

Rajendra Singh Lodha Vs Ajay Kumar Newar and Others

Court: Calcutta High Court

Date of Decision: May 19, 2006

Acts Referred: Companies Act, 1956 â€” Section 211, 213, 214, 247, 247(IA)

Criminal Procedure Code, 1973 (CrPC) â€” Section 200, 482

Evidence Act, 1872 â€” Section 111

Penal Code, 1860 (IPC) â€” Section 120B, 406, 417, 420

Succession Act, 1925 â€” Section 211, 247, 319

Citation: 111 CWN 30

Hon'ble Judges: Kalyan Jyoti Sengupta, J

Bench: Single Bench

Advocate: A.K. Mitra and S.N. Mukherjee, for the Appellant; S.B. Mukherjee, P.K. Das, S.B. Sarkar and S. Pal, for the Respondent

Judgement

Kalyan Jyoti Sengupta, J.

First mentioned application being G.A. No. 4375 of 2004 has been taken out by one Radha Debi Mohatta

being the defendant No. 2 while application being G. A. No. 4376 of 2004 was originally taken out by one Laxmi Debi Newar since deceased

being the original defendant No. 1. On her death intestacy, one Ajoy Kumar Newar, one Arabinda Kumar Newar. one Nanda Gopal Khaitan and

one Debendra Kumar Mahatri Defendant No. 1(a). Defendant No. 1(b). Defendant No. 1(c) and Defendant No. 1(d) respectively were

substituted in her place and stead. These two applications have been taken out by the aforesaid defendants for identical reliefs for appointment of

an Administrator and/or a Committee headed by an independent and impartial Administrator to take over all movable and immovable assets and

properties of the deceased, Smt. Priyambada Debt Birla including the voting rights and the right of control of the deceased in respect of the

companies specified in schedule being annexure "J" to the petition; Administrator and/or Committee to be appointed herein to take over the

management affairs and control of the M. P. Birla Group of Companies set out in schedule being annexure "J" and the shareholding of the

companies specified in schedule being annexure "AA" including Voting right: the said Administrator be directed to act as an Administrator.

pendente lite, until disposal of the testamentary proceedings; the said person or persons be directed to take all decisions with regard to exercise of

all rights in regard to shareholding of Smt. Priyambada Debi Birla in any company including the rights of control of other companies vested in Smt.

Priyambada Debi Birla; injunction restraining the said R. S. Lodha and his men agents and/or assigns from dealing with, disposing of or

encumbering any of the assets and properties of the deceased and/or exercising any right to control any company specified in schedule annexure

"J" hereto. In the same testamentary suit and in connection with aforesaid two applications the propounder/executor has taken out two separate

applications. One application has been taken out being G.A. No. 4474 of 2004 for dismissal of the application taken out by one of the defendants

being G. A. No. 4375 of 2004. Similarly, another application has been taken out by the propounder being G. A. No. 4475 of 2004 for identical

reliefs viz. for dismissal of the application taken out by another defendant being G. A. 4376 of 2004. It seems to me that the applications taken out

by the propounder are counter blast to the aforesaid two applications filed by the caveatrix (defendants) for appointment of, the Administrator.

Going by the prayer portions of the applications made by the caveatrix I think prayer for appointment of the Administrator in terms of Prayer "B"

cannot be considered for if granted, that amounts to taking over of management & control of separate juristic bodies by the Probate Court as it has

no jurisdiction to do. However, the prayer for Administrator pendente lite, in terms of prayer (a) (hereinafter in short APL) can be considered. In

the body of both the petitions and affidavit in reply of the caveatrix/defendants the statements and averments purporting to constitute the grounds

for appointment of APL are almost identically same. The said grounds shorn of mutual rival personal allegations of the parties, are summarized

hereunder.

2. The purported Will propounded by the Executor R. S. Lodha is a manufactured and procured document. Similarly, the codicil relied on and

propounded by the executor is also manufactured and procured. The genuineness of the aforesaid two testamentary documents has been seriously

challenged as it appears that disposition made therein is wholly unnatural and there is no reason to exclude any relation amongst the members of the

Birla family and to give away all her properties to the paid employee and/or accountant viz: the executor. The lady, for the last five years before

execution of the purported documents, was not at all in a good health or condition. She had been suffering from various ailments, which include

acute renal problems, tuberculosis and other diseases. She had undergone kidney transplantation, she used to move by wheelchair and almost

periodically used to go to London for treatment. The said lady was completely in the clutch and influence of the executor. Besides, the lady on 13th

July, 1982 executed a mutual Will along with her husband whereby and whereunder some other persons who have already lodged caveat in order

to contest grant of probate of Will and testament dated 18th April, 1999 and codicil dated 15th April, 2003 have been appointed executors and

trustees. In terms of the mutual Will the lady did not have any right or capacity to execute or publish any document subsequently after death of her

husband. It appears from the mutual Will of the said lady and her husband executed in 1982 that all the properties have been given to the trust for

the benefit of the public at large. It is surprising that the benevolent disposition of the lady completely disappeared from the purported last Will

unlike previous one, and the entire vast properties, both movable and immovable, have been given away to the said Lodha appointing him sole

executor of the said last Will. In "view of the execution of two mutual Wills dated 13th July, 1982 a separate suit for specific performance has been

filed and the same is pending. The executors appointed by the said lady and her husband by the Will in 1982 had already applied for grant of

Probate of the said Will and the same is pending. In this proceeding the executor Lodha has deliberately suppressed the real value of the assets

and properties left by the "said deceased in the affidavit. He has deliberately showed the value of the estate left behind by the said lady valuing her

estate at Rs. 3 crore and odd.: In the rough estimation the value of the estate and properties left behind by the said childless couple would be

nearly Rs. 2500 crore.

3. The act and conduct of Lodha both before and after death of the said lady is such that the documents were manufactured and he was busy to

grab the entire estate left behind by the said deceased. Lodha, within a few days after her death viz. on the date of Shradh ceremony hastily

declared that he is the executor and beneficiary of the said Will of 1999 read with the codicil and in the capacity of the executor he had already

rectified the respective share registers of the respective companies mutuating his name in place and stead of the said lady in order to gain entire

shareholding left behind by the s(sic)aid lady. The lady had more than majority of shareholding in all the key companies of the M. P. Birla Group

and with this majority shareholding in the key companies all other companies can be controlled and managed by one person. The said executor has

resorted to act of waste and destruction of the properties and estate as one of the premier jute mills has been closed down and other steps have

also been taken for achieving same purpose. Immediately after her death, taking control of the majority shareholding, Lodha has brought his own

chosen henchman and son to the Board of Directors of all the important companies, both holding and subsidiary companies. Serious challenge has

been thrown to the said purported Will, as such, at this stage it would not be safe if the said Lodha remains in control and possession of the

majority shareholding and the affairs of the companies. Besides, the enormity of the estate left behind by the said deceased is such that it would not

be safe at all to keep all the properties in his hands. Even before grant of Probate of the said Will Lodha has started acting not only as executor but

also started taking benefit therefrom as a sole beneficiary of the said Will. Having regard to the valuation of the estate and also act and conduct of

the said Lodha, appointment of APL has become absolutely necessary.

4. The executor Rajendra Singh Lodha has filed one affidavit-in opposition in terms of the Courts order to oppose the applications for appointment

of APL as the allegations made in the applications are identical and same in verbatim. That apart, he has made two separate applications as quoted

above. Subsequently he has also filed a supplementary affidavit after filing of the affidavit-in-reply of the applicants caveatrix/defendants. Upon

reading of all the aforesaid pleadings the grounds to oppose prayer for appointment of APL as prayed for in the application are summarized

hereunder.

5. No relief can be granted by appointing Administrator and/or otherwise to take over management, affairs and control of the M. P. Birla Group of

Companies as set out in annexure "J". These companies are separate legal entities and the assets and properties thereof do not

belong to the estate of the said deceased lady. Moreover the aforesaid companies are not parties to the probate proceedings. In any view of the

matter Probate Court has no jurisdiction to pass any order touching properties of the companies.

6. The present application is filed by the two ladies. The applications for appointment of APL have been made with oblique motive and mala fide.

Actually these two ladies have been set-up to take out the applications at the belated stage. The probate application was filed some time in the

month of July, 2004 and an instant application has been made on 20th December, 2004. Both the applications have been verified by one Kashi

Nath Tapuria who is a man of questionable character, propriety and integrity. In one case the Division Bench of the Bombay High Court convicted

him for his criminal offence. His verification should not be believed by this Court. Actually the Birla Group from the day one, when the Will of 1999

was published and made over, are trying in all possible ways to harass and malign the executor applicant in an illegal and surreptitious way. This

Birla Group setup some insignificant shareholders and also the employees of one of their companies to initiate proceedings before the learned

Court alleging oppression of minority share holders and mismanagement of all the companies of M. P. Birla Group for the same relief viz. for

appointment of Administrator. The allegations, statements and averments in those company proceedings are identically same as those made in the

instant two applications. The said proceedings before the Company Court were contested by Lodha successfully and these proceedings have been

dismissed. An appeal was preferred against the order of dismissal of the Company Court in this Hon'ble Court and such appeal has been

dismissed also. Having not been successful to dislodge the Propounder Lodha and to disturb the smooth running of all the companies and the

functioning of the respective boards of the companies this Birla Group have now set-up a third person and/or their stooge and henchmen to initiate

false and vexatious criminal proceedings amongst other against Lodha and one of the attesting witnesses. Curiously all these statements and

averments in this application as well as their defence in this affidavit-in-opposition have been made in the complaint of the criminal proceedings.

Even the annexures to the complaint in the criminal prosecution are also the copies of the pleadings filed in the instant testamentary suit. So these

applications are made as another mode of harassment and such vexatious litigations, according to Lodha, are nothing but an act of contempt and

this Court should take note of this fact and should dismiss the application in limine.

7. While explaining and/or answering the charges of the applicants on-merit it is stated basically that there is no necessity for appointment of APL.

The estate is not huge or vast as it is sought to be projected. The challenge in the probate proceedings is not a challenge at all. The probate

applicant Lodha is not a stranger in any sense whatsoever. Lodha, while having been appointed and worked as an Auditor of the M. P. Birla

Group of Companies for a long time, started enjoying confidence of the husband of the deceased Lady and the deceased Lady herself. During the

lifetime of this couple he was allowed to participate in the management and affairs of all the companies. After death of the husband of the said

deceased Lady he used to advise and help her in all matters. During her life time even long before execution of the said Will of 1999 and codicil he

was appointed as Director, co-Chairman and even Chairman of various companies of M. P. Birla Group. The business of the M. P. Birla Group of

Companies started flourishing and recovered from continuing loss in the business. All charitable activities were allowed to be looked after by

Lodha during her lifetime. Because of his ability and trustworthiness he became very close and confident of the said Lady. As a Chartered

Accountant and Advisor he never charged any fees and acted voluntarily. The deceased Lady was of such a strong character and mind that she

was not susceptible to be influenced under any circumstances; During life time of M. P. Birla there was strained relationship and after his death

strained relationship became very acute. The members of the Birla Group made all attempts to marginalize the Lady within larger Birla clans in all

possible manners and ways. She, at that time, was helpless but she could come out of all these onslaught attempted against her as well as M. P.

Birla Group of Companies. During this adverse period Lodha helped her in all manners and advised her as a most trusted friend. The Will has been

executed followed by codicil lawfully and with her full knowledge and understanding. She used to Chair the Board Meetings and she made him co-

chairman and of her own brought his son in the Board of Directors of the Company and she had a lot of affection for his son, Harsha Vardhan

Lodha.

8. So-called allegations of undue influence, forgery in relation to the Will of 1999 and codicil are wholly baseless and unfounded and this will be

proved without any doubt at the time of hearing of this probate proceedings. She was so disgusted and her mind was so distracted that she had no

wish and as such she became very firm not to give anything to anyone of the Birla family even not to her brother. All the Birla Group and her

brother wanted to destroy systematically the M. P. Birla Group of Companies and also other organizations of public charitable in nature.

9. He says that the Lady has left behind shareholding of five investment companies and she had very nominal shareholding so far as the

manufacturing companies are concerned which are the real source of wealth and earnings of the M. P. Birla Group of Companies. She inherited

from her husband roughly over one thousand shareholding in the investment companies and those shares have been recorded in her own name in

the Share Register of the respective companies by way of rectification. On her death in terms of the Articles of Association of the respective

companies and on the strength of the Will he has got his name recorded and rectified in the Share Register and the Membership Book lawfully. He

has been appointed as Chairman of the Board of Directors of the respective companies lawfully in the Annual General Meeting of the shareholders

in the manufacturing companies. All the manufacturing companies and other companies are running profitably and smoothly and there has been no

waste or mismanagement. The allegations of selling of assets and properties made in the applications are unfounded. One of the companies viz.

Birla Carbide and Gases was closed as the same was a losing concern for over the years during the lifetime of the said Lady. Accordingly, assets

and properties thereof were sold out. As far as closure of Soora Jute Mill is concerned the same was done in accordance with the decisions of the

Board of Directors as it was found that manufacturing capacity of such jute mill was not economically sustainable. The said jute mill located at

thickly populated area and there has been no scope for expansion of the same. Moreover, because of the topography of the land where the factory

is situated during rainy season it remains submerged and it is very difficult to maintain purposeful transportation of the goods to and from the factory

premises. Road space is also narrow. Therefore, in order to expand the business and to modernize the same the said Soora Jute Mill is decided to

be shifted at sonic place at the outskirts of the city where all steps are to be taken for relocating and resumption of the business very soon.

10. The investment of the dividend of the shareholding of the Lady is being made in accordance with law in recognized mutual investment

companies and other Government investments and is legally permissible in the trade and industry to get high yield and returns. The immovable

property at Kumaon Garden House of the Lady is being well looked after.

11. If any APL is appointed there will be serious repercussion in the share market and these prosperous profit making manufacturing companies

will be rendered in no time a losing concern as the people will start losing faith. That apart, there are good number of collaboration agreements with

foreign investment companies and the Directors have been appointed from and amongst the financial institutions.

12. As far as the ability, image and standing of the applicants are concerned. Lodha is in very enviable position to any individual person. He says

he was a past President of FICCI. He has served this country in trade and industrial field in various manners. He served Prime Minister's Council

on Trade and Industry, Central Direct Taxes Advisory Committee. Board of Trade. National Institute of Public Finance and Policy, Committee for

Defence Production, Advisory Committee of Capital Issue etc. The applicant Lodha is also Director of the Boards of a large number of companies

viz. National Security Depository Limited, Mumbai; PNB Equities Limited, New Delhi; SBI Life Insurance Company Limited, Mumbai; Henkel

Spiek India Limited, Chennai. He has also served important policy making and regulatory committees constituted by the Government of

India/Regulatory Bodies viz. SEBI Review Committee; SEBI Corporate Government Performance Review Committee; SEBI Committee on

Disclosure of Offers Document; National Committee of Accounting Standard; Company Law Advisory Committee constituted under the

Companies Act; Working Group of recast of the Companies Act; Bhagawati Committee for recast and take over the Rules and Regulations. He

was also trustee of various trust bodies and institutions.

13. Therefore, it is clear that his leadership skill, strategic thinking, stature and image are recognized and appreciated by all high profile institutions

and personalities. Therefore, he is not a man of straw and stranger as it is pictured in the aforesaid two applications.

14. So-called allegations of siphoning of funds and diversion of the stock of cement are very minor things and the same have been taken care of

with appropriate disciplinary measure by the efficient management. Now M. P. Birla Group of Companies are managed by very efficient

professional management group and there is no need to appoint the persons who are not accustomed to and concerned with the business at all.

15. Mr. S. B. Mookherjee, learned senior advocate appearing with Mr. P. K. Das senior advocate and Mr. S. P. Sarkar senior advocate

appearing on behalf of their respective clients on behalf of the Birla Group advanced joint and identical argument in support of the application as

follows:

He while leading the argument on behalf of all the applicants contends on plain reading of section 247 of the Act it is clear that appointment of APL

is in the sole discretion of the Court, exercise of discretion is, subject to the condition to be satisfied that there should be a pending suit touching

the validity of the will of a deceased person for obtaining or revoking probate, or grant of letters of administration. But he says the discretion has to

be exercised by the Court taking into consideration the principles or the factors as laid down by several judicial pronouncements. According to him

the vastness of the estate seems to be prime consideration, the personal factors in terms of integrity or credibility may be ground for taking the

estate out of the hands of the executors. This position has been illustrated in the English decision reported in 1948(1) All. E.R. page 271 and one

of the oldest decision of this Court reported in 13 CLJ page 34 (at page 35 last para) the prospect of protracted litigation in addition to vastness

and estate being in media is also one of the considerations as held in Calcutta case reported in AIR 1952 Cal 418 and also Bombay case reported

in AIR 1932 Bom 342. The necessity to preserve and protect the estate is not the sole guiding consideration. It is only upon consideration of

various factors in a given case the Court would come to the conclusion where such appointment is necessary and to be made. In principle he

agreed that appointment of APL is guided by the principle in case of appointment of Receiver, that is to say when the property of a deceased

person is in media, the property or an estate is said to be in media when nobody is in beneficial ownership of the property or the estate. In relation

to an application for probate of a will the expression "in medio" are to be understood in an extended sense. In support of his application he seeks

reliance on the following cases:

(i) AIR 1955 Mad 430 (para 11 page 433)

(ii) (2004)7 SCC 505 (para 10 page 513)

(iii) AIR 1952 Cal 418 (para 18 and 19 page 420)

16. In a probate proceeding such a situation can arise in either of the two situations:

(i) When no Executor is appointed by the testator in his will

(ii) When though an executor is named in the will his appointment is under challenge.

17. From the Judgment cited by the learned counsels for Lodha it will appear that an APL can be appointed whenever there is a serious challenge

to the appointment of the Executor. He contends further that ground of personal disqualification and/or "in medio" are different and separate.

Undoubtedly when the estate is in medio the Court would invariably appoint an APL regardless of the fact that the personal integrity and

credentiaility of the Executor are in question, rather no charge of waste or management has been made out or even levelled against alleged

Executor. But conversely even if an estate is not in medio but there was a question about the integrity, credibility of the executor, a Court can

appoint APL on that ground alone. He does not think that the charge of malfeasance or mismanagement is sine qua non for appointment of APL.

Appointment can be made immediately after a caveat has been lodged with supporting affidavit or at least when the probate application has been

converted into testamentary suit, before any testing time for the executor to bring his credibility or capability has elapsed. It is really mind-set of the

Court when it will appoint APL, for example if the Court feels on the given facts and circumstances the Executor is not desirable or trustworthy

person the Court may relieve him of discharging his duty of the Executor during pendency of the proceeding. In this case challenge to the Will has

been made on two fold grounds namely (i) direct allegations of the genuineness of the Will namely on the ground of forgery, undue influence and

importunity of the Will. These grounds are made out in the application (Paragraphs 7, 8 and 9); (ii) Existence of the mutual Will of 1982.

Implication of the mutual Will have been taken note of legally by the judicial pronouncement [Re Dale 1993(4) All ER 129 or 132. 133 & 134].

Therefore the challenge to the appointment of executor is really covered by the challenge of the genuiness of the Will and also by existence of the

mutual Will. As such the named executor in the allegedly last Will is not entitled to take possession of the estate or dispose of the same the estate

must be dealt with by the executors 1982 Wills in accordance with the trust which had come into existence on death of M.P. Birla. In view of the

aforesaid situation there cannot be any doubt that estate left by the said Lady must now be viewed as an estate "in medio".

18. Real question is, Mr. S.B. Mookherjee then urges, whether it is desirable or proper to keep the estate of the deceased in the hands of the

named executor. It is submitted that on the basis of settled principles of law there is no doubt that the estate is in medio. The other aspect is to see

whether there is anything against Lodha's personal standing or credibility, which would necessitate the Court taking the estate out of Lodha's

hands at this stage. In the light of information and facts which have now been revealed following the defendants' application for appointment of a

Receiver for the purpose of making an inventory and eventually for breaking open the locks show Lodha in a very dim light. Virtually a treasure

trove has been discovered through the efforts of Joint Special Officers. He urges that two possible views can be taken on this discovery; either

Lodha was not aware of their existence or he deliberately concealed the same. According to him u/s 319 of the Indian Succession Act, 1925 the

foremost duty of an executor is to acquaint himself with the assets and properties of the deceased and getting the same with reasonable diligence.

Lodha made no effort whatsoever to discharge the primary obligation and in every likelihood in absence of the caveators making the instant

application such treasure trove would have remained undiscovered. The indication, however, is very strong for the view that he deliberately

concealed the (sic)t. Lodha claims to have enjoyed Priyambada's confidence since about 1996: he had the access to intimate papers and

documents and correspondences (sic)ating back about seventy, it is inconceivable, incredible and naive for Lodha to contend that he was unaware

of the strong room and treasure trove which has now been discovered amongst other things. If the petitioner did not make the application for

inventory and appointment of Receiver the strong room and the treasure trove would have disappeared or remained concealed. Therefore, it is

plain and simple that there cannot be slightest doubt that the estate is not safe in the hands of Lodha. The significant portion of the estate of the

deceased consists of shares in various companies and some 30 odd companies were used to be controlled by the deceased Lady through her

shareholding in four investment companies. This power and control, he urges, is as much part of the estate as any tangible assets, which were

owned by her till her death. The estate means all that vests u/s 211 of the Indian Succession Act. He relies on a decision of Patna High Court

reported in AIR 1924 Pat 721 and 127 ITR 855. The estate also includes of right of action as decided in an English case reported in 1955(2) All

E.R. Actually these group of companies has now become a single corporate entity has been gaining ground. ""Piercing Corporate Veil"" theory as a

rule is invoked when a network of interlocking companies and trust used as a device or engine for avoidance of tax. This concept can also be

resorted to for the ends of justice pure and simple. He * has. referred to an English decision reported in 1985 (Butterworth is Company Law cases

333 at page 337) and he submits with full assistance of his learned Junior Mr. Das and learned supporting counsel Mr. Sarkar that Administrator

should be appointed allover the estate and over the controlling block of shares of six investment companies by directing that shares now standing in

the name of Lodha as an Executor should be transferred to the Administrator and his name will be recorded, in place and stead of that of Sm.

Priyambada Devi Birla. This would mean that the Administrator then would exercise all powers in all the controlled companies for the benefit of the

persons who should be the ultimate beneficiary in such a manner as the Executor would do. It is feasible under the law as it has been pronounced

by a decision of an English Court reported in 1952(1) All E.R. 267.

19. Mr. S. Pal. senior advocate appearing for one of the Birla Groups while pressing his client's application in addition to what has been said by

Mr. S. B. Mookherjee, contends that in this case two main issues have arisen for appointment of APL. One is prima facie ease of contest to grant

and another is serious challenge of the Will and the appointment of the executors. He contends further that in order to understand the case of

necessity the following facts and circumstances are required to be considered by the Court. The magnitude of the estate, which comprises shares,

according to his client's estimation, is Rs. 2500 crore. This value has been elaborated in the application for APL in paragraph 14 and also

amended affidavit of assets of this application, which shows it as Rs. 4,21,82,878/-. During pendency of these proceedings the case of necessity is

also established. It is observed by this Court in the interim Judgment and order dated 11th March, 2005. The apprehension of the Court recorded

in the Judgment and order was proved to be correct when inventory was conducted by the Joint Special Officers. The keys of almirahs,

cupboards, safes, strong room were not made available to the Special Officers. The executor was completely unaware of the vast and invaluable

treasure trove viz. jewellery, gold ornaments and immensely valuable, ancient and medieval gold coins. These assets were not mentioned in the

affidavit of assets. Therefore, the estate is at risk since the executor has failed to discharge his duties imposed on him: by not disclosing and further

not collecting all assets. Necessities are also apparent from the fact and in this case there is conflict of interest by reason of the fact that the

executor himself is the beneficiary under 1999 Will. According to him, the settled position of law is that the executor acts in a fiduciary capacity.

He should not put himself in a position where his personal interest is likely to be in conflict with the idea of protection of the estate the English

decision reported in (1896) A.C. 44 at page 51 is referred to. It is also observed by this Court in the Judgment and order in this matter at the ad

interim stage that it is wholly unsafe to rely on the mind of the executor who is also the beneficiary. He contends further that human nature and mind

is ordinarily swayed by his own interest, rather than duty. As such in order to avoid the conflict of interest, appointment of APL is necessary. His

next contention is that it is completely uncertain at this stage to whom the estate will go, because in terms of the provision of the prior mutual Will of

1982 for which a suit has been filed the executor shall be bound by the obligation of the mutual Will and ultimately the estate is bound to go to the

trustees for charity purpose. The concept of the mutual Will has been- accepted by the Supreme Court in its Judgment reported in AIR 1959 SC

71 and also by this Court. The genuineness of 1982 Will has been questioned by the executor simply because the genuineness of 1999 Will will

have been questioned by the petitioner. It has also been observed by this Court that the estate is in the custody of the Court pending probate

proceedings. Therefore, independent machinery to look after the estate which is in the hands of the Court is essential.

20. The named executor is not a reliable person. He is susceptible to professional misconduct as a chartered accountant holds the position of the

trust as has been settled by the judicial pronouncement reported in AIR 2000 Ker 212. Under provisions of Chartered Accountants Act, 1942

and Chartered Accountants Regulation, 1988, which imposes several duties on chartered accountants and when conduct of a chartered accountant

is in breach of such duties, contrary to honesty, opposed to good morals or unethical, then he is guilty of professional misconduct. This proposition

of law has been settled by this Court also in its Judgment reported in AIR 1946 Cal 414. Lodha has committed various acts of professional

misconduct as it has been stated in the affidavit-in-reply in paragraph 42, as such, when it has been filed before the appropriate forum against him.

21. Lodha is in habit of making false statements on oath in the instant proceedings while stating that there has been no sradh ceremony and further

stating that there was no trace of medical papers and files to ascertain physical and mental capacity of the deceased lady. He has made false

statement to making Kashinath Taporla regarding his honesty and integrity by only referring to Judgment of Bombay High Court but not referring to

the Judgment of the Supreme Court, which had overruled Bombay High Court Judgment. While taking control of entire estate Lodha has been

making pecuniary gains by investing funds of M. P. Birla Groups through the companies controlled by him i.e. PLC Securities Limited. 100%

subsidiary of Lodha Capital Agreement Limited. It is strange that within 15 days from the date of her death Lodha got his name mutated in the

respective companies as executor in place and stead of the deceased lady to gain control of the majority shareholding which, in its turn, control the

entire M. P. Birla Group of companies. His whole scheme and design is to obtain control of the entire estate as early as possible without wasting

single day and to treat the entire estate as his own.

22. As such, he says that immediately after death and during pendency of this proceeding his act and conduct is wholly untrustworthy and renders

him misfit to act as an executor.

23. He submits, while forwarding his point of argument that there is serious challenge about the validity of 1999 Will which has been executed

under suspicious circumstances. The Court cannot accept a document to be a genuine last Will prima facie unless the executor removes suspicious

circumstances. In this connection he has referred to a good number of Supreme Court decisions viz. AIR 1959 SC 443 at page 452 (para 20).

AIR 1977 SC 74 (paras 4 and 6) and AIR 1998 SC 2861 (para 3). The purported Will is also unnatural and this fact itself is suspicious

circumstances surrounding the execution of the Will. He has referred to. in this connection. the aforesaid Judgment of the Supreme Court and also

another Judgment of Supreme Court reported in AIR 1965 SC 354 at page 359 para 14. The deceased couple was childless and had a charitable

disposition throughout their lifetime and this will be evident from the fact that they set up. during their lifetime, quite a good number of trusts,

societies and those were sponsored in all respects and run by them. Mutual Wills were executed by them in the years 1981 and 1982 of which the

ultimate beneficiaries are public charities, vesting all personal assets of both the couple in charities through the medium of the trust created in 1988.

The total deflection from the charitable disposition of the deceased and the executor becoming the sole beneficiary reveals the unnatural character

of the Will and raises high degree of suspicion. His client has challenged the Will and Codicil and appointment of executor on the ground of

unnaturalness. Lodha has not made attempt to dispel the suspicious circumstances satisfactorily. The explanations given by him are far from

acceptable. The concealment and delay in production of the Will is considered to be suspicious circumstances. The change of lawyer at the time of

preparation of the Will and anticipatory/ pre-emptive recital in the Will are also suspicious circumstances. The physical and mental capacity of the

testatrix was such which renders that she was Incapacitated to execute any document because her physical and mental capacity were considerably

impaired because of various and serious ailments including kidney transplant. Moreover, the alleged Will is also product of undue influence and it is

also one of the grounds of invalidation of the Will and this has been accepted by the Court of this country reported in AIR 1955 Cal 15 and AIR

1955 SC 363 respectively. The principle of undue influence applies not only to the Will but also various other transactions, which are inter vivos (in

this connection reference is drawn of a Supreme Court decision reported in AIR 2005 SC 52).

24. Undue influence of Lodha over the deceased lady can conclusively be interred because of her age and the association with her after demise of

her husband to carry on huge business estate in the capacity of chartered accountant. In fact, his intimate closeness with the testatrix has been

admitted in the pleading in the affidavit-in-opposition to the application for APL (para 5(e), para 28). He contends that in order to decide the

question of undue influence the Court is to judge two things viz. (i) relationship between the person influenced and one influencing; and (ii) the

ingredients which will make such influence undue. In this connection he has referred to an English decision reported in 2001(4) All E.R. 449. The

burden to establish undue influence does not lie on the person who asserts but on the person who is in a position to dominate the Will or influence

the mind of another. Section 111 of the Evidence Act. he urges, is to be applied regarding the burden of proof. This proposition of law is

supported by a Supreme Court decision reported in AIR 2003 SC 4351. The magnitude of the disposition is also a factor while considering the

question of burden of proof. Therefore, it is not imperative to establish actual domination, particularly when the person is charged with undue

influence with a fiduciary position vis-a-vis the person influenced. He relies on, for this proposition of law, the following decisions viz. 2001(4) All

E.R. 449 (460), 1896 (A.C.) 44 at page 51 and 2005(2) WBLR 311. So. these are the aforesaid serious questions touching the legality, validity

and genuineness of the Will. It is an admitted position that the control of the M. P. Birla Group of Companies constitutes the most valuable assets

of the estate of the deceased. It is judicially settled, according to him. control includes de facto control. In this connection he has referred to a

decision of this Court reported in AIR 1973 Cal 450. If the executor-cum-beneficiary is allowed to continue to control these properties then he

will exclusively control and manage the entire estate as the deceased lady was controlling during her lifetime. If the balance of convenience and

convenience is weighed appointment of APL does not prejudice Lodha, any manner, as his personal assets or shareholding in his personal

capacity, as distinguished from his capacity as executor, is not affected. Lodha's controlling capacity as executor will only be suspended till the

determination of the suit. According to him, if Priyambada could exercise control and Lodha qua-executor can exercise control, there is no reason

why a thoughtfully chosen person/persons/body of persons will be unable to manage and control. In the context of the purported Will of the deceased

testatrix has thought of appointment of APL in case inability of Lodha for any reason. According to him, the apprehension of adverse effect on the

shares in the share market is baseless as the share price in the stock market depends on the performance of the companies. If there is no adverse

effect of the propounder in taking over control after death of the testatrix, there is no reason to assume that the appointment of an Administrator

would depress the share price. At present, according to his study, thirty six companies out of thirty eight companies are managed by M. P. Birla

Group after death of Priyambada. Out of these thirty six companies there are only four manufacturing companies viz. Birla Corporation Limited,

Birla Ericsson Optical Limited, Universal Cables Limited and Birla Tele Links Limited whose shares are listed in the Stock Exchange. No share is

held by public in thirty companies, therefore, there is public shareholding only in two companies viz. Birla Financial Corporation Limited to the

extent of 12% of shares and Talavadi Cements Limited to the extent of 30% of shares. The shares of these two companies are, however, not listed

in the Stock Exchange. 63.75% of shares of Birla Corporation Limited are held by M. P. Birla Group and about 10% of shares are held by Indian

public and private corporate bodies and the rest are held by mostly financial institutions.

25. Therefore, he contends that there will be no impact on the share market or on the change of share position in the event appointment of APL is

made.

26. Mr. A. K. Mitra and Mr. S. N. Mukherjee, senior advocates while opposing the application for appointment of APL and placing their two

applications for dismissal of these two applications contend that both these applications have been made with oblique motive and are mala fide.

These applications are liable to be dismissed on the ground that the applications have not been placed before the Court with clean hands. They are

not interested in the welfare of the business of M. P. Birla Group. It is evident that they are trying to advance the cause of their respective business

and weaken and disintegrate M. P. Birla Group. Birlas by exercise of their majority shareholding in two companies of M. P. Birla namely the

Rameswara Jute Mills Ltd. and Jute Investment Company Limited the control of these companies have been taken over in September 2004, by

taking these companies out of the fold of M. P. Birla Group. The rest motive of disintegration of M.P. Birla Group by other Birlas has come out on

the surface. Another Company namely Indian Melting and Refining Company Ltd. has been taken out of the fold of M. P. Birla Group within 48

hours of cremation of Priyambada Devi. This company is shown as part of M.P. Birla Group in the suit filed lay Birlas in C.S. No. 5 of 2004. As

such no prayer has been made for appointment of Administrator over this Company. Proceeding for destabilizing companies of M.P. Birla Group

have been initiated by Birlas. Four such proceedings were started in Company Law Board, two against Birla Corporation Ltd. and two against

Vinda Teli Links Ltd. However Birlas have been unsuccessful in getting favourable order from the Company Law Board. Even the appeal filed by

them in this Hon'ble Court has been dismissed. Criminal proceedings initiated by Birlas through, their henchman R.P. Pansari against Executor the

draftsman of the Will and witness to the codicil obviously with intention to pressurize them to succumb.

27. They contend the challenge howsoever, apparently strong is not a valid ground for obtaining interim order. Validity of objections will be

determined at the hearing of the testamentary suit on taking evidence. In support of their submission they have relied on paragraph 19 of the

Division Bench Judgment of this Court reported in AIR 1952 Cal. 418. even prima facie it will appear that will was executed by the said Lady with

her free mind and out of her own volition. She was completely mentally and physically fit and alert. This will appear from the statement made in the

Will. The alleged ground of suspicious circumstances is without any substance and devoid of any merit and at this stage these are not at all germen.

28. According to them in order to get an appointment APL the strong case of necessity for appointment has to be made out:. Their client is the

named executor and chosen person of the testatrix and he cannot be removed from discharging his duties as an Executor. The case of necessity is

not made out by a single factor and should be considered on the basis of the fact that whether the estate of the testator is in medio that is there is

no one to take control of the estate and the income arising therefrom. In support of their submission they have also referred to following decisions.

13 CLJ 47 page 49, AIR 1952 Cal. 418 at para 19, 1948(1) All E.R. 271. 1869 LR(1) P-D 103.

29. In order to displace the Executor a strong case has to be made out that he is guilty of gross misconduct and committing mismanagement and

waste and there is actually danger of the estate being wasted. They referred to the decisions of this Court (13 CLJ 47, AIR 1933 Bom. 342 at

page 346) in this connection.

30. The Estate of the Testator cannot be said to be in media. It is an admitted position that Lodha has taken complete control of the estate. This

admission will appear from paragraph 15 of the application being G.A. 4375 of 2004 and in the Affidavit in Reply of Kashi Nath Tapuria

paragraphs 8(a) and 11 under the law it cannot be said that the estate is in medio as the same has stood vested in the executor, (Lodha) on her

demise. They have drawn reference in this connection to Section 211 of Indian Succession Act. (2004)7 SCC 505 at para 10. All the valuable

articles which are liable to be easily removable namely ornaments, gold coins etc. have all been found intact and have been kept in bank vault

sealed by the Joint Special Officers. There is no allegation that any of the four houses where the movables belonging to Priyambada Devi are

situated, are not protected. In fact all the houses are maintained by the respective owners as they were during the deceased Lady's lifetime with full

security arrangement. As such it cannot be said that any of the estate of Sm. Priyamvada Devi is in medio that is custody of no one. On the

contrary the estate is well protected and preserved. It is settled law that the Executor being the owner of the estate in the right of the testator and

not in the, right of the beneficiary. The Lady has been acting as an Executor not as a beneficiary. Executor derives his title not merely in getting the

grant of probate. They seek reliance on two decisions (1), AIR 1924 Pal. 721 and (2) 1955(2) All E.R. 147.

31. Appointment of Administrator is made when the preservation and protection of the property is required. According to them the nature of the

property in this estate are such that it can easily be protected and preserved and indeed they have been preserved. The Birlas have given inflated

valuation of the estate and there is no support of such valuation. The nature of the estate are shares in various M. P. Birla Group of Companies,

Shares in other companies held by them 1/5th undivided shares of orchard in Kumaon, ornaments, jeweleries, gold coins, silver utensils, house

hold goods, pearls, books, plate, antiques, investment in mutual funds and Government bonds and National Savings Scheme. Whereas the value of

shares in M. P. Birla Group of Companies as far as the balance sheet of Priyamvada Devi Birla as on 31st March, 2004 is Rs. 1.21 crore

approximately as stated in the affidavit of assets by Lodha. Since the main asset of the estate is controlling block of shares in M.P. Birla Group of

Companies and power and control is the main asset, the control must be preserved or otherwise the value of the main asset will sharply depreciate.

Any possible dissipation in controlling block of shares of M.P. Birla Group of Companies by transferring any share belonging to the estate has

already been restrained at the ad interim stage to which Lodha agreed.

32. The fact has also been judicially observed in Judgment reported in 2005(2) WBLR Cal. 311 and the movable articles being considerably

valuable have also been inventorized and kept in bank vault sealed by the Joint Special Officer. Control of the estate over M. P. Birla Group of

Companies is to be preserved as power of M.P. Birla Group of Companies must not be allowed to be disintegrated or valuation in its hands of

business of rivals of predators. The controlling power over M. P. Birla Group of Companies held by the testatrix during her life time being the main

asset of the estate will be lost if M. P. Birla Group of Companies are allowed to be disintegrated or any disinterested stranger is allowed to take

charge. This apprehension is also felt by the Court at the ad interim stage. It is recorded in the Judgment as quoted above. Adequate protection

has already been given by the Court at the ad interim stage by directing Lodha to maintain status quo in regard to transfer of shares received or

already received or which might be coming into his hands. Status quo order has been extended to immovable property. The nature of the estate

though vast but not complex and the source of income are matters of record and transparent. All income coming from the creditor is directly

brought to the Bank Account and received in the form of account payee cheques. There is no allegation that the income of the estate is being

collected. No case is at all made out there is any possibility of dissipation of the controlling block of shares. The activities of manufacturing

companies in M.P. Birla Group of Companies are manufacturing cement and cables. Performance of all the manufacturing companies has shown

vast improvement in all respect namely profit per ton, total turnover, total profits, dividends, ratio of profit to assets, price of shares, trading volume

of shares including in comparison with other cement companies including other Birla companies and cable manufacturing companies. Birla object is

to create difficulties in the running of manufacturing companies in the usual course so that growth and health are deterred. Birla Ltd. is a business

rival of other Birla Group of Companies who took control over cement manufacturing companies. Birlas object is to discredit Lodha. Having

regard to the nature of the main assets of the estates, which are well protected and preserved by the ad interim order of injunction already passed.

No case of necessity for any further order in this respect has been made by the Birlas.

33. I have heard the contentions of the learned counsels appearing for the respective parties and I have gone through the statements and averments

made in the respective applications of both the parties and other records produced before me. In this matter the whole question is whether the

APL should be appointed in terms of prayer (a), or not. No one has raised disputes to the following facts and statements and records as

mentioned hereunder, as I have found also:

(a) Lodha is the named executor of the testamentary document dated 18th April, 1999 said to be the last one read with codicil dated 15th April,

2003 and he is almost sole beneficiary of the estate and properties which are enormously vast and diverse in nature left by the deceased

Priyambada Debi Birla (hereinafter referred to in short as P.D.B.).

(b) The application for grant of probate of the above Will is contested not only by the heirs and legal representatives in case of death intestacy but

also by other persons seriously challenging appointment of executor and disposing capacity of the deceased testatrix.

(c) There exists prior two testamentary documents both dated 13th July, 1982 said to have been executed by the PDB and her husband M.P.

Birla since deceased and the said documents are described to be mutual ones

(d) These two testamentary instruments are also sought to be perfected by applying for grant of probate of these two documents.

(e) Several persons have been executors in these two testamentary documents of 1982 and the beneficiaries thereof are not individual persons,

rather by these two documents estate and properties of both the persons have been vested in the charitable trust.

(f) The applications for grant of probate of these two documents are also contested by Lodha.

(g) A civil suit has been filed by the executors of the documents of 1982 against Lodha for alleged breach of agreement made by PDB in terms of

the mutual Will. By this suit the plaintiffs herein who are also parties to this probate proceedings have essentially challenged disposing capacity of

PDB by her testamentary document of 1999. consequently right, title and claim of Lodha, This suit is also contested by Lodha seriously.

(h) A criminal prosecution has been initiated amongst others against Lodha in the learned Court of Chief Judicial Magistrate Alipore 24 Paraganas

(South) by making a complaint by one Rajendra Prasad Pansari alleging criminal breach of trust under sections 406/417/420/120B of the Indian

Penal Code. The cognizance of the said complaint had been taken by the Chief Judicial Magistrate and this was registered as case No. C-469 of

2004. In this criminal proceeding an application was also made for search and seizure under appropriate provision of the Criminal Procedure

Code.

(i) This proceeding was sought to be quashed by filing an application under Section. 482 of the Code of Criminal Procedure by one S. N. Prasad

being one of the accused. This proceeding was supported by Lodha who was also a party respondent. This application for quashing was dismissed

by this Court by the Judgment and order dated 1st July, 2005 holding amongst others that the complaint and the statement of witnesses recorded

u/s 200 of the Code and the documents accompanying the complaint, if read on the whole make it clear that the allegations made in the complaint,

if they are taken at their face value and accepted in their entirety without adding anything to it or subtracting anything from it prima facie establish

elements of offence to go for trial. This Judgment and order was taken to Supreme Court of India and the challenge against this Judgment failed.

Therefore, it is clear that Lodha along with other persons are facing trials. From the statements and observations, recorded in the Judgment of the

Hon"ble Court in criminal revisional jurisdiction, it appears that the allegations and complaints center round the assets and properties left behind by

the said PDB and her husband.

(j) In the past, there were proceedings by group of shareholders against Lodha u/s 247(IA) of the Companies Act. This proceeding had to be

contested by Lodha. However, this company proceeding was dismissed. In this company proceeding as many as 29 companies were entangled

and PDB was held to be the de facto controller of these companies by virtue of her majority shareholding of the key companies, which are mostly

investment companies.

(k) During the pendency of the probate proceedings Joint Special Officers were appointed by this Court on the basis of the applications of the

defendant and contesting Birla Group and such appointment was not, of course, opposed by Lodha. The Joint Special Officers made inventories

of the personal properties and effects of PDB, and they found large number of valuable and antique articles, and other properties, which include

ornaments, jewellery, gold coins and artifacts. These were found from the houses and residences used by PDB in four different cities viz.

Allahabad, Calcutta, Delhi and Mumbai. These could neither be found nor be described in the affidavit of-assets of Lodha.

34. According to Lodha, in the affidavit-of-assets, the value of the estate left behind by PDB and her husband combinedly would be around Rs. 4

crores whereas Birla Group have stated, in their affidavit-of assets, in the region of not less than Rs. 2000 crores. Therefore, no reasonable

prudent man can dispute that the amount of estate is huge and vast. The most important estate of the deceased consists of her controlling block of

shareholding in respect of the investment companies and through it the manufacturing companies which are the source of the real wealth of M.P.

Birla Group are controlled and can be controlled by virtue of majority shareholding in the key investment companies. It is neither known to the

Court nor it has been disclosed by any of the persons in clear expression what is the dividend and mode of utilization of this dividend arising out of

this controlling shareholding and other shareholding.

35. On the aforesaid factual aspect and the allegation, and on the proposition of the law propounded by the parties question of appointment of

APL has been raised in this case. The provision for appointment is to be found at present in section 247 of the Indian Succession Act, 1925 which

is set out hereunder:

Administration, pendente lite Pending any suit touching the validity of the Will of a deceased person or for obtaining or revoking any probate or

any grant of letters of administration the Court may appoint an administrator of the estate of such deceased person, who shall have all the rights and

powers of a general administrator, other than the right of distributing such estate, and every such administrator shall be subject to the immediate

control of the Court and shall act under its direction".

36. In the said section there is no ground or guideline laid down by the legislature for such appointment. The word used in the section is "may" and

in my opinion the same suggests, without any doubt, rectory rather enabling provision. So under no stretch of imagination can be termed as "shall

or to put it differently the Court is not bound appoint as a matter of rule if any application is made. When discretion has been conferred upon the

Court obviously this must be exercised with restraint. I mean judicial restraint and prudence and in the given acts and circumstances that warrants

for such appointment. The power if appointment of this Court is not a new feature by this Act and previously power of the Court of this nature was

given by the respective previous statutes in an action of this nature. The judicial pronouncement on this subject rendered by the Court of this

country as well as English Court are not less in number.

37. However, condition precedent for entertaining such application is that there must be a suit touching validity of the Will of the deceased person

or any proceeding for obtaining or revoking any probate or grant of letters of administration must be pending- In the case on hand two probate

proceedings are pending in relation to prior two different Wills making different disposition of the estate and properties of the deceased. Moreover,

civil suit is also pending in this Court touching validity of the 1999 testamentary document. On the strength of the 1999 testamentary document the

control of the entire estate has been taken by Lodha. According to Mr. Mitra and Mr. S.N. Mukherjee, and also the provision of the law the

estate and properties vest unto him as named executor under the provision of Section 211 of the said Act. The provision of the said section is

quoted hereunder:

Character and property of executor of administrator as such. -(I) The executor or administrator, as the case may be, of a deceased person is his

legal representative for all purposes, and all the property of the deceased person vests in him as such.

(2).....

38. In spite of the provision of vesting as u/s 211 of the said Act the effect of vesting is that possession, control and management the estate vested

with the Executor. However, in my view, such light is not an absolute one and the same is subject to the provision of Sections 213 and 214 of the

Act. In spite of the above right of the executor on death of the testator/testatrix the provision of appointment of APL u/s 247 has been provided

for. Therefore, it is clear executor cannot have by virtue of section 211 absolute right to manage and control of the estate left by the

testator/testatrix. It appears that principle for appointment of APL in a testamentary action was laid down for the first time in case of Bellew vs.

Bellew (1865(4) SW & Tr 58) by the Probate Division of the English Court, as there was no defined principle for appointment in the relevant

statute viz. Court of Probate Act, 1857. though power was conferred upon the Court. However, in this case as a matter principle it was ruled by

Sir J. P. Wilde, learned Judge, that practice of Chancery Court in the matter of appointment of Receiver should also be followed in case of

appointment of APL in Probate Division in order to avoid unseemly racing of litigant to bring about conflict of decision of two different division. In

the Chancery Court it was practice to appoint Receiver when there was bona fide dispute irrespective of the condition of the estate, or of the

person who has the actual possession of it. on the ground that while there is no one legally entitled to receive or to hold the assets, or to give

discharges. Thereafter in the case Horrell vs. Witts (1866 LR 1 P&D 103), the practice followed by Chancery Division for appointment of

Receiver was not followed on the fact of the case by the same learned Judge, because the estate of the deceased consisted of share in running

partnership business and surviving partners were managing the firm well. Subsequently in the case Re. Oakes Oakes vs. Porcheron (1917)1 Ch.

230, the learned Judge sitting in Chancery Division appointed Receiver displacing the named executor, while doing so the learned Judge

assimilated the principle followed for appointment of Receiver with that of appointment of APL in Probate action. After a long time in case of

Sevan vs. Houlds-Worth (1948(1) All E.R. 271), Lord Green. Master of Roils while sitting in Court of appeal had applied the practice of

Chancery Division in appointing Receivers in the Probate Division for appointment of administrator pendente lite. In this case the principle laid

down in the case of *Bellew vs. Bellew* was followed but the principle followed in case *Horrell and Witts* was distinguished. In this case the Appeal

Court had observed that there was a bona fide contest in the probate action and having regard to size of the estate in order to protect the same

appointment of Administrator pendente lite was necessary. It is to be noticed in this Judgment, that allegations against the named Executor or for

that matter theory of necessity for appointment did not impress the learned Judges to be a factor.

39. However Courts of our country it seems to me did not blindly follow the principles laid down in case of *Bellew vs. Bellew* or of *Horrell vs.*

Witts. In the case of *Brindaban Chandra Saha vs. Sureswar Shaha Paramanick & Ors.* (10 CLJ 263) Division Bench of this Court taking note of

the English case (*Bellew vs. Bellew*), ruled that the Court of Probate would grant APL in all cases where necessity for the grant is made out; and

this is so because while the suit is pending there is not one legally entitled to receive or to hold the assets or to give discharges. In the case of

Jogendra Lal Chowdhury vs. Atindra Lal Chowdhury (XIII CLJ 34) the Division Bench of this Court was again of the view while deal with the

corresponding provision of present section 247 (Section 34 the Indian Probate and Administration Act, 1881) that not only there must be a

contest in the probate proceedings there must be necessity for such appointment.

40. In the case of *Bhuban Mohini Debi vs. Kiran Bala Debi* (XIII CLJ 47) the Division Bench of (his Court noted the practice followed in the

Probate Division of English Courts, and having taken note of *Bellew vs. Bellew* and also English Decision in case of *Horrel vs. Witts*, held that

unless strong case is made out that he has dealt with the business improperly, the Court will not appoint administrator pendente lite where there is a

person named in the will and whose appointment is not questioned, the dispute therein for instance, related to codicil only, and not affecting the

appointment of Executor. In this case factually the appointment of executor was not challenged but the competency of the personnel was under

challenge, and it was held on the facts and circumstances that the Lady on whose hand all the properties were vested, was not incompetent to

manage the same as such the Court found that there was no necessity to replace by appointing a third person.

41. In the case of *Pandurang Shamrao Laud Vs. Dwarkadas Kalliandas*, the learned single Judge of the above Court while dealing with the case of

appointment of APL u/s 247 of the said Act has held amongst others (at page 55) before appointing APL the Court has to be satisfied in the first

place that there is a bona fide suit pending touching validity of the Will of the deceased. Secondly the Court before exercising its jurisdiction has

also to be satisfied whether there is necessity for such grant.

42. At page 344 of the same Judgment the scope of section 247 has been explained as I have already observed. It is held by His Lordship inter

alia ""we are however, governed by section 247 of Indian Succession Act, the appointment is purely discretionary as the word may in the section it

clearly indicates, but that discretion has to be exercised judicially, and not arbitrarily."" The Court has to be satisfied as to the necessity of such an

administration as to the fitness of the (Sic)opsed administration, and it must also be satisfied that it is just and proper under the circumstances of the

case to appoint an administrator before subjecting the estate, to cost of such Administration."" After laying down the above principle factually in that

case the Court thought necessity will arise from the value and extent of the estate, and for safeguarding, preservation of its proper management,

discretionary power will have to be exercised particularly when the will is under challenge. It is also observed that if the appointment of Executor is

questioned and his title is under dispute because the will itself is challenged on various grounds, this constitutes circumstances where grant of APL

is called for.

43. It is further held also at page 346 of this Judgment ""when executors propounding a Will take a large and appreciable benefit thereunder, the

Court treats the Will with suspicion of more or less weight according to the facts of each case, and the onus lies on such an executor to prove to

the satisfaction of the Court that the testator understood what he did and that it was his will, and no probate can issue unless the conscience of the

Court is satisfied that the person propounding the Will has led sufficient evidence which on a close and careful examination entirely removes that

suspicion.

44. In the case referred above having regard to the nature of the challenge made and the enormity and vastness of the estate the Court appointed

APL.

45. In the case of Sudhirendra Nath Mitter vs. Arunendra Nath Mitter & Ors. (AIR 1952 Cal. 418) while discussing all the case decided in past

on the question of appointment of administrator pendente lite, the learned single Judge of this Court held that in all cases where necessity is made

out appointment be made. The word necessity was also explained in this Judgment as an illustration in paragraph 14 of the said Judgment. It was

spoken therein:

..., the necessity arises when there are assets to be collected; there is no representative to collect them: there is a "bona fide"" litigation respecting

the title to that representation.

In paragraph 15 it is observed amongst other that the reason of the thing seems to be this, that though a man makes a Will, he appoints an

executor, yet if the executor be under any incapacity or disability of acting as such, he is during his incapacity, in any respect is no executor,

therefore for that time it is considered as an intestacy.

46. Under such circumstances it was observed by His Lordship the property is in medio. Therefore, principle of appointment of Receiver in civil

action is to be followed. Factually in that case His Lordship found that the estate was considerable and appointment of executor was seriously

challenged. Therefore, appointment of administrator pendente lite was made, appointing" Administrator General of Bengal.

47. In the case of Adapata Subba Reddy & Anr. vs. Adapala Andemma & Ors. (AIR 1951 Mad 393) the Division Bench of Madras High Court

has gone pronouncing in paragraph 4 to the extent that when the probate has not yet been granted to anyone, it can be said that there is no

adequate representation of the estate of the deceased. To safeguard such estate, it cannot be said that it is not just and proper that a person should

be appointed as Receiver or Administrator, pendente lite. It is also held in that case that when the estate is of considerable magnitude and the

income from the lands most of which was under the panni cultivation of the appellants must be considerable. In view of the hostile claim being set

up by the appellants there is every probability of attempt to secret the income therefrom and otherwise to defeat the claims of the petitioner in the

probate proceedings,

48. In this Madras case the Division Bench approved the appointment of the Receiver during pendency of the probate proceedings to protect and

preserve the property.

49. Upon careful study of the aforesaid decisions it appears to me that the principle for appointment of Administrator, pendente lite, followed by

the English Courts initially in its probate division is that of the Chancery Division in case of appointment of Receiver viz. mere existence of bona fide

dispute is the probate proceedings by the caveator or caveatrix is good enough and question of necessity is of no significance. But later on there is

little departure from this principle, which was not, of course, ultimately followed. It took view later on that element of necessity is also required.

50. But the Courts in our country consistently are of the view and I also adopt, that when there is proceedings either in the nature of suit or

otherwise for obtaining probate or letters of administration and therein if the Will is seriously challenged and also the appointment of the executors it

shall be presumed that there is serious bona fide dispute. If such bona fide dispute or challenge and enormity in vastness of estate are found Court

may consider the question of appointment of APL displacing the named executor. Ordinarily the named executor is not displaced before and after

granting probate of the Will.

51. I have already observed that there is neither any ground nor guideline mentioned in the Section 247 of the Indian Succession Act, 1925 for

such appointment. After grant of probate of the Will the executor is to remain under control by the Court to do or not to do certain things and is

obliged to file accounts of administration also.

52. But there is no such corresponding provision for accountability to the Court by the executor propounder during pendency of the probate

proceedings. Does it mean to say during pendency of the probate proceedings the executor will have free hand in dealing with the estate and

properties left behind by the deceased? In my view it cannot be the intention of the legislature and for this purpose provision for appointment of the

APL is provided for. In my opinion provision of Section 247 is enabling one and power conferred upon Court, even if no application is made, if

conditions as stated above are satisfied and be exercised suo motu. In the instant case at the ad interim stage I have already held that apart from

the Indian Succession Act, 1925 and CPC the probate Court has Inherent power to take measure to protect the estate and properties of the

deceased whenever Court thinks fit and proper.

53. I cannot afford to entertain second opinion of the proposition of law that when the properties are enormous and vast and in each and every

stage there is strong possibility of proceedings being initiated or defended in connection and/or relation to the estate for collecting debts from the

debtors and to protect estate during pendency of the probate proceedings necessity arises to take appropriate measure in this case. As a matter of

fact more often the applications are being filed by both the parties to retrieve valuable movables and jewellery from third parties who are disputing

the claim. In this situation the named executor cannot enforce his right as such executor either before the Court of law or before any other authority

on the strength of the unprobated Will as Section 213 and Section 214 of the said Act operate as bar. So, according to me, this is one of the

instances of the necessity to appoint APL.

54. There were proceedings initiated in the past against executor under Companies Act, 1956. At present and there is a criminal prosecution

against the executor. The executor Lodha is to defend the criminal prosecution, as he is one of the accused persons and his challenge in the criminal

prosecution at the initial stage failed right up to Supreme Court. He is facing trials before the appropriate Court. Proceedings were initiated for

search and seizure in connection with these proceedings. It is difficult for the Court to allow a person who is the accused to control and manage

huge and vast estate of the deceased when he is facing charge of criminal breach trust, not qua executor. He has to defend this case personally.

Appropriate Court, prima facie, found that there are allegations amongst other against the Lodha for trial of criminal prosecution.. I am not

oblivious of thought that mere initiation of proceedings does not render a particular person to be untrustworthy or incompetent to hold an office,

but it is question of image of key person at whose hands large number of companies are rested for de facto control and management. Sitting in

Probate Court I do not think a tainted person should be allowed to manage or handle the estate. It is one of the instances of necessity.

55. It appears from the affidavit in support of caveat of the undisputed defendants that Will of 1999 and the codicil are seriously challenged on the

ground of amongst other undue influence and the same were executed in the suspicious circumstances and further lack of testamentary capacity.

These allegations are not bare allegation, the same are particularized viz. unnaturalness of bequest, concealment or delay in production of Will.

executor taking substantial benefit under the Will, change of lawyer for preparation of Will. Anticipatory/Preemptive recitals in the will. While

considering an application for appointment of the APL I have already observed that one of the factors is contest but, mere contest is not good

enough, nature and seriousness c the contest is to be fathomed. The Court must find, prima facie, from the documents themselves in support of

contest and upon reading of the law whether such a defence is likely to succeed or not or for that matter whether defence is a sham one. Prima

facie document has been produced before the Court showing that the mind of the Lady and her husband was of charitable disposition. A large

number of charitable trusts, have been formed to render public services from and out of their own fund and their own resources. It is alleged that in

1982 there has been two mutual Wills executed by the couple whereby the properties were given away to the charitable trust appointing executors

and trustees who are different persons.

56. In the probate proceedings the propounder is to prove due execution. attestation and testamentary capacity. In other words, the executor is to

dislodge and/or disprove what have been alleged by the contesting parties. In the case on hand the ground of contest are not without foundation of

law. There are large number of decisions cited by Mr. SB. Mookherjee. Mr. S. Pal and Mr. S. P. Sarkar. Those decisions, rendered on the

proposition of law based on fact are set out pointwise, hereunder:

(i) Suspicious circumstances: AIR 1965 SC 354, AIR 1930 PC 24, AIR 1959 SC 443. AIR 1977 SC 74 and AIR 1998 SC 2861.

(ii) Physical and mental capacity of the testatrix: AIR 1959 SC 443.

(iii) Undue influence: AIR 1936 Cal 15, AIR 1955 SC 363, AIR 2005 SC 52 (page 57) and (2001)4 All ER 449 (457-458).

57. Both Mr. Mitra and Mr. S. N. Mukherjee contend rebutting contention of learned counsel of applicants that those decisions are distinguishable

and inapplicable whatever may be contentions of both the parties on merit in depth, is not germane, what I think at this stage is neither of the case

can be ruled out, only consideration is probability of applicability of those cases of contestants to the grant. I unerringly opine that in this case that

strong probability of the aforesaid proposition of law being applied exists.

58. Therefore, going by the facts pleaded and material placed before me-- and also the law on the subject I cannot say that defence in this case is

sham or do not likely to succeed. It is plain from the contest that not only the Will but also appointment of executor is also challenged..

59. I have taken note of the legal proposition and accept as such that if the appointment of the executor is not questioned either as a person or

otherwise the Court does not normally displace the executor because he is the nominee and appointee of the deceased as he enjoyed at the time of

appointment the trust and confidence of the deceased: nor the Court ordinarily appoints its own nominee replacing the nominee of the testator

altogether. The Court lacks authority to do so, because the Court sits in the armchair of the testator as if the Court is the testator. If so occasion

arises the Court appoints the same person as Administrator But when the appointment of the nominee is challenged with serious allegations with

document as regard his competence certainly the Court can legitimately doubt his appointment and consequently it cannot take the risk of keeping

doubted person in his fiduciary position, particularly when he is the beneficiary.

60. At the earlier stage in my Judgment I expressed my feeling that the human mind is very flexible. I add now to what I had expressed earlier. that

at the time of appointment of the executor he might have behaved to be an excellently trustworthy and faithful person, but after death when he

becomes the exclusive controller and manager of the property it is not impossible to change his mind particularly when he has beneficial interest.

According to me, it is difficult, if not impossible for the executor and beneficiary particularly being a stranger and not being heir under any stretch of

imagination in case of death of intestacy, to act like an executor, when he will feel that he may lose in the probate battle having regard to serious

challenge. In order to avoid this challenge rather to frustrate the challenge it is quite likely not a remote possibility, that the property may be

secreted and diverted as I have already observed that the Act is silent to keep control over the executor during pendency of the probate

proceedings except by appointment of APL.

61. The instant proceeding has been challenged not only by the heirs and legal representatives in case of death intestacy. Other challenges have

been made directly or indirectly by filing two separate probate proceedings for obtaining probate of prior two Wills of the PBD as well as her

husband. These two Wills are described to be mutual one. Another suit has also been filed indirectly to contest the grant, for enforcement of

agreement of mutuality alleging breach of agreement entered into by the deceased lady with her husband in executing mutual Will, by executing the

Will of 1999 and the codicil. The concept of mutual Will and enforcement of the same are now legally enforceable and applicable and there is no

debate in this regard here by any of the parties. The properties which have been bequeathed by the Lady in favour of Lodha do not belong to the

Lady exclusively. The properties are mixed up admittedly. Some properties, which are yet to be identified, must have been left by her husband. It

is the case of Lodha while contesting grant of the Will of the husband of a Lady, that her husband died intestate. In the Will of the husband Lodha

has not been appointed as the executor rather some other persons are executors. Therefore, on the strength of the husband's Will the named

executors are obviously entitled to control and manage the estate left behind by husband under provision of section 211 of the said Act as has been

claimed by Lodha. This legal aspect of the matter cannot be brushed aside, but the executors appointed by the Will of M.P. Birla according to me

could neither take control nor they can discover anything else what is the exact extent of estate M.P. Birla in respect of the Wills described to be

the mutual Wills of 1982.

62. Under such circumstances ordinarily Executors of M. P. Birla should have been put in possess of his estate but it cannot be done now, firstly

as I say, the properties are mixed up with the assets and properties of the Lady. I do not know whether Will of 1982 of M.P. Birla is genuine or

not as in terms of this Will the Lady during her life time was sole beneficiary and thereafter his entire estate is supposed to go to charity. It is an

admitted position that the Lady did not take any step nor the executors of the said Will did during life time of the Lady to obtain probate of the Will

or Letters of Administration with the copy of the Will annexed. Therefore, in totality, prima facie I do not think that on the strength of the aforesaid

mutual Will the Executors appointed by M. P. Birla at this stage should be placed for management or control of the estate left by M. P. Birla for it

is absolutely difficult now to segregate or to identify the exclusive properties of M. P. Birla. At the same time I hasten to add that Lodha cannot be

in charge of the M.P.'s estate on face of the mutual Will. So it is evident that as far as the estate of M.P. is concerned, the same is absolutely in

medio"" meaning thereby none is entitled to take control lawfully. It is contended by M/s. S. B. Mookherjee. Pal. Sarkar that the deceased Lady

did not have any property of her own, all were given by her husband. This contention hardly impressed me.

63. In view of the above situation of fact and law as discussed by me it is difficult for me to accept the contention of Mr. Mitra and Mr. S.N

Mukherjee that the applications for appointment of API, are not bona fide or merit less. Mere initiation of company proceeding unsuccessfully

does not disentitle the two ladies to apply for appointment of APL: I am unable to persuade myself that the estate is not in medio as urged by them.

I am of the considered opinion that mere taking of physical control and management of the estate by the executor is not legally valid ground to

resist the applications for appointment of an APL. Upon analysis of legal position on a given fact if it is found that taking control of estate by the

named executor is not permissible, he is to be replaced pending decision in probate action. According to me with this interim measure vesting of

estate u/s 211 of the Act is not disturbed nor divested, only right of management is temporarily suspended. I just reiterate appropriately here the

proposition of law in the context of ""medio"" laid down by this Court in the cases of Bhutan Mohini Debi (XIII CLJ 47). Brindaban Chandra Saha

PC CLJ 263) and Sudhirindra Nath Mitter (AIR 1952 Cal 418) that where there is serious contest not only to the grant of probate, but the

appointment of executor itself it shall be considered there is no representation under the law, of the estate. Therefore, virtually the estate is in

medio"". Naturally it will be incumbent for the probate Court to see representation of the estate until probate proceeding comes to logical

conclusion, is legally arranged u/s 247 of the Act.

64. The act and conduct of Lodha after death of the Lady is also not appreciated by this Court. It appears from the records within the period of

fortnight after the death of the said Lady, Lodha without filing any application for obtaining probate hurriedly and hastily got his name mutated

and/or registered in the Company Share Register in place and stead of the said Lady, qua-executor on the strength of the unprobated Will and

codicil. He even did not wait for completion of "Sradh" ceremony and why he took such a step so quickly is not understandable. He claims to be a

close confidant of the said Lady during her life time for a long period so also his son. He was very prompt to take control of the key companies of

the M. P. Birla Group whereby and whereunder he can manage all the companies through the majority interlocking shareholding of all the M. P.

Birla Group companies. It is not understood by the Court why he was so anxious to take control of all the companies leaving aside other assets and

properties. He was unmindful (sic)ly to disclose her share in immovable properties in the affidavit-of-assets namely orchard and garden house at

Kumaon at the first instance.

65. The explanation has been given for his taking action of rectification of share register that Articles of Association of the respective investment

key companies permit so. I think such hasty action is not befitting of the executor. His duty as an executor with his reasonable prudence should

have been in this situation, to apply for the probate as early as possible and to keep the Court Informed about his, appointment and permission for

taking steps in case of urgency for rectification of share registers, this provision of Article of Association, if any as contended above is contrary to

implicit principle of Sections 213 & 214 of the Act.

66. Surprisingly he did not make any effort to find other assets and movable left by the Lady. Ultimately a considerably valuable properties, viz.

gold coins, ornaments and jewellerys could be discovered by the Joint Special Officers appointed by the Court. It is reasonably expected

immediately after filing of this application the executors should have taken steps for seeking direction from the Court for making all out effort to

discover other movable and immovable properties of the deceased, as it is not humanly possible to bring all the assets to the notice of the Court at

one time. It is true prayer for appointment of Special Officers was not opposed. Mere non-contest to appointment of Special Officers is not

enough to demonstrate himself to be a fit, prudent and dependable person.

67. Nothing has been explained what is the amount of dividend received from the shareholding of the deceased from the companies and how and

where it has been invested with details and particulars. On the contrary, it is alleged huge amount is divested by investing the same in the mutual

investment companies floated by Lodha himself.

68. It appears to me that Lodha was anxious and busy to gain control in all companies appointing himself as Chairman of the Board of Directors

and to constitute and reconstitute Board of Directors, but he was totally unmindful to find exact position and location of the assets and properties

of the said deceased Lady.

69. He has said that the estate left behind by the said Lady should be around Rs. 3 crores whereas the counter affidavit-of-assets filed shows that

it should be around at least more than Rs. 2000 crores. Which version is correct cannot be decided by this Court at this juncture unless detail

search and discovery exercise is undertaken by an impartial person, as I feel this exercise is one of the parts of the administration. I cannot agree

with Mr. Mitra and Mr. S. N. Mukherjee that the nature of the estate is uncomplicated. As rightly contended by M/s. S. B. Mookherjee. Pal and

Sarkar that majority shareholding in the key companies of M. P. Birla Group of Companies is very valuable intangible assets because with the

strength of the same feature and fate of the large number of Companies including manufacturing companies can be played out and prospered.

Careful circumspecting decision while exercising right of majority shareholding and utilization of dividend therefrom are themselves according to

me, involves complication. I am unable to uphold the submission of the Lodha's learned counsels that no case of necessity for any further order or

for appointment of APL has been made out. In view of my aforesaid analysis of fact and law no further or better case of necessity is required to be

made out. I do not think that as rightly contended by the learned counsels for probate contestants, that there will be any affectation of running

business or will be detrimental to the preservation and protection of controlling interest by the APL to take control of shareholding, as baselessly

argued by the propounder. Had it been so, on death of lady there would have been serious impact in the business, it did not happen so even going

by statement of Lodha.

70. It further appears to me during lifetime of the deceased, Lodha is claiming to have access to assets and properties of M. P. Birla Group. All the

companies of this group are used to be run by the Lady with the help of Lodha. It is not possible according to me, that the entirely vast estate

should be effectively managed by Lodha alone. It is true at the present moment mismanagement by Lodha has not surfaced. The business of the M.

P. Birla Group of Companies cannot be said apparently to be in perilous condition and not in serious jeopardy at the hands of Lodha. The judicial

pronouncements quoted above does not rule that mismanagement of estate is the factor for appointment of APL. I do not know wherefrom Lodha

is meeting the costs and expenses to fight the good number of litigations. He is contesting the criminal prosecution. The criminal charges levelled

against him is a personal charge and this charge is related to and in connection with the breach of trust, which is alleged to have taken place during

the lifetime of the Lady but not after her death. The executor may or may not get financial protection only when he" assumes his office of executor.

The criminal prosecution was contested right from the learned Trial Court and up to Apex Court and Lodha must have spent enormous money to

fight the litigation unsuccessfully engaging eminent learned Lawyers. I do not know wherefrom this fund to meet litigation expenses, has come,

whether it has been spent out of the estate impressed with him as an executor or from his own account is unknown to Court at least.

71. Under such circumstances I feel that those facts and bundle of facts and/or as discussed above, supported by the documents, constitute the

absolute necessity for appointment of the Administrator, pendente lite, at least for a brief period.

72. Allegations and contentions as regard his alleged misconduct as a Chartered Accountant are not germane for the time being in this matter. So I

cannot make any comment nor I wish to do so. According to me, the aforesaid facts and circumstances are sufficient for such appointment.

73. Hence, I appoint Joint Administrator, pendente lite, consisting of following persons (i) Mr. Hiranmoy Dutta, Bar-at-law of Bar Library Club;

(ii) Promotha Nath Chatterjee, learned advocate of Bar Association. Room No. 1; (iii) Mr. Prabir Kumar Roy. ex-Sheriff of this Court of 10 S.

N. Roy Road. Behala, Kolkata-700 019; (iv) Mr. Sujit Bhattacharjee of 52-C. Ballygunge Circular Road, Kolkata-700019, who shall take

charge and control of all the shareholding of the deceased Lady in all the companies and they should function as could be functioned under law by

virtue of the controlling shareholding of all the Companies left behind by the said Lady. They shall take step for rectification of all the share registers

of the Companies recording their names. They shall immediately make an enquiry as to the dealings of Lodha vis-a-vis dividends and investment of

the dividends and submit a report to the Court and they shall place themselves in the Board of Directors wherever it is possible by virtue of the

shareholding. They shall, in consultation with each other, decide to dissolve the Board if necessary under law for the benefit of the Companies,

wherever possible.

74. Of course they must consult and take the views of Lodha in each and every step while taking decision. If his views and advice are accepted by

the Administrators then the views of the contesting defendants shall be taken and if there is a difference in (the two views the matter should be

placed before the Court for obtaining direction. They shall remain in the office of the Administrator, pendente lite, for a period of two years or till

the disposal of the probate proceedings whichever is earlier. Therefore, Lodha shall hand over all the charges to the aforesaid appointed

Administrators, pendente lite. Interim order passed earlier will continue till possession is taken by the Administrator.

75. After the Judgment is delivered Mr. A. K. Mitra, senior advocate appearing for Mr. R. S. Lodha prays for stay of operation of this Judgment

and order. Such prayer is opposed by Mr. Sarkar and Mr. Das and also Mr. Sen. Considering that this matter was heard at length and

considerable points are involved in this matter, I think conditional stay should be granted. Accordingly Joint Administrators pendente lite appointed

herein shall stay their hands for a period of three weeks after reopening of summer vacation. At the same time Mr. R. S. Lodha shall not act as a

Chairman and Director on the Board of any of the Companies on the strength of the shareholding of Priyambada Devi Birla (Deceased) for a

period of three weeks. It is made clear that Mr. R. S. Lodha is free to act as a Director or Chairman elected with his own qualifying shareholding,

if he is appointed.