

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY & INTESTATE JURISDICTION

APPEAL NO.598 OF 2011
 IN
 NOTICE OF MOTION NO.22 OF 2011
 IN
 PETITION NO.1172 OF 2010

...
 Purushottam Vishandas Raheja ... Appellant
 Vs.
 Asha Shrichand Raheja and Anr. ... Respondents
 ...

Mr.Ravi Kadam, Sr.Counsel with Mr. Aashish Kamath and Mr. Kunal Mehta
 i/by Ranjit & Company for the Appellant.

Mr.Pravin Samdhani, Senior Advocate a/w Mr.Sharan Jagtiani, Mr.Mayank
 Bagla, Mr.J.S.Soloman, Ms.Soniya Putta and Ms. Kinjal Shah i/by Solomon
 & Company for the Respondents.

...

CORAM : A.S.OKA &
A.A. SAYED, JJ.

DATED : 26 JULY 2016

ORAL JUDGMENT (Per A.S.Oka,J)

OVERVIEW

The reason for giving out of turn priority to the final hearing of this Appeal of the year 2011 is the order of the Apex Court dated 27 January 2016. Against an interim order passed in this Appeal, the Respondents filed a Petition for Special Leave before the Apex Court. By the order dated 27 January 2016, the Apex Court directed the disposal of this Appeal

preferably within a period of six months.

2. In short, the issue involved in this Appeal is whether the Appellant-Caveator has a caveatable interest to lodge a caveat against grant of Probate in accordance with Section 284 of the Indian succession Act, 1925 (for short "Succession Act").

3. With a view to appreciate submissions canvassed across the bar, a brief reference to the facts of the case will be necessary. The Respondents filed a Petition seeking Probate in respect of the alleged last Will and Testament of one Shrichand Vishandas Raheja (for short "testator or deceased testator"). The present Appellant filed a caveat in the said Petition filed for grant of Probate. The Appellant is the real brother of the deceased testator and the Respondents are the widow and daughter of the deceased testator. Another daughter has allegedly granted consent for the grant of Probate to the Respondents. Notice of Motion No.22 of 2011 was taken out by the Respondents praying for dismissal of the caveat filed by the Appellant on the ground that the Appellant has no caveatable interest.

4. By the impugned order dated 27 July 2011, the learned single Judge came to the conclusion that the caveat filed by the Appellant was completely misconceived and the Caveator had no caveatable interest. By dismissing the Caveat filed by the Appellant, the Notice of Motion was

disposed of.

SUBMISSIONS OF THE APPELLANTS

5. Learned senior Counsel appearing for the Appellant, in support of the Appeal, pointed out the stand taken by the Appellant. Referring to the Caveat filed by the Appellant, he urged that the Appellant is relying upon the Memorandum of Family Settlement. He pointed out that the Appellant is also a creditor and in fact a suit filed by the Appellant for recovery of money and other reliefs is pending. He invited our attention to the decision of the Apex Court in the case of **G.Gopal Vs.C.Baskar and ors.**¹ which holds that even if a person has a slight interest in the estate of the testator, he is entitled to file a caveat and contest the grant of Probate of the Will of the testator. He also pointed out another decision of the Apex Court in the case of **Krishna Kumar Birla v/s. Rajendra Singh Lodha and ors.**² He invited our attention to the said decision. He submitted that the Apex Court held that a person who would have been otherwise succeeded to the estate of the testator would ordinarily have a caveatable interest and any other person showing a special interest has a caveatable interest. He submitted by relying upon the decision of the Privy Council in the case of **Sarala Sundari Dassya v/s. Dinbandhu Roy Brajaraf Saha (Firm)**³ that a

1 (2008) 10 SCC 489

2 (2008) 4 SCC 300

3 AIR (31) 1944 Privy Council 11

creditor of the deceased has a special interest and therefore, he has a caveatable interest. He pointed out that the Apex Court in the case of **Jagjit Singh and ors. v/s. Pamela Manmohan Singh**⁴ found conflict in the views taken by the coordinate Benches in the cases of G.Gopal and Krishna Kumar Birla and therefore, the issue was referred to a larger Bench. He pointed out that the larger bench could not decide the issue as the Appeal in which the reference was made to the larger Bench, has been withdrawn. Learned senior Counsel also invited our attention to the decision of the Apex Court in the case of **Jayamma v/s. Maria Bai and ors.**⁵. He submitted that there is no complete prohibition on the Testamentary Court deciding the issue of the title of the testator in respect of the property subject matter of will. He submitted that as held in the case of G.Gopal, even a slight interest in the estate of the testator entitles a person to file a caveat. He relied upon the observations made in paragraphs 95 and 103 of the decision in the case of Krishna Kumar Birla. He urged that considering the fact that the Appellant is claiming to be a creditor of the deceased and considering the fact his suit is pending, learned single Judge ought to have held that the Appellant had a caveatable interest. He invited our attention to the impugned judgment and order, wherein the learned single Judge has held that the decision of **Krishna Kumar Birla** binds this Court. He

4 (2010) 5 SCC 157

5 (2004) 7 SCC 459

submitted that even assuming that the said finding is correct, even the said decision holds that a creditor can be said to have a special interest and therefore, he can maintain a caveat. He submitted that the interest claimed by the Appellant cannot be said to be adverse to that of the deceased. He urged that though it was argued before the learned single Judge that the claim of the Appellant was not only under a family arrangement, but also as a creditor, the claim as a creditor has not been taken into consideration by the learned single Judge. He would, therefore, urge that the entire approach of the learned single Judge is completely erroneous. He submitted that the Notice of Motion filed by the Respondents out to have been dismissed by holding that the Appellant has a caveatable interest.

SUBMISSIONS OF THE RESPONDENTS

6. The submission of the learned Counsel appearing for the Respondents is that the first and the second Respondents being the widow and married daughter respectively of the deceased are Class-I heirs in accordance with Section 8 of the Hindu Succession Act, 1956 (for short "the said Act of 1956"). He urged that under the last Will and Testament of the deceased testator in respect of which the Probate is claimed, the Respondents and the other daughter Laxmi are beneficiaries and legatees. He urged that the Appellant being the brother of the deceased falls in category of Class-II heirs. He submitted that in view of the principles laid down in Section 8 of

the said Act of 1956, Class-I heirs exclude Class-II heirs.

7. He submitted that in the affidavit-in-support of the Caveat, the Appellant has not pleaded that he is a creditor. Inviting our attention to the Affidavit, he urged that the Appellant has set up a title in himself to the part of the property subject matter of the Will. While disputing the correctness of the submission that the claim as a creditor was also canvassed by the Appellant before the learned single Judge, he submitted that as that case was not made out in the affidavit-in-support of the Caveat, the learned single Judge could not have considered the same. He submitted that as there is no pleading that the Appellant is claiming to be a creditor, the said aspect cannot be considered. He submitted that in the affidavit-in-support of the Caveat, the Appellant has denied the title of the deceased to a property subject matter of the Will, and therefore, in the light of law laid down by the Apex Court in the case of **Krishna Kumar Birla v/s. Rajendra Singh Lodha**, the Appellant was not entitled to file a Caveat. He submitted that in a proceeding for Probate, disputed questions of title cannot be gone into. He urged that the learned single Judge has correctly held that the Appellant had no caveatable interest. He urged that the right of a creditor to file a Caveat is not unqualified. At the highest, the creditor can file a caveat only if there is displacement of right as a creditor.

CONSIDERATION OF SUBMISSIONS

8. We have given careful consideration to the submissions. We have carefully perused the affidavit-in-support of the Caveat filed by the Appellant. As stated earlier, the legatees under the alleged Will set up by the Respondents are the class I legal heirs of the deceased in accordance with the provisions of the said Act of 1956 and in even in absence of any will, the Appellant will not be entitled to any share in the estate of the deceased. What is material are paragraphs 6 and 7 of the affidavit-in-support of the Caveat which read thus:

“6. I say that I am interested and affected party inasmuch as that **under the alleged Will dated 3 July 2010, a reference and alleged claim of ownership has been made by the deceased to the property bearing Cadastral Survey No.764 of Mazgaon Division in the Registration District and Sub-District of Bombay City and Bombay Sub-urban situate at Chinchpokli Cross Lane, Byculla, Mumbai, which said property belongs to me** and in respect thereon Court proceedings in this Hon'ble Court being Suit No.1266 of 2009 filed by the deceased brother against me and others as well as Special Leave Petition No.(C) No.26974

of 2010 filed by me in the in the Hon'ble Supreme Court of India are pending and the matter is subjudice. I crave leave to refer to and rely upon the papers and proceedings in the above matters when produced.

7. **Despite the said position, under the alleged Will, my deceased brother alleged to have bequeathed all his alleged right, title and interest in the abovementioned property in favour of his wife, Asha Shrichand Raheja and daughters, Sangeeta Ravi Vaswani and Laxmi Shrichand Rahejna in equal shares which is illegal, improper and not binding and affects my rights and interest.”**

(emphasis added)

9. Thus, the Appellant has set up a rival claim of ownership in respect of one particular property subject matter of the alleged Will, and in fact, he has raised a contention that the deceased testator was not the owner of the said property. Thus, he has claimed an interest which is adverse to the testator. In the entire affidavit-in-support, there is not even a reference to the contention that the Appellant is a creditor of the deceased testator. Therefore, the learned Counsel appearing for the Respondents is right when he submitted that in the affidavit-in-support of the Caveat, it is not

even pleaded that the Appellant is claiming to be a creditor of the deceased testator. In the sur-Rejoinder filed to the Rejoinder submitted by the Respondents in the Notice of Motion for dismissal of the Caveat, a contention is raised in paragraph 7, which reads thus:-

“7. I say that apart from my interest in the estate of the deceased, I and my family members are also creditors of the deceased and large amounts running into crores are payable by the deceased and estate of the deceased and the Petitioners have not deliberately disclosed the correct facts in the Probate Petition and have suppressed the said facts and on this ground also, the Petition for Probate as well as the present Notice of Motion be dismissed with costs.”

10. We have perused the Affidavit-in-Reply filed by the Appellant on 21 February 2011 to the affidavit-in-support of the Notice of Motion taken out by the Respondents. Apart from stating that the alleged Will is a forged Will, there is no contention raised in the said Affidavit-in-Reply regarding claim of the Appellant as a creditor. However, the claim of title in respect of the Byculla property subject matter of the disputed will was made by the Appellant. At no stage, the Appellant sought a permission of the Testamentary Court to file an additional affidavit in support of the caveat for

raising a contention that he was a creditor of the deceased. On this aspect, what is material is Rule 403 of the Bombay High Court Original Side Rules which reads thus:

“403. Procedure on affidavit in support of caveat being filed
– (i) Upon the affidavit in support of the caveat being filed, the petition shall be numbered as suit in which the petitioner shall be the plaintiff and the caveator shall be defendant. Notice of the fact that the petition has been renumbered as a suit shall be given by the Prothonotary and Senior Master to the petitioner or his Advocate on record. The notice shall be in Form No. 117. **The petition shall be treated as the plaint and the affidavit in support of the caveat shall be treated as the written statement of the caveator.** The procedure in such suit shall, as nearly as may be, be according to the procedure applicable to civil suits on the Original Side of the Court.”

(emphasis added)

Therefore, for deciding the issue whether a caveator has a caveatable interest, only the contentions in the affidavit-in-support of the caveat can be taken into consideration. The reason is that in the event the testamentary petition is treated as a suit, the affidavit-in-support of the caveat is to be treated as the Written statement of the caveator. Hence, in the facts of the case, the plea that the Appellant is a creditor of the testator

cannot be taken into consideration as it does not find place in the affidavit-in-support.

CONSIDERATION OF LEGAL SUBMISSIONS

11. Now, we turn to the decision of the Apex Court in the case of **G.Gopal v/s. C.Baskar**. We must note here that the said decision was rendered on 3 September 2008 and the decision in the case of **Krishna Kumar Birla v/s. Rajendra Singh Lodha** is of 31 March 2008. Perusal of the decision in the case of G.Gopal shows that the Appeal before the Apex Court arose out of a Petition for revocation of Probate. Learned single Judge of the Madras High Court passed an order granting revocation of the Probate, which was confirmed in Appeal preferred before the Division Bench. The Apex Court in paragraph 5 held thus:

“5. The only question that was agitated before us by Mr Thiagarajan, learned counsel appearing for the appellant challenging the judgment of the High Court revoking the Probate granted in respect of the will executed by the testator, was that the respondents having no caveatable interest in the estate of the deceased, the application for revocation filed by them could not be allowed. We are unable to accept these submissions made by Mr Thiagarajan, learned counsel appearing on behalf of the appellant only for the simple reason that admittedly the

respondents were grandchildren of the testator and they have claimed the estate of the deceased on the basis of a settlement deed executed by the testator himself which admittedly was revoked by the testator. That being the position, we must hold that the respondents had caveatable interest in the estate of the testator and, therefore, they are entitled to be served before the final order is passed. It is well settled that if a person who has even a slight interest in the estate of the testator is entitled to file caveat and contest the grant of Probate of the will of the testator.”

The Apex Court was dealing with the proceedings arising out of an application under Section 263 of the Succession Act, which confers powers on the Testamentary Court to revoke or annul grant of Probate or Letters of Administration for just cause. The explanation defines the meaning of “just cause”. There are five contingencies covered by the definition of “just cause”. Thus, the issue which was considered by the Apex Court was in the context of dealing with the Application under Section 263 of the Indian Succession Act. It is in this context that the Apex Court has observed that a person who has even a slight interest in the estate of the testator is entitled to file and contest the grant of Probate. As stated earlier, the decision in the case of **Krishna Kumar Birla** of a co-ordinate Bench is prior in point of time and factually it appears to us that the

attention of the Apex Court was not invited to the said decision in the case of **Krishna Kumar Birla** when the Apex Court decided the case of **G.Gopal**. In the case of **Krishna Kumar Birla**, the issue which fell for consideration of the Apex Court is noted in paragraph 2 of the said decision. In paragraph 2, the Apex Court noted thus:

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

(emphasis added)

Thus, the issue of the meaning of the term “caveatable interest” for filing a caveat under Section 284 of the Succession Act squarely arose in the said case which did not specifically arise for consideration in the case of **G.Gopal**.

12. At this stage, it will be necessary to make a reference to the decision of Full Bench of this Court in the case of **M/s. Emkay Exports v. Madhusudan Shrikrishna**⁶. In paragraph 6 onwards of the said decision, a Full Bench of this Court observed thus:

“6. The concept of precedent has attained important role in administration of justice in the modern times. The case before the Court should be decided in accordance with law and the doctrines. The mind of the Court should be clearly reflecting on the material in issue with regard to the facts of the case. The reason and spirit of case make law and not the letter of a particular precedent. Halsbury’s “The Laws of England”, explained the word “ratio decidendi” as “It may be laid down as a general rule that that apart alone of a decision by a Court of Law is binding

⁶ 2008(4) MhLJ 843

upon Courts of coordinate jurisdiction and inferior Courts which consists of the enunciation of the reason or principle upon which the question before the Court has really been determined. This underlying principle which forms the only authoritative element of a precedent is often termed the *ratio decidendi*." It is by the choice of material facts that the Court create law. The law so created would be a good precedent for similar subsequent cases unless it falls within the exceptions hereinafter indicated.

7. The doctrine of precedent relates to following or previous decisions within its limitations. It introduces the concept of finality and adherence to the previous decisions and while attaining it, it creates consistency in application of law. The later judgment should be similar to the earlier judgment, which on material facts are the same. Finding ratio decidendi is not a mechanical process but an art which one gradually acquires through practice. What is really involved in finding the ratio decidendi of a case is the process of abstraction. Ratio decidendi is a term used in contrast to obiter dictum which is not necessarily binding in law. According to Sir John Salmond, "a precedent is a judicial decision, which contains in itself a principle. The only principle which forms its authoritative element if often termed the 'ratio decidendi'. The concrete decision is binding between the parties to it, but it is the abstract ratio decidendi which alone has the force of law as regards the world at large". According to Austin, the general reasons or principles of judicial decision abstracted from peculiarities of the case are commonly styled by writers on jurisprudence as 'ratio decidendi'.

8. Amongst the principles of law governing the binding value of judgments, doctrine of precedent is not only a well accepted principle but is one of the most pertinent facets of judicial interpretation. A ruling of Bench of higher Court is considered to be binding on the lower Courts and the Courts having a smaller Bench structure. Earlier judgments are even taken to be binding on subsequent equi Bench unless and until reasons compelling for taking a divergent view are stated. **To apply this principle, the Court must examine by process of appropriate reasoning as to the applicability of the precedent cited before the Court or even which of the views expressed by a higher Court or even a larger Bench or even a Bench of equi strength is more aptly applicable to the facts and circumstances of the case in hand. The essence of law of precedent is its applicability on the basis of ratio decidendi.** The importance and significance of adherence to law of precedent was emphasized by the Supreme Court in the case of *S.I. Roopla v. Lt. Governor through Chief Secretary, Delhi*, (2000) 1 SCC 644 : AIR 2000 SC 594.

9. The obligation upon the Court to follow the precedent law is subject to well accepted limitation. These limitations play an effective role for helping the Court to provide sound reasoning, wherever there are divergent view taken by equibenchs of the highest Court of land. The Court would be guided by the settled principles in making up its mind whether the judgments cited before it is a precedent to be followed or not depending on the facts of a given case. **Normally, the judgments pronounced by a later equi Bench would prevail provided it has not ignored or has not failed to notice the view of the earlier Benches. The law of precedent thus is a respected canon of judicial administration and subsequent Benches essentially must follow the views of the earlier Benches unless they fall within any of the stated exceptions.** The Hon'ble Supreme Court in *S.I. Roopla* (supra) held as under:

"..... Precedents which enunciate rules of law form the foundation of administration of justice under our system. This is a fundamental principle which every Presiding Officer of a Judicial Forum ought to know, for consistency in interpretation of law alone can lead to public confidence in our judicial system. This Court has laid down time and again precedent law must be followed by all concerned; deviation from the same should be only on a procedure known to law. A subordinate Court is bound by the enunciation of law made by the superior Courts. A coordinate Bench of a Court cannot pronounce judgment contrary to

declaration of law made by another Bench. It can only refer it to a larger Bench if it disagrees with the earlier pronouncement.

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We are indeed sorry to note the attitude of the tribunal in this case which after noticing the earlier judgment of a coordinate Bench and after noticing the judgment of this Court, has still thought it fit to proceed to take a view totally contrary to the view taken in the earlier judgment thereby creating a judicial uncertainty in regard to the declaration of law involved in this case. Because of this approach of the latter Bench of the tribunal in this case, a lot of valuable time of the Court is wasted and the parties to this case have been put to considerable hardship.....”

10. The Hon'ble Apex Court further observed that a caution need to be taken while applying the principle of judicial precedents as decision of the Court and its observations must be read in context in which they appear. In a judgment discussion is meant to explain and not to define. In this regard, reference can be made to the case of *Haryana Financial Corporation v. Jagdamba Oil Mills, IT*, 2002 (1) SC 484.

11. It is clear from the above dictum that precedents are to be applied with due regard to facts while adhering to the principles of “ratio decidendi”. Precedents are described as, “Authorities to follow in determinations in Courts of Justice”. Precedents have always been greatly regarded by the Sages of the Law. The Precedents of Courts are said to be the laws of the Courts; and the Court will not reverse a judgment, contrary to many precedents. Even for a precedent to be binding, it cannot be without judicial decision or arguments that are of no moment. To be a good precedent, it has to be an adjudged case or decision of a Court of competent jurisdiction considered as furnishing an example or authority for an identical or similar case or a similar question of law afterward arising. It is the ratio understood in its correct perspective that is made applicable to a subsequent case on the strength of a binding precedent. In a recent judgment, a Full Bench of this Court in the case of *State of Maharashtra v. Prashram Jagannath Auti*, 2007 (5) Mh.L.J. 403 : 2007 (5) BCR 847, while referring to the binding precedents, held as under:

“The ratio is variously defined to be the relation between two magnitudes of the same kind in terms of quality and quantity. Ratio decidendi is the reason for deciding as reasoning is the soul of decision making process. It is formulation of an opinion by the Judge which is necessary in the facts of the case for determination of the controversy. In the case of *C.D. Kamdar v. State of Orissa*, (1985) Tax L.R. 2497, expressing its views in relation to the binding precedents, the Court held as under:

“Mr. R. Mohanty, the learned counsel for some of the petitioners submitted that the power of the Board under section 90(7) of the Act is to levy fees simpliciter. He cited the case reported in (1978) 34 Cut LT 122 (SC), *Laxmidhar Sahu v. Supdt. Of Excise Berhampur* in support of the contention. Reading the entire judgment, the contention as raised by Mr. Mohanty, is not spelt out. A Decision is an authority only for what it actually decided and not for what may logically follow from it. Every judgment must be read as applicable to the particular factors proved, or assumed to be proved, since the generality of the expressions, which may be found there, are not intended to be expositions of the whole law but governed or qualified by particular facts of the case in which such expressions are to be found. See (1983) 4 SCC 353 : AIR 1983 SC 1246., *Sreenivasa General Traders etc v. State of Andhra Pradesh*. The case of *Laxmikanta Sahu* (supra) was considered by the Supreme Court in (1975) 1 SCC 737 : AIR 1975 SC 1121 : 1975 Tax LR 1569, *Harsankar v. Dy. Excise and Taxation Company*. In para 61 at page 1134 it has been observed that in that case it was expressly contended on behalf of the State of Orissa that the levy was a tax and not a fee. The decision being based on a concession did not involve the determination of the point whether the fee levied under section 90(7) of the Act is a fee simpliciter.”

2. We have already indicated that the law in its due course changes its form and application but existence of reasoning with the changing law is a mandatory requirement of judicial process. *Ratio est legis anima, mutata legis ratione, mutatur et lex* is a maxim for the proposition that law must state reasons and reasons should have a reasonable nexus to the facts of the case. It is said that reason and authority are the two brightest lights of the world and thus it follows that providing of correct reasoning for every decision is the basic feature of rule of law."

12. In order to apply a judgment as a precedent, the relevant laws and earlier judgments should be brought to the notice of the Court and they should be correctly applied. **Mere observations in a previous judgment may not be binding on a subsequent Bench if they are not truly applicable to the facts and controversies in a subsequent case as per settled principle of "ratio decidendi."** The rule of precedent, thus, places an obligation upon the Bench considering such judgments that the Court should discuss the facts and the law of both the cases and then come to a conclusion whether the principle enunciated in the previous judgment is actually applicable on facts and law to the subsequent case. **This principle would equally apply when the Courts have to consider which of the two views expressed by earlier equi or other Benches is applicable to the subsequent case.** The rule of precedent is not without exceptions. It has its own limitations. Besides that, the law changes with the changed circumstances and even good law may be rendered ineffective or unconstitutional because of passage of time, as reflected in the principle "*cessante ratione cessat ipsa lex*." Adopting this Maxim, the Supreme Court in the case of *State of Punjab v. Devans Modern Breweries Ltd.*, (2004) 11 SCC 26, stated that, with changes that are bound to occur in an evolving society, the judiciary must also keep abreast of these changes in order that the law is considered to be good law. This is extremely pertinent especially in the current era of globalisation where the entire philosophy of society, on the economic front, is undergoing vast changes. Besides this well accepted precept, there are exceptions to the rule of precedent. There are judiciously accepted exceptions to the rule of precedent and they are decisions *per incuriam*, subsilento and stare decisis. These principles explain when and where a precedent, which is otherwise a good law, necessarily need not be accepted in subsequent judgments if it fully satisfies essentials of these exceptions."

(emphasis added)

13. The Full Bench observed that normally the latest judgment pronounced by a Bench of equal strength would prevail provided it has not ignored or has not failed to notice the view of the earlier Benches of equal strength. In the present case, while deciding the case of **G.Gopal**, the Apex Court did not notice the decision in the case of **Krishna Kumar Birla** and that is the reason why the learned single Judge in the impugned judgment has rightly held that what binds the Court is the decision in the case of

Krishna Kumar Birla. Moreover, in the case of **G.Gopal**, the issue of the scope and meaning of the term “caveatable interest” in the context of the caveats under Section 284 of the Succession Act did not specifically arise.

14. At this stage, it will be necessary to make a reference to what is held by the Apex Court in the case of **Krishna Kumar Birla**. In paragraphs 55 to 58, the Apex Court considered the scheme of the Succession Act. In paragraph 57 and 58, the Apex Court held thus:

“ 57. The 1925 Act in this case has nothing to do with the law of inheritance or succession which is otherwise governed by statutory laws or the custom, as the case may be. It makes detailed provisions as to how and in what manner an application for grant of Probate is to be filed, considered and granted or refused. Rights and obligations of the parties as also the executors and administrators appointed by the court are laid down therein. Removal of the existing executors and administrators and appointment of subsequent executors are within the exclusive domain of the court. **The jurisdiction of the Probate Court is limited being confined only to consider the genuineness of the will. A question of title arising under the Act cannot be gone into the (sicProbate) proceedings. Construction of a will relating to the right, title and interest of any other person is beyond the domain of the Probate Court.**

58. A person to whom a citation is to be issued or a caveator, must have some interest in the estate of the testator. **Any person claiming any interest adverse to the testator or his estate cannot maintain any application before the Probate Court. His remedy would be elsewhere. The question with regard to the degree of interest or the right which a caveator must show to establish his or her caveatable interest before the Probate Court should be considered having regard to the aforementioned legal propositions.”**

(emphasis added)

The Apex Court referred to its earlier decisions starting from the decision in the case of **Elizabeth Antony v/s. Michel Charles John Chown Lengera**⁷. In paragraph 66 and 67, by referring to its earlier decisions, the Apex Court reiterated the view taken earlier that the Probate Court does not decide any question of title or of the existence of the property itself. In paragraph 73, the Apex Court dealt with an argument that if any person can show that he was entitled to maintain a suit in respect of property over which the Probate would have effect, he possesses a sufficient interest to enter the Caveat and oppose the grant of Probate. What is held in paragraphs 73, 74 and 75 the Apex Court reads thus:

“**73.** Strong reliance has been placed by Mr Jethmalani on *Nobeen Chunder Sil v. Bhobosoonduri Dabee* [ILR (1881) 6 Cal 460] . Therein, Field, J. interpreting Section 242 of the 1925 Act opined that if any person can show that he was entitled to maintain a suit in respect of property over which Probate would have effect, he possesses a sufficient interest to enter a caveat and oppose the grant of Probate.

74. Such a suit, however, in our opinion must have a direct nexus with the estate of the testator and not to enforce a right in respect of the application of the estate of the testator under another will. Right to maintain a suit must be independent of the wills sought to be Probated. No legal right accrues under an unProbated will except in case where taking of Probate is not mandatory. In *Nobeen Chunder Sil* [AIR 2000 Bom 189] the appellant therein had a direct interest in disputing the will. He had obtained a money decree against the testator. His share was under attachment. In the aforementioned factual backdrop, it was held: (ILR p. 470)

⁷ (1990)1 SCC 333

“... What is the meaning of the expression ‘persons claiming to have any interest?’ It appears to me that the persons claiming to have any interest ‘must be persons having such an interest as would entitle them to maintain a suit in respect of the subject-matter of such estate—persons having, for example, such an interest as, according to the practice of the Court of Chancery, would entitle them to file a bill in a court of equity’.”

It contains two competing passages. One rendered by White, J. and another by Field, J. White, J. stated: (ILR p. 461)

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

Field, J., however, expanded the ambit of “caveatable interest”.

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

(emphasis added)

15. Therefore, in paragraph 75 the Apex Court reiterated that whether the interest claimed by the caveator is an established one or a bare claim must satisfy the test that there exists an interest in the estate of the testator and the same is not adverse thereto. In paragraphs 76 and 77, the Apex Court considered the decisions of the other High Court on the issue. Ultimately, in paragraphs 84 to 86 the Apex Court held thus:-

“84. Section 283 of the 1925 Act confers a discretion upon the court to invite some persons to watch the proceedings. Who are they? They must have an interest in the estate of the deceased. **Those who pray for joining the proceeding cannot do so despite saying that they had no interest in the estate of the deceased. They must be persons who have an interest in the estate left by the deceased. An interest may be a wide one but such an interest must not be one which would not (sic) have the effect of destroying the estate of the testator itself.** Filing of a suit is contemplated inter alia in a case where a question relating to

the succession of an estate arises.

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

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

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

(ii) The test required to be applied is: Does the claim of grant of Probate prejudice his right because it defeats some other line of succession in terms whereof the caveator asserted his right?

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

(emphasis added)

In paragraph no.103, the Apex Court clarified that what would be the caveatable interest would depend upon the fact situation obtaining in each case. No hard-and-fast rule, as such, can be laid down. The Apex Court further noted that it has made an attempt to lay down certain broad legal principles.

16. Thus, in clause (iii) of paragraph 86 the Apex Court clearly held that any person questioning the existence of title in respect of the estate or capacity of the testator to dispose of the property by a Will on the ground outside the law of succession would be a stranger to the Probate proceeding inasmuch such rights cannot be effectively adjudicated upon in the Probate proceeding. Thus, the conjoint reading of clauses (ii) and (iii) shows that a person can be said to have a caveatable interest if the grant of Probate or Letters of Administration, as the case may be, will defeat his claim of succession or inheritance to the estate of the deceased. He will have a caveatable interest if he is likely to inherit even a very small part of the estate of the deceased in the event Probate or Letters of Administration, as the case may be, is not granted. If a caveator is objecting to the grant either by setting up an adverse title in himself or by disputing the very existence of the estate claimed by the deceased, he does not have a caveatable interest. In the present case, as we have pointed out earlier, the Appellant has claimed title in respect of one property (Byculla property) subject matter of the disputed Will. He claimed that the said property belongs to him. As admittedly the Respondents are the class I heirs and the Appellant is class II heir of the testator as per the provisions of the said Act of 1956 which are admittedly applicable, even if the prayer for grant of Probate is rejected on the ground that the will is not proved, the Appellant

will not be entitled to inherit any part of the estate of the testator. Moreover, the issue of title of the testator in respect of the property mentioned in the will cannot be decided by the Testamentary Court. Therefore, only by the grant of Probate, the Appellant's alleged claim of ownership in respect of the Byculla property will not be defeated. Therefore, going by the stand taken in the affidavit-in-support of the Caveat, the Appellant has no caveatable interest.

17. In the case of **Krishna Kumar Birla**, the Apex Court has considered the decision of the Privy Council in the case of **Sarala Dassya**. We must note here that the Privy Council was dealing with the issue of locus standi to apply for revocation of Probate on the ground that the grant was obtained fraudulently. It in this context that the Privy Council held that a creditor of the deceased has a locus to apply for revocation of the Probate proceeding.

18. Coming back to the decision in the case of **Krishna Kumar Birla**, in paragraphs 94 and 95 the Apex Court held thus:

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

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

(emphasis added)

19. In the present case, strictly speaking, the contention raised in the affidavit-in-sur-rejoinder to the Notice of Motion cannot be termed as a pleading of the Appellant in support of the caveat. There is a vague plea in the affidavit-in-sur-rejoinder of the Notice of Motion that the Appellant is claiming to be a creditor. As stated earlier, the plea that the Appellant is a creditor of the deceased cannot be considered to decide whether he has a caveatable interest. Even assuming that the said plea can be taken into consideration, we are of the view that the Appellant does not have a caveatable interest. Learned senior Counsel for the Appellant pointed out that a suit for recovery filed by the Appellant is pending. Thus, the claim of the Appellant is a contingent claim which depends on the outcome of the suit. Therefore, in the light of what is observed in paragraph 94 of the decision in the case of **Krishna Kumar Birla**, the Appellant will have to show a special interest. However, what is held in paragraph 95 completely defeats the case of the Appellant. In the present case, the estate of the

deceased is being represented by the legal heirs and the interest claimed by the Appellant is a contingent interest. As stated earlier, the Apex Court has reiterated the well settled law that the issue of title cannot be gone into in the Probate petition.

20. Learned senior Counsel appearing for the Appellant relied upon the decision of the Apex Court in the case of **Jayamma (supra)**, and in particular what is held in paragraph 15 in support of his contention that in certain cases, issue of the title can be decided in proceedings for the grant of Probate. In the case in hand, the Apex Court was dealing with a case where there was a statutory prohibition in view of Section 61 of the Karnataka Land Reforms Act, 1961 on transfer of the land in respect of which the tenant had become occupant. While reiterating that the Court empowered to grant Letters of Administration ordinarily may not go into the question of title in respect of property sought to be bequeathed by the testator, when a statutory embargo exists on execution of the Will, the Court shall not refuse to determine the validity of transfer, as in terms of the statute, the execution of the will may be void ab initio. The said decision does not make any departure from the law consistently laid down by the Apex Court that in a Petition for grant of Letters of Administration or Probate, the issue of title to the property claimed by the deceased testator cannot be gone into.

21. Therefore, in our considered view, no error can be found in the view taken by the learned single Judge when she proceeded to dismiss the caveat filed by the Appellant. There is no merit in the Appeal and the same is accordingly dismissed with no order as to costs.

22. At this stage the learned Counsel appearing for the Appellant seeks continuation of the interim relief dated 13 December 2011 granted by this Court in Notice of Motion No.2747 of 2011. Learned Counsel appearing for the Respondents opposed the said prayer. As the interim relief is operating for a considerable time, we extend the interim relief for a period of four months from today.

(A.A. SAYED, J.)

(A.S.OKA, J.)