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(2006) 12 CAL CK 0007

Calcutta High Court

Case No: APO No. 242 of 2005 with PLA No. 204 of 2004, APOT 284 of 2005, GA No. 1429 of 2005 and T.S. No. 6 of 2004

In The Goods Of Smt. Priyamvada Devi Birla (Deed.) Krishna Kumarbirla and Others		APPELLANT
	Vs	
Rejendra Singh Lodha and Others		RESPONDENT

Date of Decision: Dec. 21, 2006

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 482
- Hindu Succession Act, 1956 - Section 14, 15, 15(1), 15(2), 6
- Probate and Administration Act, 1881 - Section 69
- Succession Act, 1925 - Section 2, 211, 222, 230, 232
- Trusts Act, 1882 - Section 73

Citation: (2007) 1 ILR (Cal) 435

Hon'ble Judges: Pinaki Chandra Ghose, J; Japan Kumar Dutt, J

Bench: Division Bench

Advocate: S.B. Mookerjee, S. Pal, P.K. Das, Shyam Sarkar, Bhaskar Sen, S.N. Mukherjee, Surajit Nath Mitra, D.N. Sharma, V. Meheria, N.G. Khaitan, Sanjib Banerjee and Ratnanka Banerjee, for the Appellant; Anindya Mitra, Pratap Chatterjee, Abhrajit Mitra, Maloy Ghosh, Ranjan Bachawat, Dhruba Ghosh, Debanjan Mondal, A. Banerjee, Jishu Chowdhury, Sanjib Kumar Trivedi, Sakya Sen, R. Bhattacharyya, K.R. Thakkar and Joseph Banerjee, for the Respondent

Final Decision: Dismissed

Judgement

Pinaki Chandra Ghose, J.

These appeals have been filed by Krishna. Kumar Birla (hereinafter referred to as KKB), Basan Kumar Birla (hereinafter referred to as BKB) and Yashovardhan Birla (thereinafter referred to as YB) against the judgment of the Hon''ble First Court

discharging their caveats in the proceeding for grant of probate of the Will dated 18fh April, 1999 and Codicil dated 15th April, 2003 of Late Smt. Priyamvada Devi Birla (hereinafter referred to as PDB).

Cross-appeals have been filed by Rajendra Singh Lodha (hereinafter referred to as RSL) in so far as the Hon''ble First Court held that G. P. Birla (hereinafter referred to as GPB) has caveatable interest. By consent of parties both the appeals and the cross-appeals were heard together and disposed of by this common judgment.

2. The question arose in this matter whether the Appellants have any caveatable interest in the Estate of the said deceased PDB in the facts of the case.

Facts of the case briefly are as follows:

On 3rd July, 2004 PDB died. Her husband Madhav Prasad Birla (Hereinafter referred to as MPB) pre-deceased her on 30th July, 1990. The couple had no issue.

It is submitted on behalf of the KKB that KKB and Late MPB had a common ancestor and were/ are both male lineal descendants of the Raja Baldeodas Birla (the common ancestor). The relationship between the parties will appear from a Genealogical Table set out in the Paper Book, Volume 1, Page-352.

It is stated that the said Late MPB and PDB exeeuted mutual Wills in 1981. On July 13, 1982 the said couple executed mutual Wiils revoking the earlier mutual Wills. It further appears that on April 18, 1999 PDB executed a fresh Will by which she bequeathed all her properties to RSL. It also appeaars that the executors including the KKB to the mutual Wills of MPB and PDB have applied for grant of probate of the said mutual Wills. RSL has also applied for grant of probate of PDB''s Will dated April 18, 1999.

It is the case of the KKB that Laxmi Devi Newar and Radha Devi Mohatta, both sisters of MPB, are the heiress of PDB on intestacy. It further appears that the caveats were filed by KKB, BKB, GPB, YB, Laxmi Devi Newar and Radha Devi Mohatta, Similarly, RSL also filed caveats in respect of the said Wills of 1982 of Late MPB and PDB.

RSL applied for discharge of caveats filed by KKB, BKB, Ganga Prasad Birla and YB in respect of the Will dated April 18, 1999. The said application for discharge of the caveats was heard and disposed of by the judgment and order dated March 11, 2005 and caveats filed by KKB, YB, BKB were discharged and the caveats filed by Ganga Prasad Birla allowed to be retained. The application also made on behalf of the executors of 1982 Will for discharge of the caveat viled by RSL in relation to the Will of MPB was rejected by the said judgment dated March 11, 2005. Hence, KKB and other Birlas filed these instant appeals.

3. Mr. S. B. Mookherjee, Learned Senior Advocate appearing in support of the appeal filed on behalf of the KKB contended that it cannot be disputed that there were

mutal Wills left behind by MPB and PDB. He also drew our attention to a decision reported in Shiva Nath Prasad Vs. State of West Bengal and Others, and submitted that the undisputed facts are that the couple executed mutual Wills in 1981 arid in1982 the couple executed fresh mutual Wills after revoking the earlier mutual Wills. He further contended that the concept of the mutual Wills has now been recognized in our country and he relied upon the following decisions reported in), Dilharshankar C. Bhachech Vs. Controller of Estate Duty, Ahmedabad, and 1993 All E. R. 129 (Re: Dale (deceased) Proctor v. Dale).

According to him, in 1982, by concent the said couple revoked the earlier mutuals Wills, but agreed once again with each other as to the disposition of their respective Estate on their deaths in favour of charities as ultimate beneficiaries, and pursuant to such agreement the said Wills were executed on July 13, 1982. He further contended that the said Wills would be irrevocable and would remain unaltered. On July 30, 1990 after the death of MPB, PDB as beneficiary of her husband''s Will, came to possess, own and control the Estate of MPB in terms of the said Will until her death. It is submitted that the purported Will Dated 18th April, 1999 and the alleged codicil dated April 15, 2003 were executed in breach and total disregard of the subject matter of the agreement and the mutual Wills. Hence, he submitted that the executors of the mutual Wills are entitled to take possession of the entire Estate and make over, donate and settle the same for the purpose of charity at their absolute discretion. The executors are trustees of the constructive trust, which came into force, on the basis of the mutual Wills. Therefore, the said Executors are entitled to execute and implement the said trust and do all things necessary for the said purpose.

He further submitted that a suit has been filed, inter alia, for a declaration that RSL as the alleged executor and sole beneficiary of the purported Will of PDB dated April 18, 1999 and the purported Codicil dated April 15, 2003, is not entitled to deal with the subject matter of mutual Wills dated July 13, 1982 and for other reliefs. It is further submitted that the suit is pending and written statement has been filed.

4. Accordingly, he submitted that the mutual Wills of 1982 are complimentary and both are awaiting for grant of probate. Therefore, KKB and other executors of MPB''s Will have a caveatable interest and such interest is in conflict with the interest of RSL. If probate is granted in rspect of PDB''s Will of 1999, it will adversely affect the rights of KKB as executor to the Will of MPB and will displace his right as such executor. Therefore, he submitted that KKB has a caveatable interest in the matter.

He further contended that seveal letters, statements, affidavits, etc. written, made or executed by PDB asserting that MPB died intestate and she was heiress of MPB on intestacy. Such action of PDB cannot obliterate the existence of the mututal Wills. In fact, RSL has cotended that the mutual Wills have been revoked or were not acted upon. He further submitted that from the Will of PDB (Paper Book, Volume 1, page-8, Clauses 3 and 4) and Codicil (Paper Book, Volume 1, Page 11 Clausel) that

the word "bequeath" has been used. This word means that the properties, have devolved on her by testamentary disposition. In support of his contention he relied upon the following dictionaries:

(a) Shorter Oxford English Dictionary, 1993 Edn., (Page 216);

(b) Black''s Law Dictionary, 7th Edn. (page 152);

(c) Stroud''s Judicial Dictionary Volume 1 & 2 (Page 270 and Page 706) for the meaning of the words "bequeath" and "devise".

He further contended that the Will of 1999 had been challenged on diverse grounds and in particular that the said purported Will of 1999 is unnatural and not a genuine Will.

5. He submitted that KKB claims caveatable interest on, inter alia, the following grounds:

(a) as having a common ancestor with Madhav Prasad Birla.

(b) as an agnate and as having a remote or bare possibility of succeeding to the estate; and

(c) a; an executor to the mutual Will of Madhav Prasad Birla dated July 13, 1982.

He also placed Section 283 of the Indian Succession Act, 1925 and submitted that the language used is very wide. Any interest has been construed to mean a slight interest, a remote interest or a bare possibility of an interest. Even a person who has a real interest in the Estate which is or is likely to be prejudicially affected or adversely affected by the Will can oppose the grant of probate. According to him, all persons claiming to have any interest in the Estate of the deceased would be entitled to be heard. He also submitted that the Court must he satisfied, prima facie, that the interest claimed by the Caveator has sufficient interest to enable him to appear in the probate proceedings and to oppose the grant. Therefore, he submitted that the discharge of the caveat filed by KKB cannot be sustained. He also relied upon the following decisions reported in ILR 6 Cal. 460 (Nobeen Shunder Sil v. Bhobasoonduri Dabee), 10 CLJ 269 (Brindaban Chandra Saha v. Sureshwar Saha Pramanick), Hari Charan Bhunya and Others Vs. Sm. Kamal Kumari Dasi, Mt. Sheopati Kuer Vs. Ramakant Dikshit and Others, , 1972 Mad. 212 (G. Jayakumar v. R. Ramaratnam), Sm. Sima Rani Mohanti Vs. Puspa Rani Pal, , 2002 (1) CLT 260 (Benoy Ranjan Banerjee v. Sadhan Ranjan Banerjee), 2002 (4) CHN 583 (Dinanath Shah v. Suratidevi), Haripada Saha and Another Vs. Ghanasyam Saha and Another and Mrs. Elizabeth Antony Vs. Michel Charles John Chown Lengera, in Support of his such contention.

He further submitted that the Hon''ble First Court has directed that the application for probate in relation to the Will of MPB dated 13th April, 1982 shall be heard first and immediately thereafter the application filed by RSL in relation to the latter Will

of PDB shall be heard, is wholly untenable. According to him, the said procedure would mean that there would be protracted litigation. He furher contended that the probate of the Will of PDB of 1999 has already been marked as contentious cause and therefore, the said matter should be heard first and would avoid multiplicity of the proceedings and protected litigation.

Mr. Samaraditya Pal, Learned Senior Advocate appearing on behalf of YB submitted that the one and only question before the Court is whether the Appellants have a caveatable interest to contest the 1999 Will of PDB. The application filed before the Hon''ble First Court is an interlocutory application in a probate proceedings. He drew our attention to the essential and undisputed facts of the case. He submitted that in 1981 couple executed the mutual Wills, each having set of three executors (Vol. 5, Pages 691 and 693 of the Paper Book). In 1982 the couple executed the mutual Wills, revoking earlier mutual Wills and each having set of four executors (Vol. 4 Pages 250 and 252 of the Paper Book).

6. He further contended that on 30th July, 1990 MPB died. On 18th April, 1999 PDB executed the disputed Will by which she purported to bequeath all her properties to RSL. On 15th April, 2003 PDB executed the disputed Codicil (Vol. 1, Page - 11) purporting to clarify the Will and also making further bequest to RSL. On 3rd July, 2004 PDB died. On 12th July, 2004 RSL filed an application for grant of probate of 1999 Will (Vol. 4, Page 73, 80 and 87). On 19th July, 2004 Ganga Prasad Birla and Laxmi Devi Newar filed caveats to 1999 Will (Vol. 4, Pages 94 and 101). On 22nd July, 2004 Radha Devi Mohatta filed caveat to 1999 Will (Vol. 4, Page 108). On 30th July, 2004 KKB, BKB, GPB, YB, Laxmi Devi Newar and Radha Devi Mohatta filed affidavits in support of caveats in which the existence of mutual Wills were disclosed (Vol. 4, Pages 115, 133, 165, 149, 183, 196). On 17th August, 2004 executors filed applications for probate of mutual Wills and also filed a suit for specific performance of the mutual Wills on 23rd August, 2004 by a deed of appointment YB was appointed as an executor in place of PDB in mutual Wills of MPB (Vol. 5, Page 703). On 24th August, 2004 by a deed of appointment BKB was appointed as an executor in place of MPB in mutual Wills of PDB (Vol. 5, Page 699). On the same date i.e. on 24th August, 2004 YB filed supplementary affidavit disclosing appointment as executor in mutual (Wills) Vol. 1, page-225). On 25th August, 2003 BKB filed supplementary affidavit disclosing appointment as executor in mutual Wills (Vol. 1, Page 220).
Mr. Pal contended that YB derives his interest from the two sources - (1) as an executor of the 1982 mutual Wills of MPB and (2) as an heir within the provisions of Hindu Succession Act, 1956 (hereinafter referred to as HSA).

He further contended that YB as executor of 1982 mutual Wills of MPB has a caveatable interest. He also relied upon the concept of mutual Wills as per the Hon''ble Supreme Court judgment reported in Shiva Nath Prasad Vs. State of West Bengal and Others, He further submitted that the doctrine of the mutual Wilis is to

the effect that where two, individuals agree as to the disposal of their assets and execute mutual Wills in pursuance of the agreement, on death of the first testator (T1), the property of the survivor testator (T2), the subject matter of agreement, is held an implied trust for the beenficiaries named in the Wills. According to him, survivor testator may alter his/her Will because a Will is inherently revocable, but if he/ she does so, his/her representative will take the assets subject to the trust.

7. According to him, equity will not allow survivor testator (T2) to commit a fraud by going back on her agreement with first testator (T1), since assets received by the survivor testator (T2) on death of first testator (T1), were begueathed to survivor testator (T2) on the basis of the agreement not to revoke (Nullify) the Will of first testator (T1), it would be fraud for the survivor testator (T2) to take the benefit, while failing to observe the agreement and equity intervense to prevent this fraud. Instrument itself is the evidence of the agreement and he who dies first, does by his act carry the agreement into execution. He submitted that the concept of the mutual Wills is already accepted and he drew our attention to Halsbury Vol. 50 Para 208at Page 96, Corpus Juris Para 1367, Page 307 and the decisions reported in Dilharshankar C. Bhachech Vs. Controller of Estate Duty, Ahmedabad, Kuppuswami Raja and Another Vs. Perumal Raja and Others, 57 CLR 666 (Brimingham v. Renfrew), (1950) 2 All E. R. 913 (Re: Green (Deceased). Lindner v. Green and Ors.), (1981) 2 All E. R. 1018 (Re: Cleaver (deceased) Cleaver v. Insley and Ors.), (1993) 4 All E. R. 129 (Re: Dale (deceased) Proctor v. Dale), (1999) 2 Mah. L. J. 889 (vasant Narayan Karkhanis v. Mrs. Prabhavati Bhalchandra hajarnis since deceased by heirs and Ors.) and AIR 2002 Del. 321 (Ms. Meera Dewan v. Smt, Shakuntala Dewan).
He further contended that if it was an undisputed case of intestacy, then there would be no difficulty in ascertaining her successor on her death by the application of Section 15 of the Hindu Succession Act. and her estate would devolve upon those who fulfill the character of highest degree of heirship at the moment of her death. But in fact this case is not an undisputed case of intestacy. There is am impugned Will. The probate of the Will is pending.

He further contended that YB''s standing has to be decided on the happening of cerain contigencies i.e. the absence of any heirs through Newar and Mohatta because of death or otherwise betwen death of PDB and ultimate grant or rejection of probate.

He further contended that the devolution of estate of PDB as on intestacy would be u/s 15 of Hindu Succession Act. He futher submitted that YB is an agnate of MPB, i.e. husband of PDB, which cannot be disputed. YB''s caveatable interest as a possible heir cannot be defeated by the mere fact that there are heirs of better degree above him i.e. Newar and Mohatta.

He further contended that the RSL cannot be allowed. to blow hot and cold. RSL''s locus to challenge the 1982 mutual Wills in that if the 1982 mutual Wills are

probated, then his contingent interest as a beneficiary under the 1999 Will would be in jeopardy. He may contend that as the executor of the 1999 Will he is interested to see that the 1999 Will of PDB is executed on its terms. He submitted that the assumption here is that the 1982 mutual Wills may be probated. It is only in the contingency of the 1982 mutual Wills being probated, that RSL claims locus to challenge the 1982 mutual Wills. He also relied upon the decision reported in 10 CLJ 263 (Brindaban Chandra Shaha v. Sureswar Shaha Pramanick and Ors.), Priya Nath Bhattacharji Vs. Saila Bala Debi, Gourishankar Chattoraj Vs. Sm. Satyabati Debi, , Mrs. Elizabeth Antony Vs. Michel Charles John Chown Lengera, AIR 1918 Cal. 183 (Satindra Mohun Tagore and Anr. v. Sarala Sundari Debi and Anr.), (2002) 1 CLT 260 (Sri Benoy Ranjan Banerjee and Anr. v. Sri Sadhan Ranjan Banerjee), Sm. Annapurna Kumar Vs. Subodh Chandra Kumar, , Rajkishore Panda and Another Vs. Haribandhu Mahala and Others, , G. Jayakumar Vs. R. Ramaratnam, 49 CWN 713 (Haripada Saha and Anr. v. Ghanasyam Saha and Anr.), State of Bihar Vs. Radha Krishna Singh and Others, and an uneported judgment by His Lordship Ajoy nath Ray, J.

He further contended that there cannot be any dispute that the limited estate of Hindu widow was converted to absolute interest by Hindu Succession Act, 1956.

Mr. S. P. Sarkar, Learned Senior Advocate appearing on behalf of the BKB drew out attention to Sections 263, 283 etc. and other well established principles of law of succession and submitted that a most liberal approach is warranted. Firstly Section 283 of the Indian Succession Act vests the Court with wide discretion as to issue of citation to person "claiming to have interest". Secondly, because, order granting probate is a judgment in rem, the grant of probate may affect interest of a large number of people, whose interests may not be known to or foreseen by the Court while issuing citation. In support of such contention he relied upon a decision reported in 10 CLJ 263 (Supra).

8. Mr. Sarkar adopted the submissions made on behalf fo Mr. S. B. Mookherjee and Mr. S. Pal on the point of caveatable interest. He submited that a review of the said cases on caveatable interest are illustrative only. He further submitted that if a person on the known facts stands to have a possible claim or stake on the devolution of the estate of the deceased in the event of a probate to his/her Will could not be granted, such person would have a caveatable interest. On this footing alone all the cases on caveatable interest can be explained and reconciled. Thus viewed, not only heirs on intestacy as per Schedule fo the Hindu. Succession Act, but also a wide range of persons, whose claims are subordinate and subject to prior claims of such heirs and thus having a mere contingent" and reversionary interest can maintain a claim to contest.

He also relied upon a decision reported in Jammi Hanumantha Rao Vs. Aratla Latchamma, and contended that the phrase in Section 283 "claiming to have interest in the estate of the deceased" has been correctly interpreted and explained in the said decision.

He further contended that it is necessary to entitle a person to enter caveat is to claim interest in the estate of the deceased. Incidentally, the said decision throughly approves the test devised by Field J. In the case reported in ILR 6 Cal. 460 (Nobeen Chunder Sil and Ors. v. Bhobasoonduri Dabee).

He further contended that the definition of caveatable interest cannot be given by a very narrow interpretation of Section 283(1) of the Indian Succession Act.

He also submitted that PDB having died a widow and issueless, her Estate would devolve upon heirs of her husband. He also drew our attention to Section 15(1)(b) of the Hindu Succession Act. In the given facts of this case, PDB''s husband had two sisters who would be immediate heirs to inherit the Estate of PDB. In support of his such submission he drew our attention to Section 8(b) read with Schedule Class II(II) and (4). However, BKB would have a claim and qualifies as an heir subject to prior claim of two sisters of MPB as his claim could be traced through the common ancestor of Late Raja Baldeodas Birla.

He further contended that any person as a remote heir can claim caveatable interest through common ancestor and he relied upon the decisions reported in Gourishankar Chattoraj Vs. Sm. Satyabati Debi, and Mrs. Elizabeth Antony Vs. Michel Charles John Chown Lengera,

He further submitted that whether the BKB''s appointment as executor of PDB''s 1982 Will by surviving executors is valid or not, on this question he submitted that PDB in her Will dated 13th July, 1982 appointed her husband (1) MPB, (2) GPB, (3) Pradip Kumar Khaitan as her executors and in the said Will it has been provided that if any of them ceased to be the executor for any reason, the survivor or survivors might, if he or they so desire, fill up such vacancy or vacancies with a person of their choice. Therefore, during the pendency of the probate application BKB was appointed as the surviving executor of the said 1982 Will by a deed dated August 25, 2004 in place and stead of the first named executor MPB.

9. Questioning the said appointment, it was argued before the Learned Trial Court by Mr. Mitra that since MPB, the first named executor of the 1982 Will of PDB died long before PDB i.e. on 30th July, 1990, he did not assume the office of the executor at any stage and hence, the question of vacating such office of executor and consequently question of appointment of BKB as a substituted executor in his place could not and did not arise.

He submitted that the said argument and the finding of the Hon''ble First Court are based on misconception and misunderstanding as to the nature of executor''s office. For appointment of an executor it is not necessary for such an executor, who will be appointed by a testator whether he likes it or not. The executor has a right only to renounce his right u/s 230 of the Indian Succession Act. In support of such contention he relied upon Halsbury''s Laws of England, Vol. XVII, Section 222 of the Indian Succession Act, William''s on Wills 8th Edn. 223 and the decisions reported in

Raja Rama Vs. Fakuruddin Sahib and Others, and 1916 (1) Appeal Cases 603 (S.M.K.R. Meyappa Chetty v. S. N. Supramaniah Chetty).

He further drew our attention to Section 73 of the Indian Trusts Act, 1882 and Section 232 of the Indian Succession Act and submitted that it is well-known that in interpretation of Will the Court seeks to find the intention of the testator, which is popularly known as "armchair theory". Having regard to the facts of mutual Wills, the vastness and complexity of the Estate, it is not difficult to see what was in the mind of PDB while appointing a set of four executors and further empowering the said executors, in case of any vacancy to fill in the said vacancy. The intention was clearly to ensure that having regard to the vastnss and complexity of the Estate, persons from various fields were appointed to give due weightage to personal relationship and professional expertise that they should always have the power to administer the Estate.

He further contended that Mr. Mitra submitted before the Hon''ble First Court that an executor who could not assume the office of an executor he cannot vacate the same and the decision was relied upon before the Hon''ble First Court reported in 1988 (1) Chancery 775. According to him, the said case had nothing to do with office of the executor.

10. He further contended that an executor cannot be made liable unless he accepts the office as an executor. He further contended that an executor can be nominated by other executors without the intention of the testator/testatrix is clear or can be implied or gathered from the tenor of the Will. In support of such contention he relied upon the decisions reported in Cringan (1929) 1 Hag 1 ECC 548, Anne Hill Ryder In Re: Durga Das Koosary, . Therefore, according to him, the competency of BKB cannot be disputed on the ground that an executor can be appointed by the te.''Jator or testatrix alone and the interest-of BKB acquired during the pendency of the probate proceeding. He further relied upon the following decisions reported in 19 CWN 1108 (Mokshadatini Dassi v. Karnadhar Mandal), Nabin Chandra Guha Vs. Nibaran Chandra Biswas and Others, and Dinabandhu Roy Brajaraj Saha, Firm Vs. Sarala Sundari Dassya, in support of his such contention. Therefore, according to him, BKB is entitled to be added as a party to the suit and he has a clear caveatable interest in the Estate of PDB. On the point of mutual Will he adopted the arguments put forward by Mr. Pal.

He also submitted that the caveatable interest on the basis of mutual Wills arise from the fact that the executors of the mutual Wiiis are entitled to eforce the constructive trust in respect of property which comprises the estate of PDB. He also relied upon the decisions reported in ILR 6 Cal. 460 (Nobeen Chunder Sil and Ors. v. Bhobosoonduri Dabee), Jammi Hanumantha Rao Vs. Aratla Latchamma, ILR 8 Cal. 570 (Kamona Soondury Dassee v. Hurro Lall Shaha) and G. Jayakumar Vs. R. Ramaratnam,

He further contended that BKB being the executor of an earlier Will, is entitled to contest the laer Will i.e. 1999 Will since the said Will to be treated as a rival Will and therefore, BKB has a caveatable interest in the matter. In support of such contention he relied upon the decisions reported in 17 ILR Mad 378 (Rehmatuilah Sahib v. Rama Rau), AIR 1919 All. 1012 (Draupadi Dasya v. Rajkumary Dasya), Shanti Devi Agarwalla Vs. Kusum Kumari Sarkar and Another, Sm. Sima Rani Mohanti Vs. Puspa Rani Pal, and Venidas Nemchand Vs. Bai Champabai,

He futher submitted that the management of orchards by an agreement clearly vests in KKB. BKB is the co-owner of.the same and therefore, has a right of pre-emption. Hence, he has a right of caveatable interest. On the question whether the application for probate of 1982 Will or application for probate of 1999 Will would be heard first he further submitted that the probate proceedings of 1999 Will of PDB should be heard first, otherwise it will incur unnecessary expense.

11. Learned Counsel appearing on behalf of GPB drew our attention to the genealogical table of MPB and submitted that following the Rules of Succession as provided in Section 15 of the Hindu Succession Act read with the Schedule thereto, the property will first go to the two sisters of MPB but by the time the probate proceedings are over, if the two sisters of MFG and their heirs have all died, then GPB will have a chance to get a share in the estate however remote that chance might be. Therefore, even otherwise GPB has a caveatable inerest as he has an interest, may be remote, in the estate of PDB. The Hon''ble First Court has rightly observed that GPB is undisputedly a named executor appointed by the PDB and therefore, has caveatable interest in so far as the Will of 1999. Learned Trial Judge held "Accordingly I hold this interest of G. P. Birla being one of the executors above is sufficient to maintain his caveat in relation to probate proceedings of lady''s Will".

Mr. Anindya Mitra, Learned Senior Advocate appearing on behalf of the Respondents contended that the only question is whether any of the Birlas have got any caveatable interest in the Estate of the Deceased. He also drew our attention to Section 283(1)(c) of the Indian Succession Act and submitted that the "the deceased" means the deceased testator. The interest must be of such nature as would entitle a person to participate in the proceeding for probate of the Will of the deceased testator. Interest as claimed by the person concerned in the Estate of the deceased testatrix must be such interest as is likely to be displaced by the grant of probate. On behalf of the Birlas it has been argued that they do not claim any interest or benefit in the Estate of PDB. On the death of Mrs. Newar, Birlas cannot claim to be intestate heirs of Mrs. Newar nor they can have any interest on the death of Mrs. Mohatta. Therefore, Appellants Birlas do not have any caveatable interest in the facts of this case.

12. According to him, only intestate heirs shall have the caveatable interest and he relied upon a decision reported in AIR 1946 Cal. 40 (Sm. Usharani Roy v. Sm. Hemlata Roy w/o Hemendra Kumar). He also submitted that, in the said decision it

was held by the Hon''ble Division Bench that the caveator must ex hypothesi be a person entitled to administer the estate in cases of intestacy, otherwise he would have no locus standi to contest the probate proceeding. Therefore, none of the Birlas fall within this category. He futher relied upon a decision reported in AIR Cal 34 (In the Goods of Mahammad Bashir Deceased) where His Lordship Mallick, J. held that a person not being an heir and having no interest in the Estate of the deceased has no right to be cited. His Lordship further held that only such members of the family or relations who have an interest in the Estate of the deceased, have to be served with the petition for grant. Further reliance was placed by Mr. Mitra on Rajiv Ramprasad Gupta Vs. Rustom Sam Boyce, where the Hon''ble Bombay High Court held that the Petitioner not being the legal heir has no interest in the Estate in the sense that testacy or intestacy does not affect his right and as such he does not have a right to challenge the Will. In ILR 17 Cal. 49 (Abhiram Dass, Minor, By His Mohafiz and Executor Jairam Parida v. Gopal Dass) it has been specifically stated that the person having no right to succeed to any part of the Estate of the Testator has no right to oppose grant of probate. A person disputing the title of the deceased has no right to oppose grant. The Hon''ble Division Bench also disapproved the observation of Justice Field (not adopted by Justice White) to the effect that if one can file a suit, one can lodge a caveat. Sir Ashutosh Mukherjee, J. in 10 CLJ 263 (Brindaban Chandra Shaha v. Sureswar Shaha Paramanick and Ors.) also expressed reservation about the test proposed by Filed, J. He further relied upon the decisions reported in 1996 (1) CHN 205 (Nikunj Kumar Lohla v. Narayan Prasad Garodia and Ors.), Mrs. Perviz Sarosh Batliwalla and another Vs. Mrs. Viloo Plumber and another, 1997 (3) Mad L.W. 541 (M. S. Saraswathi v. M. S. Selvadurai and Anr.) and AIR 1962 Cat 623 (Lalchand Bhur and Anr. v. Sm. Sushila Sundari Dassi and Ors.) in spport of his such contention.

13. He further submitted that it is to be decided whether Appellant Birlas have any caveatabie interest in the facts of the case. He submitted that the undisputed facts are as follows:

(a) PDB died on 3rd July, 2004. Her husband MPB pre-deceased her on 30th July, 1990. The couple had no issue.

(b) Hindu Succession Act, 1956 came into operation on 17th June, 1956 and was applicable when MPB and PDB died. Admittedly, both were Hindus governed by Mitakshara School of Hindu Law. When MPB died in 1990, PDB was his sole heiress being Class I heir (widow) under Hindu Succession Act.

(c) Wehn PDB died, she had no Class I heir. Her intestate heiresses were her husband''s sisters namely Laxmi Devi Newar (for short Mrs. Newar) and Radha Devi Mohata (for short Mrs. Mohata) who are Class II heiresses (Entry No. 2). Both Mrs. Newar and Mrs. Mohata have large number of their respective Class I heirs and the Estate can only travel down that line or in escheat.

(d) In the probate petitions filed by Birlas for the two alleged Wills of 1982 of MPB and PDB respectively, it is admitted that Mrs. Newar and Mrs. Mohata are the intestate heirs of PDB. It is not even alleged the Birlas have any possibility of interest in the Estate of PDB or MPB in such probate petitions.

(e) Both Mrs. Newar and Mrs. Mohata have filed affidavits in support of caveat. The probate case has been set down as a contentious cause and marked as T. S. No. 6 of 2004.

(f) Khaitan & Co., Advocates on Record for the Birlas are also Advocates on Record of Mrs. Newar and Mrs. Mohata and they are being represented by the same Counsel as well. Caveats on behalf of the Birlas and Mrs. Newar and Mrs. Mohata have all been filed by Khaitan & Co. Now N. G. Khaitan, upon death of Mrs. Newar has been added as a Defendant in T.S. No. 6 of 2004 as an Executor to the Will of Mrs. Newar.

(g) Birlas have not claimed to be intestate heirs of either MPB or PDB under Hindu Succession Act. Birlas have claimed to be agnates of PDB.

(h) Birlas have not claimed a creditors or reversionary heirs of PDB.

(i) Mrs. Newar died after filing her written statement in the probate case. Application for probate of her Will was made through Khaitan & Co., Advocates. Even the Will is on the backsheet of Khaitan & Co. and witnessed by their Associates. In the petition for probate of the Will of Mrs. Newar dated 3rd March, 2005 being P.L.A. No. 142 of 2005 (production whereof was given in Court), Mrs. Newar''s two sons have been shown as her intestate heirs. In is not even alleged the Birlas have any possibility of interest in the estate of Mrs. Newar.

14. He further contended that KKB claimed caveatable interest on the basis of executorship under an alleged Will of MPB of 1982. The Will of MPB even if valid is not and cannot be revoked by the Will of PDB. The Will of one person cannot be revoked by another person. Therefore, executorship of KKB under the alleged will of MPB is not affected by the Will of PDB of 1999. He further contended that u/s 8 of the Hindu Succession Act, there are two heiresses in Entry 2 of Class II of the said Act. Agnates cannot and do not have any right or real interest in the Estate of the deceased. Agnates come into picture only when there is no heir of either Class I or Class II. He further submitted that assuming it is intestate death of PDB, her Estate has already devolved upon Mrs. Newar and Mrs. Mohata and upon their death will devolve to their respective heirs under the Hindu Succession Act including the heirs of their respective husbands. Therefore, the property will certainly not go back to the heirs of their father and brother.

He further submitted that KKB claims caveatable interest as co-owner of Kumaon Orchards, PDB, KKB, BKB, GPB and S. K. Birla have each got 1/5* share in Kumaon Orchards as co-owners. By her Will, PDB could bequeath only her 1/5* share as co-owner and she could not and cannot extinguish or effect the right of the other

coowners. He further submitted that the right of pre-emption, if any of the co-owners is not affected by testamentary disposition, because the right of pre-emption arises in case of voluntary transfer for consideration to a stranger. The testamentary or intestate heir will inherit the the undivided 1/5* share subject to all covenants attached to the co ownership and will be bound by the presmption right, if any.

In case of YB, YB claims to be the executor of the alleged Wifl of MPB of 1892 appointed by other executors subsequent to the death of MPB and death of PDB by the Deed of Appointment dated 24th August, 2004. He also claims his right as an executor under the alleged Will of MPB of 1982. If the Will of MPB is valid it cannot be revoked by the Will of PDB. Therefore, the executorship of YB under the alleged Will of MPB is not affected by the Will of PDB of 1999. Claims of YB as an agnate of MPB has a chance of succeeding to the estate, which attracts Section 8 of the Hindu Succession Act and he does not come within Class II or I or Class I of the Schedule.

15. With regard to BKB, claims to be intestate heir as an agante of MPB and co-owner of Kumaon Orchard, he submitted that all these cases are lying on the same grounds of KKB. He further submitted that appointment of BKB as executor to the alleged Will of 1982 of PDB after her death by other executors by a Deed of Appointment dated 25th August, 2004 also cannot be accepted on the ground that the appointment was sought to be made by other executors of the alleged Will of PDB of 1982 to fill up the vacancy of MPB who was named as an Executor of the alleged Will of 1982 of PDB, MPB had died in the year 1990, during the lifetime of PDB who died 14 years thereafter. Therefore, MPB never assumed the office of an executor of the alleged Will of PDB of 1982 and hence, there is no question of MPB ceasing to hold office. The powers of Executors were confined to appointment in case of an Executor ceasing to hold office.

He further submitted that on the ground of mutual Wills, mutual Wills must contain an agreement not to revoke the same. It is not the law that all mutual Wills contain an agreement of non-revocability. Even if mutual Wills contain an agreement between the testators/testatrix not to revoke the Wills, the probate Court is only concerned with the last Will and only if the said agreement, which is irrevocable, is established in a suit, the personal representative i.e. Executor or Administrator of the surviving testator (R. S. Lodha in this case) will hold the estate in trust to give effect to the disposition in the mutual Will. Therefore, it is the personal representative (i.e. Executor or Administator of the later Will) who will hold that property in trust, if Birlas succeed in their suit. He also relied upon a decision reported in 1914 Probate Division 192 (Wallker and Anr. v. Gaskill and Ors.) where the Probate Court is not concerned with the agreement of irrevocability of Wills. The Probate Court will only recognize the last Will of the deceased. Suit has to be filed to establish the irrevocability of earlier Will of the testators and if there is an agreement for irrevocability regarding disposition of property and if that suit

succeeds, the personal representative (i.e. Executor or Administrator of the last Will) will hold the properties in trust as may be declared by the Suit Sourt. He also relied upon a decision reported in 77 Idaho 12 (Matter of the ESTATE of Matt ISAACSON, Deceased. Herman J. ROSSI, for George Isaacson v. Waiter Jarvey, Administrator). Mr. Mitra further contended that the Probate Court cannot refuse the grant of probate of the last Will even if there were earlier mutual Wills. Existence of mutual Wills is not a ground for opposing grant of probate of the last Will. Therefore, the existence of earlier mutual Wills cannot possibly create caveatable interest because the object of caveat is to contest the later Will. As has been clearly and reepeatedly held, existence of earlier mutual Wills is not a ground to oppose the grant of probate of the later Will. In support of his submission he relied upon a decision reported in Kuppuswami Raja and Another Vs. Perumal Raja and Others, where it has been held that the Probate Court is not concerned by the existence of any prior mutual Will of the Testatrix. He also relied upon a decision reported in AIR 1971 Mysore 143 (Leo Sequiera v. Magdalene Sequiera Bai and Ors.) and contended that in fact a Will becomes operative immediately on death and operation thereof is not postponed till death of the other.

16. Mr. Mitra further contended that the office of the Executor has to be accepted and he relied upon the decisions reported in Ramautar Singh Vs. Sm. Ramsundari Kur and Others, , Sri Raja Kakarlapudi Venkata Sudarsana Sundara Narasayyamma Garu (died) and Others Vs. Andhra Bank Ltd., Vijayawada and Others, Vijayawada and Ors.), Jnanandra Nath Mukherjee and Another Vs. Jitendra Nath Mukherjee and Others, and Sm. Usharani Roy Vs. Sm. Hemlata Roy in support of his submission.

He further contended that the Hon''ble First Court has held that whether the 1982 mutual Wills are mutual Wills or not, will be decided in the suit being C. S. No. 221 of 2004 filed by the Birias. Therefore, according to him, no reason or valid ground has been shown by the Appellants to interfere with the reasoning and conclusion of the Hon''ble First Court.

He further contended that the Appellants have not claimed caveatable interest as. creditor or reversionary heir of PDB. The judgments cited on the question of caveatable interest of creditors and reversionary heirs are not at all relevant for deciding this case. He further submitted that a number of judgments have been cited dealing with revocation of grant of probate. u/s 263 of the Indian succession Act, it is not necessary that the Applicant must have caveatable interest to apply for revocation. The Hon''ble Supreme Court has noted that caveatable interest is not necessary for acquiring the right for revocation of grant of probate. Hence, it is submitted that the judgments dealing with revocation of grant of probate are not relevant at all for deciding the issue involved in this case.

He also drew our attention to Sections 8, 14 and 15 of the Hindu Succession Act and he submitted that only if there is no heir of Class I or Class II, then agnate of the deceased would succeed under Sub-section (c) of Section 8. Admittedly, Mrs. Newar

and Mrs. Mohatta were alive when PDB died and they are heiresses specified in Entry No. 2 of Class II of the Schedule to the Hindu Succession Act. The search of heirs of PDB would stop upon finding that there are heirs as specified in Entry No. 2 of Class II of heirs specified in the schedule to Hindu Succession Act in whom the Estate of the deceased PDB would vest as on intestacy. The Court will not consider the Entry No. 3 or downwards in Class II heirs of the Schedule to Hindu Succession Act, 1956.

He further contended that upon Hindu Succession Act, 1956 coming into operation on 17th June, 1956, all intestate heirs inherit absolutely. Even female heirs have become full owners and not limited owner any longer. Life interest of female heirs and consequent reversionary interest in respect of Hindu widow''s estate have been abolished by the Hindu Sucession Act. In support of such submission he relied upon the decisions reported in Lalchand Bhur and Another Vs. Sm. Sushila Sundari Dassi and Others, and Bhabani Prosad Saha Vs. Sm. Sarat Sundari Choudhurani,

He also submitted that upon Hindu Succession Act, 1956 coming into operation, there is no question of any possibility of any person other than classified heirs to have any remote interest in the Estate of a deceased. Even female heirs under the Hindu Succession Act inherit absolutely and he relied upon a decision reported in In the Goods of Mahammad Bashir (deceased),

17. He also contended that the testator may die after leaving a Will which is disputed. There is no vacuum in vesting of the property. If the Will is proved to be genuine, the estate of the deceased Will vest in legatee under the Will from the date of death and if the Will is upon contest rejected, the estate wiil vest in the intestate heirs only from the date of death of the testator under Sections 6 and 14 of the Hindu Succession Act. The Executor appointed by the testatrix will in the meantime administer the Estate and hold it for the benefit of the ultimate legatee of the Will if probated and if the probate is rejected for the benefit of the intestate heirs as on the date of the death.

He further submitted that the Estate of the deceased person on death devolves either on her testamentary heirs (legatee) under the Will or upon the intestate heirs under the Hindu Succession Act. In case a Will is left by the deceased, which is disputed, handing over of the Estate to rightful person is deferred till the validity of the Will is decided by the probate Court. It is deferment of handing over of the Estate and not deferment of vesting.

He futher submitted that the Appellants relied upon Section 73 of the Trust Act particularly Mr. Sarkar on behalf of BKB in his appeal which was not relied upon before the Hon''ble First Court. The said argument cannot be accepted. Subsequent Deed of Appointment of YB and BKB is for the appointment as Executor only and not as trustee. Hence, he submitted that the analogy of Section 73 of the Trust Act is wholly misplaced and inappropriate. It is not a case of vacancy of office of trustee at

all. The trustee is the legal owner. The Executor is not the legal owner. The Estate vests in Executor as such u/s 211 and not as legal owner. He aiso submitted that reliance was place on Section 232 of the Indian Succession Act and this is a new arguments not made before the Hon''ble First Court and he submitted that Section 232 deals with the possibility of total absence of Executors, either at the time of death of testator or before the probate is applied for. He futher submitted that Section 232 deals with the letters of administration with the copy of the Will annexed and not to a case of grant of probate.

He submitted that the caveatable interest means any interest on existing facts in the Estate of the deceased testator, which will be displaced/ affected if the probate of the Will of the deceased is granted. In short, intestate heir have caveatable interest and he relied upon the decisions reported in ILR 17 Cal 49 (supra), 1996 (1) CHN 205 (supra), 1997 Mad. L.W. 541 (supra), Mrs. Perviz Sarosh Batliwalla and another Vs. Mrs. Viloo Plumber and another, and Rajiv Ramprasad Gupta Vs. Rustom Sam Boyce,

He further contended that the intestate heirs of the deceased testator have caveatable interest, in the estate of the deceased, because their interest is likely to be affected if the Will of the deceased is probated and he relied upon the decisions reported in Sm. Usharani Roy Vs. Sm. Hemlata Roy and In the Goods of Mahammad Bashir (deceased), He futher contended that the caveatable interest is different from the right of revocation of grant and he relied upon a decision reported in Mrs. Elizabeth Antony Vs. Michel Charles John Chown Lengera, . Accordingly, he submitted that the judgment or revocation of grant are not relevant for considering caveatable interest.

18. Mr. Mitra also contended that upon death of a person his Estate immediately vests in his intestate heirs if there is no Will, or in the legatees under the Will if there is a Will. Intestate heirs have caveatable interest because upon probate of the Will being refused on contest, their succession to the Estate as on intestacy will be confirmed. The Court considers whether the person concerned have possibility of an interest as intestate heir in the estate of the deceased upon the Will being rejected. The Birlas are not intestate heirs of PDB under Hindu Succession Act, 1956 nor are they legatees under the alleged Will of 1982 or the Will of 1999. So the Birlas cannot claim any caveatable interest in any event.

He further contended that upon the death of any of the two sisters of MPB, her absolute half share in the Estate of PDB as on intestacy would devolve upon her heirs under Hindu Succession Act or upon the legatees under a Will if any made by them. None of the Appellant Birlas has claimed any right as heir of Mrs. Mohata and Mrs. Newar.

He also submitted that upon of death of MPB, PDB, either as sole intestate heiress or as the absolute legatee under the alleged Will of 1982 of M. P. Birla, inherited all the assets of the Estate of MPB. The entire Estate of MPB devolved on her and came

to be owned, possessed and controlled by PDB which is admitted by Birlas themselves as would appear from the plaint filed by the Birlas being C. S. No. 221 of 2004 "possess, own and control" (appearing at page 226, Vol IV). The affidavit in support of caveat filed by the Birlas, it has been stated by Mrs. Birla "possess, own and control her husband''s estate" (appearing at Para 25 (c) pages 129-130). The Affidavit-in Opposition of the Birlas to the petition for discharge of caveat, Mrs. Birla "possess, own ad control" (appearing at Para 3(iii) page 15). He also drew our attention to the comparison between Affidavit of Assets annexed to the petition for grant of probate of the alleged Will of 1982 of MPB with the Affidavit of Assets annexed to the petition for grant of probate of the alleged Will of 1982 of PDB, both filed on 18th August, 2004 by Messrs. Khaitan & Co., the Advocates for the Birlas will show that the assets held by MPB mentioned in the petition of probate of his Will of 1982 are also shown as assets of PDB.

19. He pointed out that MPB died on 30th July, 1990 and PDB died on 3rd July, 2004 even then the executors under the alleged Will of 1982 of MPB admitted PDB as owner of the properties left behind by MPB. He drew our attention to the following documents and the facts:

14th November, 1990: After the death of MPB a letter written by PDB to the co-owners of Kumaon Orchards including KKB for recording her name as one of the co-owners as the sole survivor and successor of MPB.

20th February, 1991: Certificate issued by Mr. R. K. Chowdhury, Senior Partner of Khaitan & Co. that MPB died leaving behind him his oly sole survivor and successor, his wife, PDB and that she inherited all assets and properties of MPB.

19th August, 1992: Affidavit affirmed by PDB before Mr. N. G. Khaitan, Advocate/Partner of Khaitan & Co. and Defendant No. 1(c) that she is the only legal heir of MPB under Class I of Hindu Succession Act.

22nd September, 1992: Document prepared by Khaitan & Co. between PDB and the Punjab Produce & Trading Co. Ltd., inter alia, stating that MPB died intestate on 30th July, 1990. Document witnessed by Partners of Khaitan & Co. By this document 3/7th undivided share in property in Aurangzeb Road, New Delhi sold by PDB.

26th March, 1996: Affidavit affirmed by PDB before the Executive Magistrate, New Delhi that MPB died without leaving behind any Will and that PDB was the only heir of MPB.

30th April, 1996: Affidavit affirmed by PDB before the Executive Magistrate, Alipore that she is the only legal heir of MPB and MPB died without leaving behind any Will (The aforesaid original documents were produced before this Hon''ble Court on subpoena by Land and Development Officer, New Delhi in terms of an order dated 27th September, 2004).

11th November, 1996: KKB issued note to co-owners of Kumaon Orchards including PDB that after obtaining approval of all the co-owners he has sold Ramgarh Orchards, a part of Kumaon Orchards.

17th June, 1997: KKB issued note to all the co-owners of Kumaon Orchard including PDB and forwarded agreement for management of Kumaon Orchards in which agreement at page 2 PDB has been described as the sole heiress of MPB while S. K, Birla has been described as sole Executor of the Estate of L. N. Birla. He further pointed out that different page 2 of this agreement was given by the Appellants while submitting a photo copy in the Trial Court and thereafter the page was allowed to be corrected after apology before the Hon''ble First Court by the Appellants.

He further submitted that the Estate of MPB was non-existent in July, 2004 when Mrs. PDB died. It had become part of her Estate. He also submitted that the claim of any right in respect of the Estate of MPB would not create caveatable interest in the proceeding for probate of the Will of Smt. PDB.

He contended that Birlas have tried to make an issue out of an expression bequathed" used in the third Paragraph of the 1999 Will. The word ''Bequath'' read in the context of Paragraph 3 of the Will would only go to show that according to PDB whatever she or her husband had were nothing but "bequests from God Almighty".

He also submited that the alleged Wills of 1982 of MPB and PDB as filed in the Court are not the originals but copies (production of these copies was given in Court). In probate proceedings, probate can only be granted of the Will of which the original has been filed and of which probate has been claimed. These alleged Wills are claimed to have been kept in an envelope and given to the brother of PDB (with whom she had bitter relationship) to be opened after death of MPB and PDB. Inspection of this alleged envelope in which these alleged Wills were allegedly kept for more than 20 years was sought for by the Advocates of the Respondent immediately after these alleged Wills were disclosed but could not be given stating that the alleged envelope was after opening "not preserved" - an unbelievable statement. There is also no explanation why probate of MPB''s alleged Will of 1982 was applied for in 2004, 14 long years after his death in 1990.

He also contended that the Executors of the alleged Wills of 1982 have been given power to appoint an Executor conditional upon any of the Executors ceasing to be the. Executor. In this case, nomination of BKB was made in August, 2004 on the ground that MPB had. ceased to be an Executor of the Will of 1982 of PDB, MPB died in 1990. The alleged Will of 1982 of PDB became operative upon her death on 3rd July, 2004. The essential characteristic of a Will is that it is revocable and the Will becomes effective and operative only upon death of the testator otherwise it will be an inter vivos instrument and not a Will and he relied upon Section 2(h) of the Indian

Succession Act. He also relied upon a decision reported in Ramautar Singh Vs. Sm. Ramsundari Kur and Others,

He further submitted that the power of appointment of Executor was conditional and the condition precedent has not been satisfied in this case/Therefore, BKB''s nomination as Executor by the surviving nominees is without any authority and void. Since, MPB had predeceased PDB by long 14 years and he never became an Executor of the alleged Will of 1982 of PDB, nomination of BKB as an Executor under the alleged Will of 1982 of PDB to fill up "the vacancy of MPB" did not arise. He also contended that the office of Executor is a private office. It is not an office of profit in the instant case; no remuneration '' is provided under the alleged Will of 1982 - no legacy in favour of the Executor.

He also submitted that the mutual Wills do not confer any caveatable interest upon the Executors or legatees under the mutual Wills in respect of the subsequent Will of the surviving testator. Mutual Wills are executed by at least two testators jointly in one document or two separate testamentary documents. The basis of the mutual Wills is an agreement of irrevocability of disposition made by the mutual Wills. What is enforced by the Court of Equity is the aforesaid agreement between the two testators. He contended that the interest, if any, under mutual Wills is not prejudicially affected by the subsequently executed Will of the last surviving testator, because the Court of Equity may specifically enforce the ''agreement underlying the mutual Wills and the personal representative under the last Will shall hold the Estate of the surviving testator on trust to give effect to the provisions of the mutual Wills. The existence of mutual wills is not a relevant matter at al while granting probate of the last Will of the surviving Testator, revoking his/her previous Will. It is for the Court of Equity (Suit. Court) to consider the question of existence of agreemtn of irrevocability of dispositions under the mutuals Wills in the suit filed for enfocement of the agreement. The Suit Court upon being satisfied that there was an agreement between the two testators that dispositions made under the mutual Wills will be irrevocable, may direct the Executors or legatees of the last Will of the surviving testator executed in violation of such agreement, to hold the Estate in trust to give effect to provisions of the mutual Wills as trustees. Thus, interest under mutual Wills are not prejudiced or affected by grant of probate of the last Will made by the last surviving testator in violation of the agreement.

He further contended that the plea of mutual Wills and agreement to revoke the mutual Wills therefore, cannot at all be raised in the proceeding for probate of the Will of 1999 of PDB, even if such Will have been executed in violation of the agreement as alleged in the plaint being C. S. No. 221 of 2004 and in the affidavit in support of caveat of KKB and in affidavit-in-opposition of KKB to the petition for discharge of caveat.

20. Mr. Mitra submitted that the Ratio of the First Court is as follows:

(a) The Hon''ble First Court has held that GPB has caveatable interest because he was originally appointed Executor under the alleged Will of PDB of 1982.

(b) Hon''ble First Court has relied on, the judgments that legatees under the previous Will have got caveatable interest - in respect of proceedings for probate of subsequent Will, because subsequent Will, if probated, earlie Will stands revoked by the subsequent Will. Hon''ble First Court has applied the judgment on legatee''s right to the case of Executor under the previous Will. RSL has preferred a cross-objection from this part of the judgment.

21. Mr. Mitra submitted that a cross-objection has been filed by R Sk against the order passed by the Hon''ble First Curt holding that GPB''s caveatable interest on the basis that the Will of 1982 of PDB was a rival Will which is contrary to the case as made out by GPB in the Hon''ble First Court. Mr. Mitra further submitted that GPB categorically stated that the Wills of 1982 was mutual Wills and was made and executed pursuant to an agreement with her husband. The Hon''ble First Court erred in making out a new case for GPB and upholding caveatable interest of GPB on the basis that the Will of 1982 of PDB was a rival Will which is contrary to the case as made out by GPB in the Hon''ble First Court. GPB having claimed under previous mutual Wills has no caveatable interest. Secondly, GPB has disputed the power of PDB to make the testamentary disposition by the Will of 1999. According to GPB, PDB had life interest at the time of her death and therefore, she could not make the Will of 1999 making absolute bequest. He relied upon the decision reported in Komalangi Ammal by her Father and Guardian, Kandasami Chettiar Vs. M.K. Sowbhagiammal and Another, and submitted that the said decision would show that the persons claiming adversely to or disputing the absolute interest of testator do not have caveatable interest. Mr. Mitra further submitted that it is not correct to say that in case of mutual Wills, no application for probate can be made until the death of the surviving testator. He also relied upon a decision reported in AIR 1971 Mysore 143 (supra) and submitted that the application for probate fo the first dying testator was made during the life time of the surviving testator and probate of the Will of first dying testator was granted by the Court. Mr. Mitra further submitted that direction for sequence of hearing as directed by the Hon''ble First Court is just the proper. The question of hearing of the application for grant of probate of the alleged 1982 Will of PDB before that of the hearing of probate of 1999 Will of PDB does not arise as because 1999 Will of PDB is granted there is no question of probate of the earlier Will and this will avoid multiplicity of proceedings. On the other hand, if the application for probate of 1982 Will is heard first and in ease it is probated, then and in that case that probate has to revoked before the application for probate of 1999 Will is heard or else both the Wills of PDB may get probated which would be absurd.

Mr. Mitra further contended that if the application for granted of probate of MPB''s alleged Will being heard before the application for probate oi PDB''s Will, this is only

natural as MPB died in. 1990 whereas PDB died in 2004. In the usual course of event if at all MPB left a Will, it ought to have been probated long back and at least during the life of PDB who is the major beneficiary under the alleged Will of 1982 of MPB. It is also to be noted that the extent of the Estate of PDB cannot be determined till such time as the application for probate of MPB''s alleged Will is disposed of. If the alleged Will of MPB is probated, then a part of his Estate would go to outsiders and as such would not comprise part of the Estate of PDB. On the other hand, if the alleged Will of MPB is not probated, then his entire Estate vests in PDB as the sole intestate heir and consequently, PDB''s Estate would comprise of the entire Estate of MPB; Therefore, it is necessary to know the outcome of the application for probate of MPB''s alleged Will. This is especially so since the Executor to the Estate of PDB has to collect the properties and make an inventory containing the full and proper particulars of all the properties of PDB as also submit final accounts.

22. For all these reasons upon grant of probate of PDB''s Will (be it 1999 or 1982 Will) the Executor will have to discharge various functions relating to her Estate and it would be absolutely essential for the Executor to know the extent of her Estate and that cannot be left to be decided on a future date depending on the outcome of the application for probate of MPB''s alleged Will.

He further contended that for hearing of the application for Probate of MPB''s Will after hearing of the application for Probate of PDB''s Will, this is based on mere convenience factor and has no legal basis and he drew our attention to Paragraph 22 (page 294 Volume II in A.P.O. No. 243 of 2005).

Hence, he submitted that the Hon''ble First Court has correctly held the sequence of hearing to be held by the Court.

Mr. Mitra submitted that.the judgment cited in ILR 6 Cal 460 (supra) was relied upon for a proposition said to have been laid down by Justice Field, J. to the effect that the expression "Persons claiming to have any interest in the estate of the deceased", would mean such an interest as would entitle the person to maintain a suit in respet of the subject matter of the Estate and he also submitted that the said judgment was specifically differed from by the Hon''ble Division Bench-in the case of Abhiram Dass v. Gopal Dass (reported in ILR 17 Cal 49). The Hon''ble Division Bench noted that the view expressed by Justice Field, J. in ILR 6 Cal 460 (supra) was not adopted by the other Learned Judge viz. Mr. Justice White. Thereafter, the Hon''ble Division Bench considered the very same expression and at page 52 held as follows:

If any further argument be necessary, we would refer to the terms of Section 69, which require the District Judge " to issue citations calling upon all persons claiming to have any interest in the estate of the deceased." The term used does not necessarily refer to any particular property, but to the claim of any person to succeed by inheritance or otherwise to any portion of the estate of the deceased by reason of an interest, not on an adverse title to the testator to any particular

property but in the estate itself, whatever that may consist of.

23. In the present case Mr. Mitra also submitted that the caveators have set up the mutual wills and are contending that PDB could not have disposed of her Estate by the last Will of 1999 and that the caveators are Executors of the alleged mutual Wills of PDB and MPB of 13th July, 1982 or as the nominee Executors. They are thus claiming an interest adverse to that of PDB on which ground alone their caveats are liable to be discharged.

In 10 CLJ 263 (supra) he submitted that the revocation of grant of probate was sought on the ground that the probated Will was a forged Will and had been set up to defeat the personal interest of the Applicant in the testator''s Estate as the immediate reversioner on intestacy. Mr. Mitra submitted that this is not a case on caveatable interest. In the said decision the Hon''ble Division Bench held as follows:

We may add that if the view put forward by the Appellant were accepted irremediable injustice of the gravest character might be done to the reversioner. It would be quite open to the widow, for instance, of a Hindu who had died intestate, to propound a fprged will and get probate thereof without contest. Under the will she might have absolute power of alienation or authority to take a son in adoption, and thus be placed in a position to deprive the reversioner of the estate to which he would otherwise be legitimately entitled.

He further contended that in the subsequent judgments reported in Bhabani Prosad Saha Vs. Sm. Sarat Sundari Choudhurani, and Lalchand Bhur and Another Vs. Sm. Sushila Sundari Dassi and Others, it has been held that after the promulgation of the Hindu Succession Act, reversionary rights have ceased to exist.

In Gourishankar Chattoraj Vs. Sm. Satyabati Debi, he pointed out that the Appellant Gouri Shankar should be allowed to "Watch the proceedings and if necessary to oppose the application" made by the deceased''s wife''s brother''s daughter. He further submitted that the said decision has no manner of application in the facts and circumstances of this case.

He further submitted that Mt. Sheopati Kuer Vs. Ramakant Dikshit and Others, and Sm. Sima Rani Mohanti Vs. Puspa Rani Pal, are the decisions dealing with the revocation of grant of the probate and he submitted that the different principles are applied in those matters. The said judgments are not applicable in the facts and circumstances of this case and he further submitted that the locus standi of an Applicant for revocation of grant is not the same as caveatable interest before the grant of a probate., He also relied upon a decision reported in Mrs. Elizabeth Antony Vs. Michel Charles John Chown Lengera, in support of. such contention.

In 2002 (4) CHN 583 (Dinanth Shah v. Surati Devi and Ors.) the Hon''ble Divsiion Bench in Paragraph 3 has observed as follows:

...these Respondents as widow and children of the testator are entitled to inherit or succeed to the estate of the testator and as such entitled to citation. Therefore, the Court has rightly found absence of citation.

He further pointed out that the facts as held in a decision reported in 2002 (1) CLT 260 (supra) are entirely different from the facts of the present case and in the said decision the Hon''ble Division Bench relied upon three earlier decisions of this Hon''ble Court relating to the reversionary interest. It wa''s not pointed that the reversionary right stands abolished, so the Court had on occasion to consider the said point.

24. Mr. Mitra further drew our attention to the decision reported in Municipal Corporation of Delhi Vs. Gurnam Kaur, wherein it was held that -

(a) If a point was not argued then the decision is not an authority on the point although such point was logically involved. In (2002) I CLT 260 (supra) the question of abolition of reversionary right was not argued.

(b) The Hon''ble Supreme Court observed that if such a point is decided without reference to the crucial matter in issue, it is not binding and not an authority. "Precedents sub silentio and without argument are not of no moment.

In an unreported decision of His Lordship Ajoy nath Ray, J. on 16th December, 1992 His Lordship refused to discharge the caveat since the testator died issueless and there was no Class I heir. Caveat was lodged by the son of the predeceased brother of the testator, who was a class II heir. Thereafter, the matter had been marked as contentious cause. It is also settled law that the order of discharge of caveat can only be passed before the proceeding is marked contentious cause against the particular caveator. Therefore, according to him, this decision cannot be a help to the Respondent.

He also submitted that in 1996 (1) CHN 205 (supra) His Lordship Ajoy Nath Ray, J. also held that the interest in the estate of the deceased must be shown to be present within the bundle of rights already available to the lodger of the caveat in such a manner as is not defeasible in all ordinary and normal circumstances.

The decision cited by the Appellant in Sm. Annapurna Kumar Vs. Subodh Chandra Kumar, deals with the grant of Letters of Administration and different principles are applicable. Hence, the said decision is wholly irrelevant both factually and legally in the present circumstances. In Nabin Chandra Guha Vs. Nibaran Chandra Biswas and Others, the Hon''ble Court held that the words in Section 283 "any interest" in their natural meaning implied a "real" interest which is likely to be prejudicially or adversely affected by the Will. Therefore, the grant of probate would have meant that the purchase would have become invalid and thus he would be adversely affected and his persent right displaced. He further relied upon a decision reported in Dinabandhu Roy Brajaraj Saha, Firm Vs. Sarala Sundari Dassya, which hs no

application in the facts and circumstanes of this case.

In V. Dandapani Chettiar Vs. Balasubramanian Chettiar (Dead) by Lrs. and Others, where the Rajathiammal inherited property from her mother and the same was reiterated in the compromise deed. Rajathiammal died intestate and issueless. It was held that Section 15(2) of the Hindu Succession Act did not apply and the heirs of her father would inherit the property and it is submitted that the said decision has no application in the facts and circumstances of this case.

The case reported in ILR 32 Cal 62 (supra) is a case of reversionary right and further after the promulgation of Hindu Succession Act it cannot be treated as a good law. The bases reported in AIR 1929 Pat 384 (supra), Mrs. Elizabeth Antony Vs. Michel Charles John Chown Lengera, are also no longer the good law.

In the decision of Haripada Saha and Another Vs. Ghanasyam Saha and Another the Court decided the right of a reversioner claiming interest in a property held by the Hindu female under the Hindu women''s Right to Property Act. The decisions reported in Sm. Annapurna Kumar Vs. Subodh Chandra Kumar, Rajkishore Panda and Another Vs. Haribandhu Mahala and Others, have no application in the facts and circumstances of this case.

In ILR 17 Mad 373 (supra) Mr. Mitra contended that the bare possibility of an interest is sufficient. But this possibility, should rest on existing facts and not on mere conjecture. Therefore, in the instant case, Mr. Mitra submitted that it is necessary to show that the interest must be an existing interest and the legatee under the prior Will must prove the same before claiming interest. In ILR 20 Cal 37 (supra) the interest acquired by the purchaser could be displaced if the probate was granted.

The decision reported in State of Bihar Vs. Radha Krishna Singh and Others, has no application since it is not a testamentary matter and the deceased died issueless prior to Hindu Succession Act, 1956 and the discussion involving reversionary right is no longer relevant. The Court reaffirmed the principle that before the property vests in the State by escheat, a notice has to be given to ensure that there is no surviving heir. The case reported in Draupadi Dasya Vs. Rajkumari Dasya and Another, is a case of revocation of grant of probate and has no application.

In Venidas Nemchand Vs. Bai Champabai, specifically deals with the caveatable interest and has no application in the facts and circumstances of this case. In G. Jayakumar Vs. R. Ramaratnam, where it has been held that whether the grant displaces any right which the caveator would ohterwise be entitled and only if answer to this is in the positive the caveator has a caveatable interest. The case reported in Jammi Hanumantha Rao Vs. Aratla Latchamma, has no application in the facts and circumstances of this case.

25. On mutual Wills a case which was cited by the Appellants and reported in (1993) 4 AM ER 129 (supra)f-MT. Mitra contended that this is not a case dealing with caveatable interest arising out of mutual Wills. The case reported in AIR 1959 SC 77(supra) is not a case of mutural Wills but that of a joint Will. This is also not a case on caveatable interest. Threfore, the said decision has no application in the facts and circumstances of this case. In a case reported in Dilharshankar C. Bhachech Vs. Controller of Estate Duty, Ahmedabad, and in Halsbury''s 4th Edition, Volume 50, Paragraph 208 Mr. Mitra contended that those cases are not dealing with the caveatable interest and have no application in the facts and circumstances of this case. In 1986 (I) SCC 701 where it has been stated that the probate will be granted of the later Will, even made in breach of the agreement not to revoke the mutual Wills, since a Court of probate is only concerned with the last Will. It is further submitted that the Corpus Juris Vol 97 page 307 has no application in the facts and circumstances of this case and the relevant portion at pae 311 is quoted as follows:

A court of probate cannot admit a mutual will to probate where it has been revoked by the testator, and cannot enforce an agreement to make mutual wills by ordering probate of a will which was revoked in breach of such agreement.

In Shiva Nath Prasad Vs. State of West Bengal and Others, Mr. Mitra submitted that the submission made on behalf of the Appellants hae referred to Paragraph 3 of the said judgment and particularly to the words ''undisputed facts'' as if to imply that it was not disputed before the Supreme Court that MPB and PDB had executed mutual Wills in 1982. It has been stated that the said submission is wrong. Firstly, RSL is not the Appellant in the Supreme Court notices was not ordered to be isued by the Court to him and neither did he appear through the Learned Counsel. It is submitted that the ''undisputed facts'' which have been referred to in the aforesaid Paragraph of the judgment are simply a narration of facts as alleged in the complaint petition quashing whereof was sought for, fistly in the High Court and thereafter in the Supreme Court. In a petition u/s 482 of the Code of Criminal Procedure which is in the nature of a demurer application, facts alleged are taken to be true and the basis of a quashing petition is that the facts alleged even if taken to be true do not disclose any offence as against the petition. The recording in the judgment has to be read in this context. He further contended that the position was made clear by the Hon''ble Supreme Court in Paragraph 48 of the said decision wherein the Hon''ble Court states that "at this stage" the Court is required to "read the complaint as it is" and that it suffices to state "at this stage of the matter" that the couple had executed mutual Wills in 1981 and 1982. Therefore, Mr. Mitra contended that the Court would not have used the words "at this stage" and has to be taken in the said iight.

He further contended that the decision reported in (1937) 57 CLR 666 (supra) has no application since it is not a case on caveatable interest. In another decision reported in (1950) 2 All ER 913 (supra) it is also not a case on caveatable interest. He further

contended that this decsion supports the Respondent for the proposition that if the surviving testator makes a subsequent Will or alters the earlier mutual Will, it is the personal representative of the testator who takes the property upon trust to carry out the underlying contract.

In (1981) 2 All ER 1018 (supra), (1999) 2 Mah LJ 889 (supra) : (1999) 101 (2) Bom LR 908 (supra) Mr. Mitra contended that these are also not the cases on caveatable interest but the cases of enforcement of bequest made on mutual Wills. Mr. Milra_drew our attention to Paragraph 6 of the said judgment (Bom LR Report) where the Court relied upon the decision reported in Kuppuswami Raja and Another Vs. Perumal Raja and Others, which is set out as follows:

If, however, the survivor in breach of faith revokes a mutual Will by making a new Will, it is the new Will which will have to be necessarily admitted to probate so far as the properties of the survivor are concerned.

The decision reported in AIR 2002 Del 321 (supra) and has no application in the facts and circumstances of this case.

It would appear from Halsbury-Vol 17 paragraph 703 that the appointment of the Executor takes effect only on the demise of the testator or else the question of carrying into effect of the provisions of the will would not arise. In Williams on Will - Paragraph 25. 15 at page 233 the executor can act before the probate but it does not say that the Executor can act before the death of the testator.

In (1916) 1 A. C. 603 (supra), Raja Rama Vs. Fakuruddin Sahib and Others, and Tristam and Coote - 27th Edition at page 131, the property of the Testator vests in the Executor as such; upon the testator''s death.

The decision reported in 162 English Reports 569 (supra) has no application in the facts and circumstances of this case.

In 164 English Reports 609 (supra) it appears that the named Executor had accepted the office of executorship and proved the Will and thereafter died. The Executor''s son who was also named as Executor under the Will to be appointed on the death of the original Executor (father) was thereafter appointed by the Court as Executor to administer the Estate of the deceased. In the present case, MPB had not assumed office of executorship and in fact could not assume the office of executorship as he predeceased PDB. Therefore, the question of MPB ceasing to be an Executor did not arise.

In AIR 1989 Cat 40 (supra) it clearly explains the difference between a Trustee and an Executor under a Will. Vesting of a proerty in Executor is only for the purpose of representing the Estate of the deceased person. Section 232 of the Indian Succession Act does not state that an Executor named in the Will of a living person assumes the office of Executor or status of Executor which would create an absurde situation. This would be further evident from the definition of Executor given in

Section 2 (c) of the said Act.

In 62 Revised Reports page 673 (supra) testator did not appoint Executor but authorized the legatees to appoint Executor. This was as per power granted under the Will and as per Scottish Law which it totally different from English law. It is not that the Executor was appointed in exercise of such power during the life-time of the Testator. This case is of no relevance in the facts and circumstances of this case. The case reported in 64 Revised Reports page 941 (supra) = 2 SW & TR 126 (supra) also has no relevance.

In In Re: Durga Das Koosary, this is not a case on caveatable interest but a case of nomination of an Executor by other Executor, who had unfettered right of nomination and had made nomination after having become the Executor after death of the testator. The Executor administered the Estate of the testator for long 19 years but could not complete administration and nominated by his Will, his son as the next Executor. Therefore, the said decision has no application in the facts and circumstaces of this case. The deision reported in 19 CWN 1108 (supra) has been relied upon in support of BkB and YB''s acquisition of alleged caveatable interest by way of the Deeds of Appointment dated 24th and 25th August,. 2004 i. e. after the demise of PDB. This case has no application in the facts and circumstances of this case.

Mr. S. B. Mukherjee, Learned Senior Advocate appearing on behalf of the Appellant KKB submitted that the cases cited on behalf of the RSL have no application in the instant proceedings and the said decisions are distinguishable. He further submitted that the deision reported in In the Goods of Mahammad Bashir (deceased), is distinguishable not only on facts but the same appears to be contrary to the subsequent decision of a Deivsion Bench which is reported in 2002 (1) CLT 269 (Benoy Ranjan Banerjee V. Sadhan Ranjan Banerjee) and Mrs. Elizabeth Antony Vs. Michel Charles John Chown Lengera,

26. With regard to the case reported in 1996 (1) CHN 205 (supra) it is submitted that in no way militates against the earlier unreported decision of the Hon''ble Judge which has been cited on behalf of the Appellants and the said decision has no manner of application in the facts and circumstances of this case. He further submitted that the effect of the Divsion Bench judgment reported in Sm. Usharani Roy Vs. Sm. Hemlata Roy it is submitted that a person setting up a subsequent Will may not be permitted to agitate the same in the proceedings for probate of the earlier Will but it is obligatory for him to file a separate petition to propound the Will set up by him.

The decisions reported in Bhabani Prosad Saha Vs. Sm. Sarat Sundari Choudhurani, and Lalchand Bhur and Another Vs. Sm. Sushila Sundari Dassi and Others, have correctly held that the question of caveatable interest was not under consideration at all. The said decisions had no relevance in the facts and circumstances of this

case.

In reply, Mr. Pal, Learned Senior Advocate appearing on behalf of the YB submitted that there cannot be any dispute that the limited estate of the Hindu widow was converted to absolute interest by the Hindu Succession Act, 1956. According to him, the Probate Court will not proceed on the basis as to who actually inherits on intestacy but on the basis of who claims to have an interest however remote and contingent. Reference to Hindu Succession Act and that reversionary interest has totally gone after Hindu Succession Act are wholly irrelevant. The question which falls for consideration is who are those persons who could qualify to be her heirs.

He further contended that the MPB died intestate - has been denied by the Appellants. He also contended that whether the MPB died intestate or not - that will be decided at the time of probate of 1999 Will or probate suit of Mutual Wills or suit for specific performance of the Mutual Wills.

It is significant that PDB''s 1999 Will expressly says that MPB ''bequeathed'' his properties to PDB. The word ''bequeath'' applies to testamentary dispositions.

He further submitted that the taking of benefit cannot be decided in the instant proceedings, that has to be decided in the suit alredy pending. It is also submitted on behalf of the Respondent that the original Mutual Wills were not produced. He submitted that a copy of the original is also admissible. He further submitted that there is no delay in applying for probate of Mutual Wills of MPB as there is no limitio.n period for applying to probate of a Will. Section 137 of Limitation Act is not applicable to probate proceedings. He further submitted that the original copy of Mutual Wills were made over to Kashi Nath Tapuriah, one of he executors to both the Mutual Wills, in a sealed envelope with direction to open on death of last surviror testator/testatrix from the date.

27. Mr. Pal also contended that executor has interest in the estate of the testator and therefore, executors have caveatable interest. He further submitted that whether KKB took or did not take possession of the estate are beyond the jurisdiction of the probate Court.

He further submitted that the submission made by Mr. Mitra on behalf of the Respondent that since the estate of MPB has totally ceased, therefore, today nobody can claim any interest as an executor of MPB''s Will in contesting the 1999 Will of PDB is fallacious and ignores the effect of Mutual Wills. He further tried to contend before us that the floating trust over the assets of MPB and PDB crystalised on the dath of PDB.

Mr. Pal further contended that the decision reported in (2002) 1 CLT 260 (Binoy Ranjan Banerjee v. Sadhan Ranjan Banerjee) is not binding on this Hon''ble Court as it was delivered per incuriam.

He further submitted that the decision cited by Mr. Mitra in In the Goods of Mahammad Bashir (deceased), has no application in the facts and circumstances of this case. It is not a case of actual inheritance on intestacy. Actual inheritance on actual intestacy has no relevance when considering caveatable interest. In considering whether cavetable interest is there in such circumstances, the Court will recognize contingencies which has been held in AIR 1918 Cal 183 (Satindra Mohun Tagore and anothr v. Sarala Sundari Debi and Anr.). Contingencies which have been recognized by the Court would be evident from certain reproted decisions (See: AIR 1940 Cal 29 (Dinabandhu Roy Brajaraj Saha, Firm v. Sarala Sundari Dassya w/o Haralal Saha), Nabin Chandra Guha Vs. Nibaran Chandra Biswas and Others, 10 CLJ 263 (supra), (2002) 1 CLT 260 (Sri Benoy Ranjan Banerjee and Anr. v. Sri Sadhan Ranjan Banerjee), Sm. Annapurna Kumar Vs. Subodh Chandra Kumar, and Haripada Saha and Another Vs. Ghanasyam Saha and Another

In Sm. Usharani Roy Vs. Sm. Hemlata Roy Mr. Pal contended that this case is not an authority for the proposition that the person who has applied for Letters of Administation will be entitled to the same without any contest to the Will.

The cases reported in Mrs. Perviz Sarosh Batliwalla and another Vs. Mrs. Viloo Plumber and another, and Rajiv Ramprasad Gupta Vs. Rustom Sam Boyce, have no appliation in the facts and circumstances of this cas Kuppuswami Raja and Another Vs. Perumal Raja and Others, does not in any manner support the contentions of the Respondent. Sri Raja Kakarlapudi Venkata Sudarsana Sundara Narasayyamma Garu (died) and Others Vs. Andhra Bank Ltd., Vijayawada and Others, has no relevance in the facts and circumstances of this case. Jnanandra Nath Mukherjee and Another Vs. Jitendra Nath Mukherjee and Others, has also no bearing on the question whether an executor named in the Will can be an executor if he predeceases the testator. (1997) 3 LW 541 (supra) it has been held that the test to be applied is "does the grant displace any right to which the caveator would otherwise be entitled ? If so, he has such an interest; if not, he has not." (1999) 101 (2) Bom. LR. 908 (supra) it has been held that the Mutual Wills becomes''irrevocable when the surviving testator receives benefit under the Will of the deceased testator. Therefore, he submitted that the Mutual Wills were irrevocable. However, correctness may be germane at the final hearing of this testamentary suit.

The decisions reported in Mary Heys (1914) P 192 (supra) was not a case of caveatable interest. Lalchand Bhur and Another Vs. Sm. Sushila Sundari Dassi and Others, Ramautar Singh Vs. Sm. Ramsundari Kur and Others, and AIR 1971 Mys 143 (supra) has no application in the facts and circumstances of this case since there is no question of caveatable interest.

The case reported in 7996 (1) CHN 205 (supra) is not the authority recognizing interest of attaching creditor in the estate. From the decision reported in 77 Idaho 12 (supra) it is clear that the ground of contest and locus standi are different concepts and has no application in the facts and circumstances of this case.

28. Mr. Sarkar also adopted the submissions put forward by Mr. Mookherjee and Mr. Pal and he submitted that AIR 1931 Madras 37 (supra) did not follow the earlier case of G.P. Satyanarayanamurthi, Agent to Sri Sri Sri Srinivasa Rajamani Raja Deo, Rajah of Mandasa Vs. Pilla Ramayya, on the ground that the test evolved by Field J. Was not followed by his Companion Judge. This perhaps is not correct, unless a companion Judge disapproves the test evolved by other Learned Judge. The judgment of Field J. is that anyone who is entitled to file a suit in respect of the estate of the testator, has a caveatable interest.

We have heard the Learned Counsel for the parties at length. We have also perused the pleadings and the documents placed before us. After considering the facts and the pleadings the question arose that whether all the caveators whose caveats are questioned, have been able to establish their any interest in respect of the estate left by the deceased testatrix (PDB). It appears that all the Appellants / caveators herein claimed themselves to be the possible heirs in case of death of PDB and they are the heirs of the deceased by survivorship, under the provisions of Mitakshara School of Hindu Law.

Mr. K. K. Birla and Mr. G. P. Birla are claiming to be the executor in respect of the will dated 13th July, 1982 left behind by M. P. Birla, since deceased and PDB, since deceased respectively. Mr. Yashobardhan Birla and Mr. B. K. Birla both claimed their right also on the basis of the appointment as the executors by the surviving executors in terms of the earlier mutual Wills left by the said couple. If further appears that the appoinment of Mr. B.K. Birla relates to the Will of Late PDB Dated 13th July, 1982 while Yashobardhan Birla''s appointment relates in respect of the Will dated 13th July, 1982 left by M.P. Birla.

Furthermore, they also tried to claim their interest in respect of immoveable properties and the Trust.

29. It is necessary for us to deal with the matter with regard to caveat- in respect of the context of death intestacy succession. Our attention was d/awn to Section 263 and Section 283 of the Indian Succession Act. The said sections are set out hereunder:

''Section 263. Revocation or annulment for just cause.

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

Explanation. Just cause shall be deemed to exist where -

(a) the proceedings to obtain the grant were defective in substance; or

(b) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case; or

(c) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently; or

(d) the grant has become useless and inoperative through circumstances; or

(e) the person to whom the grant was made has willfully and without reasonable cause omitted to exhibit an inventory or account in-accordance with the provisions of Chapter VII of this Part, or has exhibited under the Chapter an inventory or account which is untrue in a material respect.

Section 283. Powers of District Judge.

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

(a) Examine the Petitioner in person upon oath;

(b) require further evidence of the due execution of the will or the right of the Petitioner to the letters of administration, as the case may be;

(c) issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see (emphasis supplied) the proceedings before the grant of probate or letters of administration.

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

(3) Where any portion of the assets has been stated by the.petitoner to be situate within the jurisdiction of a district Judge in another State, the district Judge issuing the same shall cause a copy of the citation to be sent to such other District Judge, who shall publish the same in the same manner as if it were a citation issued by himself and shall certify such publication to the District Judge who issued the citation.

Under Section 263 of the said Act the revocation of a Will is made on just cause and u/s 283(1)(c) of the said Act all persons claiming to have any interest then they shall have the right to file a''caveat.

30. We have also considered the decisions cited before us:

In ILR 6 Calc 460 (Nobeen Chunder Sil and Ors. v. Bhobosoondari Dabee): In the said decision the Hon''ble Court dismissed the caveat filed the caveator without deciding whether they had the respective interests which they claim. The Hon''ble Division Bench held that it will be necessary for them to prove their respective interests before being allowed to oppose. The Court also held upon proof of their interests they shall have a right to file a caveat and oppose the grant of probate of the will of the deceased. The Division Bench expressed their views in the said decision that any

person who can show that he is entitled to maintain a suit in respect of property over which the probate would have effect, possesses a sufficient interest to entitle him to enter a caveat and oppose the grant under the provisions of Section 242 of the Indian Succession Act, Shall be treated as an interested person.

In 10 CLJ 263 (Brindaban Chandra Shaha v. Sureswar Shaha Paramanick and Ors.) where the Court held that the bare possibility of an interest was sufficient to enable a person to oppose a testamentary instrument.

Gourishankar Chattoraj Vs. Sm. Satyabati Debi, : In the said decision the Hon''ble court held that an application made by deceased''s wife''s brother''s daughter for Letters of Administration to the estate of the deceased was opposed by a person who was neither a sapinda nor a sakulya, nor a samanodaka of the deceased; but who was related to the deceased through a common ancestor or rather a common link to the deceased. The Court also held that though both the parties were not heirs at all still it could not be said that the person had no interest of any description which would entitle him to appear and watch and if necessary to oppose the application and can therefore be allowed to appear and oppose the application and therefore the Court held that he can be allowed to appear and oppose the application.

In Mt. Sheopati Kuer Vs. Ramakant Dikshit and Others, where the Court held that it is well established now that any interest however slight and even the bare possibility of an interest, is sufficient to entitle a party to oppose a testamentary papers. It has been held in certain decision that although a reversioner under the Hindu Law has no present alienable interest in the property left by the deceased, still he has a substantial interest in the protection or devolution of the estate, and as such, is entitled to appeal and be hard in a probate proceeding. Those persons would come within the purview of illustration (ii) of Section 263 of the Indian Succesion Act.

In Sm. Sima Rani Mohanti Vs. Puspa Rani Pal, where the Court held that any interest however slight and even the bare possibility of an interest is sufficient to entitle a person to make an application for revocation and the Court also held that the Appellant had locus standi to maintain an application for revocation of a probate.

In the matter of (2002) 4 CHN 583 Dinanath Shah v. Surati Devi and Ors.) the Court held that in order to apply for revocation or annulment of grant of probate, the Applicants must have locus standi to apply for such revocation. A person, who claims to have acquired interest in the estate, after the testator''s death in case of intestacy, in entitled to apply for revocation. It is also held that Section 283(1) of the Indian Succession Act, the citations may be issued to 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.

In (2002) 1 CLT 260 (Sri Benoy Ranjan Banerjee and Anr. v. Sri Sadhan Ranjan Banerjee) the Court held that the expressions "claiming to have any interest in the

estate of the deceased" as occurring in Clause (C) of Section 283(1) of the Indian Sucession Act would mean any interest, however slight and even the bare possibility of an interest which would be sufficient to entitle a person to enter a caveat and contest the probate proceeding.

In another unreported decision of this High Court in the goods of Santi Bhusan Bose also known as Santi Bhusan Basu being application No. 85 of 1991, the Court held-that a caveat is sought to be discharged if and only if the caveator can be shown to have no possible real interest in the estate of the deceased.

In Sm. Annapurna Kumar Vs. Subodh Chandra Kumar, the Court held that any interest, however, slight and even the bare possibility of a interest, is sufficient to entitle a party to oppose an testamentary paper. Even in a case where the person is not entitled to get a compulsory citation, but the absence of citation to such a person, also would invalidate the grant in certain circumstances.

In Nabin Chandra Guha Vs. Nibaran Chandra Biswas and Others, where the Court held that who can oppose a grant of Letters of Administation u/s 283 and the Court came to a conclusion that a person who has a real interest in the estate which is or is likely to be prejudicially affected or adversely affected by the will can opposed the grant of probate or Letters of Administration. It is not necessary for the objector that he had an interest in the estate at the time of the testator''s death.

In Dinabandhu Roy Brajaraj Saha, Firm Vs. Sarala Sundari Dassya, where the Court held that the word mentioned in Section 283(1) C) of the Indian Succession Act, the word "interest" means real interest in the estate of a deceased. It is also held that however small such interest be it entitles a man to oppose a grant to probate or to apply for revocation of a grant for a just cause.

In V. Dandapani Chettiar Vs. Balasubramanian Chettiar (Dead) by Lrs. and Others, by L Rs. and Ors.) the Hon''ble Supreme Court in the said decision after construing Section 15 of the Hindu Succession Act held that one Rajathiammal died intestate without leaving any son or daughter or children of a predeceased son or daughter. Hence, the property would devolve on the heirs of her father. It ws contended before the Court that she got the property because of the compromise decree and therefore the property was not inherited by her from her father or mother. But the Court negated the said submission and held that she was the daughter of Sivabagyammal and therefoe, she was entitled to inherit the property of her maternal grandmother as her mother had expired. In fact she got the property as daughter of her mother. Therefore, she got the property but not from the father-in-law, but from her mother''s side and the Court held that therefore the heirs of her father would be entitled to inherit her property in view of Section 15(2)(a) of the said Act. The Court also held that Rajathiammal acquired her rights by virtue of compromise is a reiteration and a declaration of a pre-existing right. Therefore, the suit property is devolved upon the heirs of her father. Section 15 (1) of the said Act

would not apply in the facts and circumstanaces of the said decision.

In ILR 32 Cal 62 (Abinash Chandra Mazumdar v. Harinath Shaha) the Court held that the view that a remote reversioner can bring a declaratory suit when the immediate reversioner is herself only the holder of a life estate is well founded on principle. In Chunder Koomar Hazaree v. Dwarkanath Purdan ILR 32 Cal 62 in which three learned Judges of the Sudder Court observed as follows: "A preliminary objection was taken to the plaint by the Defendant''s vakil on the ground of the interest of the minor on whose behalf it is brought being too remote. We see, however, no force in the objection. The minor is the first reversioner after the death of the two intervening life tenants, the widow and daughter of Biseswar Bardhan. His right is undoubtedly only contingent and has not vested, and it is possible that he may never succeed: nevertheless we think in accordance with the precedents of this Court that a suit like the present to remove obstructions out of the way of the first reversioner and so to enable him on the death of the tenants for life, if he survives them immediately to enter on possession, is maintainable in our Courts."

In Priya Nath Bhattacharji Vs. Saila Bala Debi, the Court held that a person having a reversionary interest although such interest inalienable and dependent upon remote contingencies is nevertheless substantially interested in the protection of devolution of the estate and as such he is entitled to appear and be heard in probate proceeding. And it is held that the said reversioners shail get an opportunity of protecting their vested interests in the reversioner.

In Mrs. Elizabeth Antony Vs. Michel Charles John Chown Lengera, Where the Suprema Court after scrutinising the facts of the case held that the Petitioner did not establish. her- caveatable interest and in the backdrop of the said facts the Hon''ble Supreme Court held that the findings regarding she caveatable interest of the Petitioner have a limited effect and are relevant only to the extent of granting of probate. But they cannot deprive his right, if he has any, to invoke Section 263 of the Act.

In Haripada Saha and Another Vs. Ghanasyam Saha and Another where the Court held that the right to enter caveat in a probate proceeding based on their possibility of any interest however slight.

In Rajkishore Panda and Another Vs. Haribandhu Mahala and Others, where the Court would revoke the grant of a probate on the ground the application filed for'' grant of probate was defective and the Court held that the Mandatory provision of the statute was overlooked by the Court and on that ground the grant of probate was revoked.

In ILR 17 Mad 373 (Rahamtullah Sahib v. Rama Rau and Anr.) the Court held that to contest a will, a person can be permitted to do so after showing that he has some interest in respect of the estate. It has been specifically treated that the bare possibility of an interest is sufficient. This possibility should rest on existing fact and

not on mere conjecture.

In AIR 1918 Cal 183 (Satindra Mohun Tagore and Anr. v. Sarala Sundari Debi and Anr.) where the Court held that the remote reversioners are entitled to sue, has the right to lodge a caveat when nearer reversioners are making amicable settlement. It is also based on the principle that whether any interest, however, slight and even the bare possibility of an interest, in the estate left by an alleged testator is enough to entitle a party to oppose the will.

In ILR 20 Calcutta 37 (Muddun Mohun Sircar v. Kali Churn Dey and Anr.) the Court held that the remote reversioners are entitled to sue, has the right to lodge a caveat when nearer reversioners are making amicable settlement. It is also based on the principle that whether any interest however slight or even the bare possibility of an interest in the estate left by an alleged testator is enough to entitle a party to oppose the will.

In State of Bihar Vs. Radha Krishna Singh and Others, the Court decided the principle that when a claim of escheat is pur forward by the government the onus lies heavily on the Appellant to prove the absence of any heir or the Respondent anywhere in the world. Normally, the Court frowns on the estate being taken by escheat unless the essential conditions for escheat are fully and completely satisfied. Further, before the plea of escheat can be entertained there must be a public notice given by the Government so that if there is any claimant anywhere in the country or for that matter in the world, he may come forward to contest the claim of the State. In the instant case, the States of Bihar and Uttar Pradesh merely satisfied themselves by appearing to oppose the claims of the Plaintiffs-Respondents. Even if they succeeded in showing that the Plaintiffs were not the nearest reversioners of the late Maharaja, it does not follow as a logical corollary that the failure of the Plaintiffs'' claim would lead to the irresistible inference that there is no other heir who could at any time come forward to claim the properties.

In Draupadi Dasya Vs. Rajkumari Dasya and Another, the Court held that the fact that there was an earlier Will is admitted and in the later Will itself it is stated that the earler Will is thereby revoked. There are many references in the evidence on both sides to the earlier will. If the later Will stands, Draupadi cannot claim any rights under the first Will under which she has a substantial interest. She had, therefore, sufficient interest to oppose the grant of the later Will and to apply for revocation of the later-Will. Further, it is contended that she cannot apply for revocation of the later Will unless and until she obtains probate of the earlier will. We think that it is not necessary that Draupadi should obtain probate of the earlier Will for the purpose of enabling her to apply for revocation of the Letters of Administration. If she succeeds in showing that there was no later Will, it will be open to her to prove the earlier Will and to apply for Letters of Administration with a copy of the Will annexed. And the Court held that she has locus standi to make the

application.

In Venidas Nemchand Vs. Bai Champabai, the question was determined by the Court in respect of grant of probate under the testamentary and intestate jurisdiction of this Court as to what is the proper procedure to be followed where two Wills are set up by two persons in regard to the same estate, and where the Court directed to grant liberty to the Defendant to take steps to propound the Will set up by her.

In G. Jayakumar Vs. R. Ramaratnam, where the Court held any interest in the estate in respect of which the deceased is alleged to have executed a testament must entitle the holder of that interest to attend and oppose the probate proceedings. The provision of Section 283 is intended to give the widest possible publicity to the probate proceedings and to give an opportunity to any person having the slightest interest in the proceedings to challenge the genuineness of the Will and place before the Court all the relevant circumstances before a grant in rem is made in favour of the persons claiming probate. Thus, in case of a testatrix dying issueless the daughter of the brother of the testatrix has a caveatable interest and is competent to participate in proceedings for grant of probate. So also a person claiming title paramount to testatrix in respect of the properties settled upon her is also a person entitled to a citation and challenge the Will.

In ILR 8 Cal 570 (Kamona Soondury Dassee v. Hurro Lall Shaha) where the Court held that a presumptive reversioner to property with which a Will deals, has a sufficient interest in the property to entitle him to maintain a suit in respect of such property and is entitled to maintain a case for the revocation of probate.

In Jammi Hanumantha Rao Vs. Aratla Latchamma, the Court held that the true principle deducibei from the cases is that a person who is entitled to any portion of the estate left by the deceased or a right to claim maintenance from the estate of the deceased has an interest within the meaning of Section 69 of the Probate and Aministration Act. It is not necessary that he should claim through the testator in order to enable him to oppose the grant of probate of the Will of the testator. If a person is likely to suffer by the grant of the probate of a forged Will or an invalid Will he has sufficient interest to enter a caveat.

In AIR 1959 Cal 71 (Kochu Govindan Kaimal and Ors. v. Thayankoot Thekkot Lakshmi Amma and Ors.) the Court held that a Will is mutual when two testators confer upon each other reciprocal benefits, as by either of them constituting the other his legatee; that is to say, when the executants fill the roles of both testator and legatee towards each other.

In Dilharshankar C. Bhachech Vs. Controller of Estate Duty, Ahmedabad, the Court held that the next question has to be found out after construing the Will that whether the deceased had any power to revoke or alter the disposition made in the Will or to do anything inter vivos after the death of her husband which would have gone against the ultimate disposition indicate in the Will.

We have to come to the conclusion that to maintain a caveat it is necessary to prove that the persons claiming their right has to be found out that they in fact have a lawful right to claim such interest which cannot be thrown out of the Court by the Court. Therefore, the interest or possible interest has to be adjudged after interpreting the Hindu Succession Act, 1956. We have to consider Sections 8, 15 of the said Act and the heirs mentioned in Schedule of the said Act and thereafter we have to come to the conclusion whether the persons claiming their right to lodge caveat has any interest or can satisfy or come within the purview of those factors mentioned in the said Act.

Now we sum up the facts as pointed out by the parties before us:

After summing up the facts and the points urged before us it appears that the submissions have been made by Mr. Mookherjee on behalf of KKB that the mutual Wills were executed by MPB and PDB in the yer 1981 and thereafter revoking the said mutual Wills further mutual Wills were executed in 1982. MPB died on July 30, 1990. Hence, as a beneficiary to the Will of MPB, PD& came to possess, own and control the estate of MPB. PDB executed her last Will and testament on 18th April, 1999 and thereafter a codicil dated 15th April, 2003 was also executed by her. According to Mr. Mookherjee, the said Will was executed in breach and total disregard of the mutual Wills. According to him, executors of the mutual Wills are entitled to take possession of the entire estate for the purpose of charity. He also submitted both the mutual Wills are awaiting for grant of probate since the application have been filed before this Hon''ble Court. The executors of the mutual Wills of 1982 have caveatable interest, which is in conflict with the interest of RSL.

His further contention is grant of probate to the Will of PDB will adversely affect the rights of KKB as an executor to the mutual Wills and will displace his right as such executor. Therefore, according to him KKB claims caveatable interest inter alia on the grounds of common ancestor, bare posibility of succession and executor to mutual Will of 1982.

Whereas Mr. S. Pal, Learned Senior Advocate appearing on behalf of the Yashobardhan Birla submitted that YB derives his interest as an executor of the 1982 mutual Wills and further heir within the provisions of Hindu Succession Act, 1956.

31. Mr. Sarkar, Learned Seniro Advocate appearing on behalf of BKB on the point of caeatable interest adopted the submissions made by Mr. Mookherjee and Mr. S. Pal. According to him, PDB haveing died as a widow and issueless, her estate would devolve upon heirs of her husband. But he did not question the right of the two sisters of the hunband of PDB and he submitted that those two sisters would be immediate heiress to inherit the estate of PDB. His further contention that BKB''s appointment as an executor to the 1982 Will of PDB by the surviving executor is valid since according to him during the pendency of the probate application filed in

this Hon''ble Court BKB was appointed by the surviving executor of the said 1982 Will by a deed dated August 25, 2004 in place and stead of the first named executor MPB. He further submitted that BKB has a caveatable interest as an executor of the said mutual Wills. He further contended that BKB being the executor of the said earlier Will is entitled to contest the Will executed by PDB in 1999.

Learned Counsel appearing on behalf of the GPB tried to contend before us that u/s 15 of the Hindu Succession Act read with the Schedule thereto, GPB would hae to get a chance in the estate, such interest is remote. Therefore, he submitted that GPB has a caveatable interest. It is further contended that GPB is a named executor appointed by PDB in her mutual Wills in the year 1982. Hence, he has a caveatabie interest in respect of the Will of 1999 executed by PDB.

32. To summarize the arguments pur for ward by Mr. Anindya Mitra, Learned Senior Advocate, we have been able to find out from his contention that Birlas have got no caveatabie interest in the estate of the deceased. He also drew our attention to Section 283 (1) (c) of the said Act and contended before us that none of the Birlas has any interest in the estate of PDB nor such interest is likely to be displaced by the grant of probate. He further pointed out that it has been submitted on behalf of the B Trlas that they dp not claim any interest or benefit in the estate of PDB. He further pointed out that Birlas cannot claim to be intestate heirs of Mrs. Newar on her death nor they can have any interest on the death of Mrs. Mohatta. Therefore, he submitted.that the Appellants Birias do not have any caveatabie interest in the facts of this case.

He also drew our attention to the decisions and contended that the Court held only interested heirs shall have the cavetable interest (See: AIR 1946 Cal 40 (Supra), In the Goods of Mahammad Bashir (deceased), , Rajiv Ramprasad Gupta Vs. Rustom Sam Boyce,

He also drew our attention to the following undisputed facts and we have taken note of that:

On 3rd July 2004, PDB died- MPB pre deceased her on July 30, 1990. The couple had no issue;

Hindu Succession Act, 1956 applicable in this case. Admittedly. PDB and MPB were Governed by Mitakshara School of Hindu Law. PDB was the sole heiress being Class I heir in the said Act ;

When PDB died, she had no Class I heir under the said Act. Her husband''s sisters have large number of their respective Class I heiress ;

In the probate petitions filed by Birlas in respect of the Mutual Wills of 1982, it is also admitted that Mrs. Newar and Mrs. Mohatta are the intestate heiress of PDB;

Upon the death of Mrs. Newar, Mr. Khaitan has been added as a Defendant in the suit as an executor to the Will of Mrs. Newar;

Birlas have not claimed themselves to the intestate heirs of either MPB under the Hindu Succession Act, 1956. Birlas have claimed to be the agnates of PDB;

Birlas cannot have any right as creditors or reversionary heirs of PDB and further it was pointed out that Mrs. Newar died after filing her written statement in the probate proceedings and the application was filed by Mrs. Newar''s sons as her intestate heirs. After summarizing this undisputed facts he contended that the Birlas cannot have any caveatable interest in the Will of PDB.

His further contention is that the KKB claimed caveatable interest on the basis of executorship under the Will of MPB in 1982 cannot have any caveatable interest on the basis of such executorship since his executorship is not affected by the Will of PDB and he further contended that u/s 8 of the Hindu Succession Act there are two heiresses in Entry 2 of Class II of the said. Agnates cannot and do not have any right or real interest in the estate of the deceased.

33. Further rights claimed by KKB as a co-owner of Kumaon Orchards also cannot give a right to KKB and cannot have any right as such caveator.

In case of YB, the claim possessed on the Deed of Appointment dated 24th August, 20Q4 and he also claimed his right as an executor under the alleged Will of MPB of 1982. Mr. Mitra contended that on the ground of mutual Wills, mutual Wills must contain an agreement not to revoke the same. Therefore, his right is not affected by the Will of PDB of 1999 and the agnates of MPB also cannot give him a right to claim the caveatorship.

With regard to BKB it is pointed out that his appointment by a Deed of Appointment dated 25th August, 2004 appointment was sought to be made by the other executor of the alleged Will to fill up the vacancy of PDB. MPB died in the year 1990 admittedly and PDB died 14 years threafter. Therefore, the question of appointment as an executor in place and stead of MPB in respect of the Will of 1982 of PDB cannot give any right to BKB to claim a right to hold his caveat.

He further contended that the Will becomes operative, immediately, on death and operation thereof is not postponed till death of the other. According to him, since no steps was taken earlier to appoint BKB as an executor therefore at this stage no steps can be taken to appoint him as an executor.

Cross-objections have been filed by RSI-Challenging the order holding GPB and YB have caveatable interest as Executors to the mutual Wills of 1982. Mr. Mitra contended that the Hon''ble First Court erred in upholding the caveatable interest of GPB on the basis that the Will of PDB was a rival Will which is contrary to the case as made out by the GPB before the Hon''ble First Court. However, we have considered the said facts, but we come to the conclusion after considering the facts of this case

that if Birlas succeed in the said suit which has been filed on the basis of the agreement between MPB and PDB to execute the said mutual wills in that case we feel that GPB shall have a right to lodge caveat in respect of the Will of PDB. Therefore, We have to come to such conclusion that Birlas do not have any caveatable interest in the facts of this case excepting we hold that GPB has a right since he was undisputedly a named executor appointed by PDB by the mutual Wills of 1982 and therefore if the Will of 1999 can be dislodged, then automatically his right will survive and we have to hold that the interest of GPB being one of the executors -is sufficient to maintain his caveat in respect of the probate proceedings of PDB''s Will.

34. We have also specifically gone through the reasoning given by His Lordship in respect of appointment of YB toy way of nomination by the surviving trustees in terms of the Will of MPB, since deceased and we do find that the reasoning given by His Lordship is absolutely correct and we do accept such reasoning of His Lordship as His Lordship held as follows:

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

In respect of the sequence of hearing as directed by the Hon''ble Court we do not find that there is any reason to interf0re with the said portion of the order. Hence, we uphold that part of the order pased by the Hon''ble First Court.

After considering the facts and after analyzing the decisions cited before us it appears to us that the property already develoved upon the Laxmi Devi Newar and Radha Devi Mohatta and in their absence the property cannot be gone back to the heirs of their father or brother. The succession will follow in the line.of Lamxi Devi Newar and Radha Devi Mohatta. The decisions which were earlier decided by the Court taking into account at that point of time the right of reversionary. But in our opinion, after the enactment of Hindu Succession Act, 1956 the line of succession on

the basis of the.existing facts would automatically go in favour of Laxmi Devi Newar and Radha. Devi Mohatta and there is no question of reverting back to their brothers. Therefore, i^hese circumstances in our opinion, the Hon''ble First Court was right in holding that none of caveator has not any interest nor any possible interest in the estate of the deceased under any circumstances in case of death intestacy.

35. As far as argument of joint Hindu family is concerned, we do not find any reason to differ with the opinion expressed by His Lordship and we have to come to the conclusion on the basis of the materials on record that the joint family had been splitted and there is no material on record to accept till the death of PDB, since deceased, joint family subsists in any manner whatsoever. In these circumstances, we also uphold the decision of the Hon''ble First Court. We are also not in a position to accept the argument on the ground of co-owner and / or co-sharer of the properties the deceased had with the others and we do not find any reason to deal with the said question here since it had no substance.

It appars to us that G.P. Birla, the named executor, appointed by PDB in her Will dated July 13, 1982. Similarly, the K.K. Birla is named an executor with the Will of MPB whereas Yashobardhan Birla and B.K. Birla are appointed executors by way of nomination by surviving executor of both the deceased. Under section''211 of the Indian Succession Act it is settled position that on the death of the testator/testatrix the property will vest under the named executor of the Wills. The legatee cannot derive benefit from the will unless assent to legacy is given by the legator which is specifically stated in Chapter VI of the Indian Succession Act, 1925. It further appears to us that in this case going by the apparent reading of the rival earlier will undisputed executors are also the trustees in real sense for the benefit of the member of public for charitable purpose, of the estate left behind by the said deceased PDB. In terms of this will they have been given wide discretion and right to choose the class and nature of the beneficiaries. This right, title and interest had indeed been vested unto the Lady along with other surviving trustees so far the will of M.P. Birla is concerned. After death of the PDB surviving executors'' right are there. As far as the deceased PDB''s will is concerned appointed by the PDB and they being alive have above right undisputedly. In our opinion, applying legal principle as above surviving executors of prior will of the PDB have possible real interest in the estate. The Courts have already recognized the legatee''s and / or his assignee''s interest of prior rival will as having locus to contest grant. All these rights will be defeated if not displaced, if probate to last instrument is granted. Accordingly, we hold this interest of G.P. Birla being one of the executors above is sufficient to maintain his caveat in relation probate proceedings of PDB''s will. So far K.K. Birla is concerned he is not one of the executors of PDB''s will his claim is based on executorship of the mutual will of her husband. His interest is not at all affected by the will of the PDB.

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

It further appears from the fact that M.P. Birla predeceased the PDB. Therefore, at no point of time, M.P. Biria had any occasion to function as the executor of PDB.

In our opinion, appointment of executor during lifetime of testator is always inchoate, it becomes absolute on death for it is possible for testator to revoke such appointment at any time or automatic revocation on death of the executor before death of testator/testatrix. Three surviving executors are only competent persons to apply for probate and they do not and did not have any right to make fresh appointment of executor, nor to fill in vacancy when such appointment was not made by the testatrix. Had it been the intention of the testatrix to keep the number of the executors four a(l! the time then she would have by a subsequent document, appointed immediate after death of M.P, Birla another person of her choice. In effect they have made fresh appointment.

Therefore, we have to accept the opinion expressed by His Lordship and we also hold that the appointment B. K. Birla as executor cannot be treated as an appointment as has been held by the Hon''ble First Court either in law or otherwise and we further uphold His Lordship''s views as His Lordship held in the light of the decision reported in 1 Ch. 1899, 775 at page 779 where the Hon''ble Chancery Division held as follows:

It seems to me, however, that is an unnatural interpretation of Article 92 to say that Lord Norneys ''ceased to hold'' the due qualification, when in fact, he never had any qualification. The Article contemplates the case of a qualification once possessed and subsequently lost, but not the case of a qualification never possessed.

The concept of mutual Wills has been defined in Halsbury Vol. 50 para 208 which is set out hereunder:

Will are mutual when the testators confer upon each other reciprocal benefits, which may be absolute benefits in each other''s property, or life interests with the same ultimate disposition of each estate on the death of the survivor. In practice, the several Wills which constitute a joint Will are mutual, but reciprocal benefits may be given by separate Wills and these are known as Mutual Wills. Where there is an agreement not to revoke mutual wills and one party dies having stood by the agreement, a survivor is bound by it.

In Shiva Nath Prasad Vs. State of West Bengal and Others, and 1981 (II) All E.R.1018 (supra), the Hon''ble Court held that in the case of mutual Wills generally there must be an agreement between the two testators concerning disposal of their respective properties. Their mutuality and reciprocity depends on several factors.

In Kuppuswami Raja and Another Vs. Perumal Raja and Others, the Court held 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. 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. If one single document is executed using the expressions "our property" "our present Wishes" "our Will" and such similr expressions, it is strong cogent evidence of the intention that there is no power to revoke except by mutual consent.

37. We have to come to the conclusion that there must be an agreement between the two testators and/ or testatrix either written or oral or by implication to the effect that there shall not be revocation of the Will on the death of either of them by the surviror. But at this stage, it appears to us that whether there is any mutual Wills or agreement between MPB and PDB that would depend on the result of the suit filed by the parties. It also appears to us that the executors of the said mutual wills have already filed a suit against RSL for enforcement of the agreement for not revoking one of the mutual Wills by the surviving testator/testatrix. The existence of the mutual Wills and the rights thereunder would only come to play its role if the suit filed by the executors against Lodha succeeds, then and then only the said executors shall be able to make out a case. Until the suit is decided, in our opinion, the executors under the mutual wills cannot have any right and/or locus standi to maintain the caveat in respect of the will left by PDB. Therefore, we hold that the Hon''ble First Court correctly came to the conclusion that if in the suit which has already been filed for enforcement of the mutual Wills and if it is proved that the two wills are mutual, then and then only RSL as the executor of the last Will, will be bound by the said mutual Wills.

After considering the facts and circumstances of this case, we cannot accept the contention of Mr. Pal, even if we accept that Yashobardhan Birla was appointed as an executor in respect of the will of M.P. Birla can have any caveatable interest in respect of the estate of PDB and therefore, we uphold the views expressed by His Lordship that Yashobardhan Birla has no caveatable interest in the estate of PDB, since deceased. Accordingly, we uphold His Lordship''s views of discharging the caveats filed by K. K. Birla, Yashobardhan Birla and B.K. Birla and we also accept His Lordship''s views and uphold the right of G.P. Birla and the appointment of YB as an Executor to the Mutual wills of 1982 and we uphold the decision of the Hon''ble First Court.

For the discussions held by us hereinabove, we dismiss the appeals filed by the Appellants as well as the cross-objetions filed by the Respondent in the other matter..

Tapan Kumar Dutt, J.

I agee.

LATER:

Stay of the operation of order as prayed for is granted for a period of 4 (four) weeks from date.

Urgent Xerox certified copy of this judgment order be supplied to the parties, if applied for, upon compliance of requisite formalities.