant upon the death of a Hindu female cannot be validly alienated, it was held that a Hindu widow not only cannot dispose off the estate, but also cannot bind the reversioner's expectant rights. Having said so, a question was posed. Does it necessarily mean that such a person has not such an interest in the estate under Section 69 of the Probate and Administration Act so as to entitle him to oppose the grant of probate of a Will which if probated is likely

A to prejudice him? Answering the said question, this Court held:

> "...Although a reversioner under the Hindu Law has no present interest in the property left by deceased, yet it is manifest that he is substantially interested in the protection or devolution of the estate. It is well-settled that a
B reversioner can sue to restrain waste *Hurry Doss v. Rangunmoney [(1851) Sev 657].* The reversioner can, if he makes out a proper case obtain an order for the appointment of the receiver...."

C On that premise, a reversioner was held to have a caveatable interest.

81. *Nobeen Chander Sil* (supra) and *Abhiram Dass* (supra) were also noticed therein. It was, however, held that it was not necessary to express any opinion on the other questions
D raised having regard to the fact situation obtaining therein.

82. In *Gourishankar Chattoraj v. Smt. Satyabati Debi* [AIR 1931 Calcutta 470] the High Court held that the applicant Gourishankar would not have inherited the estate of testatrix Charumati (wife of Shyamsunder) and furthermore held that he
E was neither a 'sapinda' nor a 'sakulya' nor a 'samanodaka' under the Dyabhaga School of Hindu law. Despite the fact that no opinion was expressed upon the rights of the competing heirs in the peculiar facts of that case, Gourishankar was allowed to appear and oppose the application for the grant of Letters of
F Administration.

83. No principle of law was laid down therein. It does not have even a persuasive value. It, in our opinion, does not lay down any law.

G 84. The Madras High Court, we may notice, in a recent judgment in *M.S. Saraswathi* (supra) had a snapshot of a large number of decisions of various High Courts operating in the field including the decisions of Calcutta, Bombay, Madras and Kerala High Courts. It followed a Division Bench Decision *In re*
H Narasimha [AIR 1975 Madras 330] wherein it was held that

Section 8 of the Hindu Succession Act would apply and the caveator being an heir alone could claim a share and his son and, thus, the applicant therein could not claim any share as he had no present interest in the property. It was emphasized that a caveator if he denied the testator's title was liable to be discharged.

85. Real vs. Bare Interest test was considered in each of the cases having regard to the fact situation obtaining therein.

PROPOSITIONS OF LAW

86. Section 283 of the 1925 Act confers a discretion upon the court to invite some persons to watch the proceedings.

Who are they? They must have an interest in the estate of the deceased. Those who pray for joining the proceeding cannot do so despite saying that they had no interest in the estate of the deceased. They must be persons who have an interest in the estate left by the deceased. An interest may be a wide one but such an interest must not be one which would not have the effect of destroying the estate of the testator itself.

87. Filing of a suit is contemplated inter alia in a case where a question relating to the succession of an estate arises.

88. We may, by way of example notice that a testator might have entered into an agreement of sale entitling the vendee to file a suit for specific performance of contract. On the basis thereof, however, a caveatable interest is not created, as such an agreement would be binding both on the executor, if the probate is granted, and on the heirs and legal representatives of the deceased, if the same is refused.

89. The propositions of law which in our considered view may be applied in a case of this nature are:

(i) To sustain a caveat, a caveatable interest must be shown;

(ii) The test required to be applied is: does the claim of

A grant of probate prejudice his right because it defeats some other line of succession in terms whereof the caveator asserted his right.

(iii) It is a fundamental nature of a probate proceeding that whatever would be the interest of the testator, B the same must be accepted and the rules laid down therein must be followed. The logical corollary whereof would be that any person questioning the existence of title in respect of the estate or capacity of the testator to dispose of the property by Will on C ground outside the law of succession would be a stranger to the probate proceeding inasmuch as none of such rights can effectively be adjudicated therein.

APPLICATION OF THE RULES:

D 90. The bare possibility test as advanced in *Brindaban Chandra Shaha* (supra) as adopted in *Gourishankar Chattoraj v. Smt. Satyabati Debi* [AIR 1931 Cal 470], in our opinion would have no application in the instant case. However, we may also notice that the Calcutta High Court itself in some of the decisions E have applied the real interest test as for example *Nabin Chander Guha* (supra) and *Dinabandhu Roy Brajaraj Saha v. Sarala Sundari Dassya w/o Haralal Saha* [AIR 1940 Calcutta 296].

91. We may furthermore notice another line of decisions, F where an interest in the estate of the deceased-testator which may be affected by grant of probate of the will of the deceased had been applied for determination of the issue of caveatable interest, which, inter alia, are :-

G 1. *Abhiram Dass* (supra)
2. *Nikunj Kumar Lohia* (supra)
3. *M.S. Saraswathi* (supra)
4. *Perviz Sarosh Batliwalla* (supra)
5. *Rajiv Ramprasad Gupta* (supra)

H

6. *In the Goods of Mahammad Bashir (deceased)* (supra)

7. *Namita Singha* (supra)

92. While determining the said question, the law governing the intestate succession must also be kept in mind. The right of the reversioner or even the doctrine of 'spes successonis' will have no application for determining the issue in a case of this nature.

93. Two sisters of MPB being alive (one of them is since deceased), indisputably in the event the application for grant of probate of RSL in respect of the 1999 Will is refused they will have an interest in the estate of the testatrix. The right of the said sisters of MPB being definite and clear, it is not a case where it is necessary to apply the bare possibility or the common ancestor test.

94. Both MPB and PDB claimed their interest in certain companies. The subject matter of the Will is not the ancestral property over which the caveators claim any interest. It is one thing to say that the subject matter of the will is 'coparcenary' or a 'joint family property' in which case the larger concept of interest in the agnates would apply, but it is another thing to say that if people are available who would otherwise represent the interest of the estate and against whom citations have been issued, others who have no interest would also be entitled to enter a caveat.

95. In the context of the laws governing inheritance and succession, as they then stood, the widest possible meaning to the term "interest" might have been given in a series of decisions to which the learned counsel for the appellants rely upon ranging from *Nobeen Chunder Sil* (supra) to *Radharaman Chowdhuri and others vs. Gopal Chandra Chakravarty* [AIR 1920 Calcutta 459] so as to hold that a caveat would be maintainable even at the instance of a person who had been able to establish "some sort of relationship" and howsoever distant he may be from the deceased which per se cannot have any application after coming

A into force of the Hindu Succession Act. Ordinarily, therefore, a caveatable interest would mean an interest in the estate of the deceased to which the caveator would otherwise be entitled to, subject of course, of having a special interest therein.

96. Smt. Laxmi Devi Newar and Smt. Radha Devi Mohatta
B were heirs and legal representatives of PDB. Even in the event application of RSL for the grant of probate is dismissed, they and/ or their respective heirs would continue to represent the estate of PDB.

C 97. A Will is executed when the owner of a property forms an opinion that his/ her estate should not devolve upon the existing heirs according to the law governing intestate succession. When, thus, a person who would have otherwise succeeded to the estate of the testator, would ordinarily have a
D caveatable interest, any other person must ordinarily show a special interest in the estate.

98. Such a special interest may be a creditor of the deceased as was the case in *Sarala Sundari Dassya v. Dinabandhu Roy Brajaraf Saha (Firm)* [AIR 1944 PC 11]. But,
E in our opinion, the same would not mean that even if the estate of the deceased is being represented by the legal heirs, caveat can be entertained at the instance of a person who has no real interest therein or in other words would merely have a contingent interest.

F 99. A transferee pendente lite without the leave of the court would not have a caveatable interest and as such cannot be impleaded as a party. A person cannot also be impleaded as a party even on an apprehension that those who have a caveatable interest and to whom citations have been made would not take
G any interest in the litigation.

100. A tenant occupying the premises belonging to a testator was held not to have any caveatable interest in the property of the testator. [See *Jagdish Chander v State & Anr.* 1988 RLR 678]
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In *Sunil Gupta v. Kiran Girhotra & Ors.* [2007 (12) SCALE 59], this Court held: A

> "17. Citation, as is well-known, should be conspicuously displayed on a notice board. Before purchasing the properties, Amit Pahwa and consequently the appellant had taken a calculated risk. In a situation of this nature, he is not a necessary party. He took the risk of the result of the probate proceedings. His apprehension that Raj Kumar may not take any interest in the litigation cannot by itself a ground for interfering with the impugned judgment. It is speculative in nature." B C

101. Reliance was placed by Mr. Venugopal on an unreported decision of the Calcutta High Court in the case of *Goods of Santi Bhusan Bose, Application No. 85 of 1991* where caveat was not discharged on the premise that the caveator would succeed in the event of death of the heirs of the deceased. Apart from that fact, the said decision, in our opinion, did not lay down the correct law, even the principles enunciated will have no application in this case as the heirs of Smt. Laxmi Devi Newar and Smt. Radha Devi Mohatta would succeed to their interest in the property and not the appellants, as classified heirs succeed absolutely and upon death of any such heir, the estate devolves upon the heirs of such absolute successor. There could not, therefore, be any question of reversion of the property. D E

102. We are not oblivious of the fact that a judgment rendered in a probate proceeding is a judgment in rem. But, its application is limited. A judgment rendered in a probate proceeding would not be determinative of the question of title. If a probate has been obtained by fraud or suppression of material fact, the same can be the subject matter of revocation of the grant in terms of Section 263 of the 1925 Act. [See *Elizabeth Antony* (supra)]. F G

In *Basanti Devi* (supra), it was held : H

> "23. It is now well settled that an application for grant of

A probate is a proceeding in rem. A probate when granted not only binds all the parties before the Court but also binds all other persons in all proceedings arising out of the Will or claims under or connected therewith. Being a judgment in rem, a person, who is aggrieved thereby and B having had no knowledge about the proceedings and proper citations having not been made, is entitled to file an application for revocation of probate on such grounds as may be available to him. We are, therefore, of the opinion that the application for revocation of the grant of C probate should have been entertained."

[See also *Sunil Gupta* (supra)].

These decisions relied upon by Mr. Jethmalani relating to revocation of grant, as for example *Brindaban Chandra Shah* D (supra) are, thus, not applicable to the facts of the present case.

103. We may notice that in *Jagdish Prasad Tulshian vs. Yasheen Jain* [AIR 2007 Calcutta 218], the Calcutta High Court held:

E "20. In the case of Elizabeth Antony v. Michel Charles John Crown Lengera reported in 1990 (3) SCC 333 : (AIR 1990 SC 1576), the Supreme Court was dealing with an application for revocation of grant of a Probate and in the said case a party sought to establish a caveatable interest on the basis of a Will though the said Will or the copy F thereof was not filed before the Court. In such a case, the Supreme Court was of the view that it was not expedient to reopen the matter. In the said case, the Supreme Court, however, held that for the purpose of revocation of a grant within the scope of Section 263 of the Indian Succession G Act, the absence of caveatable interest does not stand in the way. In the case before us, we are not concerned with a case of revocation of grant. Therefore, the principle laid down in the said decision, cannot have any application to the case before us. Moreover, in that case, even the copy H of the purported Will was not produced."

What would be the cavetable interest would, thus, depend upon the fact situation obtaining in each case. No hard and fast rule, as such, can be laid down. We have merely made attempts to lay down certain broad legal principles.

INTERPRETATION

104. A statute must be interpreted having regard to the purport and object of the Act. The doctrine of purposive construction must be resorted to in a case of this nature. The court must place itself in the chair of a reasonable legislator. In *New Indian Assurance Co. v. Nusli Neville Wadia and Anr.* [2007 (14) SCALE 556], it was held :

> "50. Except in the first category of cases, as has been noticed by us hereinbefore, Sections 4 and 5 of the Act, in our opinion, may have to be construed differently in view of the decisions rendered by this Court. If the landlord being a State within the meaning of Article 12 of the Constitution of India is required to prove fairness and reasonableness on its part in initiating a proceeding, it is for it to show how its prayer meets the constitutional requirements of Article 14 of the Constitution of India. For proper interpretation not only the basic principles of natural justice have to be borne in mind, but also principles of constitutionalism involved therein. With a view to read the provisions of the Act in a proper and effective manner, we are of the opinion that literal interpretation, if given, may give rise to an anomaly or absurdity which must be avoided. So as to enable a superior court to interpret a statute in a reasonable manner, the court must place itself in the chair of a reasonable legislator/ author. So done, the rules of purposive construction have to be resorted to which would require the construction of the Act in such a manner so as to see that the object of the Act fulfilled; which in turn would lead the beneficiary under the statutory scheme to fulfill its constitutional obligations as held by the court inter alia in *Ashoka Marketing Ltd* (supra).

A 51. Barak in his exhaustive work on 'Purposive Construction' explains various meanings attributed to the term "purpose". It would be in the fitness of discussion to refer to *Purposive Construction* in Barak's words:

> "Hart and Sachs also appear to treat "purpose" as a
> B subjective concept. I say "appear" because, although Hart and Sachs claim that the interpreter should imagine himself or herself in the legislator's shoes, they introduce two elements of objectivity: *First*, the interpreter should assume that the legislature is
> C composed of reasonable people seeking to achieve reasonable goals in a reasonable manner; and *second*, the interpreter should accept the non-rebuttable presumption that members of the legislative body sought to fulfill their constitutional
> D duties in good faith. This formulation allows the interpreter to inquire not into the subjective intent of the author, but rather the intent the author would have had, had he or she acted reasonably."

E (See also *Bharat Petroleum Corporation Ltd. v. Maddula Ratnavalli & Ors.* [(2007) 6 SCC 81, para 22]

In so doing, it would not be permissible for the court to construe the provisions in such a manner which would destroy the very purpose for which the same was enacted. The principles
F in regard to the approach of the Court in interpreting the provisions of a statute with the change in the societal condition must also be borne in mind.

105. In *Anuj Garg & Ors. v. Hotel Association of India & Ors.* [(2007) 13 SCALE 762], this Court held :

G

> "8. Changed social psyche and expectations are important factors to be considered in the upkeep of law. Decision on relevance will be more often a function of time we are operating in. Primacy to such transformation in
> H constitutional rights analysis would not be out of place. It

will be in fitness of the discussion to refer to the following text from "Habits of the Heart: Individualism and Commitment in American Life" by R. Bellah, R. Madsen, W. Sullivan, A. Swidler and S. Tipton, 1985, page 286 which suggests factoring in of such social changes.

> "The transformation of our culture and our society would have to happen at a number of levels. If it occurred only in the minds of individuals (as to some degree it already has) it would be powerless. If it came only from the initiative of the state, it would be tyrannical. Personal transformation among large numbers is essential, and it must not only be a transformation of consciousness but must also involve individual action. But individuals need the nurture of crops that carry a moral tradition reinforcing their own aspirations.
>
> These are commitments that require a new social ecology and a social movement dedicated to the idea of such a transformation."

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

107. Directly or indirectly the appellants and in particular KKB is questioning the title or disposing power of the testator, which is impermissible in a probate proceeding. Appellants, in fact, have been prevaricating their stand from proceeding to proceeding. They have been raising various contentions which are wholly impermissible in law.

108. Be that as it may. even the decisions relied upon by Mr. Jethmalani were rendered in the factual situation obtaining

A therein.

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

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

E 111. While interpreting the provisions of a statute, we must also bear in mind the admitted legal position that a probate proceeding should not be permitted to be converted into a title suit. It should not be permitted to become an unchartered field to be trespassed into by persons even if he is not affected by F testamentary disposition.

SECTION 284 OF THE ACT

112. Section 284 of the 1925 Act may have to be construed keeping in view the aforementioned legal principles. It does not G lay down the qualifications or disqualifications of the caveator. Once a caveat is filed, it is for the court to determine the question as to whether the caveator has any caveatable interest or not.

113. Section 284 of the 1925 Act only provides for a forum and nothing more. It has nothing to do with qualification. Drawing H our attention to the decisions prevailing prior to coming into force

of the 1925 Act, some of which have been noticed by us hereinbefore, as also the decision of the Bombay High Court in *Pirajshah Bikhaji & Others v. Pestonji Merwanji* [(1910) ILR 34 Bombay 459], the learned senior counsel contended that the legislature having not changed the wordings of the earlier statute despite judicial interpretation of the terminologies thereof, must be held to have not intended to rectify the same.

114. In our opinion, it is not necessary to go into the said question as we have held that the decisions upon which reliance has been placed are either not good law or not relevant for our purpose.

RULES OF THE CALCUTTA HIGH COURT

115. The Rules framed by the Calcutta High Court provide for determination of the issue of caveatable interest as a preliminary issue. We do not see any reason as to why the High Court, in exercise of its powers conferred upon it under Section 122 of the Code of Civil Procedure, could not frame such Rules. After coming into force of the Constitution such Rules can also be framed by the High Court in exercise of its supervisory jurisdiction under Article 227 of the Constitution of India.

If the contention of Mr. Jethmalani is to be accepted that there being no such provision in the Act for determination of such an issue as preliminary issue, the High Court chould not have framed the Rules, we are of the opinion that in a similar situation this Court also could not direct listing of the writ petitions under Article 32 of the Constitution of India for preliminary hearing in terms of the Supreme Court Rules. The Court having regard to its general power as also the power under Order XIV Rule 1 of the Code of Civil Procedure can decide the matter by framing preliminary issues in regard to the maintainability or otherwise of the application. It is a rule of procedure and not of substance. A court is entitled to dismiss a lis at the threshold if it is found not maintainable. The Court even in absence of any rule must take the precaution of not indulging in wasteful expenditure of its time at the instance of the litigants who have no case at all.

A We do not, therefore, find any legal infirmity in the Rules.

MUTUAL WILLS

116. We have noticed the recitals of the 1982 Wills purported to have been executed by MPB and PDB. Whether B the same constitutes a mutual Will in the sense that thereby an agreement had been entered into by and between the husband and the wife in regard to the application of the property is in question. We although may not be directly concerned therewith, the law operating in the field should be considered only on the C premise as to whether the said doctrine creates any caveatable interest in the executors of the will. A Will by its nature is revocable. It is the last desire of the testator. Till he breathes his last, he will have a final say. In short, the latter Will revoking the earlier Will would be probated. It is one thing to say that the D agreement between the parties to the purported mutual Will would not affect any agreement or arrangement on the application of the latter Will or the estate of the testator must be administered in terms of such agreement.

The proposition of law as such is not much in dispute. E Despite the existence of a mutual Will, the representative under the latter Will will take the property. He, however, takes the property subject to the terms of the Mutual Will. Whether there exists any such agreement enforceable either in equity or by way of a suit for specific performance, will have to be considered F only in the event the probate is granted and not prior thereto.

117. In Halsbury's Laws of England, Fourth Edition, Volume 50, page 108, it is stated:

> "221...*Even when there is such an agreement and one* G *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 later 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 H

deceased has stood by the agreement and not revoked or altered his will, the survivor is bound by it, and although probate will be granted of a later will, the survivor is bound by it, and although probate will be granted of a later Will made by him in breach of the agreement, since a court of probate is only 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.

Where mutual will, whether constrained in a joint will or in separate documents, relate to joint property, the agreement to make the mutual wills and the making of the dispositions in pursuance of the agreement, sever the joint tenancy and convert it into a tenancy in common."

[Emphasis supplied]

118. In Lewin on Trusts, Seventeenth Edition, pages 270-271, it is stated:

"10-27 ...If the survivor, whether or not after taking an actual benefit under the arrangement, alters his will, his personal representative takes the property which is subject to the agreement upon trust to perform the contract. Equity cannot prevent the survivor from revoking his will, for instance, by marriage or another will, but it causes his personal representatives to give effect to his revoked will in so far as his contract bound him not to revoke it..."

[See also Theobald on Wills, Sixteenth edition, pages 26, 27 (Paras 2.09 & 2.11)].

119. Similar statement of law can be found In Williams, Mortimer and Sunnucks on Executors, Administrators and Probate, 18th edition, pages 131-132.

While dealing with the probate issue, therefore, the authors categorically state that only the latter Will would have to be probated.

120. We may notice a decision rendered in our country in this regard.

In *Kuppuswami Raja and another v. Perumal Raja and Others* [AIR 1964 Madras 291], the Madras High Court stated the law, thus:

> "We confess that the matter is not free from difficulty. 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 benefits under the mutual Will, and that there need not be a specific contract prohibiting revocation when the arrangement takes 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 expressions "our property" "our present wishes" "our Will" and such similar expressions, it is strong cogent evidence of the intention that there is no power to revoke except by mutual consent."

Such is not the case here.

121. Mr. Jethmalani has relied upon a decision in *Walker and Another v. Gaskill and Others* [1914] P. 192. Therein, Wills were made between the wife and husband in October, 1907. A Codicil and subsequent Will were made in breach of a definite arrangement. Plaintiffs thereof were appointed as executors under the Will of 22nd January, 1913. The husband died on 20th October, 1911 Terming the two Wills of 1907 as mutual Wills, a contention was raised that the stipulations made therein remained irrevocable despite the death of the husband. It was held "the function of this Court as a Court of Probate is to ascertain and pronounce that is the last Will, or what are the testamentary documents constituting the last Will, of a testator,

which is or are entitled to be admitted to probate". A

122. The contention that such a Will was irrevocable was held to be lacking any foundation. The court refused to go into the question as to whether the court having the jurisdiction to decide both the contentions independently should go thereinto by holding that it being a court of probate and not a court of B construction, it could only construe testamentary documents to the extent of determining those testamentary documents that should be admitted for probate.

123. What could be done and has not been done by a C court of equity does not create a precedent. It does not even have a persuasive value. In this country, we are bound to follow the law laid down under the statute or the decision which create binding precedents. An observation made by a Court of Probate would not persuade us to hold that the High Court should have D taken recourse to "advance from the region of testamentary disposition into that of contracts and trusts and to declare certain trusts upon the footing of contract" which could be done by the Chancery Division.

124. The American law operating in the field may be noticed E from American Jurisprudence, Second Edition, Vol. 79, page 850 in the following terms:

> "The breach of a contract for the joint execution of a will, or the execution of separate wills, containing reciprocal bequests, gives rise to the same remedies in favor of the F injured party as are employed in other cases of breach of contract to make a will, namely, an action at law for damages and a suit in equity, but it is to be observed that the latter is the type of relief usually invoked. In fact, according to some authority, only a court of equity can G take cognizance of an allegation that the revocation of a joint and mutual will by the surviving testator was in violation of his contract with the deceased testator.
>
> In any case, the enforceability of a contract to make wills H

A containing mutual and reciprocal provisions depends, of course, upon the establishment of the contract by good and sufficient evidence.

"794. Remedy in probate court; contest of revoking will.

B A probate court whose jurisdiction is limited to the determination of the issue whether the instrument propounded is the last will of the decent lacks power to enforce an agreement between two testators to make wills which are mutual and reciprocal in their provisions. C Generally speaking, the remedy of a person injured by the violation of a contract for the execution of wills containing reciprocal bequests and bequests to third persons effective upon the death of the surviving testator is not to be had in a contest of the probate of the will which D constitutes the violation of which complaint is made, since, in the absence of statute, the only issue on a contested probate is whether the paper propounded is "the last will of the decent.""

[See also Corpus Juris Secundum, Vol. XCVII, pages 304 E to 312]

125. Relying on a decision in *Branchflower et al v. Massey* [208 P. 2d 341], it was contended by Mr. Jethmalani that the Probate Court may also examine a witness of a mutual Will. We have examined the said decision. The proposition of law F laid down therein was that the Probate Court will first revoke the Will and then determine the rights under mutual Will either in equity or in specific performance. It was held that a Probate Court cannot determine whether the proponent having revoked her own Will is thereby estopped from claiming under the Will G executed by the deceased pursuant to a contract between the deceased and proponent. It referred with approval the decision of *Brazil v. Silva* [181 Cal. 490] wherein it was observed:

"In support of their contention that the complaint does not state a cause of action, counsel for the defendant advance H

two propositions. The first is that the matter is determined by the order admitting the will to probate. The soundness of this position depends upon whether or not the issues presented by the present complaint are questions going to the final question before the probate court; that is, the question as to the instrument being the legal and valid will of the decedent unrevoked at the time of his death. If the issues presented by the complaint are not of this character, it is plain that they could not be passed on in the probate proceedings, and are not concluded by the result of those proceedings.' (Italics supplied.)" A B C

126. In *Massey* (supra), it was observed:

"It was held that the question whether the defendant was guilty of fraud, and therefore should be declared trustee of the property received under the will, could not have been determined in the probate proceeding, and consequently plaintiffs were not concluded by the order admitting the will to probate." D

The said authority, therefore, does not advance the case of the appellants. E

127. The law as prevailing in Australia is also to the same effect, as would appear from the decision in *Birmingham and Others v. Renfrew and Others* [57 C.L.R. 666].

Latham, CJ therein opined that a Will made in breach of an arrangement is nevertheless effective as a Will. It upheld the dicta contained in *Stone v. Hoskins* [1905 P. 197] wherein the following law was laid down: F

"Though a will is always revocable, and the last must always be the testator's will; yet a man may so bind his assets by agreement that his will shall be a trustee for performance of his agreement... These cases are common, and there is no difference between promising to make a will in such a form and making his will with a promise not to revoke it. This court does not set aside the will; but makes the devisee G H

A heir or executor trustee to perform the contract."

128. The law laid down in the aforementioned treatises and decisions rendered in different jurisdictions clearly suggests that existence of a mutual Will or filing of a suit, by themselves, are not sufficient to create a caveatable interest. In fact the B appellants have disentitled themselves from lodging a caveat as they are questioning the title of the testatrix as also her right to execute a Will as it had been contended that she merely had a life interest and no right of dispossession of property by Will or otherwise.

C They cannot fall back upon the purported "Mutual Wills" only because they also challenge the genuineness of the 1999 will.

129. Mr. Jethmalani, furthermore, relied upon a decision D in *Re Dale (deceased) Proctor v. Dale* [(1993) 4 All ER 129] which, in our opinion, has no application in this case as it was not a case dealing with "caveatable interest" arising out of "mutual Wills".

Strong reliance has also been placed on *Dilharshankar* E *C. Bhachech v. Controller of Estate Duty* [(1986) 1 SCC 701] wherein again Halsbury's Laws of England has been quoted, which we have noticed heretobefore.

The said decision of this Court, therefore, supports the F contention of the first respondent and not that of the appellants.

130. It is not much in dispute that probate has to be granted to the latter Will even when made in prejudice of the agreement not to revoke the mutual wills inasmuch as the court of probate is only concerned with the last Will.

G 131. Mr. Jethmalani has also placed strong reliance upon a decision rendered by this Court inter-parties arising out of a criminal case in *Shiva Nath Prasad v. State of W.B. and Others* [(2006) 2 SCC 757]. Therein, this Court was concerned with the question as to whether a First Information Report lodged H

against the first respondent herein and others under Sections 417 and 420 of the Indian Penal Code should be quashed. This Court dealt at some details with the legal principles behind the doctrine of mutual Will, ultimately to hold:

> **"48.** *We have referred to the doctrine of mutual and reciprocal wills and trusts only to understand the basis of the complaint..."*

That far and no further.

Some observations have been made in paragraph 49 of the said judgment but yet again it was opined:

> "50. We have entered into the above discussion, not to express any opinion, but to answer the main plank of the argument advanced on behalf of the appellant that this case basically involves a civil dispute. None of our observations be treated as expression of our opinion on the rightfulness of the claim made in the complaint."

Shiva Nath Prasad (supra), therefore, is not an authority on the legal principles of mutual Will.

132. The principles which can be deduced from the discussions made heretobefore are :-

(i) A Will made in prejudice of an agreement will nevertheless be effective as a Will as it is by its very nature and by its very essence a revocable instrument.

(ii) A subsequent infringing Will would be valid even if it revokes an earlier Mutual Will.

(iii) Similarity of the terms would not be enough to establish the necessary agreement.

(iv) Whether a legatee has taken any benefit under the alleged Wills of 1982 would, however, be relevant.

FAMILY INTEREST

A 133. It is too far fetched a submission that a person having a remote family connection or as an agnate is entitled to file a caveat. A reversioner or an agnate or a family member can maintain a caveat only when there is a possibility of his inheritance of the property in the event the probate of the Will is
B not granted. If there are heirs intestate who are alive, entertaining of a caveat on the part of another family member or a reversioner or an agnate or cognate would never arise.

134. The Hindu Succession Act, 1956 has brought about a sea change in the matter of inheritance and succession.
C "Agante" has been defined in the Hindu Succession Act to mean:

> "agnate"— one person is said to be an "agnate" of another if the two are related by blood or adoption wholly through males;"

D 135. Agnate or cognates are, thus, recognized as heirs. They may be the erstwhile members of a nuclear family. So far as heirs and legal representatives of the family are concerned, the Hindu Succession Act clearly lays down five classes of heirs, Sisters of husband belong to Class II heir. They succeeded to
E the interest of MPB in 2004 on the death of PDB. Appellants accepted the said fact but contended that as the life of the said heirs was uncertain they, thus, have a caveatable interest. It has been accepted that there would be no difficulty in ascertaining the successors of PDB. It is an indisputable case of intestacy
F having regard to Section 15 of the Hindu Succession Act.

136. It was contended that having regard to the testate succession created by reason of the Will and the matter remaining pending for last three years, the claim of the appellants and family members is required to be decided on
G the happening of certain contingencies in the intervening period between the death of PDB and the ultimate decision of the probate application, as one of the heirs of PDB has died.

137. The submission, to say the least, is fallacious. The heirs of the deceased have already been impleaded as parties.
H

Inheritance to an estate never remains in abeyance. In the event of death of the sisters of MPB, their heirs and legal representatives would inherit the property in their own right and not as the heirs of MPB. The dispute regarding intestacy does not change the law of succession and inheritance.

138. As Agnates KKB, BKB, YB and GPB also claimed caveatable interest as agnates. Entry 2 of Class II of the Schedule appended to the Hindu Succession Act in this case would not bring them into the picture, as agnates will acquire an interest only when there is no heir of either Class I or Class II. When there exists Class II heirs, the appellants would not have any real interest in the property. The property upon the death of Smt. Laxmi Devi Newar and Smt. Radha Devi Mohatta would pass on to their legal heirs. Appellants being not the heirs of MPB or PDB have no caveatable interest.

SPIRITUAL WELL-BEING

139. The theory of looking after the spiritual well-being of the deceased soul by the near relatives has no application for the purpose of judging the validity or otherwise of a Will; more so, after coming into force of the Hindu Succession Act, 1956 as in terms thereof the concept of succession to the estate of a deceased on the said consideration has lost its relevance. Such a contention, therefore, must be rejected out right, being a wholly misconceived one.

140. The doctrine of 'larger circle of the caveators as being members of the Birla family' and to protect the spiritual interest does not convert a non-existent interest into a caveatable interest. Such a question had not been raised even in the affidavits of the appellants. We do not find any force therein.

QUALITY OF TITLE

141. We may notice the affidavit of Shri KKB in opposition to the grant of probate, as a caveator. In the said affidavit, apart from the genuineness of the 1999 Will, the power of the testatrix to execute the same has also been questioned.

A In paragraph 7, it is contended:

"7. It will be evident from the same that the deceased, Late Priyamvada Devi Birla was very closely connected to me. She was related to my wife (being her aunt) and was the wife of my paternal first cousin Late Madhav
B Prasad Birla."

The merit of the Will has been discussed in the following terms:

"(a) In 1981, the deceased and her husband Madhav
C Prasad Birla, who is also deceased, agreed as to the disposal of their property in favour of charities and had executed mutual Will in pursuance of the agreement both date May 10, 1981. In 1982, by consent they revoked the said mutual Will but agreed once again with each other as
D to the disposition of their respective estates on their deaths in favour of charities as ultimate beneficiaries, and that Wills made pursuant to such agreement would be irrevocable and would remain unaltered.

(b) In pursuance of the said agreement and in consideration
E of it, the deceased and her husband made their respective Will both dated July 13, 1982 virtually reiterating the provisions of their earlier wills but increasing the number of Executors from three to four in each will. Each of them, by his or her Will devised and bequeathed his or her entire
F estate to the other absolutely and in the event of the other predeceasing him or her as case may be, the Executors appointed in their respective Wills were directed to make over, donate or settle the entire estate, barring certain specific legacies for charitable purposes at their absolute
G discretion.

(c) The husband of the deceased died on July 30, 1990 and the deceased as beneficiary of her husband's Will came to possess, own and control his estate in terms thereof and thus had taken and enjoyed the benefit under
H

the said Will until her death.

(d) The purported Will dated April 18, 1999 has thus been allegedly executed by the deceased in clear breach and total disregard of the subject matter of the agreement and the mutual Will of the deceased and her husband. It is inconceivable that the deceased consciously would so conduct herself which would amount to fraud on her husband. The said purported Will is not her Will.

(e) On a true construction of the terms and tenor of the aforesaid Wills and in the events which had happened, the deceased had only a life interest in the estate of her husband without being competent to dispose of on her own, the combined estate by alienation or dissipation in a manner inconsistent with the terms and tenor of the mutual Wills. The disposition made in favour of Rajendra S. Lodha under the purported Will dated April 18, 1999 is, therefore, unlawful, unauthorized and cannot be binding, as the entire estate of the deceased stood impressed with the trust in terms of the mutual Wills.

(f) Accordingly on her death, the surviving executors of the Will of the deceased and her husband are entitled to take possession of her entire estate and make over, donate or settle the same for the purposes of charitable trust at their absolute discretion. The surviving executors as trustees of the constructive trust which came into being on the basis of the mutual Wills are entitled to execute and implement the said trust and do all things necessary for the said purposes.

(g) The petitioner is not entitled to put any impediment in the implementation of the said trust.

(h) I am one of the surviving executors of the said mutual will of Late Madhav Prasad Birla executed on July 13, 1982."

The said affidavit also reiterates the contents of the plaint.

A No contention, however, has been raised that they have a caveatable interest keeping in view the spiritual life of MPB and the testatrix as a member of the family or otherwise. Similar affidavits have been filed by B.K. Birla, Yashovardhan Birla, Smt. Laxmi Devi Newar and Smt. Radha Devi Mohatta. The sisters B are also supporting the Birla family.

The claim of acquiring cavetable interest on the said basis, thus, is wholly unacceptable.

PRE-EMPTION : FUTURE DOMAIN DOCTRINE

C 142. A right to claim pre-emption is not a right in the estate. It creates an interest in the property. It does not create an interest in succession. If such a right has been created by an agreement, the same can be enforced only in the event any contingency in that behalf takes place. A Will is not a transfer for enforcement D of a right of pre-emption under a contract. It must be enforced by a suit. On the right of pre-emption based on consanguinity being unconstitutional, we may notice the decision of this court in *Atam Prakash v. State of Haryana & Ors.* [(1986) 2 SCC 249], wherein while striking down Section 15(1)(a) of the Punjab E Pre-emption Act, 1913 as being ultravires of Article 14 of the Constitution it was opined at Paragraph 2:

> "The right of pre-emption based on consanguinity has been variously described by learned judges as 'feudal', 'piratical', 'tribal', 'weak', 'easily defeated', etc. [Kalwa v. F Vasakha Singh A.I.R. 1983 Punjab & Haryana 480 (F.B.) at 490 and Bishan Singh v. Khazan Singh [1959] S.C.R. 878.] Fusing as it does the ties of blood and soil, it cannot be doubted that the right is antiquated and feudal in origin and in character."

G It was thus held:

> "We are thus unable to find any justification for the classification contained in Section 15 of the Punjab Pre-emption Act of the kinsfolk entitled to pre-emption. The H right of pre-emption based on consanguinity is a relied of

the feudal past. It is totally inconsistent with the Constitutional scheme. It is inconsistent with modern ideas. The reasons which justified its recognition quarter of a century ago, namely, the preservation of the integrity of rural society, the unity of family life and the agnatic theory of succession are today irrelevant. The list of kinsfolk mentioned as entitled to pre-emption is intrinsically defective and self-contradictory. There is, therefore, no reasonable classification and clauses 'First', 'Secondly', and 'Thirdly' of Section 15(1)(a), 'First', 'Secondly' and 'Thirdly', of Section 15(1)(b), Clauses 'First', 'Secondly' and 'thirdly' of Section 15(1)(C) and the whole of Section 15(2) are, therefore, declared ultra vires the Constitution."

143. KKB, BKB and GPB claimed caveatable interest as co-owners of 1/5th share in Kumaon Orchards, two other co-owners being PB and S.K. Birla. S.K. Birla does not claim any caveatable interest in the estate of PDB. Even a person claiming an interest in the property of the testator by reason of an agreement for sale would not have a caveatable interest on the premise that such an agreement would be binding both upon the executor as also upon the heirs of the deceased (in the event, probate is not granted). The same principle would apply herein. Right of pre-emption, if any, is not affected by grant of probate. A right of pre-emption would arise only when a voluntary transfer is made for consideration in favour of a stranger and not prior thereto.

144. Reliance has been placed by Mr. Venugopal on *Bhoop v. Matadin Bhardwaj* [(1991) 2 SCC 128]. We may notice that therein a decree for pre-emption had already been granted.

145. Right of a co-owner is not affected by testamentary disposition. Indisputably, the object of conferring the right on a co-sharer or owner of an adjacent immovable property is to exclude strangers from acquiring interest in an immovable property as a co-sharer or to keep objectionable strangers away from the neighbourhood. The same by itself, in our considered

A opinion, does not constitute a caveatable interest. A right of pre-emption as was submitted by Mr. Venugopal may run with the land as has been held in *Sri Audh Behari Singh v. Gajadhar Jaipuria & Ors.* [AIR 1954 SC 417], but, the same would not, it is bear repetition to state, constitute any caveatable interest.

B **AS EXECUTORS OF 1982 WILL**

146. BKB claims to have a ceveatable interest as an executor of the 1982 Will of PDB. A deed of appointment was executed on 25th August, 2004 to fill up a purported vacancy C caused by the death of MPB. So far as the claim of BKB and GPB are concerned, the same are required to be dealt with separately.

147. MPB was an executor under the 1982 Will of PDB. He expired in 1990. The deed of appointment was executed on D 25th August, 2004. Both the learned Single Judge as also the Division Bench of the High Court opined that MPB never ceased to be the executor. The High Court noticed a term of purported 1982 Will, which reads as under :-

E "If any of them ceases to be executor for any reason, survivor or survivors might, if he or they so desire, fill up such vacancy or vacancies with a person of their choice."

148. It was furthermore held that on the death of PDB, the three executors were alive. It was furthermore noticed that he F did not claim any caveatable interest as an executor to the 1982 Will. Such a claim was made for the first time in a supplementary affidavit in opposition filed on 25th August, 2004 after the commencement of the hearing of the application for discharge. It was not averred that MPB had ever become an executor or G ceased to be an executor under the said Deed of Appointment.

149. Section 2(c) of the 1925 Act defines 'executor' to mean "a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided."

H 150. 'Will' has been defined in Section 2(h) to mean "the

legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.". A

Will takes effect after the death of testator. Rights and obligations of an executor of a Will arise only then. No right is created in the executor during the life time of the testator. Appointment of a testator and appointment of a trustee stand completely on different footings. B

151. A person named as an executor under a Will cannot claim any right to act as an executor until the death of the testator. He has to survive him. He has to accept the office as an executor expressly or by conduct. The term "ceasing to be" thus necessarily means assumption of office of executor and thereafter ceasing to hold such office, by renouncement or removal or death, etc. C D

In *Salton v. New Beeston Cycle Company* [(1899) 1 LR.Ch.D. 775] interpretation of the words "cease to hold" was held to mean that a director could not 'cease' to hold a qualification which he never possessed. Thus, if a Director is named in the articles, and never had a qualification, he cannot be said to cease to hold it, stating: E

> "If Lord Norreys had been only a de facto director and never a de jure director, I think there might have been force in this contention ; but it seems to follow from what I have held on the first point that Lord Norryes, not having ceased to be a director, must be regarded as still a member of the board, and as such entitled to remuneration." F

152. The genuineness of the Will executed by MPB and PDB in 1982 is not admitted by the first respondent. Their genuineness therefore is in question. G

We have noticed hereinbefore in brief the stipulations made in the said Will. We have also noticed that Shri P.L. Agarwal is an attesting witness in all the three documents. It H

may, however, be placed on record that the 1999 Will is a registered one. The 1982 Wills are not.

153. Mr. K.K. Venugopal has relied upon two decisions of the English Courts being *In Re Lighton* [ER (1 HAGG. ECC) 569] and *In RE Henrietta Johnson* [ER (1 SW&TR-18) 609]

In *Re Lighton* (supra), a Will was executed on 17th March, 1827, The executors were appointed in the following terms:

> "And of this my will I nominate, constitute and appoint Sir Samuel Hayes, and the Reverend Steward Hamilton, executors and trustees; and, in case of the death of either of them, I nominate and appoint Edmund Hayes, and my brother Henry Lighton, to act and be executors and trustees in their stead".

Having regard to the phraseology used therein, it was held that the appointment of Edmund Hayes was complete stating:

> "The deceased died possessed of a policy of insurance on his own life in the Equitable Assurance Office, in England, of the value of about 63001; and for the purpose of obtaining payment of it the present application was made for a grant of probate, in this country, of the same will to Sir Edmund Hayes. It was founded on the affidavits of Sir Edmund Hayes, of Mr. Shaw of Dublin (who prepared the will), and of Dr. Abraham Colles (the physician who attended the deceased); that he, the deceased, at the time of executing his will, was in a very dangerous state of health, and contemplated the near approach of his death; and that it was intended by the deceased that the substitution of executors should take effect in the event of the death of either of the first named executors at any time.
>
> A proxy also was exhibited under the hand and seal of the Reverend Steward Hamilton, by which he waived his title to probate, and consented that it should pass to the substituted executors, jointly or severally."

The said decision, therefore, was rendered in the fact of that case.

154. In *RE Henrietta Johnson* (supra) in the Will made by A, B,C,D and E were appointed executors and in case of the death of B, F to become executor in his place. B,C,D and E proved the Will. B and C died. F applied to have a double probate granted to him. D and E opposed such grant. It was held that F was entitled to the grant and that the casualty was not restricted to the death of B in A's life time holding:

> "I should be very loath to take any presumed policy of the Court of Probate as my guide. In the Goods of Lighton there were in fact two decisions for there was a grant of the Irish Court in the first instance and that was acted upon by the Judge of the Prerogative Court in this country. Here there are ample grounds to satisfy me as to the intention of the testatrix. Blake, the father, was trustee and executor of the person from whom she received a considerable amount of property in a complicated state, and John Joseph Balko, as his father's partner, was conversant with the whole business. These are very good reasons why the testatrix should have desired him to succeed his father as her executor, and I cannot consider such substitution as limited to the casualty of the father's decease in the lifetime of the testatrix."

155. Reliance has also been placed upon *Williams on Executors, 15th Edition at page 34* by Mr. Venugopal, wherein it is stated :-

> "The office of Executor being a private one of trust, and, as a rule, named by the testator, not by the law, the person nominated may refuse, so long as he had not intermeddled, though he cannot assign the office; and even if in the lifetime of the testator he has agreed to accept the office, it is still in his power to recede...."

There is nothing to show that BKB or any other executor

A accepted the office of the executor during the life time of MPB or PDB. In the absence of any such statement having been made, the said authority cannot be said to have any application.

156. In *Jnanadndra Nath Mukherjee and another v. Jitendra Nath Mukherjee and others* [AIR 1928 Cal. 275] it was B held :-

> "Now the office of executor being a private office of trust named by the testator and not by the law, one named executor may refuse the office or renounce. It is, however, C too late to refuse or renounce when one has once elected to act as executor; and he may determine such election by acts which amount to an administration."

(See also *Sri Raja Kakadapudi Venkata Sudarshana Narasayyamma and others v. Andhra Bank Ltd., Vijayawada* D *and others*, AIR 1960 AP 273; *Ramautar Singh v. Ramsundari Kur.*, AIR 1959 Pat 585 and *Leo Sequiera v. Magdalene Sequiers Bai and others,* AIR 1971 Mysore 143).

157. We may notice that in *Sri Raja Kakadapudi Venkata Sudarshana Narasayyamma* (supra), it has been held : E

> "57. In Parlhasarathy Aiyar v. Subbaraya Gramany, AIR 1924 Mad 07 at p. 70, it was observed by Schwabe C. J., that
>
> "It is not right, as has been suggested in some cases, to F treat a will of which probate has not been granted as non-existent and the property passing y intestacy."
>
> This will of course depend upon the fact whether the plaintiff has accepted the office as an executrix. The learned G counsel for the appellant has placed strong reliance on certain observations in the judgment of the Madras Higb Court in Parthasarathy Appa Rao v. Venkatadri Appa Rao, 43 Mad LJ 486 at p. 515 : (AIR 1922 Mad 457 at pp. 469-470). But that case obviously has no application, because on the facts of that case it was found that the executor H

died without accepting the office or showing any indication that he took upon himself the duties of executor. A

Whether the executor has accepted the office or not will depend upon the facts of each case. In this case the plaintiff has not given evidence and no oral evidence was at all tendered by her. We can only, therefore, deduce the fact of her acceptance from the record available. In Ex. B-2, the counsel of the plaintiff stated that his client was appointed as an executrix under the will of her husband and that he was instructed to take adequate legal steps to have the estate duly represented. We are of opinion that this letter written obviously on behalf of the plaintiff is enough to constitute acknowledgment or the acceptance of the plaintiff of her office as an executrix." B C

158. In *Smt. Usharani Roy v. Smt. Hemlata Roy* [AIR 1946 Cal. 40] it was held :- D

"If the caveator is not the executor under the later will, a citation would be necessary as is provided for by S. 229, Succession Act, calling upon the executor to accept or renounce his executorship and if the executor renounces or fails to accept the executorship within the time limited for acceptance or refusal thereof, the will may be proved and letters of administration with a copy of the will annexed may be granted to the person who would be entitled to administration cases of intestacy. (Section 231, Succession Act.)" E F

The said decisions, therefore, were rendered having regard to the doctrine of renouncing the office of an executor by implication in view of Section 229 of the 1925 Act and clearly show that an executor can act only upon the death of the testator and not during his life time. G

159. If the submission of the learned counsel that the executors had interest even during the life time of MPB is accepted the same would give rise to an absurdity. H

160. An executor must first become an executor. As MPB predeceased PDB, he never became an executor. If he did not become an executor, the question of filling up of any vacancy would not arise.

161. For the aforementioned purpose, we may assume that the 1982 Will was valid. As MPB could never become an executor, BKB's appointment does not confer on him a caveatable interest. An appointment of an executor ordinarily is the function of a court in terms of Section 301 of the 1925 Act. We, however, need not go into the question as to whether his appointment was legal or not. But, we may only notice that even in the deed of appointment, there is nothing to show that the necessary ingredients for appointment of B.K. Birla by the surviving executors had been made out as it was not stated that the original executor had seized to hold office.

162. The office of executor under the 1982 Will does not carry any remuneration therewith. The power to appoint an executor was dependent upon any executor ceasing to be one. The condition precedent has not been fulfilled. In the instant case, MPB had never become the executor, hence, the question of his "ceasing to be an executor" does not arise.

163. Appellants are not the legatees of the said Will. They are not the beneficiaries thereunder. They being merely executors, in our opinion, would not clothe them with a right to lodge a caveat as by reason thereof they did not derive any caveatable interest in the estate of PDB.

CAVEATABLE INTEREST OF GPB AS A NAMED EXECUTOR

164. GPB was held to have caveatable interest on the premise that he was named as an executor. He, therefore, in our opinion, has rightly been held to have a caveatable interest.

165. An application for grant of probate of 1982 Will is also pending. Therein a contention has been raised by the first respondent that the said Will was not genuine. If respondent

No.1 has a caveatable interest in respect of 1982 Will, we do not see any reason as to why GPB would not have any right in respect of 1999 Will.

APPOINTMENT OF YB AS AN EXECUTOR IN PLACE OF MPB

166. So far as the case of YB is concerned, his appointment as an executor has been upheld by the High Court. It was, however, opined that by reason thereof, he did not acquire any caveatable interest. RSL has filed an appeal against that part of the judgment whereby his appointment as an executor of the Will of MPB of 1992 in place of PDB has been upheld.

167. For the reasons stated in regard to the legal position governing the filling up of vacancy of one of the named executors by the others, we are of the opinion that the appointment of YB as an executor of the Will of MPB in place of PDB cannot be sustained. It is not a case of YB that PDB had assumed office or the purported Will of MPB had been given effect to. Genuineness of the said Will is in question. KKB has already filed an application for grant of probate in respect of the said Will. As there is nothing to show that any vacancy has been created by reason of death of PDB, YB could not have been appointed in her place at this stage.

The vacancy has to be filled up in terms of the instrument or in accordance with law. It cannot be directed to be filled in equity by a Court of Law as was submitted by Mr. Venugopal.

168. We are furthermore of the opinion that only because YB has a right to maintain a suit for purported enforcement of the Mutual Wills, the same by itself cannot confer upon him a caveatable interest.

169. There exists a distinction between an executor named by the testator in the Will and an executor who is appointed on a purported vacancy arising out of death of another executor. In the latter case such an appointment may not be valid. In a case

A of this nature YB could not be held to have caveatable interest only by reason of such an appointment as here is nothing on record to show that PDB had enjoyed the benefit under the said Will and not as an heir of MPB. If the Will had not been given effect to for such a long time, there is no reason as to why the B terms thereof should be directed to be acted upon at this juncture and/or in terms thereof dispute between the parties in this behalf cannot be adjudicated upon at an interlocutory stage.

170. In *Mrs. Hem Nolini Judah (since deceased) and after her Legal Representative Mr. Marlean Wilkinson v. Isolyne* C *Sarojbashini Bose and others* [AIR 1962 SC 1471], it was held :-.

"(7) Re. (1).

We have already pointed out that though it was said that D Dr. Miss Mitter had executed a will in favour of her mother Mrs. Mitter in June 1925 bequeathing the house in dispute to her, no probate or letters of administration were ever obtained by Mrs. Mitter. It is true that Mrs. Mitter in her turn made a will in favour of the appellant and she obtained E letters of administration of that will. In that will the house in dispute was mentioned as the property of Mrs. Mitter was bequeathed to the appellant and in the letters of administration granted to her this property was mentioned as one of the properties coming to her by the will of her F mother. The question therefore that arises is whether it was necessary before the appellant could take advantage of the bequest in favour of Mrs. Mitter that letters of administration of the will of Dr. Miss Mitter should have been obtained by Mrs. Mitter Section 213(1) which governs G this matter is in these terms :-

"(1) No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in India has granted probate of the will under which the right is claimed, or has H granted letters of administration with the will or with

a copy of an authenticated copy of will annexed." A

This section clearly creates a bar to the establishment of any right under a will by an executor or a legatee unless probate or letters of administration of the will have been obtained. It is now well-settled that it is immaterial whether the right under the will is claimed as a plaintiff or a B defendant; In either case s. 213 will be a bar to any right being claimed by a person under a will whether as a plaintiff or as a defendant unless probate or letters of administration of the will have been obtained : (see Ghanshamdoss v. Gulab Bi Bai) ((1927) I.L.R. 50 Mad. C 927). But it is urged on behalf of the appellant that this section will not bar her because she obtained letters of administration of the will of her mother Mrs. Mitter under which she is claiming and that it was not necessary for Mrs. Mitter to have obtained probate of the will of Dr. Miss D Mitter in her favour.

It was further observed :

Whosoever wishes to establish that right, whether it be a legatee or an executor himself or somebody else who E might find it necessary in order to establish his right to establish the right of some legatee or executor from whom he might derived title, he cannot do so unless the will under which the right as a legatee or executor is claimed has resulted in the grant of a probate or letters of F administration.

171. We may notice the findings of the learned Single Judge which reads :-

"In any event going by the submission of Mr. P.K. Roy G 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."

172. The affidavit of assets annexed by the Birlas to their H

A petition for grant of probate in respect of 1982 Will of MPD and the affidavit of assets annexed by them to the petition for grant of probate of 1982 Will of PDB show that the assets held by the former mentioned in the petition for probate of his Will of 1982 are also shown as assets of PDB.

B **APPLICATION OF SECTION 92 CPC**

173. A suit contemplated under Section 92 of the Code of Civil Procedure cannot be equated with a probate. In a suit under Section 92 of the Code of Civil Procedure, the title of the donor C may be disputed. Such a question as of necessity must be gone into by the court which, however, is a forbidden domain for the Probate Court. Reliance has been placed on *Sirajul Haq Khan & Others v. The Sunni Central Board of Waqf, U.P. and Others* [1959 SCR 1287] wherein this Court was of the opinion that a D person ascertaining that the property in dispute was not a wakf property was entitled to be heard. In a suit of that nature the title in the property or lack of it would be germane.

SECTION 73 OF THE INDIAN TRUST ACT.

E 174. Provisions of Section 73 of the Indian Trust Act have limited application. Applicability thereof would arise when a trustee disclaims, dies or is absent from India for a period of more than six months or leaves India for the purpose of residing abroad or is declared an insolvent etc.

F 175. Prima facie BKB or YB were not appointed as trustee. They were only appointed as executors. An executor becomes a trustee only upon completion of administration of trust. This proposition does not appear to be in dispute. Administration of trust being incomplete, MPB did not become an executor. He, G therefore, was not a trustee. Provisions of Section 73 of the Indian Trusts Act will, therefore, have no application. In the Will of PDB executed in the year 1982 he was merely named as an executor. It is also difficult, at this stage, to construe the Will of 1982 of PDB as an instrument of trust. The question in regard to the administration of the estate of PDB only arose after her H

death which took place in 2004. MPB died in 1990. The said provisions, therefore, have no application.

PREJUDICE ARGUMENTS

176. Submission that RSL is an outsider and the bequest is un-natural does not appeal to us. Such a question cannot be determined at this stage. Why an owner of the property executes a Will in favour of another is a matter of his/her choice. One may by a Will deprive his close family members including his sons and daughters. She had a right to do so. The court is concerned with the genuineness of the Will. If it is found to be valid, no further question as to why did she do so would be completely out of its domain. A Will may be executed even for the benefit of others including animals. Various documents have been placed before us by the learned counsel appearing on behalf of the first respondent to show that MPB was not happy in regard to management of Birlas' Group of Companies and by the division thereof which took place after the demise of G.D. Birla in 1983.

177. Indisputably, however, they were separate. They were in the control and management of their respective companies. The group of companies managed by MPB and PDB were known as M.P. Birla Group of Companies. There are other companies, named separately, in the name of individual group of Birlas.

178. According to the first respondent he had closely been involved in the M.P. Birla Group of Companies and had been inducted as Director/Co-Chairman/Chairman of various M.P. Birla Group of Companies during the lifetime of PDB. Other persons belonging to Birla family were not so involved. In fact according to the appellants themselves, the first respondent was a man of trust so far PDB is concerned as it was stated :-

> "(f) The Petitioner through Lodha & Co. and/or other firms under his control, ostensibly or otherwise, came to be appointed as statutory auditors and/or to be otherwise involved in matters concerning the finance and accounts

A of several companies and organizations where the Birla family has substantial stakes in management and/or shareholding. By reason of the same, the petitioner came to enjoy the trust and confidence of most of the members of the Birla family.

B (g) After the death of late Madhav Prasad Birla in or about July, 1990 the deceased who has had no formal education relied and continued to rely on the petitioner and reposed and continued to repose complete trust and confidence in the petitioner in the matters pertaining to all her financial C affairs by reason whereof, the petitioner was at all material times, privy to all information concerning the personal and financial affairs of the deceased. The deceased also sought and obtained advice from the petitioner with regard to her assets, savings and investments and with regard to D and in the management and affairs of several companies and institutions where the deceased had a stake in the shareholding and/or management and the deceased was at all material times accustomed to act as per the wishes and dictates of the petitioner. The petitioner is and was at E all material times aware of the same.

(h) By reason of the aforesaid, the petitioner was, at all material times, in a fiduciary relationship with the deceased."

F 179. The said arguments, therefore, do not appeal to us to determine the issues in favour of Birlas. We wish that these contentions were not raised before us.

APPEAL ARISING OUT OF SLP (C) NO. 19047 OF 2007

G 180. Whether RSL has a cavetable interest in the proceeding in respect of the probate of the Will of MPB dated 13th July, 1982 is also in question in this appeal.

181. We have already held that GPB has caveatable interests as executor of MPB in respect of his Will of 1982. We, H therefore, see no reason as to why RSL would not have a

caveatable interest being a beneficiary under the 1999 Will in the proceedings for grant of probate of the Will of MPB dated 13th July, 1982. If the grounds taken in the appeal are to be upheld, the same ex facie would destroy the case of the appellants in the other cases.

A

B

SUIT ON MUTUAL WILLS

182. We have noticed hereinbefore the averments made in the plaint of Civil Suit No.221 of 2004. Filing of the said suit, in our opinion, does not bar considering the caveatable interest and as we have not been called upon to decide the maintainability of the said suit at this stage, we do not make any observation thereupon. We have noticed the averments made in the plaint at some length only for the purpose of arriving at a finding on the question as to whether the plaintiffs therein have acquired any caveatable interest by reason thereof or not.

C

D

183. In our opinion, the High Court was right in opining that a caveatable interest may arise only after suit for enforcement of mutual Will is decreed and not prior thereto.

EPILOGUE

E

184. Before parting with this case we may notice some disturbing features. Each party for good or bad reasons has been opposing one or the other application filed by the other. It is stated that respondent No.1 is opposing the application for substitution of heirs and legal representatives of Mrs. Laxmi Devi Newar, sister of MPB. We do not know on what premise such a stand is being taken. Counsel for both the parties put the blame on the other side for causing delay in disposal of the matters.

F

185. We, keeping in view the facts and circumstances of the case, are of the opinion that the probate proceedings should be taken up for hearing by the High Court as expeditiously as possible. We would request the High Court to consider this aspect of the matter.

G

186. Probate proceedings may also be taken up for

H

A hearing one after the other.

187. Probate proceeding of RSL in respect of Will of PDB executed in the year 1999 should be taken up first. The hearing of the probate proceeding of Will of MPB of 1982 may be taken up immediately thereafter. Judgments may be delivered, if B possible, at the same time. The suit filed by the executors of the two 1982 Wills being Civil Suit No. 221 of 2004 may be taken up for hearing only after the disposal of the probate proceedings, if necessary.

C **CONCLUSION**

188. For the reasons aforementioned, Civil Appeal arising out of SLP (C) No. 10176 of 2007 filed by RSL challenging appointment of YB is allowed and all other appeals are dismissed with costs.

D

189. Who would be the beneficiaries of the case? We think that benefit should go to Legal Services Authority. We direct the appellants in the appeal filed by Birlas should deposit a sum of Rs.2,50,000/- (Rupees Two lac fifty thousand only) with the Member Secretary of West Bengal Legal Services Authority. E Such deposit should be made within four weeks from today, failing which the West Bengal Legal Services Authority would be entitled to realize the amount by filing application for execution wherefor cost would be borne by the appellants herein. Let a copy of this order be sent by the Registry to Member-Secretary, F West Bengal Legal Services Authority.

G.N. Civil Appeal Nos. 2277, 2274, 2276, 2279, 2275 of 2008 dismissed and Civil Appeal 2278 of 2008 allowed.