

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

INTERIM APPLICATION NO. 2807 OF 2024
(For Condonation of Delay)
IN
Caveat (L) NO. 191 OF 2018
IN
TESTAMENTARY PETITION NO.462 OF 2018

Ketan Kishoredas Mehta,
Age : 53 years, Occ : Business,
Hindu Indian Inhabitant of Mumbai,
Residing at 7, Shriniketan,
2nd Marine Cross Lane, 14, Queens Road,
Churchgate, Mumbai – 400 020
being one of the Beneficiary in the
Estate of Deceased above named

...Applicant
(Org. Respondent)

IN THE MATTER BETWEEN :

Himanshu Harshad Choksi,
aged 70 years, of Ahmedabad,
Indian Inhabitant, Married
Occupation : Business, residing at
2, Krishna Society, Ellisbridge,
Ahmedabad, Gujarat,
one of the Surviving Executors of
the Will of the Deceased abovenamed

... Petitioner

And

Ketan Kishoredas Mehta,
Age : 53 years, Occ : Business,
Hindu Indian Inhabitant of Mumbai,
Residing at 7, Shriniketan,
2nd Marine Cross Lane, 14, Queens Road,
Churchgate, Mumbai – 400 020
being one of the Beneficiary in the
Estate of Deceased above named

... Respondent

**WITH
INTERIM APPLICATION NO.2156 OF 2023
IN
TESTAMENTARY PETITION NO.462 OF 2018**

**Himanshu Harshad Choksi,
aged 70 years, of Ahmedabad,
Indian Inhabitant, Married
Occupation : Business, residing at
2, Krishna Society, Ellisbridge,
Ahmedabad, Gujarat,
one of the Surviving Executors of
the Will of the Deceased abovenamed**

...Applicant
(Org. Petitioner)

IN THE MATTER BETWEEN :

**Himanshu Harshad Choksi,
aged 70 years, of Ahmedabad,
Indian Inhabitant, Married
Occupation : Business, residing at
2, Krishna Society, Ellisbridge,
Ahmedabad, Gujarat,
one of the Surviving Executors of
the Will of the Deceased abovenamed**

... Petitioner

And

**Ketan Kishoredas Mehta,
Age : 49 years, Hindu Indian Inhabitant of
Mumbai, Occupation : Businessman,
Residing at 7, Shriniketan,
2nd Marine Cross Lane, 14, Queens Road,
Churchgate, Mumbai – 400 020**

... Caveator/
Respondent

*Mr. Gaurang Mehta a/w Ms. Vidhi Dharia, Ms. Rhea Mehta, and
Mr. Ameya Mahajan for the Applicant/Petitioner in IA/2156/2023 and for
the **Petitioner** in IA/2807/2024*

*Mr. Rubin Vakil a/w Ms. Khushboo Chughani i/b Mr. Markand Gandhi for
the Respondent/Caveator in IA/2156/2023 and for the
Applicant/**Caveator** in IA/2807/2024*

CORAM : SHARMILA U. DESHMUKH, J.

RESERVED ON : MARCH 9, 2026

PRONOUNCED ON : APRIL 6, 2026

ORDER :

1. Interim Application No. 2807 of 2024 has been preferred by the Caveator seeking condonation of delay of 133 days in filing of the affidavit in support of the Caveat. Interim Application No. 2156 of 2023 has been filed seeking dismissal of the Caveat. Both applications were taken up for hearing together and common submissions were canvassed and both applications are being decided by this common order.

INTERIM APPLICATION NO 2807 OF 2024:

2. The Caveat is filed by one Ketan Kishoredas Mehta on 21st July, 2018, claiming to be creditor of the deceased. The Affidavit in support of Caveat was filed on 14th December, 2018. The application seeks condonation of delay of 133 days caused in filing the Affidavit in support of Caveat. Under Rule 402 of the Bombay High Court (Original Side) Rules, the Caveat is required to be filed within eight days of service of citation and the affidavit in support of Caveat is required to be filed within 14 days of filing of Caveat. The application pleads that the father of the Caveator, Kishoredas Mehta, had obtained decree dated 27th June, 2006 against the deceased and had also filed

insolvency petition in which the deceased was adjudicated as insolvent. The said Kishoredas Mehta expired in the year 2011 and the Caveator is one of the legal heirs of the deceased judgment creditor and entitled to payment from the estate of the deceased. The Testamentary Petition was not served upon the Caveator and the filing of the Petition came to his knowledge on 21st June, 2018. From 25th June, 2018 to 17th July, 2018, the Caveator was not in India and in the meantime his Advocate addressed communication dated 30th June, 2018 to the Official Assignee requesting it to take steps in respect of the Testamentary Petition. After the Caveator's return to India, the Caveat was filed on 21st July, 2018. However due to dispute with erstwhile advocate, the papers were returned to the Caveator and no Affidavit in support was filed and the Caveat remained in objection. The present Advocates came to be engaged on 31st October, 2018 and thereafter the Affidavit in support came to be filed on 14th December, 2018.

3. The copy of the interim application was not served upon the Petitioner and was served only at the time of hearing of the application. In order to avoid further delay in the hearing, the matter proceeded for hearing on the basis of denial with consent.

4. Mr. Vakil, learned counsel appearing for Caveator would submit that no citation was issued to the Caveator, despite the deceased

having expired as undischarged insolvent. He submits that the Caveator took necessary steps after learning about the filing of the Petition and the application sets out the dispute with the erstwhile Advocate which explains as to why the Affidavit could not be filed in support of Caveat within time. He submits that time was granted till 9th November, 2022 by the Learned Prothonotary and Senior Master to comply with office objections and the present application was filed on 8th November, 2022.

5. Mr. Mehta, learned counsel appearing for Petitioner submits that though the Affidavit in support of Caveat was filed on 14th December, 2018, the present Application seeking condonation of delay was filed in November, 2022 without any prayer for condoning the delay of almost four years in filing the Interim Application. He submits that the Caveat was abandoned by the Caveator and the present Application is by way of afterthought. He submits that by order dated 2nd August 2022, the Prothonotary and Senior Master directed the Caveator to get the Caveat registered and numbered before 13th September 2022, which was not done. He submits that on 9th November 2022, more than four years after lodging the Caveat, the application was filed for condonation of delay in filing the affidavit, which also remained pending for almost two years. He submits that the Petitioner filed Interim Application No. 2156 of 2023 for striking off the Caveat on

account of non-removal of office objections and alternatively, to discharge/dismiss the Caveat, and thereafter steps were taken by the Caveator to number interim application for condonation of delay, which was numbered in September, 2024. He submits that the delay is not of 133 days as sought to be projected but the Caveator has taken period of almost six years in getting the present application registered and numbered which shows gross negligence. He submits that by reason of inaction by the Caveator, the Petition remained pending for almost seven years and the intent is to cause obstruction in grant of probate.

6. I have given my thoughtful consideration to the rival contentions raised.

7. The Applicant was not cited in the Testamentary Petition but learnt about the filing of the Testamentary Petition and accordingly filed Caveat on 21st July, 2018. Rule 402 of the Bombay High Court Original Side Rules provides that an affidavit in support of Caveat shall be filed within eight days from the date of filing of the Caveat and no such affidavit shall be filed after the expiry of period of eight days without an order of the Judge in Chambers. The Affidavit in support of Caveat was filed on 14th December, 2018 without applying for an order for condonation of delay and hence the Caveat remained in objection and the testamentary petition was not converted into suit. The

present application has been filed after a period of almost four years on 8th November, 2022 and there is no explanation for the delay and no prayer for condonation of delay. The Applicant has calculated the delay of 133 days by taking into consideration the period from the date of filing of Caveat i.e. 21st July, 2018 till the date of filing of Affidavit in support of Caveat i.e. 14th December, 2018 but has failed to seek condonation of delay for the inordinate delay of about four years in filing the present application. Under Article 137 of Limitation Act, the period of limitation for filing of the application would be three years when the right to apply accrues. The period of limitation commenced upon the delayed filing of the Affidavit in support of Caveat and in the absence of any explanation and absence of relief seeking condonation of delay, the present application is barred by limitation. Resultantly, the application itself cannot be entertained and deserves to be dismissed.

8. Apart from the above, for the proceedings to be converted into contentious proceedings, the Rules set out prescribed timelines and the delayed filing of the Affidavit in support of Caveat derailed the entire proceedings as the Petition was neither converted into suit nor proceeded for grant. Even after filing of the application in the year 2022, no efforts were taken to get the application numbered and circulated. The application has been numbered in the year 2024 and it

is not demonstrated that any attempt was made to circulate the application for hearing.

9. The relief sought is for condonation of delay of 133 days which does not seem such an inordinate delay, however, when considered with the attendant circumstances, brings to the fore the inaction on part of the Caveator to take timely steps in proceeding with the opposition to the grant of Probate. *Sans* any explanation for the delay in filing the present application, the only conclusion to be drawn is that the intent is to delay the grant. Even accepting that there was dispute with the erstwhile Advocate, the Caveator had obtained legal advice and had filed the Affidavit in support. As there was delay, the application ought to have been filed immediately for condoning the delay. Instead the Caveat was kept under objection for number of years. The Caveator has slept over the matter and after period of four years preferred the present application without any explanation and without seeking relief of condonation of delay. It is no answer to say that time was granted by the registry to remove office objections and the same cannot constitute an explanation for the delay. The written submissions of the Caveator seeks to justify the delay in filing the Affidavit in support of Caveat but offers no explanation for the delay in filing the present application.

10. The Court will not countenance such inaction and negligence as it

would be easy for a party to stall the grant by deliberately delaying the filing of Affidavit in support of Caveat and then remain passive for years without filing or circulating the application for condonation of delay resulting in successful obstructing the grant without much effort. Law comes to the aid of the parties who are diligent in pursuing their remedies and not to the parties who have demonstrated negligence and inaction.

11. In light of the above, though the application ostensibly seeks condonation of delay of 133 days, the application itself is barred by limitation. There is absolutely no explanation tendered for delay in filing the present application and no relief sought for condonation of delay of almost four years in filing the present application. I am therefore not inclined to allow the application. Resultantly, the Application stands dismissed.

12. Despite the dismissal of application for condonation of delay, as this Court is convinced that even if the delay is condoned, the Caveator has no Caveatable interest, the application for dismissal of Caveat is being considered.

INTERIM APPLICATION NO 2156 OF OF 2023:

13. Testamentary Petition No. 462 of 2018 was filed seeking probate of the last Will and Testament dated 24th April 1997 of deceased Harshad Harilal Choksi, who, at the time of his death on or about 25th

February 2010, was an undischarged insolvent. In the Testamentary Petition, as initially filed on 11th January 2018, there were no pleadings about the deceased being an undischarged insolvent or that the property vested in the Official Assignee. The schedule of assets to the Testamentary Petition listed the immovable property being 100% ownership of Plot No. 63, Choksi Villa, admeasuring 634.68 sq. meters, including a garage, situated at King Circle, Mumbai 400 090, valued at Rs. 33,31,92,006. On 21st July, 2018, one Ketan Kishoredas Mehta filed Caveat (L) No 191 of 2018 opposing the grant of Probate and the affidavit in support of Caveat was filed in December, 2018. The Affidavit in support of Caveat brought on record the fact of the deceased being an undischarged insolvent and that the father of Caveator was creditor of the deceased and pursuant to the order of adjudication of insolvency, the estate of the deceased vested in the Official Assignee, with whom the deceased creditor had filed his Affidavit of proof of claim.

14. Vide order dated 18th December, 2025, Petitioner was permitted to amend the petition. By the amendment, the Petitioner sought to incorporate the pleadings as regards the order of adjudication of insolvency dated 16th June 2009, the vesting of the estate of the deceased in the Official Assignee, disputing the proof of debts lodged with Official Assignee and sought to amend the schedule of assets to

restrict it to the surplus upon administration of the estate of the deceased under the Insolvency Act. Exhibit 'C' described the immovable properties, i.e., Choksi Villa, as well as the bank account of the deceased, and by way of Exhibit 'C-1', the schedule of property of deceased, described the right and entitlement of the deceased to receive from the Official Assignee the movable and immovable properties vested in the Official Assignee, either upon recall of order of adjudication of insolvency Court or discharge of insolvency of the deceased or the right or entitlement to receive the surplus.

15. The Caveat opposes the grant claiming that the Caveator is one of the creditors of the deceased-Harshad Harilal Choksi. It is stated that the Caveator's father had obtained decree against the deceased for sum of Rs. 38,43,422.12, which decree has attained finality. In execution proceedings, the immovable property of the deceased came to be attached, and as the decree was not satisfied, the Caveator's father filed Petition No. 18 of 2007 before this Court in insolvency jurisdiction and vide order dated 16th June 2009, the deceased was adjudicated as an insolvent and the property of the deceased vested with the Official Assignee, and the deceased ceased to have any interest in the said property. After the death of the deceased, the legal heirs, including the testamentary Petitioner, were impleaded as legal heirs of the deceased, and an order of *status quo* was passed in

respect of the estate of the deceased, and they were also directed to make disclosures. Upon the death of the Caveator's father, the Caveator, along with the other legal heirs, was brought on record in the insolvency petition. It is submitted that, being a creditor of the deceased, the Caveator has a Caveatable interest in the estate of the deceased and in the manner in which it is administered upon the demise of the deceased, and despite thereof, no citation has been issued to the Caveator's late father or even to the Official Assignee in whom the estate of the deceased vests. It was contended that the Petition does not disclose that the deceased was an undischarged insolvent and also suppresses the debts owed by the estate of the deceased to various creditors, including the Caveator's father. It is submitted that the testamentary petition is seeking probate of the Will after almost 8 years of his demise, which raises a suspicion about the alleged Will, which may be a forged and fabricated document in order to defeat the interest of the creditors.

16. Mr. Mehta, learned counsel appearing for the petitioner, submits after the order of adjudication of insolvency, the father of the Caveator, had filed proof of claim on 15th October 2009 with the Official Assignee, which was not proved during the lifetime of the deceased creditor, and no effective steps were taken by the legal heirs of the deceased creditor before the Official Assignee. He submits that

by way of the probate petition, post the amendment granted, the petitioner has brought on record that there are only two creditors who had filed proof of claim and the total amount claimed is Rs. 11 crores or thereabouts, which debts were seriously disputed. He points out that by reason of the order of adjudication of insolvency, the assets of the deceased have vested in the Official Assignee, and it is only the assets which are listed in Exhibit 'C-1', i.e., the surplus which would come either by reason of recall of order of adjudication or payment of debts, in respect of which the probate petition is filed. He points out to Section 276(1) of the Indian Succession Act, 1925 (for short, '**Succession Act**'), which provides for the application for probate to state the amount of assets which are likely to come in the Petitioner's hands.

17. He submits that the creditor of the deceased testator has no locus to object to the probate of the Will of the deceased testator and has no Caveatable interest. He submits that the Caveator is not the creditor but the legal heir of the creditor of the deceased, who has not yet taken steps in respect of the proof of claim filed with the Official Assignee. He submits that the grant of probate will not affect the rights of the creditor, as the creditor is not concerned with whether the Will is found to be genuine or not. He submits that the lodging of the Caveat is against the express legal bar contained in Section 17 of the

Presidency Towns Insolvency Act, 1909 (for short "**Insolvency Act**"), as the creditor of a deceased insolvent, by virtue of vesting of the property in the Official Assignee, does not have any remedy against the property of the insolvent in respect of the debt claimed, and there is a legal bar against the creditor on initiating legal proceedings *qua* the same. He submits that the Caveat is, therefore, barred by law, not maintainable and requires to be rejected at the threshold.

18. He would submit that the Caveator, as the alleged creditor of the deceased insolvent, cannot take any stand independent of the Official Assignee, who is appointed for the benefit of the general body of creditors of the deceased insolvent and the interest of the body of the creditors lies with the Official Assignee. He submits that the Official Assignee has not objected to the probate petition and, therefore, the Caveator has no locus. He submits that, post order of adjudication of insolvency, the rights of such creditor are not against the insolvent debtor or his estate but only against the Official Assignee to ensure due administration of the property of the insolvent by the Official Assignee for payment of debts of the creditors.

19. He would submit that an executor of a Will of the deceased insolvent is his legal representative within the meaning of Section 211 of the Succession Act and is entitled to exercise all rights, interest, and enjoyment of the deceased insolvent, under the Insolvency Law.

20. He submits that the claims made by the deceased creditor are seriously disputed and not adjudicated though litigation is pending since last more than two decades. He submits that the deceased creditor and, after his demise, his legal representatives are merely contingent creditors who have no present right to inherit.

21. He submits that the right and entitlement of the deceased insolvent is to the surplus as contemplated under Section 76 of the Insolvency Act, which is the property of the deceased and devolve upon the executors of the Will upon his demise. He submits that the probate was mandatory to establish rights under the Will. He submits that the probate petition has been filed by the executors, and there is no bar either under the Insolvency Act or the Succession Act barring a testamentary petition in respect of the Will left behind by the deceased insolvent. In support, he relied on the following decisions :

(i) Purushottam Vishandas Raheja vs. Asha Shrichand Raheja & Anr.¹

(ii) Rahamtullah Sahib vs. Rama Rau & Anr.²

(iii) C. P. Paul vs. M/s. Hydro Power Constructions, Kothamangalam & Ors.³

¹ Order dated 26.07.2016 passed in Appeal No.598/2011 in NM/22/2011 in Petition/1172/2010

² Madras Series Vol. XVII 373

³ (1996) ILR 2 Ker 536 (KER) : AIR 1996 KERALA 324

(iv) Surya Prakash S. Makharia vs. Pramod Kumar Makharia⁴

(v) Hemraj Champa Lall vs. Ramkishen Ram⁵

22. Mr. Vakil, learned counsel appearing for the Caveator submits that the Caveator being creditor of the deceased has Caveatable and special interest in the estate of the deceased. He submits that the Caveator's father is decree holder in respect of an adjudicated final claim and Petitioner in insolvency proceedings. He submits that the Caveator is legal heir of the creditor and represents the estate of the creditor. He submits that the claim of the Caveator is not adverse to the estate of the deceased and only seeks to assert his right to recover debts due from the estate of the deceased in insolvency proceedings. He distinguishes the decisions cited by Mr. Mehta and would submit that the decisions of the Madras High Court and the Kerala High Court are prior to the decision of the Hon'ble Apex Court in **Krishna Kumar Birla vs. Rajendra Singh Lodha & Ors.⁶** Insofar as decision of **Surya Prakash S. Makharia vs. Pramod Kumar Makharia** (supra), is concerned, he submits, in that case the claim of the Caveator was of contingent nature and the Caveator therein had sought to challenge the title of the deceased testator to the property. He submits that in present case, Caveat has been filed for administration of the estate of

4 AIR Online 2024 BOM 2336

5 AIR 1916 Patna 279

6 (2008) 4SCC 300

the deceased and is not any claim relating to property of the insolvent, and hence the decision in **Hemraj Champa Lall vs. Ramkishen Ram** (supra), is clearly misconceived.

23. He assails the maintainability of testamentary petition during the continuance of the insolvency proceedings, as the Insolvency Act is a special legislation and is a code in itself providing for a mechanism to deal with the assets and estate of the insolvent. He would point out Sections 108 to 111 of Insolvency Act dealing with the administration of the deceased debtor's estate. He submits that in case of an insolvent dying as an undischarged insolvent, the estate of insolvent **vests** in the Official Assignee who is in charge of the administration of the estate. He submits that in case of deceased dying as an undischarged insolvent, if parallel proceedings for administration of his estate is held to be maintainable then incongruous situation would arise where a person being declared insolvent after his demise will be governed by the Insolvency Act for the administration of his estate, whereas a person dying as an undischarged insolvent will not be subject to the administration of the estate under the Insolvency Act.

24. He submits that a reading of Section 273 of the Succession Act and Rule 374 of High Court Rules would indicate that the existence of property of a deceased person is a precondition for filing of a petition for probate. He submits that where a person dies as an undischarged

insolvent, no estate of such person would exist in law, as the property of an insolvent vests in the Official Assignee and thus the jurisdictional fact for maintaining a petition for grant of probate is absent. He submits that the Official Assignee sought relief of transfer of the testamentary petition to the insolvency court, which is different from the Caveator's contention that the testamentary petition is not maintainable.

25. He submits that the contention of the petitioner upon amendment, claiming only the surplus under Section 76 of the Insolvency Act is misconceived, as admittedly, there is no order of discharge of the deceased from insolvency under Section **38**, and hence the provisions of Section 76 are not attracted. He submits that the schedule of property at Exhibit 'C-1' of the petition is speculative and without any basis. He submits that a comparison of Exhibit 'C' and Exhibit 'C-1' shows that the value of assets is identical, and hence an attempt is being made to obtain probate in respect of the entire purported estate of the deceased.

26. He would submit that the original Petitioner, though being a party to the insolvency petition, suppressed the insolvency proceedings and vesting of estate in Official Assignee in the testamentary petition and he submits that there is no disclosure about the existence of the Will in the insolvency proceedings. He submits

that the application for amendment was filed seven years after the filing of the affidavit in support of the Caveat. He submits that, in view of the Petitioners' conduct, the Caveator's presence is necessary to protect the interest of the creditor in testamentary proceedings. In support, he relies upon the following decisions:

(i) Krishna Kumar Birla vs. Rajendra Singh Lodha & Ors.

(supra);

(ii) Sanwarmal Kejriwal vs. Vishwa Co-op. Hsg. Society Ltd. & Ors.⁷

27. In rejoinder, Mr. Mehta would submit that the decision of **Krishna Kumar Birla vs. Rajendra Singh Lodha & Ors.** (supra) does not lay down an absolute proposition that the creditor of a deceased testator can maintain a Caveat to oppose the probate petition. He submits that, in that case, the Hon'ble Apex Court was not considering Caveatable interest of creditor. He would submit that the decision in the case of **Sarala Sundari Dassya vs. Dinabandhu Roy Brajaraf Saha (Firm)**⁸ arose out of revocation petition filed by the creditor, and in that context, it was held that a creditor of the legal heir of the deceased testator would have locus to file revocation petition. He points out that in paragraphs 101 and 102 of the decision in **Krishna Kumar Birla vs. Rajendra Singh Lodha & Ors.** (supra), the Hon'ble

⁷ (1990) 2 SCC 288

⁸ AIR 1844 PC 11.

Apex Court has acknowledged that the decisions relating to revocation of grant are not applicable to the facts of that case. He submits that, in the present case, the estate of the deceased is being represented by his executors, and even applying the test formulated by the Hon'ble Apex Court in the case of **Krishna Kumar Birla vs. Rajendra Singh Lodha & Ors.** (supra), the Caveat is not maintainable.

28. He would further submit that there is no conflict or repugnancy, between Insolvency Act and the Succession Act, both of which are general legislations and operate in different fields and spheres. He submits that Sections 108 to 111 of Insolvency Act are special provisions having no application as the adjudication order of insolvency was passed under Part II of the Insolvency Act. He submits that Part X applies only when a debtor has not been adjudicated insolvent during his lifetime and gives his legal representative an opportunity to contest the petition filed by a creditor upon the demise of the debtor under Section 108 of the Insolvency Act. He submits that, pertinently, Section 109(4) of the Insolvency Act provides for payment of the surplus to the legal representative of the deceased debtor after the administration of the estate, which indicates a need to obtain grant of legal representation even before completion of administration of the estate.

29. I have given my anxious consideration to the rival contentions.

30. The Caveator is the legal heir of the judgment creditor in respect

of an adjudicated claim against the deceased under decree dated 27th June 2006. The father of the Caveator was the petitioning creditor in insolvency petition, whereby the deceased was adjudicated as an insolvent. The issue which arises for consideration is whether the Caveator has a Caveatable interest to oppose the grant of Probate. The Affidavit in support of Caveat sets out the details of litigation between the father of the Caveator and the deceased resulting in the suit being decreed and the subsequent insolvency proceedings wherein the deceased was adjudicated an insolvent, various orders passed in insolvency proceedings, and litigation pertaining to the property of the deceased. The Affidavit thereafter sets out the steps taken by the Caveator in filing of Caveat and the affidavit subsequent to the discovery of the filing of the Testamentary Petition. The relevant portion of paragraph 4 and 17 of the Affidavit states as under:

“4.Since the deceased failed to comply with the said order, the deceased was adjudicated as an insolvent and the property of the deceased, thereafter vested with the official assignee of this Hon’ble Court under the provisions of Presidency Towns Insolvency Act, 1909 and the deceased ceased to have any interest in these properties.”

“17. I apprehend that the Petitioner was son of the deceased has suppressed and not disclosed the aforesaid facts before this Hon’ble Court in the present petition including the fact that the deceased was an undischarged insolvent at the time of his demise. Having regard to the fact that the Petitioner has blatantly misrepresented and suppressed the status of the assets of the deceased before the Insolvency Court as

stated hereinabove, he may continue to do so even before this Hon'ble Court thereby jeopardizing the interest of the creditors of the deceased including myself and other legal heirs of my late father. The Petitioner may have also misrepresented facts about the debts owed by the estate of the deceased to various creditors including my late father to deprive these creditors of their dues. In any event, it is surprising that the Petitioner is seeking probate of the Will of his late father after almost 8 years from his demise. This itself causes suspicion about the alleged Will and the contents thereof. I believe that the alleged Will may be forged and fabricated document which has been gotten up to defeat the interest of the creditors of the deceased including my late father. I also do not admit that the deceased had the necessary testamentary capacity at the time when the alleged Will was made." (Emphasis supplied).

31. A careful reading of the Affidavit would indicate that the grant is opposed by disputing the testamentary capacity of the testator to bequeath the estate as the estate vested in the Official Assignee upon the deceased being adjudicated an insolvent. In the written submissions tendered by Mr. Vakil, it is stated that as on date there is no property/estate of the deceased and in view of Section 17 of Insolvency Act the Petition is not maintainable as there is no estate/property of the deceased. It is submitted that in case of person dying an undischarged insolvent, no estate of such person would exist in law. The submissions thus border on setting up a title adverse to that of the estate of the deceased albeit in the Official Assignee and denial of the testamentary capacity of the deceased. The only ground

for opposition of grant of Probate *qua* the Will is that the Will is forged, fabricated and suspicious document to defeat interest of the creditors, without any material pleadings to support the allegations.

32. The Petition as initially filed did not disclose the facts regarding the deceased being an undischarged insolvent which facts have now being brought on record by way of amendment. The Schedule of Assets have been amended to described the assets which vest in the Official Assignee at Exhibit "C" and Schedule of Assets which may come into the hands of the Petitioner in the adjudication order is recalled or there is discharge of insolvent or there is surplus at Exhibit "C-1".

33. Under Section **17** of the Insolvency Act, upon the making of an order of adjudication, the property of the insolvent, wherever situated, shall vest in the Official Assignee and shall become divisible amongst his creditors. The Official Assignee, under Section 68 of the Insolvency Act, is entitled to realize the properties of the insolvent and apply the proceeds for the payment of the debts of the insolvent. Pertinently, Section 76 of the Insolvency Act provides that the insolvent shall be entitled to any surplus remaining after payment in full of the creditors, with interest as provided by the Act, and of the expenses of the proceedings taken thereunder.

34. The statutory provisions of Insolvency Act makes it clear that though, upon the order of adjudication being passed, the property

vests in the Official Assignee, the surplus remaining after the debts of the creditors have been satisfied would constitute the estate of the insolvent. As the Official Assignee has not fully administered the estate of the deceased, the surplus cannot be ascertained as of date. However, the same does not mean that the Testamentary Petition cannot be filed for seeking Probate of the Will of the deceased.

35. Under Section 211 of Succession Act, the executor or the administrator of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such. Under Section 227, the probate of the Will, when granted, establishes the Will from the death of the testator and renders valid all intermediate acts of the executor as such. Considering the provisions of Section 76 of the Insolvency Act, the surplus remaining after satisfaction of all the debts would constitute the estate of the deceased in respect of which the executor can apply for probate. It cannot be accepted that in case of a deceased dying as an undischarged insolvent, no estate of person exists in law, as the surplus remaining would constitute the estate of the deceased, which is likely to come into the hands of its executor. There is no embargo under the provisions of the Succession Act from seeking probate of the Will of an undischarged insolvent. Section 276 of the Succession Act provides that the application for probate shall set out the necessary particulars,

including the amount of assets which are likely to come into the petitioner's hands. In the present case, the amended testamentary petition sets out that after the debts have been satisfied, the estate remaining would constitute the asset of the deceased. The testamentary petition in Schedule of Assets at Exhibit "C-1" sets out the assets which are likely to come in the hands of the executor. As the Petitioner can claim succession to the surplus left after the administration of the debts by the Official Assignee under Section 76 of Insolvency Act, the contention of Mr. Vakil that there should be existence of property also fails. It is not that there is no estate of the deceased but by virtue of insolvency, the estate of the deceased vests in the official assignee. The expression used in Section 276(1)(c) of Succession Act is "assets likely to come to the petitioner's hands." The surplus remaining upon satisfaction of debts and expenses as per the Insolvency Act would constitute the assets likely to come to the petitioner's hands.

36. The Caveator claims a Caveatable interest by reason of being a creditor of the deceased. The averments in the Affidavit in support of Caveat reproduced above indicates that the Caveator questions the testamentary capacity of the deceased to bequeath the estate. Mr. Vakil, by questioning the existence of property disputes the right of the deceased to the estate. In this context, it would be apposite to

refer to the decision in the case of **Purushottam Vishandas Raheja vs. Asha Shrichand Raheja & Anr.** (supra), where the Hon'ble Division Bench considered the issue of Caveatable interest in respect of Caveat filed by the brother of the deceased testator. The Hon'ble Division Bench noted the observations of the Hon'ble Apex Court in **Krishna Kumar Birla** (supra) in para 57, 58, 85 to 86, which reads as under:

"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 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."

"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."

37. The Hon'ble Division Bench noted in paragraph 16 that the Hon'ble Apex Court has clearly held that, any person questioning the existence of title in respect of the estate or the capacity of the testator to dispose of the property by a Will would be a stranger to the probate proceedings, inasmuch as such rights cannot be effectively adjudicated upon in probate proceedings. It held that if a Caveator is objecting to the grant by disputing the very existence of the estate claimed by the deceased, he does not have a Caveatable interest. A person will have Caveatable interest if he is likely to inherit even a very small part of the estate of the deceased in 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 Caveatable interest.

38. In the present case, the Caveator disputes the very existence of the estate by reason of the insolvency of the deceased as the estate vests in the official assignee, which makes the Caveator stranger to the probate proceedings. The interest must be shown in the estate derived from the deceased by succession or otherwise and the title of the deceased to the estate cannot be disputed. A careful reading of the Affidavit in support of Caveat would indicate that the Caveator disputes the very existence of the estate of the deceased and the testamentary capacity to bequeath the estate and on this ground alone the Caveat ought to be dismissed.

39. Testing the argument further, let us consider the effect of refusal of the grant. The Caveator has lodged his proof of debt with the Official Assignee, which claim will be adjudicated and satisfied in those proceedings. Irrespective of the grant being issued or refused, the Caveator's debt is not affected as the debt will be satisfied in the insolvency proceedings. The Probate Court does not venture into the dispute of title and the only question to be answered is whether the Will is validly and legally executed and attested as the last Will and Testament of the deceased. It is well settled that the Probate Court

will not go into the manner of administration of the estate or even into the existence of the estate. **(See Kanwarjit Singh Dhillon vs Hardyal Singh Dhillon⁹)**. The contention that Caveat has been filed to assert the Caveator's right to recover debts is an alien issue in probate proceedings.

40. The decision of **Krishna Kumar Birla** (supra) analyzed the concept of Caveatable interest in light of the statutory provisions and various judicial pronouncements. Before the Hon'ble Apex Court, reliance was placed on the decision of **Nobeen Chunder Sil vs Bhobosoonduri Dabee ILR¹⁰** to contend that if any person can show that he is entitled to maintain a suit in respect of the property over which probate would have effect, he possesses sufficient interest to enter a Caveat. In **Nobeen** (supra), the person had obtained money decree against the testator and his share was under attachment. The Hon'ble Apex Court in **Krishna Kumar Birla** (supra) held in paragraph 92, 94 and 95 as under:

"92. In the context of the laws governing inheritance and succession, as they then stood, the widest possible meaning to the term "interest" might have been given in a series of decisions to which the learned counsel for the appellants rely upon ranging from Nobeen Chunder Sil (supra) to Radharaman Chowdhuri and others vs. Gopal Chandra Chakravarty [AIR 1920 Calcutta 459] so as to hold that a Caveat would be maintainable even at the instance of a person who had been able to establish "some sort of relationship" and howsoever distant he may be

9 2007 11 SCC 357.

10 (1881) 6 Cal 460.

from the deceased which per se cannot have any application after coming into force of the Hindu Succession Act. Ordinarily, therefore, a Caveatable interest would mean an interest in the estate of the deceased to which the Caveator would otherwise be entitled to, subject of course, of having a special interest therein.”

“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.”

41. The Hon’ble Apex Court in **Krishna Kumar Birla** (supra) held in paragraph 103 and para 111 as under:

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

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

42. The decision of **Sarala Dassya** (supra) was rendered in the context of revocation of probate obtained fraudulently and considered

the issue of locus of creditor to apply for revocation of Probate. The consideration differ as revocation can be ordered for just cause.

43. The opposition to the grant should make out a case germane to the issue of grant. It must be shown that if probate is granted, the Caveator's right will be affected which is not so in the present case. The Caveator's proof of debt is required to be adjudicated by the official assignee and the debt will be satisfied in insolvency proceedings. The estate of the deceased dying as undischarged insolvent vests in the official assignee and the grant of Probate or otherwise has zero impact on the Caveator's right to receive due payment upon his claim being adjudicated by the official assignee. The assertion of any right by the Caveator in present proceedings would convert the testamentary proceeding into a suit for title. A creditor can be said to have special interest, if it is shown that by grant of probate, the creditor's right is impacted. As the debt before Official Assignee is yet to be adjudicate, even though the Caveator's father was judgment creditor, the creditor's interest would be contingent interest. The debts would be debt in accordance with the priority of debts under Section 49 of Insolvency Act.

44. The Petitioner being the legal heir is entitled to seek probate of the Will of the deceased and cannot be asked to wait till the insolvency proceedings attain finality and the surplus is ascertained. The

continuation of the testamentary proceedings will neither have any impact on the insolvency proceedings nor will affect the right of the Caveator in insolvency proceedings.

45. Dealing with the challenge to the maintainability of the testamentary petition, it needs to be noted that there is no application of the Caveator seeking dismissal of the Petition on the ground of maintainability. Going a step forward and dealing with the said contention, the argument is premised on the ground that the Insolvency Act provides the mechanism to deal with the estate and assets of the insolvent and in respect of undischarged insolvent the testamentary jurisdiction cannot be exercised. The said submission overlooks the primary difference in jurisdictions exercised in testamentary proceedings and insolvency proceedings. While exercising testamentary jurisdiction, the Probate Court does not delve into the issue of title of the asset of the deceased or manner of administration of the estate or provide for payment of debts or liabilities and is only concerned with the aspect of validity and authenticity of the Will. On the other hand, the Insolvency Act provides the manner in which the estate of an insolvent is to be realised and applied for satisfaction of the debts. Under Section 227 of Succession Act, the effect of probate is that when granted establishes the Will from the death of the testator and renders valid all intermediate acts

of the executor as such. Under Section 220 the effect of grant of letters of administration entitles the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death. If the deceased is an undischarged insolvent, the vesting is interdicted by the provisions of Insolvency Act and the estate vests in the official assignee with the right restricted to the surplus remaining after the administration of the estate by the official assignee. As the property vests in the official assignee under the Insolvency Act, the grant of Probate will not impact the administration of the estate under the Insolvency Act. In my view, the maintainability of the Petition seeking grant of probate cannot be questioned on the ground that the deceased was an undischarged insolvent.

46. In light of the above discussion, in my view, the Caveator does not have Caveatable interest and resultantly, the Caveat deserves to be dismissed. Hence the following order is passed:

- (a) Interim Application No 2807 of 2024 seeking condonation of delay stands rejected.
- (b) Interim Application No 2156 of 2023 is allowed. Caveat (L) No 191 of 2018 is rejected.

[SHARMILA U. DESHMUKH, J.]