COMPENDIUM OF CASE LAWS ON

PROBATE AND LETTER OF ADMINISTRATION



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TABLE OF CONTENTS

Contents / Case Law	Page No.
Interplay of Statutory Provisions	
The Indian Succession Act, 1925	1
The Indian Evidence Act, 1872 [Repealed]	7
The Transfer of Property Act, 1882	8
Excerpts of Landmark Case Law on Probation and Letter of Administration	
General Observation	
H. Venkatachala Iyenar vs B. N. Thimmajamma and Ors. 1958 SCC OnLine SC 31 : 1959 Supp (1) SCR 426 : AIR 1959 SC	10
Rani Pnrnima Debi v. Kumar Khagendra Narayan Deb 1961 SCC OnLine SC 89 : (1962) 3 SCR 195 : AIR 1962 SC 567	25
Jaswant Kaur v. Amrit Kaur (1977) 1 SCC 369 : 1976 SCC OnLine SC 368	31
Proving Execution of Will	
Janki Narayan Bhoir v. Narayan Namdeo Kadam (2003) 2 SCC 91 : 2002 SCC OnLine SC 1234	39
Excerpts of Case Law on Injunction in Probate Case	
Rupali Mehta v. Tina Narinder Sain Mehta 2006 SCC OnLine Bom 846 : (2006) 6 Mah LJ 786 : (2006) 6 Bom CR 778 : AIR 2007 Bom 62 : (2007) 3 All LJ (NOC 430) 157 : (2007) 1 AIR Bom R 223 : (2007) 2 AIR Jhar R (NOC 649) 232 : 2007 AIHC 449	46

Ramchandra Ganpatrao Hande v. Vithalrao Hande 2011 SCC OnLine Bom 440 : (2011) 4 Mah LJ 50 : AIR 2011 Bom 136 : (2011) 4 Bom CR 326 : (2011) 3 AIR Bom R 258 : 2011 AIR CC 2182 : (2011) 2 HLR 308 : (2011) 2 Civ LT 154	57
Fauzia Sultana v. State & Ors. 2022 SCC OnLine Del 3583	63
Uma Devi Nambiar v. T.C. Sidhan (2004) 2 SCC 321 : 2003 SCC OnLine SC 1371	71
Issues in Testamentary Suit	76
Legal Propositions	77
Excerpts of Case Law on Limitation in Probate Case	
Kunvarjeet Singh Khandpur v. Kirandeep Kaur (2008) 8 SCC 463 : 2008 SCC OnLine SC 613	82
Krishan Kumar Sharma v. Rajesh Kumar Sharma (2009) 11 SCC 537 : (2009) 4 SCC (Civ) 555 : 2009 SCC OnLine SC 653	87
Ramesh Nivrutti Bhagwat v. Surendra Manohar Parakhe (2020) 17 SCC 284 : (2021) 4 SCC (Civ) 306 : 2019 SCC OnLine SC 1301	88

Sameer Kapoor v. State (2020) 12 SCC 480 : 2019 SCC OnLine SC 630	96
Excerpts of Case Law on Substitution in Succession Act	
H.S. Bhatnagar 1999 SCC OnLine All 1197 : (2000) 40 ALR 676 : 2000 All LJ 2708 : (2000) 38 ALR (SUM 35) 13 : 2001 AIHC 165 : (2000) 91 RD 97 : (2001) 1 HLR 180 : (2000) 1 Civ LT 273	103
Thrity Sam Shroff v. Shiraz Byramji Anklesaria 2007 SCC OnLine Bom 200 : (2007) 4 Mah LJ 56 : AIR 2007 Bom 103 : (2007) 109 (1) Bom LR 606 : (2007) 55 AIC 480 : (2007) 2 Bom CR 560 : (2007) 4 AIR Kant R (NOC 515) 195 : (2007) 4 All LJ (NOC 706) 245 : (2007) 3 AIR Bom R 106 : (2007) 3 AIR Jhar R (NOC 979) 354 : 2007 AIHC 1912 : (2007) 3 Civ LT 63 : (2007) 4 KLT (SN 10) 10	107
Vatsala Srinivasan v. Narisimha Raghunathan 2011 SCC OnLine Bom 78 : (2011) 2 Mah LJ 953 : AIR 2011 Bom 76 : (2011) 3 Bom CR 78 : (2011) 102 AIC 764 : (2011) 2 AIR Bom R 629 : 2011 AIR CC 1155	110
Vatsala Srinivasan v. Shyamala Raghunathan (2016) 13 SCC 253 : (2017) 2 SCC (Civ) 424 : 2016 SCC OnLine SC 568	117

The Indian Succession Act, 1925

PART 1 — PRELIMINARY

Section 2. Definitions

2 (h) "will" means the legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death.

PART 6 — TESTAMENTARY SUCCESSION

CHAPTER 3 — OF THE EXECUTION OF UNPRIVILEGED WILLS

Section 63. Execution of unprivileged wills

63. Execution of unprivileged wills.—Every testator, not being a soldier employed in an expedition or engaged in actual warfare, 1[or an airman so employed or engaged,] or a mariner at sea, shall execute his will according to the following rules:—

(a) The testator shall sign or shall affix his marks to the will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

PART 6 — TESTAMENTARY SUCCESSION

CHAPTER 3 — OF THE EXECUTION OF UNPRIVILEGED WILLS

Section 64. Incorporation of papers by reference

64. Incorporation of papers by reference.—If a testator, in a will or codicil duly attested, refers to any other document then actually written as expressing any

part of his intentions, such document shall be deemed to form a part of the will or codicil in which it is referred to.

PART 6 — TESTAMENTARY SUCCESSION

CHAPTER 6 — OF THE CONSTRUCTION OF WILLS

Section 88. The last of two inconsistent clauses prevails

88. The last of two inconsistent clauses prevails.—Where two clauses of gifts in a will are irreconcilable, so that they cannot possibly stand together, the last shall prevail.

Illustrations

(i) The testator by the first clause of his will leaves his estate of Ramnagar "to A", and by the last clause of his will leaves it "to B and not to A". B will have it.

(ii) If a man at the commencement of his will gives his house to A, and at the close of it directs that his house shall be sold and the proceeds invested for benefit of B, the latter disposition will prevail.

PART 7 — PROTECTION OF PROPERTY OF DECEASED

Section 192. Person claiming right by succession to property of deceased may apply for relief against wrongful possession

192. Person claiming right by succession to property of deceased may apply for relief against wrongful possession.—(1) If any person dies leaving property, movable or immovable, any person claiming a right by succession thereto, or to any portion thereof, may make application to the District Judge of the district where any part of the property is found or situate for relief, either after actual possession has ben taken by another person, or when forcible means of seizing possession are apprehended.

(2) Any agent, relative or near friend, or the Court of Wards in cases within their cognizance, may, in the event of any minor, or any disqualified or absent person being entitled by succession to such property as aforesaid, make the like application for relief.

PART 7 — PROTECTION OF PROPERTY OF DECEASED

Section 193. Inquiry made by Judge

193. Inquiry made by Judge.—The District Judge to whom such application is made shall, in the first place, examine the applicant on oath, and may make

such further inquiry, if any, as he thinks necessary as to whether there is sufficient ground for believing that the party in possession or taking forcible means for seizing possession has no lawful title, and that the applicant, or the person on whose behalf he applies, is really entitled and is likely to be materially prejudiced if left to the ordinary remedy of a suit, and that the application is made bona fide.

PART 8 — REPRESENTATIVE TITLE TO PROPERTY OF DECEASED ON SUCCESSION

Section 211. Character and property of executor or administrator as such

211. Character and property of executor or administrator as such.—(1) The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such.

(2) When the deceased was a Hindu, Muhammadan, Buddhist, Sikh, 1[Jaina or Parsi] or an exempted person, nothing herein contained shall vest in an executor or administrator any property of the deceased person which would otherwise have passed by survivorship to some other person.

PART 8 — REPRESENTATIVE TITLE TO PROPERTY OF DECEASED ON SUCCESSION

Section 213. Right as executor or legatee when established

213. Right as executor or legatee when established.—(1) No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in 1[India] has granted probate of the will under which the right is claimed, or has granted letters of administration with the will or with a copy of an authenticated copy of the will annexed.

2[(2) This section shall not apply in the case of wills made by Muhammadans 3[or Indian Christians], and shall only apply—

(i) in the case of wills made by any Hindu, Buddhist, Sikh or Jaina where such wills are of classes specified in clauses (a) and (b) of Section 57, and

(ii) in the case of wills made by any Parsi dying, after the commencement of the Indian Succession (Amendment) Act, 1962, where such wills are made within the local limits of the ordinary 4[original] civil jurisdiction of the High Courts at Calcutta, Madras and Bombay, and where such wills are made outside those limits, in so far as they relate to immovable property situate within those limits.]

PART 9 — PROBATE, LETTERS OF ADMINISTRATION AND ADMINISTRATION OF ASSETS OF DECEASED

CHAPTER 2 — OF LIMITED GRANTS

Grants for the use and benefit of others having right

Section 247. Administration pendente lite

247. Administration pendente lite.—Pending any suit touching the validity of the will of a deceased person or for obtaining or revoking any probate or any grant of letters of administration, the Court may appoint an administrator of the estate of such deceased person, who shall have all the rights and powers of a general administrator, other than the right of distributing such estate, and every such administrator shall be subject to the immediate control of the Court and shall act under its direction.

PART 9 — PROBATE, LETTERS OF ADMINISTRATION AND ADMINISTRATION OF ASSETS OF DECEASED

CHAPTER 4 — OF THE PRACTICE IN GRANTING AND REVOKING PROBATES AND LETTERS OF ADMINISTRATION

Section 266. District Judge's powers as to grant of probate and letters of administration

266. District Judge's powers as to grant of probate and letters of administration.—The District Judge shall have the like powers and authority in relation to the granting of probate and letters of administration, and all matters connected therewith, as are by law vested in him in relation to any civil suit or proceeding pending in his Court.

PART 9 — PROBATE, LETTERS OF ADMINISTRATION AND ADMINISTRATION OF ASSETS OF DECEASED

CHAPTER 4 — OF THE PRACTICE IN GRANTING AND REVOKING PROBATES AND LETTERS OF ADMINISTRATION

Section 268. Proceedings of District Judge's Court in relation to probate and administration

268. Proceedings of District Judge's Court in relation to probate and administration.—The proceedings of the Court of the District Judge in relation to the granting of probate and letters of administration shall, save as hereinafter otherwise provided, be regulated, so far as the circumstances of the case permit, by the Code of Civil Procedure, 1908.

PART 9 — PROBATE, LETTERS OF ADMINISTRATION AND ADMINISTRATION OF ASSETS OF DECEASED

CHAPTER 4 — OF THE PRACTICE IN GRANTING AND REVOKING PROBATES AND LETTERS OF ADMINISTRATION

Section 269. When and how District Judge to interfere for protection of property

269. When and how District Judge to interfere for protection of property.—

(1) Until probate is granted of the will of a deceased person, or an administrator of his estate is constituted the District Judge, within whose jurisdiction any part of the property of the deceased person is situate, is authorised and required to interfere for the protection of such property at the instance of any person claiming to be interested therein, and in all other cases where the Judge considers that the property incurs any risk of loss or damage; and for that purpose, if he thinks fit, to appoint an officer to take and keep possession of the property.

(2) This section shall not apply when the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, nor shall it apply to any part of the property of an Indian Christian who has died intestate.

PART 9 — PROBATE, LETTERS OF ADMINISTRATION AND ADMINISTRATION OF ASSETS OF DECEASED

CHAPTER 4 — OF THE PRACTICE IN GRANTING AND REVOKING PROBATES AND LETTERS OF ADMINISTRATION

Section 295. Procedure in contentious cases

295. Procedure in contentious cases.—In any case before the District Judge in which there is contention, the proceeding shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, 1908, in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who has appeared to oppose the grant shall be the defendant.

PART 9 — PROBATE, LETTERS OF ADMINISTRATION AND ADMINISTRATION OF ASSETS OF DECEASED

CHAPTER 8 — OF ASSENT TO A LEGACY BY EXECUTOR OR ADMINISTRATOR

Section 332. Assent necessary to complete legatee's title

332. Assent necessary to complete legatee's title.—The assent of the executor or administrator is necessary to complete a legatee's title to his legacy.

Illustrations

(i) A by his will bequeaths to B his Government paper which is in deposit with the Imperial Bank of India. The Bank has no authority to deliver the securities, nor B a right to take possession of them, without the assent of the executor.

(ii) A by his will has bequeathed to C his house in Calcutta in the tenancy of B. C is not entitled to receive the rents without the assent of the executor or administrator.

PART 9 — PROBATE, LETTERS OF ADMINISTRATION AND ADMINISTRATION OF ASSETS OF DECEASED

CHAPTER 8 — OF ASSENT TO A LEGACY BY EXECUTOR OR ADMINISTRATOR

Section 337. Executor when to deliver legacies

337. Executor when to deliver legacies.—An executor or administrator is not bound to pay or deliver any legacy until the expiration of one year from the testator's death.

Illustration

A by his will directs his legacies to be paid within six months after his death. The executor is not bound to pay them before the expiration of a year.

The Indian Evidence Act, 1872 [Repealed]

PART 2 — ON PROOF

CHAPTER 5 — OF DOCUMENTARY EVIDENCE

Section 68. Proof of execution of document required by law to be attested

68. Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

1[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]

The Transfer of Property Act, 1882

Chapter 1. Preliminary

Section 3. Interpretation clause

3. Interpretation clause.—In this Act, unless there is something repugnant in the subject or context,—

"immoveable property".—"immoveable property" does not include standing timber, growing crops or grass;

"instrument".—"instrument" means a non-testamentary instrument;

1["attested", in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary;]

"registered".—"registered" means registered in 2[3[any part of the territories] to which this Act extends] under the 4law for the time being in force regulating the registration of documents;

"attached to the earth".—"attached to the earth" means—

(a) rooted in the earth, as in the case of trees and shrubs;

(b) imbedded in the earth, as in the case of walls or buildings; or

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached;

5["actionable claim" means a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent;]

6["a person is said to have notice" of a fact when he actually knows that fact, or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it.

Explanation I.—Where any transaction relating to immoveable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or, 7[where the property is not all situated in one sub-district, or where the registered instrument has been registered under sub-section (2) of Section 30 of the Indian Registration Act, 1908 (16 of 1908), from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose sub-district any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated:]

Provided that—

(1) the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908 (16 of 1908) and the rules made thereunder,

(2) the instrument 8[or memorandum] has been duly entered or filed, as the case may be, in books kept under Section 51 of that Act, and

(3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under Section 55 of that Act.

Explanation II.—Any person acquiring any immoveable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

Explanation III.—A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material:

Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud.]

General Observation

(1) This extract is taken from *H. Venkatachala Iyenar vs B. N. Thimmajamma and Ors.*, 1958 SCC OnLine SC 31 : 1959 Supp (1) SCR 426 : AIR 1959 SC

1. The learned trial Judge put the onus of proving the will on the appellant but he observed that "the proof that is necessary to establish a will is not an absolute or a conclusive one. What is required is only such proof as would satisfy a prudent man".

2. 1958 SCC OnLine SC 31 : 1959 Supp (1) SCR 426 : AIR 1959 SC 443 In the Supreme Court of India (BEFORE T.L. VENKATARAMA AYYAR, P.B. GAJENDRAGADKAR AND A.K. SARKAR, JJ.) H. VENKATACHALA IYENGAR ... Appellant; Versus B.N. THIMMAJAMMA AND OTHERS ... Respondent. Civil Appeal No. 18 of 1955*, decided on November 13, 1958

Para 18. What is the true legal position in the matter of proof of wills? It is well-known that the proof of wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. **Sections 67 and 68 of the Evidence Act** are relevant for this purpose. Under **Section 67**, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for **proving such a handwriting under Sections 45 and 47 of the Act** the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. **Section 68** deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, **Sections 59 and 63 of the Indian Succession Act** are also relevant. **Section 59**

provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. **Section 63** requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

Para 19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour

of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature, in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tendsto make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.

21. Apart from the suspicious circumstances to which we have just referred, in some cases the wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with wills that present such suspicious circumstances that decisions of English courts often mention the test of the satisfaction of judicial conscience. It may be that the

reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word "conscience" in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasizes that, in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive.

22. It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the mind of the court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. It is quite true that, as observed by Lord Du Parcq in Harmes v. Hinkson1 "where a will is charged with suspicion, the rules enjoin a reasonable scepticism, not an obdurate persistence in disbelief. They do not demand from the Judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth". It would sound platitudinous to say so, but it is nevertheless true that in discovering truth even in such cases the judicial mind must always be open though vigilant, cautious and circumspect.

23. It is in the light of these general considerations that we must decide whether the appellant is justified in contending that the finding of the High Court against him on the question of the valid execution of the will is justified or not. It may be conceded in favour of the appellant that his allegation that Lakshmamma has put her signatures on the will at five places is proved; that no doubt is a point in his favour. It may also be taken as proved that Respondent 1 has failed to prove that Lakshmamma was unconscious at the time when the will is alleged to have been executed. It is true she was an old woman of 64 years and had

been ailing for some time before the will was executed. She was not able to get up and leave the bed. In fact she could sit up in bed with some difficulty and was so weak that she had to pass stools in bed. However, the appellant is entitled to argue that, on the evidence, the sound and disposing state of mind of Lakshmamma is proved. Mr Iyengar, for the appellant, has strongly urged before us that, since these facts are established, the court must presume the valid execution of the will and in support of his contention he has invited our attention to the relevant statements on the point in the text books dealing with the subject. Jarman on Wills2 says that "the general rule is 'that the onus probandi lies in every case upon the party propounding a will and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator'". He adds that, "if a will is rational on the face of it, and appears to be duly executed, it is presumed, in the absence of evidence to the contrary, to be valid". Similarly, Williams on Executors and Administrators3 has observed that, "generally speaking, where there is proof of signature, everything else is implied till the contrary is proved; and evidence of the will having been read over to the testator or of instructions having been given is not necessary". On the other hand, Mr Viswanatha Sastri, for Respondent 1, contends that the statements on which the appellant has relied refer to wills which are free from any suspicions and they cannot be invoked where the execution of the will is surrounded by suspicious circumstances. In this connection, it may be pertinent to point out that, in the same text books, we find another rule specifically mentioned. "Although the rule of Roman Law", it is observed in Williams, "that **'Qui se scripsit haeredem'** could take no benefit under a will does not prevail in the law of England, yet, where the person who prepares the instrument, or conducts its execution, is himself benefited by its dispositions, that is a circumstance which ought generally toexcite the suspicion of the court, and calls on it to be vigilant and zealous in examining the evidence in support of the instrument in favour of which it ought not to pronounce, unless the suspicion is removed, and it is judicially satisfied that the paper does express the true will of the deceased"4.

24. It would, therefore, be necessary at this stage to decide whether an execution of the will in the present case is surrounded by any suspicious circumstances. Does the will appear to be on the whole an improbable, unnatural and unfair instrument as held by the High Court? That is the

first question which falls to be considered. We have already indicated that the preamble to the will contains many argumentative recitals. Indeed it would not be unjust to say that the preamble purports to meet by anticipation the main objections which were likely to be raised to the competence of Lakshmamma to make a will in regard to the properties covered by it. The preamble in great detail makes out a case that the properties received by the testatrix and her husband under the gift deed (Ex. D) devolved upon her by survivorship after her husband's death, a plea which has not been accepted even by the trial court. It also seeks to prove that the subsequent purchases made by her husband were in law the joint acquisitions of her husband and herself, a point on which the two courts below have differed. It sets out in detail the theory that the son of the testatrix has lost his right, title and interest in the properties which devolved on him after his father's death because he had alienated more than his share in the said properties during his lifetime; and it even suggests that during his illness and to help him to build a house in Mysore the testatrix had advanced him money from her separate funds, pleas which have not been accepted by either court below. It seems to us that the elaborate and well-considered recitals which have been deliberately introduced in the preamble cannot possibly be the result of corresponding instructions given by the testatrix to the appellant for preparing the draft of her will. In the context these recitals sound artificial and unnatural and some of them at any rate are untrue. The draftsman of the will has tried to be overwise and that itself is a very serious infirmity in the appellant's case that the instrument represents the last will and testament of the testatrix. Take for instance the statement in the will that the testatrix had advanced Rs 3000 to her son to enable him to purchase a house at Mysore. By itself this is not a matter of very great importance; but this detail has been introduced in the will in order to make out a strong case that all the properties mentioned in the will were the separate properties of the testatrix and so it would be relevant to consider what the appellant himself has to say about this recital. In regard to the Rs 3000 in cross-examination the appellant has stated that Mr B.G. Ramakrishna Iyengar had sent this amount to thehusband of Respondent 1 in 1942 or so. It was sent by cheque on Mysore Bank. The appellant then added that the husband of Respondent 1 had deposited this amount with B.G. Ramakrishna Iyengar's father-in-law after selling Goudanahalli lands with intent to purchase lands at Mysore; so that the claim made in the will that the

testatrix had given this amount to her son out of her separate funds is inaccurate. The manner in which the several recitals have been made in the will amounts to a suspicious circumstance which must be satisfactorily explained by the appellant.

25. The next circumstance which calls for an explanation is the exclusion of the grand children of the testatrix from any substantial legacies under the will. It is true that a bequest of Rs 500 each is given to them but that can hardly be regarded as fair or just to these children. It was, however, urged by Mr Iyengar before us that Narayana Iyengar had, during his lifetime, given lands to his sister's daughters. He had also spent considerable amounts on the occasion of their marriages and had given them each valuable ornaments. In this connection, he referred us to certain documents exhibited under Ex. 'G' and attempted to show that the lands given to his sisters' daughters were of the value of Rs 1500 to Rs 2000 each. Apart from the fact that the value of these lands is not clearly proved nor are the circumstances under which they came to be gifted to the donees, we do not think it would be possible to accept the argument that even with these gifts the testatrix would not have thought of making more substantial bequests to her grandchildren. It is not suggested that the relations between the testatrix and these grandchildren were not cordial and affectionate and so it would be reasonable to assume that they would have been the objects of her bounties in a more liberal measure in ordinary circumstances.

26. There is one more point which must be considered in this connection. As we have already mentioned the appellant's sons have received substantial bounties under the will. Are these bequests probable and natural? It must be remembered that the appellant came into the family of Annaji by adoption long after the testatrix was married. The record does not show that the testatrix was on such affectionate terms with the appellant that she would have preferred to make a bequest to his sons rather than to her own grandchildren. Indeed the appellant admitted that, at the relevant time, he was in straightened circumstances and was indebted to the extent of nearly Rs 30,000; and it does not appear that when he was faced with financial difficulties of this magnitude he asked for or obtained any assistance from his adoptive sister. That is why the bequests to the appellant's sons also amount to a suspicious circumstance which must be clearly explained by the

appellant. We cannot easily reject the argument urgedon behalf of Respondent 1 that the bequests have been made in the names of the appellant's sons because, if they had been made in his own name, the properties bequeathed would have been attached and sold at the instance of his numerous creditors. We do not propose to measure precisely the value of the properties bequeathed to the appellant's sons. It would be enough to say that the said bequests are by no means insignificant or unsubstantial. Therefore, we are unable to see how the appellant can successfully challenge the finding of the High Court that some of the broad features of the will appear to be improbable and unfair; and if that be so, the appellant will have to remove the suspicions arising from these features before he can persuade the court to accept the instrument as the last will and testament of the testatrix.

27. In this connection it is necessary to bear in mind that the appellant whose sons have received the said bequests has admittedly taken a very prominent part in bringing about the execution of the will. He has prepared the draft and it was at his dictation that the scribe wrote the will. Indeed on the important question as to when and how instructions were given by the testatrix and whether or not in preparing the draft those instructions have been faithfully carried out, the only evidence adduced in the case is that of the appellant and no one else. Thus, the very important, if not the decisive, part played by the appellant in the execution of the will cannot at all be disputed in the present case.

29. According to the decisions in Fulton v. Andrew5 "those who take a benefit under a will, and have been instrumental in preparing or obtaining it, have thrown upon them the onus of showing the righteousness of the transaction". "There is however no unyielding rule of law (especially where the ingredient of fraud enters into the case) that, when it has been proved that a testator, competent in mind, has had a will read over to him, and has thereupon executed it, all furtherenquiry is shut out". In this case, the Lord Chancellor, Lord Cairns, has cited with approval the well-known observations of Baron Parke in the case of Barry v. Butlin6. The two rules of law set out by Baron Parke are:"first, that the onus probandi lies in every case upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator"; "the second is, that, if a party writes or prepares a will under which he takes a

benefit, that is a circumstance that ought generally to excite the suspicion of the court and calls upon it to be vigilant and zealous in examining the evidence in support of the instrument in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased". It is hardly necessary to add that the statement of these two rules has now attained the status of a classic on the subject and it is cited by all text books on wills. The will propounded in this case was directed to be tried at the Assizes by the Court of Probate. It was tried on six issues. The first four issues referred to the sound and disposing state of the testator's mind and the fifth to his knowledge and approval of the contents of the will. The sixth was whether the testator knew and approved of the residuary clause; and by this last clause the propounders of the will were made the residuary legatees and were appointed executors. Evidence was led at the trial and the Judge asked the opinion of the jurors on every one of the issues. The jurors found in favour of the propounders on the first five issues and in favour of the opponents on the sixth. It appears that no leave to set aside the verdict and enter judgment for the propounders notwithstanding the verdict on the sixth issue was reserved; but when the case came before the Court of Probate a rule was obtained to set aside the verdict generally and have a new trial or to set aside the verdict on the sixth issue for misdirection. It was in dealing with the merits of the finding on the sixth issue that the true legal position came to be considered by the House of Lords. The result of the decision was that the rule obtained for a new trial was discharged, the order of the Court of Probate of the whole will was reversed and the matter was remitted to the Court of Probate to do what was right with regard to the qualified probate of the will.

30. The same principle was emphasized by the Privy Council in Vellasawmy Servai v. Sivaraman Servai, where it was held that, where a will is propounded by the chief beneficiary under it, who has taken a leading part in giving instructions for its preparation and in procuring its execution, probate should not be granted unless the evidence removes suspicion and clearly proves that the testator approved theWill.

31. In Sarat Kumari Bibi v. Sakhi Chand, the Privy Council made it clear that "the principle which requires the propounder to remove suspicions from the mind of the Court is not confined only to cases where the propounder takes part in the execution of the will and receives benefit

under it. There may be other suspicious circumstances attending on the execution of the will and even in such cases it is the duty of the propounder to remove all clouds and satisfy the conscience of the court that the instrument propounded is the last will of the testator". This view is supported by the observations made by Lindley and Davey, L. JJ., in Tyrrell v. Painton. "The rule in Barry v. Butlin, Fulton v. Andrew and Brown v. Fisher, said Lindley, L.J., "is not in my mind confined to the single case in which the will is prepared by or on the instructions of the person taking large benefits under it but extends to all cases in which circumstances exist which excite the suspicions of the court".

32. In Rash Mohini Dasi v. Umesh Chunder Biswas it appeared that though the will was fairly simple and not very long the making of it was from first to last the doing of Khetter, the manager and trusted adviser of the alleged testator. No previous or independent intention of making a will was shown and the evidence that the testator understood the business in which his adviser engaged him was not sufficient to justify the grant of probate. In this case the application for probate made by the widow of Mohim Chunder Biswas was opposed on the ground that the testator was not in a sound and disposing state of mind at the material time and he could not have understood the nature and effect of its contents. The will had been admitted to the probate by the District Judge but the High Court had reversed the said order. In confirming the view of the High Court the Privy Council made the observations to which we have just referred.

33. The case of **Shama Charn Kundu v. Khettromoni Dasi** on the other hand, was the case of a will the execution of which was held to be not surrounded by any suspicious circumstances. Shama Charn, the propounder of the will, claimed to be the adopted son of the testator. He and three others were appointed executors of the will. The testator left no natural son but two daughters and his widow. By his will the adopted son obtained substantial benefit. The probate of the will with the exception of the last paragraph was granted to Shama Charn by the trial Judge; but, on appeal the application for probate was dismissed by the High Court on the ground that the suspicions attending on the execution of the will had not been satisfactorily removed by Shama Charn. The matter was then taken before the Privy Council; and Their Lordships held that, since the adoption of Shama Charn was proved, the fact that he

took part in the execution of the will and obtainedbenefit under it cannot be regarded as a suspicious circumstance so as to attract the rule laid down by Lindley, L.J., in Tyrrell v. Painton9. In Bai Gungabai v. Bhugwandas Valji13 the Privy Council had to deal with a will which was admitted to probate by the first court, but on appeal the order was varied by excluding therefrom certain passages which referred to the deed-poll executed on the same day by the testator and to the remuneration of the solicitor who prepared the will and was appointed an executor and trustee thereof. The Privy Council held that "the onus was on the solicitor to satisfy the court that the passages omitted expressed the true will of the deceased and that the court should be diligent and zealous in examining the evidence in its support, but that on a consideration of the whole of the evidence (as to which no rule of law prescribed the particular kind required) and of the circumstances of the case the onus was discharged". In dealing with the question as to whether the testator was aware that the passages excluded by the appeal court from the probate formed part of the instrument, the Privy Council examined the evidence bearing on the point and the probabilities. In conclusion Their Lordships differed from the view of the appeal court that there had been a complete failure of the proof that the deed-poll correctly represented the intentions of the testator or that he understood or approved of its contents and so they thought that there were no grounds for excluding from the probate the passages in the will which referred to that deed. They, however, observed that it would no doubt have been more prudent and business like to have obtained the services of some independent witnesses who might have been trusted to see that the testator fully understood what he was doing and to have secured independent evidence that clause 26 in particular was called to the testator's attention. Even so, Their Lordships expressly added that in coming to the conclusion which they had done they must not be understood as throwing the slightest doubt on the principles laid down in Fulton v. Andrew5 and other similar cases referred to in the argument.

34. In Perera v. Perera14 it was held that when the testator is of sound mind when he gives instructions for a will but at the time of signature accepts the instrument drawn in pursuance thereof without being able to follow its provisions, he must be deemed to be of sound mind when it is executed. The will of Perera with which the court was concerned in this case was signed with a cross by the testator in the presence of five

witnesses present at the same time who duly subscribed the will in the presence of the testator. The Notary Public was also among the persons present but he did not attest the will. No objection was taken in the court of first instance on this ground, but, in the Court of appeal, the said objection was raised and it was held thatthe will was invalid on the ground that though the Notary Public was present he had not attested the instrument. The case was then taken to the Supreme Court in its collective capacity on review preparatory to an appeal to Her Majesty. The Supreme Court reversed the judgment under appeal and then proceeded to determine the case on the merits. The Court held by a majority decision that the testator was of sound and disposing state of mind and restored the order of the Primary Judge. Against this decision there was an appeal. In this case, the evidence about the instructions given by the testator was very clear; and there was not the slightest reason for disbelieving the statement of Gooneratne that he had drawn the will faithfully in accordance with the details of instructions given to him. The will prepared from the said instructions seemed to be fair and just disposition of the testator's property. There was no concealment about the preparation of the will. The instructions were given on June 1 and it was in the evening of June 4 that the will was brought to the testator for execution. It is on these facts that it was held, following the observations of Sir James Hannen in Parker v. Felgate15 that if a person has given instructions to a solicitor to make a will and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good will if executed by the testator is that he should be able to think thus far:“If I gave my solicitor instructions to prepare a will making certain dispositions about my property I have no doubt that he has given effect to my intention and I accept the document which is put before me as carrying it out”. We would again like to emphasize that the evidence about the instructions was very clear and definite in this case and it was also clearly established that the will which was just and fair was executed faithfully in accordance with the said instructions given by the testator. In such a case whether or not the will should be admitted to probate would depend upon the opinion which the court may form about the relevant evidence adduced in support of the will. It would be difficult to deduce any principle from this decision and to seek to apply it to other cases without reference to their facts.

35. The last case to which reference must be made is the decision of the Privy Council in Harmes v. Hinkson1. It appears that, in this case, the testator George Harmes died in the city of Regina on April 4, 1941. Two days later Mr Hinkson brought to the manager of the Canada Permanent Trust Company at its office in Regina a document which purported to be the will of the said Harmes. It was dated April 3, 1941, and named the Trust Company as executor. Under the will Mr Hinkson by a devise and bequest of the residue was to benefit to a sum of more than £ 50,000. Mr Hinkson was by profession a barrister and solicitor and had drawn the will with no witness present until after the body of the document was complete. Then two nurses were called in to witnessits due execution. The learned Judge of the Surrogate Court, after a lengthy trial affirmed the will and decreed probate in solemn form. On appeal, by a majority decision the order of the trial court was reversed. Then there was a further appeal to the Supreme Court of Canada. It was heard by five learned Judges. By a majority (Hudson, J., alone dissenting) the appeal was allowed and the decree of the Surrogate Court was restored. Against this decision the appellant obtained special leave to appeal to His Majesty-in-Council and it was urged on his behalf that, since the document was charged with suspicion from the outset, probate should not have been granted to the respondent Hinkson. The Privy Council did not accept this contention and dismissed the appeal. It was in dealing with the appellant's contention about the suspicions surrounding the execution of the will that Lord Du Parcq made the observations which we have already quoted. Prima facie the facts on which the appellant relied were strong enough; but the question which according to Their Lordships fell to be decided in the appeal was whether the learned trial Judge's decision on the facts was erroneous and so manifestly erroneous that an appellate court ought to set it aside. Their Lordships then referred with approval to the principles which had been frequently enunciated as to the respect which the appellate court ought to pay to the opinion which a Judge who has watched and listened to the witness has formed as to their credibility (Powell v. Streatham Manor Nursing Home16. Their Lordships then briefly referred to the evidence led in the case and observed that it was impossible for them judging only from the printed page to decide between the various opinions of Mr Hinkson's character which its perusal may leave open for acceptance by different minds. In the result they came to the conclusion in agreement with the Supreme Court that the trial court's decision on the facts must stand. It would

thus be noticed that the decision of the Privy Council proceeded more on the basis that there was no justification for interfering with a finding of fact recorded by the trial Judge particularly when the said finding rested on his appreciation of the evidence given by several witnesses before him. In this connection it is significant to note that the allegation of the appellant that Mr Hinkson had exercised undue influence on the testator was repelled by the Privy Council with the observation that their acceptance of the Judge's findings of fact leaves them no alternative but to reject it. Thus this decision merely serves to illustrate the importance which the Privy Council attached to the finding of fact recorded by the trial court in this case.

36. It is in the light of these decisions that the appellant wants us to consider the evidence which he has adduced in the present case. It would be convenient to begin with the appellant's story about the instructions given by the testatrix for preparing the will. In the plaintthe appellant has referred to the sudden illness of the testatrix at Mandya and it is alleged that when she took ill the testatrix sent for him with the obvious intention of making arrangements regarding her properties. Accordingly when he met her at Mandya she explained all her intentions to him in the matter of disposing all her properties and her rights thereto. In other words, the case made out in the plaint clearly and specifically is that when the testatrix was ill at Mandya she sent for the appellant and gave him instructions for preparing a draft of her will. However, when the appellant gave evidence he made a material improvement in his story. According to his evidence, the appellant had received instructions from the testatrix a year before the will was actually drafted. It was then that the testatrix had given him the gift deed (Ex. D) and asked him to prepare the draft. Consistently with this new version the appellant has added in his evidence that when he met her at Mandya during her illness she reminded him that she had asked him to make a will for quite some time and she insisted that the draft should be prepared without any delay. In our opinion, the evidence given by the appellant on this point is clearly an after-thought and his story that he had received previous instructions cannot be accepted as true. Besides, it is somewhat remarkable that, on both the occasions when the testatrix talked to the appellant and gave instructions to him, no one else was present; and so the proof of this part of the appellant's case rests solely on his own testimony. If the testatrix had really thought of making a will

for over a year before it was actually executed, it is unlikely that she would not have talked about it to other relatives including Kalbagal with whom she was actually staying at the material time.

39. In this connection we would like to add that the learned trial Judge appears to have misdirected himself in law inasmuch as he thought that the proof of the signature of the testatrix on the will raised a presumption that the will had been executed by her. In support of this view the learned Judge has referred to the decision of the Calcutta High Court in Surendra Nath Chatterji v. Jahnavi Charn Mukerji17. In this case no doubt the Calcutta High Court has held that on the proof of the signature of the deceased or his acknowledgment that he has signed the will he will be presumed to have known the provisions of the instrument he has signed; but Mr Justice B.B. Ghose, in his judgment, has also added that the said presumption is liable to be rebutted by proof of suspicious circumstances and that undoubtedly is the true legal position. What circumstances would be regarded as suspicious cannot be precisely defined or exhaustively enumerated. That inevitably would be a question of fact in each case. Unfortunately the learned trial Judge did not properly assess the effect of suspicious circumstances in the present case to which we have already referred and that has introduced a serious infirmity in his final conclusion. Incidentally we may also refer to the fact that the appellant obtained a power of attorney from the testatrix on the same day; and that has given rise to the argument that the appellant was keen on taking possession and management of the properties under his control even before the death of the testatrix. There is also another circumstance which may be mentioned and that is that the Sub-Registrar, in whose presence the document was registered on the same day, has not been examined though he was alive at the date of the trial. On these facts then we are inclined to hold that the High Court was justified in reversing the finding of the trial court on the question of the due and valid execution of the will.

(2) This extract is taken from *Rani Pnrnima Debi v. Kumar Khagendra Narayan Deb*, 1961 SCC OnLine SC 89 : (1962) 3 SCR 195 : AIR 1962 SC 567

K.N. WANCHOO, J.— FACTUAL MATRIX : This is an appeal by special leave against the judgment of the Assam High Court in a probate matter. The main appellant is Rani Purnima Debi widow of Kumar Chandra Narayan Deb (hereinafter called "the testator"), who died in June 1946. The second appellant is the testator's married daughter. An application was made by Kumar Khagendra Narayan Deb (hereinafter referred to as "the respondent") before the District Delegate, Gauhati in August 1946 for grant of letters of administration with the will annexed. The case of the respondent was that the testator had executed a will on December 29, 1943, in favour of the respondent by which the testator gave his entire property to the respondent subject to the respondent's maintaining the testator's widow and sister.

Objections were filed on behalf of the appellants to the grant of letters of administration on the basis of the will propounded by the respondent and three main grounds were urged in that connection, namely (*i*) that the will was not duly and legally executed and attested, (*ii*) that the testator had no sound disposing mind at the time he executed the will, and (*iii*) that the will was the outcome of undue influence and coercion exercised by the respondent. While the application of the respondent was pending, another application for probate of another will said to have been executed by the testator a few months before his death was made by Kumar Dwijendra Narayan Deb. The appellants objected to that will also on the same grounds and further added that that will was a forgery. Dwijendra Narayan Deb did not dispute the execution of the will in favour of the respondent but contended that that will had been revoked by the later will in his favour. The respondent, however, contended that the will in favour of Kumar Dwijendra Narayan Deb was a forgery.

2. The two suits arising out of the two applications for probate were eventually tried together by the Subordinate Judge at Gauhati. He held that the will propounded by Kumar Dwijendra Narayan Deb was not genuine and therefore dismissed his application. As to the will propounded by the respondent it was held that it was duly executed and attested and was made by the testator at a time when he had sound disposing state of mind and that it was not made under any undue influence and coercion. Consequently the

application of the respondent was allowed and letters of administration with the copy of the will annexed were ordered to be issued to him.

3. This was followed by three appeals to the High Court. One of the appeals was by the present appellants and they contested the issue of letters of administration in favour of the respondent; the other two appeals were by Kumar Dwijendra Narayan Deb. By one appeal he contested the issue of letters of administration to the respondent and by the other he contested the finding of the Subordinate Judge that the will propounded by him was not genuine. The three appeals were heard by the High Court together and it upheld the finding of the trial court that the will in favour of Dwijendra Narayan was not genuine; in consequence, the two appeals filed by him were dismissed. This order of the High Court has become final and we are not concerned in the present appeal with the will propounded by Dwijendra Narayan. In the appeal by the appellants, the High Court upheld the findings of the trial court and dismissed the appeal. The High Court was conscious of the fact that there were certain suspicious circumstances attending the execution of the will in favour of the respondent; but it held that as the will propounded by the respondent was later registered in January 1944, the suspicion attending the execution of the will was dispelled by the fact of registration. The High Court therefore held that due execution and attestation of the will had been proved and it was also proved that the testator was of sound disposing state of mind at the time of the execution and that there was no undue influence or coercion exercised on the testator by the respondent in connection with the execution of the will.

4. The appeal before the High Court was heard by a Division Bench and separate but concurring judgments were delivered by the learned Judges composing the Bench. Ram Labhaya, J. who delivered the main judgment was not much impressed by the alleged suspicious circumstances and held that whatever suspicion there might be was dispelled by the fact of the registration of the will later. The learned Chief Justice, who was the other Judge, and who substantially agreed with Ram Labhaya, J. was more impressed by the existence of suspicious circumstances relating to the execution and attestation of the will; even so he held that the registration of the will was a complete answer to the suspicious circumstances which undoubtedly existed in this case. In the event both the learned Judges agreed in dismissing the appeal. Eventually the appellants came to this Court by way of special leave which was granted; and that is how the matter has come up before us.

Ratio : 5. Before we consider the facts of this case it is well to set out the principles which govern the proving of a will. This was considered by this Court in *H. Venkatachala Iyengar* v. *B.N. Thimmajamma* [1959 Supp (1) SCR 426] . It was observed in that case that the mode of proving a will did not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by Section 63 of the Indian Succession Act. The onus of proving the will was on the propounder and in the absence of suspicious circumstances surrounding the execution of the will proof of testamentary capacity and signature of the testator as required by law was sufficient to discharge the onus. Where, however, there were suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the Court before the will could be accepted as genuine. If the caveator alleged undue influence, fraud or coercion, the onus would be on him to prove the same. Even where there were no such pleas but the circumstances gave rise to doubts, it was for the propounder to satisfy the conscience of the Court. Further, what are suspicious circumstances was also considered in this case. The alleged signature of the testator might be very shaky and doubtful and evidence in support of the propounder's case that the signature in question was the signature of the testator might not remove the doubt created by the appearance of the signature. The condition of the testator's mind might appear to be very feeble and debilitated and evidence adduced might not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will might appear to be unnatural, improbable or unfair in the light of relevant circumstances; or the will might otherwise indicate that the said dispositions might not be the result of the testator's free will and mind. In such cases, the Court would naturally expect that all legitimate suspicions should be completely removed before the document was accepted as the last will of the testator. Further, a propounder himself might take a prominent part in the execution of the will which conferred on him substantial benefits. If this was so it was generally treated as a suspicious circumstance attending the execution of the will and the propounder was required to remove the doubts by clear and satisfactory evidence. But even where there were suspicious circumstances and the propounder succeeded in removing them, the Court would grant probate, though the will might be unnatural and might cut off wholly or in part near relations.

Suspicious Circumstances -

7. Let us now turn to the facts relating to the execution of this will. We have already pointed out that the High Court was of the view that there were suspicious circumstances attending the execution of the will and that it was an unnatural will. The testator left behind him his widow and his married daughter (who are appellants before us) and an unmarried sister who was dependent upon him. Besides these, the testator had a number of other relations who were much nearer to him than the respondent. Even if we leave out of account the married daughter and the other nearer relations, the widow and the sister were certainly expected to be properly provided for by the testator. It is not in dispute that the relations between the testator and his wife and sister were good. In these circumstances we should have expected something better than what is provided in the will for these two. All that the will says is that the wife and the sister would be suitably maintained by the respondent during their lifetime. No amount is specified which should be given to these two ladies as maintenance and no charge is created on the properties left by the testator which were considerable. In effect, the two ladies were left to the tender mercies of the respondent in the matter of their maintenance. Further the result of this will is that the daughter would be completely disinherited. The testator had a number of children but all had died many years before and only one daughter was alive at the time of his death. She was married and on behalf of the propounder it is said that the relations between the testator and her husband were not very happy. The evidence, however, does not show that the relations between the testator and his son-in-law were particularly strained at the time of the execution of the will. In any case there is no satisfactory evidence to show that relations between the testator and his daughter were bad, even if the relations between him and his son-in-law were not of the best. In the circumstances we should have expected the testator to make some provision for the daughter, particularly when it is said that she was not well-off. There is no doubt therefore that the will is most unnatural and that is a suspicious circumstance which must be satisfactorily explained before the respondent can get letters of administration.

8. Another suspicious circumstance is that the respondent gets the sole benefit under the will subject to the maintenance of the wife and the sister and he was certainly taking part in the execution of the will on the date it was executed. In such circumstances the respondent was required to remove the

said suspicion by clear and satisfactory evidence. Whether he has done so or not will be considered by us later.

9. Another suspicious circumstance is that the signature of the testator does not appear to be his usual signature. That is why a lot of questions were put to the witnesses whether the testator signed the will with his left hand or right hand and evidence was also given that the right hand of the testator had been injured sometime before.

10. Another suspicious circumstance is that it has been proved in this case that the testator used to sign blank papers for use in his cases in court and used to send them to his lawyer through his servants and these papers could be in the possession of Rameswar Sarma, the lawyer of the testator, who has appeared as a witness to prove the will and who was, according to his evidence, consulted by the testator in this matter. Such papers could also be found in the possession of the testator's mukhtars. Therefore it was possible to manufacture a will on papers already signed by the testator; and that is certainly a suspicious circumstance which had to be overcome in this case.

11. Lastly, the High Court has noticed that the signature of the testator is not in the same ink and may not be with the same pen with which the body of the will is written. The difference in ink may not ordinarily be a matter for serious suspicion; even so it has to be explained in the peculiar circumstances of this case when blank papers containing the testator's signatures were available.

Ratio: - 23. There is no doubt that if a will has been registered, that is a circumstance which may, having regard to the circumstances, prove its genuineness. But the mere fact that a will is registered will not by itself be sufficient to dispel all suspicion regarding it where suspicion exists, without submitting the evidence of registration to a close examination. If the evidence as to registration on a close examination reveals that the registration was made in such a manner that it was brought home to the testator that the document of which he was admitting execution was a will disposing of his property and thereafter he admitted its execution and signed it in token thereof, the registration will dispel the doubt as to the genuineness of the will. But if the evidence as to registration shows that it was done in a perfunctory manner, that the officer registering the will did not read it over to the testator or did not

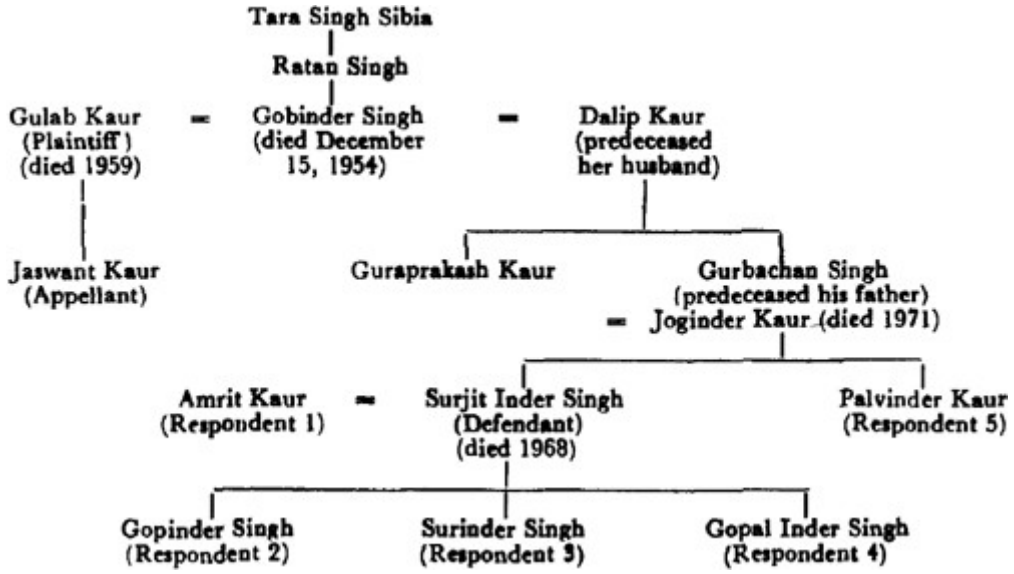
bring home to him that he was admitting the execution of a will or did not satisfy himself in some other way (as, for example, by seeing the testator reading the will) that the testator knew that it was a will the execution of which he was admitting, the fact that the will was registered would not be of much value. It is not unknown that registration may take place without the executant really knowing what he was registering. Law reports are full of cases in which registered wills have not been acted upon : (see, for example, *Vellasamay Servai* v. *L. Sivaraman Servai* [(1930) ILR 8 Ran 179] , *Surendra Nath Lahiri* v. *Jnanendra Nath Lahiri* [AIR 1932 Cal 574] and *Girji Datt Singh* v. *Gangotri Datt Singh* [AIR 1955 SC 346] . Therefore, the mere fact of registration may not by itself be enough to dispel all suspicion that may attach to the execution and attestation of a will; though the fact that there has been registration would be an important circumstance in favour of the will being genuine if the evidence as to registration establishes that the testator admitted the execution of the will after knowing that it was a will the execution of which he was admitting.

24. The question therefore is whether in the circumstances of the present case the evidence as to registration discloses that the testator knew that he was admitting the execution of a will when he is said to have put down his signature at the bottom of the will in the presence of Arabali. We have scrutinized that evidence carefully and we must say that the evidence falls short of satisfying us in the circumstances of this case that the testator knew that the document the execution of which he was admitting before Arabali and at the bottom of which he signed was his will. Therefore we are left with the bald fact of registration which in our opinion is insufficient in the circumstances of this case to dispel the suspicious circumstances which we have enumerated above. We are therefore not satisfied about the due execution and attestation of this will by the testator and hold that the propounder has been unable to dispel the suspicious circumstances which surround the execution and attestation of this will. In the circumstances, no letters of administration in favour of the respondent can be granted on the basis of it.

(3) This extract is taken from *Jaswant Kaur v. Amrit Kaur*, (1977) 1 SCC 369 : 1976 SCC OnLine SC 368 at page 371

Y.V. CHANDRACHUD, J.— Sardar Gobinder Singh Sibia who was possessed of a large estate died on December 15, 1954 at the age of about 70. He had taken two wives, Gulab Kaur and Dalip Kaur. The story of his life follows the familiar pattern — the pretext of a disagreement with the unwanted wife, special favours for the favourite and jealous rivalries between the children born of the two.

2. The following pedigree will facilitate a better understanding of the issues involved in the case:



After the birth of the appellant Jaswant Kaur, Gulab Kaur started living or as the story goes, was compelled to live with her parents. Dalip Kaur had given birth to a daughter Guraprakash Kaur and a son Gurbachan Singh. Gurbachan Singh died during the lifetime of his father Gobinder Singh, leaving behind his widow Joginder Kaur who died in 1971. Gurbachan Singh and Joginder Kaur gave birth to two children, a son Surjit Inder Singh and a daughter Palvinder Kaur. Surjit Inder Singh died in 1968 leaving behind a widow Amrit Kaur and three sons.

3. On May 22, 1956 which was about a year and a half after the death of Sardar Gobinder Singh, his widow Gulab Kaur filed a suit in forma pauperis claiming maintenance @ Rs 1000 per month or in the alternative a one-half

share in the properties left by her husband. Her co-wife's grandson Surjit Inder Singh was the defendant to the suit. He filed his written statement on January 5, 1957 contending that the plaintiff had deserted her husband and that she was neither entitled to maintenance nor to any share in his estate. On these pleadings the trial court struck issues in the suit on February 1, 1957. At the end of her evidence on August 17, 1957 the plaintiff gave up her claim for maintenance and stated that she wanted a one-half share in her husband's estate. The hearing of the suit was adjourned by the learned trial Judge to August 24, for recording defendant's evidence.

4. In the meanwhile, on August 20, the defendant filed an application asking for permission to produce a will stated to have been made by Sardar Gobinder Singh, on November 26, 1945. The learned District Judge, Sangrur, who was then seized of the suit rejected that application and refused to allow the defendant to amend his written statement. That order was, however, set aside in revision by the Punjab High Court which directed the trial court to allow the defendant to amend his written statement and to produce his father's alleged will. On March 8, 1958 the defendant amended his written statement contending that by the will, his father had left almost the entire property to him and that the plaintiff Gulab Kaur was not entitled to any share in the property under the will. In June, 1958 the plaintiff filed a formal application seeking leave to amend her plaint giving up her claim for maintenance and asking for a one-half share in the properties of her deceased husband. Fresh issues were thereafter framed on the basis of the amended pleadings. On March 10, 1959 the plaintiff died and her daughter, Jaswant Kaur, who is the appellant before us, was brought on the record as her legal representative.

5. The suit was tried eventually by the learned Senior Sub-Judge, Sangrur, who by his judgment dated June 29, 1964 decreed it. The learned Judge held that the defendant who set up the will had failed to prove that it was the last will and testament of his grandfather Gobinder Singh and alternatively, that even on the assumption that the will was proved, it must be deemed to have been revoked on account of certain dispositions made by the testator after the making of the will. This alternative conclusion that the will stood revoked by implication is clearly unsupportable and the appellant, who disputes the will, did not urge that consideration before us. The revocation of an unprivileged will is an act only a little less solemn than the making of the will itself and has to

comply with statutory requirements contained in Section 70 of the Succession Act.

6. Holding that the defendant had failed to discharge his onus of proving the will, the trial court granted to the plaintiff a decree for a one-half share in the properties of her husband. In doing this, the court relied on "overwhelming documentary evidence" showing that according to the custom by which the parties were governed, a sonless widow was entitled to a one-half share in the estate of her husband, as an equal sharer with the male progeny born of a co-wife. That the parties were governed in this matter by customary law was "openly conceded" in the trial court, the point of dispute being restricted on this point to the question as to what in fact was the custom. It was common ground before us that if the will goes, the plaintiff will be entitled to a half share in the estate of her husband Gobinder Singh.

8. The defendant who is the principal legatee and for all practical purposes the sole legatee under the will, is also the propounder of the will. It is he who set up the will in answer to the plaintiff's claim in the suit for a one-half share in her husband's estate. Leaving aside the rules as to the burden of proof which are peculiar to the proof of testamentary instruments, the normal rule which governs any legal proceeding is that the burden of proving a fact in issue lies on him who asserts it, not on him who denies it. In other words, the burden lies on the party which would fail in the suit if no evidence were led on the fact alleged by him. Accordingly, the defendant ought to have led satisfactory evidence to prove the due execution of the will by his grandfather Sardar Gobinder Singh.

RATIO: -

9. In cases where the execution of a will is shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and the defendant. What, generally, is an adversary proceeding becomes in such cases a matter of the court's conscience and then the true question which arises for consideration is whether the evidence led by the propounder of the will is such as to satisfy the conscience of the court that the will was duly executed by the testator. It is impossible to reach such satisfaction unless the party which sets up the will offers a cogent and convincing explanation of the suspicious circumstances surrounding the making of the will.

10. There is a long line of decisions bearing on the nature and standard of evidence required to prove a will. Those decisions have been reviewed in an elaborate judgment of this Court in *R. Venkatachala Iyengar* v. *B.N. Thimmajamma* [AIR 1959 SC 443 : 1959 Supp 1 SCR 426] . The Court, speaking through Gajendragadkar, J., laid down in that case the following propositions :

> "1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.
>
> 2. Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by Section 68 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.
>
> 3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.
>
> 4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were

disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5. It is in connection with wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."

SUPICIOUS CIRCUMSTANCES

14. Circumstances are too numerous to mention which throw a cloud of suspicion on the making of the will by Gobinder Singh. The will is alleged to have been made on November 26, 1945 but it did not see the light of the day till August 20, 1957. Being an ambulatory document, it may be granted that there may be no occasion for anyone to know of its existence until the death of the testator on December 15, 1954. But it is understandable that a document by which property worth lakhs of rupees was disposed of should have remained a closely guarded secret from the whole world of intimate friends and relatives, nay, from the sole legatee himself, for over 2½ years after the testator's death. The testator had left behind him a large property and along with it a large amount of litigation which makes it impossible to believe that upon his death in December 1954, no one bothered to go through his papers which would reflect the state and extent of his property. The explanation of the defendant

that he hit upon the will by chance while going through some papers of his grandfather is therefore patently lame and unacceptable.

16. The will has been typed out on both sides of a single foolscap paper and is obviously drafted by a lawyer. No evidence at all has been led as to who drafted the will and who typed it out. The will uses some trite legal jargon but it does not show where it was executed and contains no description whatsoever of any of the extensive properties bequeathed to the defendant.

17. The will has been attested by two persons called Dinshaw H.M. Framjee and Pali Ram. It is intriguing that a person in the position of Sardar Gobinder Singh should choose these two strangers as attesting witnesses to a very solemn and important document. Dinshaw Framjee was a trader in Simla and Pali Ram was his servant. Framjee has stated in his evidence that he did not remember where Gobinder Singh used to stay in Simla, that he did not know for how long he was staying in Simla before the attestation of the will, that he was unable to state whether he had met Gobinder Singh after the attestation of the will and that he was unable to give the approximate time of the day when the will was attested — forenoon, afternoon or evening. Framjee was sure about one thing only, that he had not attested the will at night. He attempted to say that he was on friendly terms with the testator's family but he was unable to give even the approximate ages of the testator's son and daughter. Under the stress of cross-examination, he had to admit eventually that he knew nothing about the testator's family or family affairs.

21. The will is unnatural and unfair in more than one respect. At the time that the will is alleged to have been made, the testator had a daughter Guraprakash Kaur who was born of Dalip Kaur and a daughter-in-law Joginder Kaur, being the widow of the testator's predeceased son Gurbachan Singh who was also born of Dalip Kaur. Gurbachan Singh and Joginder Kaur gave birth to the defendant Surjit Inder Singh and to a daughter Palvinder Kaur. The will contains not even a fleeting reference either to the testator's daughter or the widowed daughter-in-law or to the grand-daughter Palvinder Kaur. It is urged that all of these persons were happily placed in life and it was therefore needless for the testator to provide for them. If that be so, it was equally unnecessary to refer to the appellant Jaswant Kaur who also, it is common ground, has been married happily.

22. The plaintiff Gulab Kaur has been wholly excluded as an heir of the testator for the supposed reason that she had brought disgrace to the Sibia family and that her behaviour was such as would not even bear a mention in the will. Not only that no evidence was led to show any misconduct on the part of Gulab Kaur but the evidence of Jaswant Kaur (PW 2) shows that for about 7 or 8 years prior to 1956 Gulab Kaur had lost her eyesight. One of the issues in the suit, namely, Issue 3, arising from the original pleadings was whether the plaintiff was disentitled to maintenance for the reason that she had deserted her husband. The judgment of the trial court shows that the defendant led no evidence in support of that issue and that during the course of arguments, the defendant's counsel did not press the particular issue. The plaintiff on the other hand led evidence in rebuttal and accepting that evidence the trial court rejected the contention that she had deserted her husband. It seems to us difficult to believe that a person in the position of Sardar Gobinder Singh who was possessed of a large estate, would disinherit so many of his near relatives including his wife Gulab Kaur and shower his bounty on the grandson, to the exclusion of everyone else.

23. Quite a few other circumstances can be mentioned which raise a grave suspicion as regards the making of the will but the circumstances enumerated above are, in our opinion, sufficient to discard the will. The defendant in his evidence has offered no explanation of any of these circumstances. He has totally failed to discharge the heavy onus which lay on him of explaining the suspicious circumstances surrounding the execution of the will and of establishing that the document which he propounded was the last will and testament of his grandfather Gobinder Singh.

25. Frankly, though with respect, it surprises us that the High Court should have accepted the will as genuine. It observes : “It is evident from the above evidence that there are no suspicious circumstances about the execution or the contents of the will”. We could have understood if the High Court were to say that the defendant had given a valid explanation of the suspicious circumstances surrounding the execution of the will. But to say that there is nothing in the case to excite the court's suspicion and to accept the will as genuine on that premise is wholly ununderstandable. The High Court does not refer to a single circumstance out of the many that we have discussed and the operative part of the judgment just recites a few facts mechanically as if there could possibly be no answer to the validity of the will. The High Court has not

referred in its judgment even in passing to the rule as to the burden of proof which applies to testamentary proceedings. If only it had taken the trouble of looking at the decision of this Court in *Iyengar case* which is copiously extracted in the judgment of the trial court, it would have realied what is true duty was in the case.

PROVING EXECUTION OF WILL (S. 63 Succession Act & S.68 ,71 of Evidence Act).

(4) This extract is taken from *Janki Narayan Bhoir v. Narayan Namdeo Kadam*, (2003) 2 SCC 91 : 2002 SCC OnLine SC 1234 at page 95

SHIVARAJ V PATIL, J.— This appeal by special leave is by the defendant questioning the validity and correctness of the impugned judgment and decree passed by the High Court in the second appeal. The respondent herein filed the suit for possession of the suit properties comprised of agricultural land and a house as owner under the will said to have been executed by Honaji Dama Kadam. The trial court, accepting the will on the basis of evidence placed on record, decreed the suit. The District Judge in the regular first appeal set aside the decree passed by the trial court. The High Court in the second appeal by the impugned judgment and decree set aside the judgment of the first appellate court and restored the judgment and decree passed by the trial court.

2. The contentions urged by the learned counsel for the appellant were that the will in question was not proved as required by law, having regard to Section 63 of the Indian Succession Act read with Section 68 of the Indian Evidence Act, 1872 the attestation of the will by two witnesses was not established; the High Court committed an error in treating the scribe as an attesting witness when he did not sign as *animo attestendi*. The evidence of the one attesting witness examined does not establish the attestation of the will by another attesting witness; the other attesting witness though available, was not examined; the High Court committed a serious error in setting aside the judgment of the first appellate court which was based on proper appreciation of evidence in the absence of any substantial question of law that arose for consideration.

3. On the other hand, the learned counsel for the respondent urged that although Section 63 of the Succession Act requires attestation of a will at least by two witnesses but the will could be proved by examining one attesting witness as per Section 68 of the Evidence Act and by leading other evidence as per Section 71 of the Evidence Act. He fairly conceded that the scribe was not and could not be treated as an attesting witness in this case.

ANALYSIS & RATIO

7. We think it appropriate to look at the relevant provisions, namely, Section 63 of the Indian Succession Act, 1925 and Sections 68 and 71 of the Indian Evidence Act, 1872 which read:

Section 63 of the Succession Act

"63. *Execution of unprivileged wills.*—Every testator, not being a soldier employed in an expedition nor engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules—

(*a*)-(*b*)***

(*c*) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

Section 68 of the Evidence Act

"68. *Proof of execution of document required by law to be attested.*—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence:

Provided…."

Section 71 of the Evidence Act

"71. *Proof when attesting witness denies the execution.*—If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence."

8. To say a will has been duly executed the requirements mentioned in clauses (*a*), (*b*) and (*c*) of Section 63 of the Succession Act are to be complied with i.e. (*a*) the testator has to sign or affix his mark to the will, or it has got to be signed by some other person in his presence and by his direction; (*b*) that the signature or mark of the testator, or the signature of the person signing at his direction, has to appear at a place from which it could appear that by that mark or signature the document is intended to have effect as a will; (*c*) the most important point with which we are presently concerned in this appeal, is that the will has to be attested by two or more witnesses and each of these witnesses must have seen the testator sign or affix his mark to the will, or must have seen some other person sign the will in the presence and by the direction of the testator, or must have received from the testator a personal acknowledgement of signature or mark, or of the signature of such other person, and each of the witnesses has to sign the will in the presence of the testator.

9. It is thus clear that one of the requirements of due execution of a will is its attestation by two or more witnesses, which is mandatory.

10. Section 68 of the Evidence Act speaks of as to how a document required by law to be attested can be proved. According to the said section, a document required by law to be attested shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence. It flows from this section that if there be an attesting witness alive capable of giving evidence and subject to the process of the court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the will was that of the testator but must also prove that attestations were also made properly as required by clause (*c*) of Section 63 of the Succession Act. It is true that Section 68 of the Evidence Act does not say that both or all the attesting

witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the will as envisaged in Section 63. Although Section 63 of the Succession Act requires that a will has to be attested at least by two witnesses, Section 68 of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the court. In a way, Section 68 gives a concession to those who want to prove and establish a will in a court of law by examining at least one attesting witness even though the will has to be attested at least by two witnesses mandatorily under Section 63 of the Succession Act. But what is significant and to be noted is that one attesting witness examined should be in a position to prove the execution of a will. To put in other words, if one attesting witness can prove execution of the will in terms of clause (*c*) of Section 63 viz. attestation by two attesting witnesses in the manner contemplated therein, the examination of the other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attestation of a will by him and the other attesting witness in order to prove there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the will by the other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the *execution of the will* does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under Section 63 of the Succession Act. Where one attesting witness examined to prove the will under Section 68 of the Evidence Act fails to prove the due execution of the will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the will by the other witness there will be deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act.

11. Section 71 of the Evidence Act is in the nature of a safeguard to the mandatory provisions of Section 68 of the Evidence Act, to meet a situation where it is not possible to prove the execution of the will by calling the attesting witnesses, though alive. This section provides that if an attesting witness denies or does not recollect the execution of the will, its execution may be proved by other evidence. Aid of Section 71 can be taken only when the attesting witnesses, who have been called, deny or fail to recollect the execution of the document to prove it by other evidence. Section 71 has no application to

a case where one attesting witness, who alone had been summoned, has failed to prove the execution of the will and other attesting witnesses though are available to prove the execution of the same, for reasons best known, have not been summoned before the court. It is clear from the language of Section 71 that if an attesting witness denies or does not recollect execution of the document, its execution may be proved by other evidence. However, in a case where an attesting witness examined fails to prove the due execution of will as required under clause (*c*) of Section 63 of the Succession Act, it cannot be said that the will is proved as per Section 68 of the Evidence Act. It cannot be said that if one attesting witness denies or does not recollect the execution of the document, the execution of will can be proved by other evidence dispensing with the evidence of other attesting witnesses though available to be examined to prove the execution of the will. Yet another reason as to why other available attesting witnesses should be called when the one attesting witness examined fails to prove due execution of the will is to avert the claim of drawing adverse inference under Section 114 Illustration (*g*) of the Evidence Act. Placing the best possible evidence, in the given circumstances, before the Court for consideration, is one of the cardinal principles of the Indian Evidence Act. Section 71 is permissive and an enabling section permitting a party to lead other evidence in certain circumstances. But Section 68 is not merely an enabling section. It lays down the necessary requirements, which the court has to observe before holding that a document is proved. Section 71 is meant to lend assistance and come to the rescue of a party who had done his best, but driven to a state of helplessness and impossibility, cannot be let down without any other means of proving due execution by "other evidence" as well. At the same time Section 71 cannot be read so as to absolve a party of his obligation under Section 68 read with Section 63 of the Act and liberally allow him, at his will or choice to make available or not a necessary witness otherwise available and amenable to the jurisdiction of the court concerned and confer a premium upon his omission or lapse, to enable him to give a go-by to the mandate of law relating to the proof of execution of a will.

12. Turning to the facts of the case on hand, it is evident that only one attesting witness Prabhakar Sinkar, examined in the case, did not prove the execution of the will inasmuch as he did not prove the attestation of the will by the other attesting witness Wagle who though available was not examined. The scribe examined in the case was not an attesting witness, which is clear from the evidence on record and as rightly conceded so by the learned counsel for the respondent before us. Hence, it is unnecessary to go into the question

whether the scribe in this case could or could not be an attesting witness. The evidence of Sinkar, the only attesting witness, does not satisfy the mandatory requirements of Section 68 of the Evidence Act. We are not in a position to accept the contention urged on behalf of the respondent that the evidence of other witnesses, namely, that of the respondent and the scribe could be considered under Section 71 of the Evidence Act. Section 71 has no application when the one attesting witness, who alone has been summoned, has failed to prove the execution of the will and the other attesting witness though available has not been examined. When the document is not proved as mandatorily required under Section 68 of the Evidence Act, the provision of Section 71 of the Evidence Act, which is permissive, and enabling in certain circumstances as discussed above does not help the respondent. **In *Vishnu Ramkrishna* v. *Nathu Vithal* [AIR 1949 Bom 266 : 51 Bom LR 245] Chagla, C.J.,** speaking for the Division Bench in similar circumstances has stated that although Section 63 of the Succession Act requires that a will has to be attested by two witnesses, Section 68 of the Evidence Act permits the execution of the will to be proved by only one attesting witness being called. Where the attesting witness, who is called to prove the execution, is not in a position to prove the attestation of the will by the second witness, the evidence of the witness called falls short of the mandatory requirements of Section 68. Section 71 of the Evidence Act can only be requisitioned when the attesting witnesses who have been called failed to prove the execution of the will by reason of either denying their own signatures or denying the signature of the testator or having no recollection as to the execution of the document. This section has no application when one attesting witness has failed to prove the execution of the will and the other attesting witnesses were available who could prove the execution if they were called.

13. The view taken in *Manki Kaur* v. *Hansraj Singh* [AIR 1938 Pat 301] on which heavy reliance was placed by the learned counsel for the respondent, in our view is not a correct view as to the scope and effect of Section 71 of the Evidence Act. That case related to an action taken on mortgage bond and not on a will. There were four attesting witnesses. One of them was dead, two others, who were called, denied execution. But the absence of the fourth from the Court was not explained. On the facts of that case, the High Court took the view that the execution of the mortgage bond could be proved by other evidence having recourse to Section 71 of the Evidence Act. **In our opinion, the position of law explained in relation to Section 71 of the Evidence Act in**

the judgment of the Bombay High Court aforementioned is a correct view which we approve.

15. Under these circumstances we have no hesitation in holding that the High Court committed a manifest error in reversing the judgment and decree of the first appellate court. In this view the impugned judgment and decree cannot be sustained. Hence, they are set aside. The judgment and decree of the first appellate court are restored. In the result, the suit filed by the respondent-plaintiff shall stand dismissed. There shall be no order as to costs.

(1) This extract is taken from *Rupali Mehta v. Tina Narinder Sain Mehta*, 2006 SCC OnLine Bom 846 : (2006) 6 Mah LJ 786 : (2006) 6 Bom CR 778 : AIR 2007 Bom 62 : (2007) 3 All LJ (NOC 430) 157 : (2007) 1 AIR Bom R 223 : (2007) 2 AIR Jhar R (NOC 649) 232 : 2007 AIHC 449 at page 788

1. This Notice of Motion has been taken out by the plaintiff in Suit No. 75 of 2005. Petition No. 378 of 2005 has been filed by the present plaintiff Rupali Mehta praying for grant of letters of administration with the Will annexed. The letters of administration are sought in relation to the estate left behind by Captain Narindersain Bhimsain Mehta, who expired on 22nd December, 2004. The Defendant Tina Narinder Sain Mehta had filed a caveat and therefore the petition was converted into Testamentary Suit No. 75 of 2005.

3. An objection has been raised on behalf of the Defendant to the maintainability of this Notice of Motion seeking interim orders in relation to the property which according to the plaintiff is left behind by the deceased on the ground that in a petition filed for letters of administration with Will attached or in a petition for grant of probate, title of the deceased to the property or properties left behind by the deceased is not the subject-matter of the suit and therefore, the Court does not have power and jurisdiction to make interim orders in relation to the property.

4. I have heard the learned Counsel appearing for both sides in detail on this question. **According to the plaintiff, in terms of the provisions of section 268 of the Indian Succession Act to the proceedings for grant of probate and letters of administration, the provisions of the Code of Civil Procedure is applicable and therefore, according to the learned Counsel section 141 of the Civil Procedure Code applies and therefore this Court has the jurisdiction to make interim orders in relation to the property which according to the plaintiff is left behind by the deceased**. The learned counsel has relied on several decisions of different High Courts, even of this Court, to contend that the provisions of section 141 of the Civil Procedure Code apply to a testamentary suit. The learned Counsel also referred to several orders made by this Court granting interim orders in testamentary suits in relation to the properties. The learned Counsel also relied on a judgment of the learned single Judge of the Calcutta High Court in the case of *Priyamvada Devi Birla* v. *Laxmi Devi Newar*, 2005 (4) CHN 544.

ANALYSIS

5. Perusal of the preamble of the Indian Succession Act, 1925 shows that the Act has been enacted to consolidate the law applicable to intestate and testamentary succession. The Act has been divided into several parts and each parts has been divided into several chapters. Part-I of the Act deals with short title and contains the dictionary of the Act i.e. definitions of various words used in the Act and power of the State Government to exempt any race or tribe from the operation of the Act. Part-II deals with Domicile. Part-II deals with Marriage. Part-IV deals with Consanguinity. Part-V deals with Intestate Succession. Part-VI deals with Testamentary Succession. Perusal of section 57 of the Act shows that this Part-VI deals with testamentary succession of Hindu, Buddhist, Sikh or Jaina on or after the first day of September, 1870 within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay. Part-VII deals with Protection of Property of Deceased person. Part-VIII deals with Representative Title to Property of Deceased on Succession and Part-IX deals with grant of Probate, Letters of Administration and Administration of Assets of Deceased. Part-IX is divided in 13 chapters. Perusal of Part-IX shows that it begins with section 217. Section 217 reads as under:—

> **217.** *Applicant of Part.* — Save as otherwise provided by this Act or by any other law for the time being in force, all grants of probate and letters of administration with the Will annexed and the administration of the assets of the deceased in cases of intestate succession shall be made or carried out, as the case may be, in accordance with the provisions of this Part.

6. Perusal of the provisions of the above section shows that grant of probate and letters of administration as also the administration of estate of the deceased in case of intestate succession is to be made and carried out in accordance with the provisions of this Part. Perusal of this Part shows that it makes provisions in detail as to how an application for probate or letters of administration is to be made. How that application is to be processed and how that application is to be decided. Section 268, which is found in Part-IX lays down that provisions of the Code of Civil Procedure are applicable. Section 269 is the only provision that I find in Part-IX of the Succession Act giving power to the Court to interfere for protection of the property. Section 269 reads as under:—

269. *When and how District Judge to interfere for protection of property.* — (1) Until probate is granted of the Will of a deceased person, or an administrator of his estate is constituted, the District Judge, within whose jurisdiction any part of the property of the deceased person is situate, is authorised and required to interfere for the protection of such property at the instance of any person claiming to be interested therein, and in all other cases where the Judge considers that the property incurs any risk of loss or damage; and for that purpose, if he thinks fit, to appoint an officer to take and keep possession of the property.

(2) This section shall not apply when the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, nor shall it apply to any part of the property of an Indian Christian who has died intestate.

7. Perusal of this section shows that special power which is conferred on the Court by this section to interfere for protection of property till probate is granted is not available in cases where the deceased is Hindu, Muhammadan, Buddhist, Sikh or Jaina or an Indian Christian who has died intestate. There is no doubt that in the present case the deceased was Hindu and therefore section 269 is not available. In my opinion, the very fact that the Legislature has made a special provision in section 269 giving power to the Court to make orders for protection of property during the pendency of the probate petition or a petition for letters of administration and restricted that power in case of certain category of person indicates two things i) that in order to enable a testamentory Court to make interim order in relation to the properties during the pending of probate petition or a petition for letters of administration, the legislature has to enact a provision in that regard and ii) that the legislature did not intend to confer such a power on the testamentory Court in relation to the persons who are of the category mentioned in section 269(2) of the Act. So far as the Act is concerned, there is one more provision which gives power to the Court to make orders for protection of the property and that provision is contained in section 192 and section 193. Sections 192 and 193 reads as under:—

192. *Person claiming right by succession to property of deceased may apply for relief against wrongful possession.* — (1) If any person dies leaving property, moveable or immovable, any person claiming a right by succession

thereto, or to any portion thereof, may make application to the District Judge of the district where any part of the property is found or situate for relief, either after actual possession has been taken by another person, or when forcible means of seizing possession are apprehended.

(2) Any agent, relative or near friend, or the Court of Wards in cases within their cognizance, may, in the event of any minor, or any disqualified or absent person being entitled by succession to such property as aforesaid, make the like application for relief.

193. *Inquiry made by Judge.* — The District Judge to whom such application is made shall, in the first place, examine the applicant on oath, and may make such further inquiry, if any, as he thinks necessary as to whether there is sufficient ground for believing that the party in possession or taking forcible means for seizing possession has no lawful title, and that the applicant, or the person on whose behalf he applies is really entitled and is likely to be materially prejudiced if left to the ordinary remedy of a suit, and that the application is made bona fide.

8. Sections 192 and 193 quoted above are found in Part-VII of the Act. Perusal of the provisions of Part-VII shows that the order for protection of the property under Part-VII is made by the Court in summary proceeding and the Court can make such an order when the Court finds that urgent orders are necessary and the Court cannot wait for the party to secure that order by adopting an ordinary remedy of civil suit. The order under sections 192 and 193 can be made only to prevent a person having no rights in relation to the property taking forcible possession. Sections 208 and 209, in my opinion, are also relevant. They reads as under:—

208. *Saving of right to bring suit.* — Nothing contained in this Part shall be any impediment to the bringing of a suit either by the party whose application may have been rejected before or after the summoning of the party in possession, or by the party who may have been evicted from the possession under this Part.

209. *Effect of decision of summary proceeding.* — The decision of a District Judge in a summary proceeding under this Part shall have no other effect

than that of settling the actual possession; but for this purpose it shall be final, and shall not be subject to any appeal or review.

9. Perusal of the above quoted provisions shows that the order made by the Court under Part-VII does not prevent the party from bringing a suit on the same question and those orders are restricted only to the possessory aspect of the property. In other words, where the Court finds that the party can conveniently institute a civil suit and obtain suitable order about protection of the property, the Court will not only be justified but also would be under a duty to leave the party to adopt an ordinary remedy of civil suit. The Supreme Court has considered the scheme of Part-VII of the Act in its judgment in the case of *Uma Devi Nambiar* v. *T.C. Sidhan*, (2004) 2 SCC 321. Observations made in paragraph 17 to 22 of the judgment are relevant. They read as under:—

17. Now we shall deal with the scope of section 208. The object of Part VII of the Act is to protect the property appertaining to large estates in case of a dispute as to succession. This Part in some respect stands in a similar position to section 145 of the Code of Criminal Procedure, 1973 (in short "the Code") with respect to certain specified properties, where its scope is large inasmuch as it embraces all properties movable and immovable and once for all its settles the right to hold possession of the property summarily directing the other disputants to seek their remedy in proper Court. (See *Biso Ram* v. *Emperor*). A person aggrieved by an order passed in a summary proceeding under Part VII, should seek remedy by a suit and not by an application for revision. This remedy is preserved by this section. (See *Gourishankar* v. *Debiprasad*). The suit should be a suit for possession by establishment of title. (See *Bhoba Tarani* v. *Profulla*). Therefore, it should necessarily be by the person who needs to establish his title to claim any such possession on the basis of title.

18. By analogy to Order 21 Rule 63, it can be said that where an adverse order has been passed against the plaintiff, under section 194 of the Act, the onus lies heavily on the plaintiff to show that he has a right which has been demised by the decision under section 194. (See *Dhirendra Nath Das* v. *Indra Chandra Kisriwala*, *Mohd. Ali Mohd. Khan* v. *Bismillah Begam*, *Sahdeo Karan Singh* v. *Usman Ali Khan*, *Ahmad Din Allah*

Ditta v. *Partap Singh*, *Mohd. Ismail* v. *Hanuman Parshad* and *Masina Bavamma* v. *Yendru Papanna*)

19. Coming to the scope and ambit of sections 192, 193, 194 and 195, it is to be noted that they form a part of Chapter XIII dealing with the modalities to be adopted for protection of properties of the deceased being covered by Part VII. These proceedings are essentially interlocutory in character and necessarily summary depending upon the filing of an application for relief seeking the Court to determine who has a right to possession pending the final determination of the rights of the parties in a regular suit.

20. Section 192, inter alia, provides that a person who claims right by succession can make an application in respect of a property, movable or immovable, left behind a person who has died. Section 193 provides for an enquiry by the District Judge to whom such an application is made and section 194 deals with the procedure to be adopted when an application is made under section 192.

21. The Court before taking any steps in the matter under section 194 is required to be satisfied of the existence of such strong ground of belief on both points i.e. the person in possession has no lawful title and that the person applying is likely to be materially prejudiced if left to the ordinary remedy of a regular suit. An order under section 194 is in the nature of summary decision and can only be passed if the conditions embodied in Section 193 are fulfilled. The expression "subject to a suit" means subject to a suit contemplated under section 208 i.e. a regular suit to establish title and obtain possession.

22. The effect of a summary decision even in an extreme case is not a bar to a regular suit. The underlying object of section 208 and Part VII is particularly to protect the property appertaining to large estates in case of a dispute as to succession. As noted above, it has great similarity to a proceeding under section 145 of the Code with respect to certain specified properties where its scope is large inasmuch as it embraces all properties movable and immovable and once for all it settles the right to hold possession of the property summarily directing the other disputants to seek their remedy in proper Court by appropriate proceedings. A person aggrieved by an order passed by a summary proceeding under Part VII is

required to seek remedy by a suit and not by an application for revision. This remedy is preserved by section 208. Section 209 makes the position further clear. It provides that the decision of a District Judge in a summary proceeding under Part VII shall have no other effect than that of settling the actual possession, but for this purpose it shall be final and shall not be subject to any appeal or review. But where instead of a summary disposal, there is in-depth analysis of the evidence and conclusive conclusions/decisions arrived at, it cannot be said that there has been a proper exercise of the power conferred while dealing with an application under section 192 of the Act.

It is thus clear that for making an application under section 192, it is not necessary that any proceeding for probate or letter of administration should be pending. But order can be sought only in relation to possession of property of the deceased, and only when the orders are urgently needed. Insofar as the present notice of motion is concerned, it is nobody's case that the notice of motion is taken out under section 192 of the Act.

RATIO:-

10. Thus, to my mind, it is clear that in the Act itself there is no provision made authorising testamentary Court to make interim order as a matter of course for protection of the property during the pendency of the testamentary suit.

11. No doubt not only section 141, but the entire Civil Procedure Code is applicable to a testamentary suit. Therefore, the power of the Court under Order XXXIX would also be available to the Court for making orders of temporary injunction. But for making an order of temporary injunction under Order XXXIX, the property in relation to which the order is sought has to be subject-matter of the suit. Similar is the case with the provisions of Order XL, in relation to appointment of the receiver. An order of temporary injunction or an order appointing the receiver can be made by the Court only in relation to the property which is subject-matter of the suit. A Civil Court can also make interim order in relation to property which is not the subject-matter of the suit, but interim order in relation to such property is necessary to be made to secure the execution of the decree that the Court may pass in the suit. However, in a

testamentary suit, property left behind by the deceased is not the subject-matter of the testamentary suit. The nature of decree that the testamentary Court passes is such that to secure its execution it is not necessary for the Court to make any interim order in relation to any property. The Division Bench of the Patna High Court in its judgment in the case *Kashi Nath Singh* v. *Dulhin Gulzari Kuer*, AIR 1941 Patna 475 has observed thus:

> **In an application for probate of a Will or for the grant of letters of administration with a copy of the Will annexed the sole question that arises is whether or not the Will is a true one. It is not open to the probate Court to decide whether or not the property with which a testator has purported to deal, in fact, belonged to him. In 19 All 458 Sir John Edge said this:**
>
> **It has been contended that where an application for probate of a Will is contested and it is alleged that the property dealt with by the Will was not of the testator or was not property over which the testator had a power of testamentary disposal, it is the duty of the Court to try an issue raising this question. All we can say is that it would be exceedingly inconvenient if Courts in this country had to try such issue. A Court could never be quite sure that it had got the proper parties before it. It would be difficult always to be sure that there was no collusion in the case. It is much safer in the interest of the public that issues as to the title to property should be decided when the issues are raised in a regular suit, and not on an application for a grant of probate.**
>
> **It is true that the learned Additional District Judge realised perfectly well that it would have been improper for him to decide whether or not the house and the orchard and kasht land described in the Will actually belonged to Mr. Barta Kuar and not to her son, Ram Chariter Singh. It is, however, a pity that he did not also recognize that for more or less the same reasons as made this improper Kashi Nath Singh was not a person interested in the estate of the testatrix and as such entitled to oppose the grant. The result of permitting persons in such a position as Kashi Nath Singh to appear and contest the grant of probate or letters of administration may be very inconvenient and troublesome to the proponents of a Will who are thereby put to the expense of proving**

it in solemn form when it might otherwise be proved in common form. I would dismiss this appeal with costs.

12. It is thus clear that in a petition for probate of a Will or a petition for grant of letters of administration the sole question that arises for consideration is whether or not the Will is genuine or not? The property left behind by the deceased is not the subject-matter of decision of the probate Court. These observations were made by the Division Bench of the Patna High Court while considering the question whether a caveat filed by a person who disputes title of the testator to the property is maintainable or not and the Division Bench has held that a caveat filed by such a person is not maintainable. The Supreme Court has referred to the decision of the Patna High Court in *Kashi Nath Singh case* in its judgment in the case of *Shanta G.Z. Mehta* v. *Sarla J. Mehta*, AIR 2004 SC 1238 in its paragraphs 5 and 6 of its judgment. Those paragraphs 5 and 6 read as under:—

5. There is no dispute about the question of law that the Caveator who denies the title of the testator has no right to contest the Will and his remedy is to approach the Civil Court to agitate the question of title. The learned Counsel for the plaintiff invited my attention to number of decisions of this point, where it has been uniformly held that the caveator who denies the title of the testator has no right to contest the probate proceedings. He has relied on AIR 1932 Patna 89, *Ramyad Mahton* v. *Ram Bhaju Mahton*; 1993 (1) Bombay CR 340, *Eruch Rustom Irani* v. *Limji Kalkashroo Panday*, AIR 1941 Patna 475, *Kashi Nath Singh* v. *Dulhin Gulzari Kuer*; and some other decisions where it has been uniformly held that if the caveator disputes the title of the testator, he has no right to lodge the caveat and the caveat has to be rejected. As already stated there cannot be any dispute about this proposition of law.

6. It may also be noted that in most of the cases cited above, the caveator had no personal interest in the property as an heir in the present case, the respondents are daughter-in-law and grand children of the deceased testator. If the Will is not in existence or the Will is proved to be not genuine then there can be no dispute that the respondents are entitled to a share in the property of the testator. Therefore, the respondents being heirs are directly interested in challenging the execution of the Will.

As could be seen from the affidavit filed in support of the caveat, the respondents have taken number of pleas challenging the execution of the Will.

It is only recently they have amended an affidavit to take one more plea that the testator had no competence to execute the Will in respect of the joint family property. It may be that the Testamentary Court has no jurisdiction to go into the question of title. A mere fact that the caveators have been taken an alternative plea and that too "without prejudice" to other contentions their caveat cannot be rejected as contended on behalf of the plaintiff. In none of the decisions relied on by the learned counsel for the plaintiff there is a case similar to the one before us, where the main defence is one of denial of execution of the Will and an alternative prayer and that too "without prejudice" is taken subsequently challenging the competence of the testator. Therefore, in my view none of the decisions relied on by the learned counsel for the plaintiff are applicable to the facts of the present case. Here the respondent being the natural legal heirs of the deceased along with the plaintiff are entitled to challenge the execution of the Will. The mere fact that they have now taken up a new and additional plea as an alternative plea and without prejudice to the earlier contentions cannot take away their defence. Hence, I am not impressed by the contention urged on behalf of the plaintiff that the caveat is liable to be rejected and the proceedings should be treated as non-contentious.

13. It is thus clear that the Supreme Court has held that the proposition of law which is laid down by the Division Bench of the Patna High Court in its judgment in *Kashi Nath Singh case* is undisputable. The Supreme Court has also observed that the testamentary Court has no jurisdiction to go into the question of title of the deceased to the property mentioned in the Will. It is thus clear that in a testamentary suit, the property which is mentioned in the Will or property which may be or may not be left behind by the deceased is not the subject-matter of the testamentary suit, and therefore, in my opinion, in exercise of its power under Civil Procedure Code, the Court would not be entitled to make any interim order in relation to protection of the property, unless, an order is required to be made by the Court in the peculiar circumstances under Part-VII of the Act.

14. So far as various orders made by this Court from time to time making interim orders in relation to the property in testamentary suits are concerned, as the question of existence of the power in the Court to make such an order was neither raised nor decided in those cases, they will not constitute a precedent, therefore, in my opinion, are not relevant for deciding the question. So far as the judgment of the learned single Judge of Calcutta High Court in the case of *Priyamvada Devi Birla* is concerned, the learned single Judge of the Calcutta High Court has proceeded on the assumption that the Court has inherent power to pass suitable interim orders for protection of the property in probate petition. It is clear from the scheme of the Act to which I have made reference above, that there is no such inherent power available to the Court. In my opinion, in view of the scheme of the Act, it will not be possible for any Court to assume existence of such inherent power in the Court.

(2) This extract is taken from *Ramchandra Ganpatrao Hande v. Vithalrao Hande*, 2011 SCC OnLine Bom 440 : (2011) 4 Mah LJ 50 : AIR 2011 Bom 136 : (2011) 4 Bom CR 326 : (2011) 3 AIR Bom R 258 : 2011 AIR CC 2182 : (2011) 2 HLR 308 : (2011) 2 Civ LT 154 at page 54

The nature of the jurisdiction of the probate Court:

5. In a proceeding for the grant of probate or for the grant of Letters of Administration with a Will annexed, the Court exercising testamentary jurisdiction is not concerned with title to property. In determining whether probate should be granted, the Court determines only upon the genuineness and due execution of the Will. Determinations on issues of title are alien to probate proceedings. In *Ishwardeo Narain Singh* v. *Kamta Devi*, (1953) 1 SCC 295 : AIR 1954 SC 280 the Supreme Court formulated the principle of law in the following terms:—

> "The Court of Probate is only concerned with the question as to whether the document put forward as the last Will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the Probate Court."

This principle was reiterated in *Chiranjilal Shrilal Goenka (deceased through LRs)* v. *Jasjit Singh*, (1993) 2 SCC 507 in the following observations:

> "The Succession Act is a self-contained code insofar as the question of making an application for probate, grant or refusal of probate or an appeal carried against the decision of the probate court. This is clearly manifested in the fascicule of the provisions of the Act. The probate proceedings shall be conducted by the probate court in the manner prescribed in the Act and in no other ways. The grant of probate with a copy of the Will annexed establishes conclusively as to the appointment of the executor and the valid execution of the Will, Thus it does no more than establish the factum of the Will and the legal character of the executor. Probate court does not decide any question of title or of the existence of the property itself."

6. In *Delhi Development Authority* v. *Mrs. Vijaya C. Gurshaney*, (2003) 7 SCC 301 the Supreme Court again emphasized the following principle:

> "A Testamentary Court is only concerned with finding out whether or not the testator executed the testamentary instrument of his free Will. It is settled law that the grant of a Probate or Letters of Administration does not confer title to property. They merely enable administration of the estate of the deceased."

7. In *Krishna Kumar Birla* v. *Rajendra Singh Lodha*, (2008) 4 SCC 300 the Supreme Court once again reiterated that:

> "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 (sic probate) proceedings. Construction of a Will relating to the right, title and interest of any other person is beyond the domain of the Probate Court."

10. Probate by virtue of section 222 can be granted only to an executor appointed by the Will. The effect of the grant of a probate of a Will, as elucidated in section 227 is that it establishes the Will from the death of the testator and renders valid all intermediate acts of the executor as such. Chapter II of Part IX deals with limited grants. Under section 247, the Court is empowered to appoint an administrator for the estate of the deceased pending a suit touching the validity of the Will or for obtaining or revoking any probate or grant of Letters of Administration. The administrator shall have all rights and powers of a general administrator, other than the right of distributing such estate. The administrator is subject to the control of the Court and has to act under its direction. Under section 261, the Court may rectify certain errors and alter or amend the probate or Letters of Administration accordingly. Chapter IV of Part IX deals with the practice in granting and revoking probates and Letters of Administration. Under sub-section (1) of section 264, the District Judge shall have jurisdiction in granting and revoking probates and Letters of Administration in all cases within his district. By section 266, the District Judge shall have the like powers and authority in relation tothe grant of probate and Letters of Administration and "all matters connected therewith", as are by law vested in him, in relation to any civil suit or proceeding pending in his Court. Section 268 provides that the proceedings of the Court of the

District Judge in relation to the grant of probate and Letters of Administration shall, save as hereinafter otherwise provided", be regulated, so far as the circumstances of the case permit, by the Code of Civil Procedure, 1908.

11. Section 269 provides as follows:

> "269. When and how District Judge to interfere for protection of property.—
>
> (1) Until probate is granted of the Will of a deceased person, or an administrator of his estate is constituted, the District Judge, within whose jurisdiction any part of the property of the deceased person is situate, is authorised and required to interfere for the protection of such property at the instance of any person claiming to be interested therein, and in all other cases where the Judge considers that the property incurs any risk of loss or damage; and for that purpose, if he thinks fit, to appoint an officer to take and keep possession of the property.
>
> (2) This section shall not apply when the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, nor shall it apply to any part of the property of an Indian Christian who has died intestate."

12. The contents of a Petition for probate are regulated by section 276. An application for probate or for Letters of Administration with a Will annexed have to be made by a Petition with the Will annexed stating: (i) the time of the death of the testator; (ii) that the writing annexed is his last Will and testament;(iii) that it was duly executed; (iv) the amount of assets which are likely to come to the Petitioner; and (v) when the application is for probate, that the Petitioner is the executor named in the Will. Similar provisions have been made in section 278 in respect of a petition for Letters of Administration with modifications relevant to the context. Under section 291, a person to whom Letters of Administration is committed, has to furnish a bond engaging for the due collection and administration of the estate of the deceased. Under section 307, the executor has the right to dispose of the property which is vested in him. Section 308 empowers the executor and administrator to incur expenditure for the purposes enunciated. The executor or administrator has to furnish an inventory and account under section 317 and is under an obligation

under section 319 to collect with reasonable diligence the property of the deceased and debts that were due to him. A liability is cast upon the executor in respect of the loss or damages occasioned upon his misapplication of the estate of the deceased.

14. In *Thrity Sam Shroff* v. *Shiraz Byramji Anklesaria*, 2007 (4) Mh.LJ. 56 : 2007 (2) ALL MR 856 a Division Bench of this Court while interpreting the provisions of section 295, which provides that in contentious cases, the proceedings before the District Judge shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, 1908, observed thus:

> "...the proceeding shall merely take the form of a suit according to the Code of Civil Procedure and that too as nearly as possible, meaning thereby that though the proceeding is not a suit within the meaning of the said expression under the Code of Civil Procedure, yet the provisions of the Code of Civil Procedure, to the extent they are not inconsistent with those of the said Act, may be followed bearing in mind the limited jurisdiction and function of the probate Court."

Now, it has been emphasized on behalf of the Appellant that the words "all matters connected therewith" in section 266, have a broad connotation and that section 268 emphasizes that the proceedings before the District Judge in relation to the grant of probate and Letters of Administration will be regulated so far as the circumstances of the case permit by the Code of Civil Procedure, 1908. It is contended that the power to grant interim orders is a necessary adjunct of the power of a Civil Court. The ambit of the words "all matters connected therewith" has to be construed in relation to the grant of probate and letters of administration. Such a proceeding does not concern itself with title or even the existence of the property but only determines whether the Will was executed bythe testator of his own free Will. That being the ambit of the proceeding, the words "connected therewith" cannot transform the probate proceeding into one in which issues alien to the grant of probate are to be decided. That would be impermissible. The contents of the broad general language in sections 266 and 268 must be read in the context of the specific provisions which are made in section 269. The Legislature in sub-section (1) of section 269 made a specific provision to the effect that until probate of the Will of a deceased person is granted or an administrator of his estate is constituted,

the District Judge (i) is authorised and required to interfere for the protection of such property at the instance of any person claiming to be interested therein; and (ii) in all other cases where the Judg considers that the property incurs any risk of loss or damage to do so. For that purpose, the District Judge is empowered to appoint an officer to take and keep possession of the property. While recognising and conferring such a power expressly on the District Judge, the Legislature nonetheless mandated in sub-section (2) thatthis section shall not apply when the deceased is a Hindu, Mohammadan, Buddhist, Sikh or Jaina or an exempted person, nor shall it apply to any part of the property ofan Indian Christian, who has died intestate. When section 268 emphasizes that "save as hereinafter otherwise provided", the proceedings before the District Judge shall, be regulated by the Code of Civil Procedure, 1908 so far as the circumstances of-the case permit, it is not open to the District Judge to exercise apower contrary to the legislative intent and mandate of section 269. Until probate of the Will is granted of, a deceased person or an administrator is constituted, the statute has recognized the power of the District Judge for the protection of the property (at the behest of a person claiming tobe interested) and in all other cases (where the Judge considers that the property incurs a risk of loss or damage). But, just as this power is specifically conferred upon the District Judge, sub-section (2) precludes the exercise of the power when the deceased belongs to one of the categories specified in sub-section (2). If the provisions of sections 266 and 268 were broad enough to bring within their purview, powers of the nature specified in subsection (1) of section 269, there wasno necessity to incorporate a provision in the nature of sub-section (1) of section 269. As a rule of interpretation, the Court will not ascribe or attribute the useof a surplusage to the Legislature. But, even if an alternate construction is possible - one that recognizes that sub-section (1) of section 269 only makes implicit a power which is exercisable under sections 266 and 268 - the effect of sub-section (2) is to preclude the exercise of that power in the case of one of the excepted categories. It would not be permissible, in the face of the specific provision of sub-section (2) of section 269 to read into the provisions of sections 266 and 268 a general power to grant interlocutory relief even prior to the grant of probate in respect of the property which is alleged to form part of the estate of the deceased. This construction is fortified by the principle that the testamentary Court in proceedings for probate is only concerned with the question as to whether the Willof the deceased is genuine and that it has been made voluntarily. The probate Court is not concerned with questions relating to the property itself. Though an assiduous attempt was made on behalf of the Appellant to rely upon the provisions of the Act, to which a reference has been

made earlier, the Court in this case is essentially concerned with the powers of the testamentary Court when it exercises its jurisdiction in a petition for the grant of probate. In view of the express provision which is contained in section 269(2), there can be no recourse to the exercise of the inherent powers of the Civil Court. This, however, would not preclude recourse to a civil suit for obtaining relief necessary for the protection of the property.

(3) This extract is taken from *Fauzia Sultana v. State & Ors.* 2022 SCC OnLine Del 3583

47. On the aspect of maintainability of the application, this Court in the afore-said discussed case, has in paragraphs 11 to 14, held as under:—

(11) It is fully manifest from the relevant provisions extracted above, that a High Court has got the concurrent jurisdiction with the District Judge in the matter of grant of probate and the District Judge under Section 266 while acting as a Probate Court has got all the powers of a Civil Court as is abundantly clear from Section 266 of the Indian Succession Act. A close scrutiny of Section 247 of the Indian Succession Act reveals that the object behind the enactment of the said section is to preserve the disputed property from being destroyed, dissipated and frittered away.

(12) I am tempted over here to cite a few authorities in support of my above view. It was observed in AIR 1951 Cal 561 (Atula Bala Dasi *v.* Nirupama Devi). *"It is open to the Probate Court not only to appoint an administrator pendente lite but also to issue an order of injunction, temporary in character, pending the appointment of an administrator pendente lite. If such powers are exercised in probate cases by a probate court, there is no reasonable chance of any property being dissipated, pending the actual grant of a probate or the appointment of an administrator".*

(13) To the same effect are the observations of their Lordships of the Supreme Court as (Manohar Lal Chopra *v.* Rai Bahadur Rao Raja Seth Hiralal)…. *"Section 151 itself says that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make orders necessary for the ends of justice. In the fact of such a clear statement, it is not possible to hold that the provisions of the Code control the inherent power by limiting it or otherwise affecting it. The inherent power has but been conferred upon the Court; it is a power inherent in the Court by virtue of its duty to do justice between the parties before it. Further, when the Code itself recognizes the existence of the inherent power of the Court, there is no question of implying any powers outside the limits of the Code".*

(14) In view of the above, I conclude that the present application is maintainable and this Court can grant injunction while exercising its inherent powers even in a probate case."

48. It is the submission of Mr. Khanna, that the said judgment still holds the field.

49. Insofar as the judgment in the case of *Ramchandra Ganpatrao Hande alias Handege* (supra) relied upon by Mr. Mukul Gupta is concerned, there in the said case, the issue which arose for consideration before the Bombay High Court was the appellant who was the named executor under the Will, filed a Testamentary Petition seeking probate of the Will. The appellant initiated the interlocutory proceeding in the form of a Notice of Motion seeking injunction against the Fourth and Fifth respondents therein, from entering upon, coming to or interfering with the immovable property of the testatrix. The said motion was opposed by the Fourth and Fifth respondents therein, on the ground that in view of the judgment of the Bombay High Court in the case of *Rupali Mehta* v. *Tina Narinder Sain Mehta*, (2006) 6 Mah LJ 786, the motion is not maintainable. In that judgment, it was held that in a petition for probate, an order of injunction cannot be granted in relation to the property of the deceased, since the Court in such a petition, is not concerned with the Will and the sole question which concerns the probate court is whether or not the Will is genuine. When the Notice of Motion came up for hearing before the learned Single Judge, it was dismissed as being not maintainable in view of the judgment in *Rupali Mehta* (supra).

50. Then in the appeal, the Division Bench of the High Court of Bombay, on analyzing the position of law on this context, has in paragraphs 14 and 15, held as under:—

"14. xxx xxx xxx Now, it has been emphasized on behalf of the Appellant that the words "all matters connected therewith" in Section 266, have a broad connotation and that Section 268 emphasizes that the proceedings before the District Judge in relation to the grant of probate and Letters of Administration will be regulated so far as the circumstances of the case permit by the Civil Procedure Code, 1908. It is contended that the power to grant interim orders is a necessary adjunct of the power of a civil court. The ambit of the words

"all matters connected therewith" has to be construed in relation to the grant of probate and letters of administration. Such a proceeding does not concern itself with title or even the existence of the property but only determines whether the will was executed by the testator of his own free will. That being the ambit of the proceeding, the words "connected therewith" cannot transform the probate proceeding into one in which issues alien to the grant of probate are to be decided. That would be impermissible. The contents of the broad general language in Sections 266 and 268 must be read in the context of the specific provisions which are made in Section 269. The Legislature in sub-section (1) of Section 269 made a specific provision to the effect that until probate of the will of a deceased person is granted or an administrator of his estate is constituted, the District Judge (i) is authorised and required to interfere for the protection of such property at the instance of any person claiming to be interested therein; and (ii) in all other cases where the Judge considers that the property incurs any risk of loss or damage to do so. For that purpose, the District Judge is empowered to appoint an officer to take and keep possession of the property. While recognising and conferring such a power expressly on the District Judge, the Legislature nonetheless mandated in sub-section (2) that this section shall not apply when the deceased is a Hindu, Mohammadan, Buddhist, Sikh or Jaina or an exempted person, nor shall it apply to any part of the property of an Indian Christian, who has died intestate. When Section 268 emphasizes that "save as hereinafter otherwise provided", the proceedings before the District Judge shall be regulated by the Code of Civil Procedure, so far as the circumstances of the case permit, it is not open to the District Judge to exercise a power contrary to the legislative intent and mandate of Section 269. Until probate of the Will is granted of a deceased person or an administrator is constituted, the statute has recognized the power of the District Judge for the protection of the property (at the behest of a person claiming to be interested) and in all other cases (where the Judge considers that the property incurs a risk of loss or damage). But, just as this power is specifically conferred upon the District Judge, sub-section (2) precludes the exercise of the power when the deceased belongs to one of the categories specified in sub-section (2). If the provisions of Sections 266 and 268 were broad enough to bring within their purview, powers of the nature specified in sub-section (1) of Section 269, there was no necessity to incorporate a provision in the nature of sub-section (1) of Section 269. As a rule of interpretation, the Court will not ascribe or attribute the use of a surplusage to the Legislature. But, even if an alternate construction is possible - one that recognizes that sub-section (1) of Section 269 only makes

implicit a power which is exercisable under Sections 266 and 268 - the effect of sub-section (2) is to preclude the exercise of that power in the case of one of the excepted categories. It would not be permissible, in the face of the specific provision of sub-section (2) of Section 269 to read into the provisions of Sections 266 and 268 a general power to grant interlocutory relief even prior to the grant of probate in respect of the property which is alleged to form part of the estate of the deceased. This construction is fortified by the principle that the testamentary Court in proceedings for probate is only concerned with the question as to whether the Will of the deceased is genuine and that it has been made voluntarily. The probate Court is not concerned with questions relating to the property itself. Though an assiduous attempt was made on behalf of the Appellant to rely upon the provisions of the Act, to which a reference has been made earlier, the Court in this case is essentially concerned with the powers of the testamentary Court when it exercises its jurisdiction in a petition for the grant of probate. In view of the express provision which is contained in Section 269(2), there can be no recourse to the exercise of the inherent powers of the Civil Court.

This, however, would not preclude recourse to a civil suit for obtaining relief necessary for the protection of the property.

15. In Atula Bala Dasi *v.* Nirupama Devi, *AIR 1951 Cal 561, a Division Bench of the Calcutta High Court inter alia considered the question as to whether the probate Court has any jurisdiction to issue an order for stay of proceedings pending in another Court. The Division Bench noted that the powers of the probate Court for the protection of the property which is a subject matter of testamentary disposition are regulated by the specific provisions of the Act and Section 247 authorises the Court to appoint an administrator pendente lite. The Court adverted to Section 269, including sub-section (2) and observed that in that case it was not necessary to consider the implications of the provision. The Division Bench of the High Court held that an order of temporary injunction could be made pending the appointment of an administrator pendente lite. In the present case, as pointed out on behalf of the Respondents, no such prayer is made for an appointment of the administration pendente lite. The Respondents have contended that they are admittedly the original heirs of the deceased and not "other persons". According to the Respondents, the only prayer sought by the executor who incidentally is not even an heir of the deceased, is an interim injunction*

against the Respondents, who are the heirs of the deceased. We do not find that the judgment of the Calcutta High Court would be of any assistance to the Appellant. Similarly, the judgment of the Learned Single Judge of this Court in Pandurang Shamrao Laud *v.* Dwarkadas Kalliandas, *(1932) 35 BLR 700 does not really deal with the issues which have arisen in the present case.*

Reliance was placed on the judgment of the Supreme Court in Mansukhlal Dhanraj Jain *v.* Eknath Vithal Ogale, *(1995) 2 SCC 665 : AIR 1995 SC 1102 in support of the contention that the words "in connection with" are of the widest amplitude. These observations of the Supreme Court are sought to be relied upon to amplify the words ""all matters connected therewith" in Section 266. The words which have been used in Section 266 must receive interpretation in the context in which where they are used. In the context of the jurisdiction of the probate Court, it is a well settled principle of law laid down by the Supreme Court that the Court cannot go into questions as regards title or of the existence of a property bequeathed by the deceased. We, therefore, find merit in the contention of the Respondents that the interpretation which is sought to be placed by the Appellant would travel beyond the scope of the jurisdiction of the probate Court and would be contrary to legislative intent.*

(emphasis supplied)

51. From the reading of the afore-mentioned judgment, it is clear that an application, as has been filed by the petitioner in the present case, which is not a prayer as contemplated under Section 247 of the Indian Succession Act, 1925, shall not be maintainable.

52. In fact, I find that the Coordinate Bench of this Court in the case of *Ajay Malhotra* v. *State*, Test Cas. 37/2018 decided on May 15, 2019, while considering an application under Order XXXIX Rule 1 and 2 read with Section 151 CPC, 1908, filed in a probate petition seeking probate of Will dated October 26, 2017, wherein the petitioner had sought an interim injunction against respondent Nos. 2 and 3 therein, restraining them from selling, alienating, transferring or creating any third party rights or interest in respect of any of the immovable properties bequeathed in favour of the petitioner therein, under a document dated October 26, 2017, purporting to be the Will and testament of

the deceased testator, had dismissed the same. While interpreting the provisions of Section 269(2) of the Indian Succession Act, 1925, this Court, held that the said sub-section, specifically restricts the application of Section 269(1), if the probate is sought of the Will of the deceased person who was Hindu, Muhammadan, Buddhist, Sikh or Jaina. This Court while holding that such an Application, as not maintainable, has held, as under:

"14. The court would also like to record that notwithstanding the fact that the question of title is not involved in testamentary proceedings, the Court is not wholly incompetent to grant a temporary injunction in extreme cases. Such order of injunction is issued in aid of and in furtherance of the purpose for which a grant is made by a probate Court. Section 247 of the Indian Succession Act, gives the Court such power. The said provision reads as under:

"247. Administration pendente lite.-Pending any suit touching the validity of the will of a deceased person or for obtaining or revoking any probate or any grant of letters of administration, the Court may appoint an administrator of the estate of such deceased person, who shall have all the rights and powers of a general administrator, other than the right of distributing such estate, and every such administrator shall be subject to the immediate control of the Court and shall act under its direction."

The reading of the aforesaid provision clearly shows that it is therefore open for the probate Court not only to appoint an administrator pendent lite, but also to issue an order of temporary injunction, pending the appointment of an administrator pendent lite. However, such orders are passed, when an application is made for the appointment of administrator pendent lite. The probate court will not grant injunction as a matter of course. The Court would have to examine whether there is a necessity for appointment of an administrator pendent lite. Such is not the case before the Court in the present case.

15. It is also to be noticed that section 269 of the Act reads as under:

"269. When and how District Judge to interfere for protection of property.-

(1) Until probate is granted of the will of a deceased person, or an administrator of his estate is constituted, the District Judge, within whose jurisdiction any part of the property of the deceased person is situate, is authorised and required to interfere for the protection of such property at the instance of any person claiming to be interested therein, and in all other cases where the Judge considers that the property incurs any risk of loss or damage; and for that purpose, if he thinks fit, to appoint an officer to take and keep possession of the property.

(2) This section shall not apply when the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, nor shall it apply to any part of the property of an Indian Christian who has died intestate."

The said provision also empowers the Court to pass orders for the protection of the property of the deceased person. Sub-section (2) of section 269 specifically restricts the application of the said provision where the deceased is a Hindu, Mohammedan, Sikh or Jaina. Admittedly, the deceased here is a Hindu and therefore, not entitled to invoke section 269. The fact that the legislature has restricted the application of section 269, to certain category of persons, clearly indicates by implication that the legislature never intended to confer such power on the testamentary court to give interim directions in relation to the persons covered under section 269(2) of the Act.

16. No doubt this Court in Kulbir Singh *v.* State *(1993) 52 DLT 57 has held that the Court has the power to grant injunction exercising its inherent powers, however, the facts of the said case are distinguishable and in that case, section 269(2) was not brought to the notice of the Court in the said judgment. As discussed above, the Court in exceptional circumstances can pass interim orders in order to preserve the disputed property from being destroyed, dissipated and fettered away. However, the facts and circumstances of the present case are not such that would entitle the petitioner to seek such a relief. For the afore-going reasons, the application is completely devoid of merits and is accordingly dismissed.*

53. In fact, I find that the Division Bench of the Bombay High Court clearly held that the effect of Sub-Section (2) of Section 269 of the Indian Succession

Act, 1925, is to preclude exercise of power in case of one of the excepted categories. It went on to hold that it would not be permissible, in the face of the specific provision of sub-section (2) of Section 269, to read into the provisions of Sections 266 and 268 of the Indian Succession Act, 1925, a general power to grant interlocutory relief, even prior to the grant of probate in respect of the property which is alleged to form part of the estate of the deceased. In the case in hand, the deceased being a Muhammadan, the bar under Section 269(2) shall come into play.

54. Suffice to state that the Coordinate Bench of this Court in *Ajay Malhotra* (supra), has clearly held by referring to the judgment of *Shri Kulbir Singh* (supra), that the latter judgment is distinguishable, as Section 269(2) of the Indian Succession Act, 1925, was not brought to the notice of this Court in the said judgment.

55. I agree with the above conclusion of the Coordinate Bench of this Court and the law having been settled in terms of the judgment of the Division Bench of the Bombay High Court, this Court is of the view that the present application filed by the petitioner for the prayers, as already noted above, shall not be maintainable in these proceedings and as such, the same is dismissed.

(4) This extract is taken from *Uma Devi Nambiar v. T.C. Sidhan*, (2004) 2 SCC 321 : 2003 SCC OnLine SC 1371 at page 332

15. Section 63 of the Act deals with execution of unprivileged Wills. It lays down that the testator shall sign or shall affix his mark to the Will or it shall be signed by some other person in his presence and by his direction. It further lays down that the Will shall be attested by two or more witnesses, each of whom has seen the testator signing or affixing his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator and each of the witnesses shall sign the Will in the presence of the testator. **Section 68 of the Indian Evidence Act, 1872** (in short "the Evidence Act") mandates examination of one attesting witness in proof of a Will, whether registered or not. The law relating to the manner and onus of proof and also the duty cast upon the court while dealing with a case based upon a Will has been examined in considerable detail in several decisions of this Court. (See *H. Venkatachala Iyengar* v. *B.N. Thimmajamma* [AIR 1959 SC 443] , *Rani Purnima Debi* v. *Kumar Khagendra Narayan Deb* [AIR 1962 SC 567] and *Shashi Kumar Banerjee* v. *Subodh Kumar Banerjee* [AIR 1964 SC 529] .) A Constitution Bench of this Court in *Shashi Kumar Banerjee case* [AIR 1964 SC 529] succinctly indicated the focal position in law as follows : (AIR p. 531, para 4)

> "The mode of proving a Will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a Will by **Section 63** of the Indian Succession Act. The onus of proving the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the Will as genuine. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the Will being unnatural, improbable or unfair in the light of relevant circumstances or there might be other indications in the Will to show that the testator's mind was not free. In such a case the court would naturally expect that all legitimate suspicion should

be completely removed before the document is accepted as the last Will of the testator. If the propounder himself takes part in the execution of the Will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the court would grant probate, even if the Will might be unnatural and might cut off wholly or in part near relations."

16. A Will is executed to alter the ordinary mode of succession and by the very nature of things, it is bound to result in either reducing or depriving the share of natural heirs. If a person intends his property to pass to his natural heirs, there is no necessity at all of executing a Will. It is true that a propounder of the Will has to remove all suspicious circumstances. Suspicion means doubt, conjecture or mistrust. But the fact that natural heirs have either been excluded or a lesser share has been given to them, by itself without anything more, cannot be held to be a suspicious circumstance especially in a case where the bequest has been made in favour of an offspring. As held in *P.P.K. Gopalan Nambiar* v. *P.P.K. Balakrishnan Nambiar* [1995 Supp (2) SCC 664 : AIR 1995 SC 1852] it is the duty of the propounder of the Will to remove all the suspected features, but there must be real, germane and valid suspicious features and not fantasy of the doubting mind. It has been held that if the propounder succeeds in removing the suspicious circumstance, the court has to give effect to the Will, even if the Will might be unnatural in the sense that it has cut off wholly or in part near relations. (See *Pushpavathi* v. *Chandraraja Kadamba* [(1973) 3 SCC 291 : AIR 1972 SC 2492] .) In *Rabindra Nath Mukherjee* v. *Panchanan Banerjee* [(1995) 4 SCC 459] it was observed that the circumstance of deprivation of natural heirs should not raise any suspicion because the whole idea behind execution of the Will is to interfere with the normal line of succession and so, natural heirs would be debarred in every case of Will. Of course, it may be that in some cases they are fully debarred and in some cases partly.

17. Now we shall deal with the scope **of Section 208. The object of Part VII of the Act is to protect the property appertaining to large estates in case of a dispute as to succession**. This Part in some respect stands in a similar position to Section 145 of the Code of Criminal Procedure, 1973 (in short "the Code") with respect to certain specified properties, where its scope is large inasmuch as it embraces all properties movable and immovable and once

for all it settles the right to hold possession of the property summarily directing the other disputants to seek their remedy in proper court. (See *Biso Ram* v. *Emperor* [66 IC 76 : AIR 1922 Pat 372 : 23 Cri LJ 236] .) A person aggrieved by an order passed in a summary proceeding under Part VII, should seek remedy by a suit and not by an application for revision. This remedy is preserved by this section. (See *Gourishankar* v. *Debiprasad* [AIR 1929 Nag 317] .) The suit should be a suit for possession by establishment of title. (See *Bhoba Tarani* v. *Profulla* [140 Ind Cas 379] .) Therefore, it should necessarily be by the person who needs to establish his title to claim any such possession on the basis of title.

18. By analogy **to Order 21 Rule 63**, it can be said that where an adverse order has been passed against the plaintiff, under **Section 194 of** the Act, the onus lies heavily on the plaintiff to show that he has a right which has been demised by the decision under Section 194. (See *Dhirendra Nath Das* v. *Indra Chandra Kisriwala* [AIR 1939 Cal 578] , *Mohd. Ali Mohd. Khan* v. *Bismillah Begam* [AIR 1930 PC 255 : 35 CWN 324] , *Sahdeo Karan Singh* v. *Usman Ali Khan* [184 IC 113 : AIR 1939 Pat 462] , *Ahmad Din Allah Ditta* v. *Partap Singh* [AIR 1939 Lah 438] , *Mohd. Ismail* v. *Hanuman Parshad* [AIR 1938 PC 290 : 1938 All LR 910] and *Masina Bavamma* v. *Yendru Papanna* [AIR 1936 Mad 971 : (1937) 1 MLJ 133] .)

19. Coming **to the scope and ambit of Sections 192, 193, 194 and 195**, it is to be noted that they form a part of **Chapter XIII dealing with the modalities to be adopted for protection of properties of the deceased being covered by Part VII. These proceedings are essentially interlocutory in character and necessarily summary depending upon the filing of an application for relief seeking the court to determine who has a right to possession pending the final determination of the rights of the parties in a regular suit.**

20. Section 192, inter alia, provides that a person who claims right by succession can make an application in respect of a property, movable or immovable, left behind a person who has died. Section 193 provides for an enquiry by the District Judge to whom such an application is made and Section 194 deals with the procedure to be adopted when an application is made under Section 192.

21. The court before taking any steps in the matter under Section 194 is required to be satisfied of the existence of such strong ground of belief on both points i.e. the person in possession has no lawful title and that the person

applying is likely to be materially prejudiced if left to the ordinary remedy of a regular suit. An order under Section 194 is in the nature of summary decision and can only be passed if the conditions embodied in Section 193 are fulfilled. The expression "subject to a suit" means subject to a suit contemplated under Section 208 i.e. a regular suit to establish title and obtain possession.

22. The effect of a summary decision even in an extreme case is not a bar to a regular suit. The underlying object of Section 208 and Part VII is particularly to protect the property appertaining to large estates in case of a dispute as to succession. As noted above, it has great similarity to a proceeding under Section 145 of the Code with respect to certain specified properties where its scope is large inasmuch as it embraces all properties movable and immovable and once for all it settles the right to hold possession of the property summarily directing the other disputants to seek their remedy in proper court by appropriate proceedings. A person aggrieved by an order passed by a summary proceeding under Part VII is required to seek remedy by a suit and not by an application for revision. This remedy is preserved by Section 208. Section 209 makes the position further clear. It provides that the decision of a District Judge in a summary proceeding under Part VII shall have no other effect than that of settling the actual possession, but for this purpose it shall be final and shall not be subject to any appeal or review. But where instead of a summary disposal, there is in-depth analysis of the evidence and conclusive conclusions/decisions arrived at, it cannot be said that there has been a proper exercise of the power conferred while dealing with an application under Section 192 of the Act.

23. In the case at hand by several orders/judgments on earlier occasions/stages, it has been specifically held that the genuineness of the Will has to be established in a regular suit. While dealing with an application under Section 192 of the Act, obviously there has to be some consideration of the genuineness of the Will. But it cannot be in a conclusive and detailed manner as has been done in this case. Further, when admittedly half of the share in the property indisputably belonged to Appellant 1, the District Judge while dealing with an application under Section 192 could not have either ventured to undertake even a summary decision of a disputed title of the respondent or even delivered possession of the whole property to original Respondent 1 in preference to the person whose title and claims are beyond controversy at least in respect of her half share. This itself shows that the consideration was not proper and the entire exercise wholly impermissible. The High Court dismissing

the revision petition holding that the jurisdiction was discretionary, is to put it even in mild terms, a serious error and misdirection virtually placing a premium on grave illegality committed resulting in miscarriage of justice.

28. The principles relating to exercise of discretion judicially do not appear to have been kept in view by the High Court in this case. The inevitable result, therefore, is that the order of the High Court refusing to interfere with the order of the District Judge needs to be vacated. The curator should have been directed to deliver possession only to the appellants whose rights to half share is indisputable and beyond controversy, rather than keep out of possession such sharer. While setting aside the orders of the courts below, we direct the possession to be delivered forthwith to the appellants. We also find substance in the plea of the appellants that this being an ancestral property with lot of sentiments attached to it, if the possession is given to the appellants with clear conditions stipulated, that the mesne profits, the claim relating to which is yet to be decided, shall be deposited in court awaiting final adjudication in the matter. It shall be for the respondents to establish the genuineness of the Will in the manner recognized by law in the appropriate proceeding, and thereafter seek for possession including the claim for any mesne profits in such proceedings. It shall not be construed that our interference in the matter is on the basis of any expression of opinion about merits of the original dispute i.e. relating to genuineness of the Will but made only for the limited purpose of setting aside the illegal orders of the courts below as to right to possession. As and when, an appropriate suit is filed, the competent court shall be at liberty to determine the question of title to the disputed half share of the respondents on its own merits, on the basis of materials and evidence that may be let in during trial, uninfluenced by the observations made on such claims in the orders set aside, as well as those made in this order. The appeal is allowed in the aforesaid terms. Parties to bear their respective costs.

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Vide order dated ---------- from the pleadings of parties, the following issues were framed:

1) Whether the Will dated ----------, propounded by the petitioners is the duly executed last and final Will testament of late ---------- in sound disposing mind?

2) Whether petitioners are entitled to the grant of probate?

3) Relief

1. **Interim order is always granted in aid of the ultimate relief which is, in fact, an age old established principles of law and followed by all the Indian Courts.**

2. Para 60. I have carefully considered these submissions and having done so, I am not persuaded by the arguments so advanced by the learned senior counsel. It must be appreciated that the court of probate is a court of conscience and not a court of suspicion and the wishes of the testator cannot be throttled merely because of certain aspersions are being casted on the authenticity of the Will without any basis. The Hon'ble Supreme Court in **V. Prabhakara vs. Basavaraj K. (Dead) by Lr., AIR 2021 SC 4830**, made the following pertinent observations:

> "25.**A testamentary court is not a court of suspicion but that of conscience**. It has to consider the relevant materials instead of adopting an ethical reasoning. A mere exclusion of either brother or sister per se would not create a suspicion unless it is surrounded by other circumstances creating an inference. In a case where a testatrix is accompanied by the sister of the beneficiary of the Will and the said document is attested by the brother, there is no room for any suspicion when both of them have not raised any issue."

PRESUMPTION OF REGISTERED DOCUMENT

61. A registered document carries a rebuttable presumption in its favour and it is presumed to be genuine in terms of Section 114(e) of the Evidence Act, 1872. The presumption though a rebuttable one but a burden is laid in the shoulders of the party alleging contrary to its genuineness**. In Prem Singh & Ors. Vs. Birbal & Ors., (2006) 5 SCC 353,** the Hon'ble Supreme Court made the following pertinent observations:

62. "27. There is a presumption that a registered document is validly executed. A registered document, therefore, prima facie would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption. In the instant case, Respondent 1 has not been able to rebut the said presumption." (emphasis supplied) In view thereof, in the present cases, the initial onus was on the plaintiff, who had challenged the stated registered document." Learned senior counsel has relied on Dharam Chand (supra) to contend that no presumption can be drawn in favour of the registered Will about its genuineness. I am unable to agree with the said decision as then the solemn objective of registration to guard against fraud of a document qua Will would fall to the ground. It is pertinent to refer to

the landmark decision of the Hon'ble Supreme Court **in Rajni Tandon vs. Dulal Ranjan Gosh Dastidar, 2009 (14) SCC 782**, wherein the Supreme Court made the following observations: "27.The object of registration is designed to guard against fraud by obtaining a contemporaneous publication and an unimpeachable record of each document."

63. It is also pertinent to refer to the decision of the Hon'ble Supreme Court in **Rani Purnima Devi & Anr. vs Kumar Khagendra Narayan Dev, AIR 1962 SC 567**, wherein the apex Court held as follows: "There is no doubt that 'if a will has been registered, that is a circumstance which may, having regard to the circumstances, prove its genuineness But the mere fact that a will is registered will not by itself be sufficient to dispel all suspicion regarding it where suspicion exists, without submitting the evidence of registration to a close examination……"

64. Undoubtedly, registration will be an additional point weighing in favour of the execution of the Will and it cannot be an incontrovertible piece of evidence to prove the Will, which will be highly dependent on the facts and circumstances of the execution of the Will, but merely because one of the beneficiary under the Will is kept out from other assets of the deceased Testator or there has been unequal distribution cannot be a ground to question the authenticity and genuineness of the Will more so, when the Will under challenge is a registered document. It is also apposite to state that the entire findings on this controversy may not be relevant at this stage, as this Court at this stage has to only consider if any prima facie case has been made out or not.

Ratio & Law **: "Until the document is avoided or cancelled by proper declaration, the duly registered document remains valid and binds the parties. So the suit necessarily has to be laid within three years from the date when the cause of action had occurred.".**

(vii) Sanjay Roy v. Sandeep Soni, 2022 SCCOnline Del 1525.

"32. In the three-Judge decision reported as **Ramti Devi (Smt.) v. Union of India, (1995) 1 SCC 198** the Apex Court held as follows: **"Until the document is avoided or cancelled by proper declaration, the duly registered document remains valid and binds the parties. So the suit necessarily has to be laid within three years from the date when the cause of action had occurred.".**

33. It is trite law that no amount of evidence or argument in the absence of pleadings can be gone into by the Court. **In Trojan & Co. Ltd. v. Rm. N.N.**

Nagappa Chettiar, AIR 1953 SC 235, the Supreme Court referred to the Privy Council decision **in Mahant Govind Rao v. Sita Ram Kesho, (1897-98) 25 IA 195 (PC**) and held that decisions cannot be founded on grounds outside the pleadings and what has to be considered or granted is the case pleaded. It was also held that without amendment of the pleading in light of facts disclosed or discovered subsequently, the Court would not be entitled to modify or alter the relief claimed. These rulings were followed in Ram Kumar **Barnwal v. Ram Lakhan (dead), (2007) 5 SCC 660**.

34. Thus, in the absence of any challenge to the registered Conveyance Deed in favour of the plaintiff, ever raised by the appellant in his pleadings or otherwise, it conferred absolute ownership rights in favour of Smt. Kalyani Roy, which is beyond challenge.

35. There is another aspect of the matter. Under **Section 3 of the Transfer of Property Act,** a person is said to have **"notice"** of a fact when he actually knows that fact, or when, but for willful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it. The first explanation **to Section 3** reads as follows: "Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or, where the property is not all situated in one sub-district, or where the registered instrument has been registered under **sub-section (2) of section 30 of the Indian Registration Act, 1908 (16 of 1908),** from the earliest date on which any memorandum of such registered instrument has been filed by any Sub-Registrar within whose subdistrict any part of the property which is being acquired, or of the property wherein a share or interest is being acquired, is situated :]"

36. **In Dattatreya Shanker Mote v. Anand Chintaman Datar, (1974) 2 SCC 799 and followed in Bina Murlidhar Hemdev v. Kanhaiyalal Lokram Hemdev, (1999) 5 SCC 222**, it was held that the registration of a document which is compulsorily registrable under law amounts to constructive notice on a person aggrieved by the title or interest created by such document.

37. **The limitation for challenging the Deed is three years as per Article 59 of the Limitation Act**. **The Supreme Court, in Mohd. Noorul Hoda v. Bibi Rafiunnisa, (1996) 7 SCC 767** observed as under in regard to limitation: "there is no dispute that Article 59 would apply to set aside the instrument, decree or contract between the inter se parties. When the plaintiff seeks to establish his right to the property which cannot be

established without avoiding an instrument, that stands as an insurmountable obstacle in his way which otherwise binds him, though not a party. The party necessarily has to seek a declaration and have that decree, instrument or contract cancelled or set aside or rescinded. **Section 31 of the Specific Relief Act, 1963** regulate suits for cancellation of an instrument which lays down that any person against whom a written instrument is void or whatever and who has a reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, can sue to have it adjudged void or whatever and the court may in its discretion so adjudge it and order it to be delivered or cancelled. It would therefore be clear that if he seeks avoidance of the instrument, decree or contract and seek a declaration he is necessarily bound to lay the suit within three years from the date when the facts entitling the plaintiff to have the instrument first became known to him."

38. **Section 27 of the Limitation Act** prescribes that upon expiration of the period of limitation provided, any person's right to sue for recovery of possession of immovable property is extinguished. It reads as follows: "**27. Extinguishments of right to property** - At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished."

39. The Supreme Court **in Prem Singh v. Birbal, (2006) 5 SCC 353 : AIR 2006 SC 3608** observed about the imperative nature of the provision, and held that:

"11. Limitation is a statute of repose. It ordinarily bars a remedy, but, does not extinguish a right. The only exception to the said rule is to be found in Section 27 of the Limitation Act, 1963 which provides that at the determination of the period prescribed thereby, limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.

12. An extinction of right, as contemplated by the provisions of the Limitation Act, prima facie would be attracted in all types of suits. The Schedule appended to the Limitation Act, as prescribed by the articles, provides that upon lapse of the prescribed period, the institution of a suit will be barred. Section 3 of the Limitation Act provides that irrespective of the fact as to whether any defence is set out or is raised by the defendant or not, in the event a suit is found to be barred by limitation, every suit instituted, appeal preferred and every application made after the prescribed period shall be dismissed..."

40. The appellant himself had given "No Objection" in favour of Smt. Kalyani Devi and was always in the knowledge of the Conveyance Deed and any challenge now to the ownership/title of Smt. Kalyani Devi acquired by her by virtue of Conveyance Deed, is clearly time barred. The appellant took no steps to assert his rights at any point of time. In these circumstances, the supervening equity in favor of the respondents estops and bars the appellant from opposing the title of Smt. Kalyani Devi in the property in question.

41. The appellant never challenged the validity of the Conveyance Deed; rather he gave his "No Objection" in the year 1994 for mutation of property in favour of Smt. Kalyani Devi on the basis of which the Conveyance Deed was executed in her favour in 2000. Interestingly, even in the present proceedings, the Conveyance Deed and its genuineness has not been challenged nor is there any claim that it has been wrongly executed in favor of Smt. Kalyani Roy. The only plea now being set up is that she had acquired only life estate by virtue of the Will of her husband, who was admittedly the absolute owner of the property in question. Now the Conveyance Deed has attained finality and by virtue of this Conveyance Deed. Smt. Kalyani Roy became the absolute owner of the suit property and thus, competent to enter into the Collaboration Agreement with the Respondent No. 1.

42. The learned Single Judge has rightly held that Smt. Kalyani Roy had an absolute right in the suit property and findings of the learned Arbitrator contrary to the Will, were liable to be set aside being patently illegal.

43. Now the question which arises for consideration is whether it is within the scope of Section 34 to upset the findings of the learned Arbitrator. Section 34 of the Act, 1996, provides the ground for setting aside the domestic arbitral award if it is in conflict with "public policy of India". It has been explained that in conflict with public policy of India means (i) the award is induced or affected by fraud; or (ii) is in contravention with the fundamental policy of Indian Law; or (iii) is in conflict with the most basic notions of morality of justice."

(1) This extract is taken from *Kunvarjeet Singh Khandpur v. Kirandeep Kaur*, (2008) 8 SCC 463 : 2008 SCC OnLine SC 613 at page 465

5. The order was challenged before the High Court. The appellant's stand was that Article 137 of the Limitation Act, 1963 (in short "the Limitation Act") had application. It was submitted that Article 137 of the Limitation Act has clear application and the application for grant of letters of administration was filed beyond the speculated time.

6. The High Court observed that Article 137 of the Limitation Act does not apply to proceedings or grant of probate/letters of administration and therefore the view of the learned Additional District Judge was correct. Reliance was placed on a Division Bench of the Delhi High Court in *S.S. Lal* v. *Vishnu Mitter Govil* [(2004) 112 DLT 877] .

8. In support of the appeal, learned counsel for the appellant submitted that the High Court's view that Article 137 of the Limitation Act was not applicable is incorrect. It is submitted that right to apply in terms of Article 137 accrued when there was a dispute about genuineness of the will. Therefore it was submitted that the view of the High Court is clearly unsustainable.

9. On the other hand, learned counsel for the respondents submitted that the right to apply for grant of letters of administration is a continuing right and the starting point is the happening of an event. In the instant case, after the petition for grant of probate was withdrawn the event arose. Further while permitting withdrawal, liberty was granted to the present Respondents 1 to 3 to initiate appropriate proceedings.

10. Two questions need to be addressed in this appeal.

Firstly, **about the applicability of Article 137 of the Limitation Act** and **secondly**, even if it is applicable whether the petition was within time.

11. In *Kerala SEB* v. *T.P. Kunhaliumma* [(1976) 4 SCC 634] it was inter alia observed as follows : (SCC pp. 638 & 39, paras 18 & 22)

"*18.* The alteration of the division as well as the change in the collocation of words in Article 137 of the Limitation Act, 1963 compared with Article 181 of the 1908 Limitation Act shows that applications contemplated under

Article 137 are not applications confined to the Code of Civil Procedure. In the 1908 Limitation Act there was no division between applications in specified cases and other applications as in the 1963 Limitation Act. The words 'any other application' under Article 137 cannot be said on the principle of *ejusdem generis* to be applications under the Civil Procedure Code other than those mentioned in Part I of the third division. Any other application under Article 137 would be petition or any application under any Act. But it has to be an application to a court for the reason that Sections 4 and 5 of the 1963 Limitation Act speak of expiry of prescribed period when court is closed and extension of prescribed period if the applicant or the appellant satisfies the court that he had sufficient cause for not preferring the appeal or making the application during such period.

22. **The conclusion we reach is that Article 137 of the 1963 Limitation Act will apply to any petition or application filed under any Act to a civil court**. **With respect we differ from the view taken by the two-Judge Bench of this Court** in *Athani Municipal Council case* [*Town Municipal Council, Athani* v. *Presiding Officer, Labour Court*, (1969) 1 SCC 873] **and hold that Article 137 of the 1963 Limitation Act is not confined to applications contemplated by or under the Code of Civil Procedure**. The petition in the present case was to the District Judge as a court. The petition was one contemplated by the Telegraph Act for judicial decision. The petition is an application falling within the scope of Article 137 of the 1963 Limitation Act."

In terms of the aforesaid judgment any application to civil court under the Act is covered by Article 137. The application is made in terms of Section 264 of the Act to the District Judge. Section 2(*bb*) of the Act defines the District Judge to be the Judge of the Principal Civil Court.

12. Further in *S.S. Rathore* v. *State of M.P.* [(1989) 4 SCC 582 : 1990 SCC (L&S) 50 : (1989) 11 ATC 913] it was inter alia stated as follows : (SCC p. 585, para 5)

"*5*. Appellant's counsel placed before us the residuary Article 113 and had referred to a few decisions of some High Courts where in a situation as here reliance was placed on that article. It is unnecessary to refer to those decisions as on the authority of the judgment of this Court in *Pierce Leslie & Co. Ltd.* v. *Violet Ouchterlony Wapshare* [AIR 1969 SC 843] it must be held

that Article 113 of the Act of 1963, corresponding to Article 120 of the old Act, is a general one and would apply to suits to which no other article in the Schedule applies."

13. Article 137 of the Limitation Act reads as follows:

"Description of suit	*Period of limitation*	*Time from which period begins to run*
137. Any other application for which no period of limitation is provided elsewhere in this Division.	Three years	When the right to apply accrues."

The crucial expression in the petition (*sic* Article) is "right to apply". In view of what has been stated by this Court, Article 137 is clearly applicable to the petition for grant of letters of administration. As rightly observed by the High Court in such proceedings the application merely seeks recognition from the court to perform a duty and because of the nature of the proceedings it is a continuing right. The Division Bench of the Delhi High Court referred to several decisions. One of them was *S. Krishnaswami* v. *E. Ramiah* [AIR 1991 Mad 214] . In para 17 of the said judgment it was noted as follows : (AIR p. 222)

"*17.* In a proceeding, or in other words, in an application filed for grant of probate or letters of administration, no right is asserted or claimed by the applicant. The applicant only seeks recognition of the court to perform a duty. Probate or letters of administration issued by a competent court is conclusive proof of the legal character throughout the world. An assessment of the relevant provisions of the Indian Succession Act, 1925 does not convey a meaning that by the proceedings filed for grant of probate or letters of administration, no rights of the applicant are settled or secured in the legal sense. The author of the testament has cast the duty with regard to the administration of his estate, and the applicant for probate or letters of administration only seeks the permission of the court to perform that duty. There is only a seeking of recognition from the court to perform the duty. That duty is only moral and it is not legal. There is no law which compels

the applicant to file the proceedings for probate or letters of administration. With a view to discharge the moral duty, the applicant seeks recognition from the court to perform the duty. It will be legitimate to conclude that the proceedings filed for grant of probate or letters of administration is not an action in law. Hence, it is very difficult to and it will not be in order to construe the proceedings for grant of probate or letters of administration as applications coming within the meaning of an 'application' under Article 137 of the Limitation Act, 1963."

14. Though the nature of the petition has been rightly described by the High Court, it was not correct in observing that the application for grant of probate or letters of administration is not covered by Article 137 of the Limitation Act. Same is not correct in view of what has been stated in *Kerala SEB case* [(1976) 4 SCC 634] .

15. Similarly reference was made to a decision of the Bombay High Court **in *Vasudev Daulatram Sadarangani* v. *Sajni Prem Lalwani* [AIR 1983 Bom 268] . Para 16 reads as follows : (AIR p. 270)**

"*16*. Rejecting Mr Dalpatrai's contention, I summarise my conclusions thus—

(*a*) under the Limitation Act no period is advisedly prescribed within which an application for probate, letters of administration or succession certificate must be made;

(*b*) the assumption that under Article 137 the right to apply necessarily accrues on the date of the death of the deceased, is unwarranted;

(*c*) such an application is for the court's permission to perform a legal duty created by a will or for recognition as a testamentary trustee and is a continuous right which can be exercised any time after the death of the deceased, as long as the right to do so survives and the object of the trust exists or any part of the trust, if created, remains to be executed;

(*d*) the right to apply would accrue when it becomes necessary to apply which may not necessarily be within 3 years from the date of the deceased's death;

(*e*) delay beyond 3 years after the deceased's death would arouse suspicion and greater the delay, greater would be the suspicion;

(*f*) such delay must be explained, but cannot be equated with the absolute bar of limitation; and

(*g*) once execution and attestation are proved, suspicion of delay no longer operates."

Conclusion (*b*) is not correct while Conclusion (*c*) is the correct position of law.

16. In view of the factual scenario, the right to apply actually arose on 9-8-1999 when the proceedings were withdrawn by Smt Nirmal Jeet Kaur. Since the petition was filed within three years, the same was within time and therefore the appeal is without merit, deserves dismissal, which we direct but in the circumstances without any order as to costs.

(2) This extract is taken from *Krishan Kumar Sharma v. Rajesh Kumar Sharma*, (2009) 11 SCC 537 : (2009) 4 SCC (Civ) 555 : 2009 SCC OnLine SC 653 at page 538

4. The basic question before the High Court was whether Article 137 of the Limitation Act, 1963 (in short "the Limitation Act") applies to the facts of the present case. The High Court relied upon the judgments of the Delhi High Court in S.S. *Lal* v. *Vishnu Mitter Govil* [(2004) 112 DLT 877] and in *Kanwal Malhotra* v. *State* [(2005) 125 DLT 281] to hold that the Limitation Act has no application to proceedings seeking for probate.

5. Learned counsel for the appellant submitted that the interpretation placed by the High Court is not correct. The primary question that needs reconsideration is whether Article 137 of the Limitation Act is applicable. It appears that certain other aspects were considered by the High Court to which reference shall be made subsequently.

(3) This extract is taken from *Ramesh Nivrutti Bhagwat v. Surendra Manohar Parakhe*, (2020) 17 SCC 284 : (2021) 4 SCC (Civ) 306 : 2019 SCC OnLine SC 1301 at page 287

7. A learned Single Judge of the Bombay High Court relied [*Ramesh Nivrutti Bhagwat* v. *Surendra Manohar Parakhe*, 2001 SCC OnLine Bom 178 : (2001) 4 Mah LJ 375] on *Rukmani Devi* v. *Narendra Lal Gupta* [*Rukmani Devi* v. *Narendra Lal Gupta*, (1985) 1 SCC 144] , to say that if a party does not contest proceedings for grant of probate, it cannot be permitted to question the validity of the will by a collateral attack in different proceedings. The court held that the grant being *in rem*, binds not only persons who are parties but also others who are not parties to the proceedings, whether they had notice or not. The probate granted by the competent court is conclusive on the validity of the will unless revoked in accordance with law, and no evidence can be admitted to impeach it except in the proceedings for revocation. Thus, since the original probate granted by the California court was not challenged by appropriate proceedings and since the probate was in force, there is no question of revoking an ancillary grant which was merely to give effect to the original probate of the will granted by the California court. The Single Judge also held that since the letters of administration were granted in ancillary proceedings on 25-11-1994 and the petition for its revocation was filed on 21-7-1999, proceedings were time barred. The Single Judge held that such proceedings are covered by Article 137 of the Limitation Act, 1963, which requires the application to be filed within 3 years from the date when the right to apply accrues. Even if the period spent on the notice of motion from 29-3-1997 to 1-4-1998 were excluded from consideration, the petition for revocation was filed beyond the period of three years from 25-11-1994, as the three-year period expired on 24-11-1997, and the revocation petition was filed on 21-7-1999. The court, after excluding the period of seven months and two days spent in pursuing the remedy of notice of motion, held it to be hopelessly barred by time. The Single Judge also held that the appellant Ramesh was not an heir of the deceased—a fact admitted by him in the rejoinder-affidavit. In view of these facts, the application for revocation was rejected. Ramesh appealed unsuccessfully to the Division Bench. The judgment [*Ramesh Nivrutti Bhagwat* v. *Surendra Manohar Parakhe*, 2007 SCC OnLine Bom 1506] of the Division Bench rejected the sole contention made in the appeal, that the law prescribed no limitation for an application of cancellation of letters of administration.

8. The learned counsel for the appellant argued that Ramesh had no notice of the proceedings initiated for grant of letters of administration and that he and his father (Balaji's brother) became aware of the fact only when the properties were sought to be mutated in the revenue records, pursuant to the letters granted. It was submitted that the limitation for filing an application should be calculated from the date of knowledge of the grant, and not the date of grant.

9. The counsel for the respondent, on the other hand, urged this Court to dismiss the appeal. It was contended that the letters of administration in respect of the will in question dated 24-6-1977 were granted by the court after due notice and citation; proceedings for their grant were in rem. Consequently, when granted, the letters of administration operated against the entire world. The cause of action, if any, for seeking their cancellation, therefore, accrued from the date of their grant, and not on the date of knowledge of grant, in the absence of any allegation of fraud.

10. As evident, the appellant's application for cancellation of the letters of administration was rejected concurrently. **The only question urged is whether there is any limitation prescribed and if not, whether the residuary provision (Article 137 in the schedule to the Limitation Act, 1963—hereafter "the Act") applies and for which the starting point of limitation is the date of alleged knowledge of the grant of letters of administration.**

11. The relevant provisions dealing with recognition in respect of grant of probate, of letters of administration in respect of the probate granted, and cancellation of probate (or letters of administration) of the Succession Act, 1925, read as follows:

> "**228.** ***Administration, with copy annexed, of authenticated copy of will proved abroad***.—When a will has been proved and deposited in a court of competent jurisdiction situated beyond the limits of the State, whether within or beyond the limits of India and a properly authenticated copy of the will is produced, letters of administration may be granted with a copy of such copy annexed.

263. *Revocation or annulment for just cause*.—The grant of probate or letters of administration may be revoked or annulled for just cause.

***Explanation*.**—Just cause shall be deemed to exist where—

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

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

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

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

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

Illustrations

(*i*) The court by which the grant was made had no jurisdiction.

(*ii*) The grant was made without citing parties who ought to have been cited.

(*iii*) The will of which probate was obtained was forged or revoked.

(*iv*) *A* obtained letters of administration to the estate of *B*, as his widow, but it has since transpired that she was never married to him.

(*v*) *A* has taken administration to the estate of *B* as if he had died intestate, but a will has since been discovered.

(*vi*) Since probate was granted, a latter will has been discovered.

(*vii*) Since probate was granted, a codicil has been discovered which revokes or adds to the appointment of executors under the will.

(*viii*) The person to whom probate was, or letters of administration were, granted has subsequently become of unsound mind.

276. *Petition for probate*.—(1) Application for probate or for letters of administration, with the will annexed, shall be made by a petition distinctly written in English or in the language in ordinary use in proceedings before

the court in which the application is made, with the will or, in the cases mentioned in Sections 237, 238 and 239, a copy, draft, or statement of the contents thereof, annexed, and stating—

(*a*) the time of the testator's death,

(*b*) that the writing annexed is his last will and testament,

(*c*) that it was duly executed,

(*d*) the amount of assets which are likely to come to the petitioner's hands, and

(*e*) when the application is for probate, that the petitioner is the executor named in the will.

(2) In addition to these particulars, the petition shall further state—

(*a*) when the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge; and

(*b*) when the application is to a District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such delegate.

(3) Where the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another State, the petition shall further state the amount of such assets in each State and the District Judges within whose jurisdiction such assets are situate."

12. The Succession Act, 1925 does not prescribe a specific period of limitation for the grant of probate, or for moving an application for cancellation of probate or letters of administration. The residuary entry Article 137 of the Act, which covers proceedings for which no period of limitation is stipulated in the Act, provides for a three-year period of limitation. Article 137 reads as follows:

"*Description*	*Period of limitation*	*Time from which period begins to run*
137. Any other application for which no period of limitation is provided elsewhere in this Division.	Three years	When the right to apply accrues."

13. This issue was considered in *Kunvarjeet Singh Khandpur* v. *Kirandeep Kaur* [*Kunvarjeet Singh Khandpur* v. *Kirandeep Kaur*, (2008) 8 SCC 463] . This Court negatived the plea that since the Act prescribes no period of limitation in regard to matters concerning grant of probate or letters of administration, there is no time-limit. The Court followed the decision in *Kerala SEB* v. *T.P. Kunhaliumma* [*Kerala SEB* v. *T.P. Kunhaliumma*, (1976) 4 SCC 634 : (1977) 1 SCR 996] which took note of the change in the collocation of words in Article 137 of the Limitation Act, 1963 compared with Article 181 of the Limitation Act, 1908, and held that applications contemplated under Article 137 are not applications confined to the Code of Civil Procedure, 1908. In the older Limitation Act of 1908, there was no division between applications in specified cases and other applications, as in the Limitation Act, 1963. The Court held in *Kerala SEB* [*Kerala SEB* v. *T.P. Kunhaliumma*, (1976) 4 SCC 634 : (1977) 1 SCR 996] that: (SCC pp. 638-39, paras 18 & 22)

> "*18*. … The words "any other application" under Article 137 cannot be said on the principle of *ejusdem generis* to be applications under the Civil Procedure Code other than those mentioned in Part I of the third division. Any other application under Article 137 would be petition or any application under any Act. But it has to be an application to a court for the reason that Sections 4 and 5 of the Limitation Act, 1963 speak of expiry of prescribed period when court is closed and extension of prescribed period if applicant or the appellant satisfies the court that he had sufficient cause for not preferring the appeal or making the application during such period.
>
> *22*. The conclusion we reach is that Article 137 of the Limitation Act, 1963 will apply to any petition or application filed under any Act to a civil court. With respect we differ from the view taken by the two-Judge Bench of this Court in *Athani Municipal Council case* [*Town Municipal Council, Athani* v. *Labour Court*, (1969) 1 SCC 873] and hold that Article 137 of the Limitation Act, 1963 is not confined to applications contemplated by or under the Code of Civil Procedure."

14. Applying the ratio in *Kerala SEB* [*Kerala SEB* v. *T.P. Kunhaliumma*, (1976) 4 SCC 634 : (1977) 1 SCR 996] , the Court, in *Kunvarjeet Singh Khandpur* [*Kunvarjeet Singh Khandpur* v. *Kirandeep Kaur*, (2008) 8 SCC 463] observed that: (*Kunvarjeet Singh Khandpur case* [*Kunvarjeet Singh Khandpur* v. *Kirandeep Kaur*, (2008) 8 SCC 463] , SCC p. 467, para 13)

"*13.* … The crucial expression in the petition (*sic* Article) is "right to apply". In view of what has been stated by this Court, Article 137 is clearly applicable to the petition for grant of letters of administration. As rightly observed [*Kunvarjeet Singh Khandpur* v. *Kirandeep Kaur*, 2005 SCC OnLine Del 1573] by the High Court in such proceedings the application merely seeks recognition from the court to perform a duty and because of the nature of the proceedings it is a continuing right."

The Court then concluded that **the right to apply for probate accrues on the date of death of the testator.**

15. Recently, in *Sameer Kapoor* v. *State* [*Sameer Kapoor* v. *State*, (2020) 12 SCC 480] , the context was slightly different; the probate was issued by a foreign court. The executor sought letters of administration in an Indian court (like in the present case), under Section 228. The Court dealt with the objection of limitation, and noticed, firstly, that *Kunvarjeet Singh Khandpur* [*Kunvarjeet Singh Khandpur* v. *Kirandeep Kaur*, (2008) 8 SCC 463] had ruled about applicability of Article 137 for grant of probate in the first instance. Drawing a distinction from the grant of probate (or letters of administration) and the recognition of that, under Section 228, the Court [in *Sameer Kapoor* [*Sameer Kapoor* v. *State*, (2020) 12 SCC 480]] held as follows: (*Sameer Kapoor case* [*Sameer Kapoor* v. *State*, (2020) 12 SCC 480] , SCC pp. 490-91, para 17)

"*17.* … it can be said that in a proceeding, or in other words, in an application filed for grant of probate or letters of administration, no right is asserted or claimed by the applicant. The applicant only seeks recognition of the court to perform a duty. Probate or letters of administration issued by a competent court is conclusive proof of the legal character throughout the world. That the proceedings filed for grant of probate or letters of administration is not an action in law but it is an action in rem. As held by this Court in *Kunvarjeet Singh Khandpur* [*Kunvarjeet Singh Khandpur* v. *Kirandeep Kaur*, (2008) 8 SCC 463] : (SCC p. 468, para 15)

'*15.* … "*16.* … (*c*) … *an application [for grant of probate or letters of administration] is for the court's permission to perform a legal duty created by a will or for recognition as a testamentary trustee and is a continuous right which can be exercised any time after the death of the deceased, as long as the right to do so survives and the object of the trust exists or any part of the trust, if created, remains to beexecuted.*" ' [**Ed.**: As observed in *Vasudev*

Daulatram Sadarangani v. *Sajni Prem Lalwani*, 1983 SCC OnLine Bom 54, para 16.] "

(emphasis in original)

16. The decision in *Lynette Fernandes* v. *Gertie Mathias* [*Lynette Fernandes* v. *Gertie Mathias*, (2018) 1 SCC 271] , dealt with the precise issue of the period of limitation applicable for an application for cancellation of a probate or letters of administration. This Court held as follows: (SCC pp. 283-84, para 19)

"*19.* One must keep in mind that the grant of probate by a competent court operates as a judgment in rem and once the probate to the will is granted, then such probate is good not only in respect of the parties to the proceedings, but against the world. **If the probate is granted, the same operates from the date of the grant of the probate for the purpose of limitation under Article 137 of the Limitation Act in proceedings for revocation of probate.** In this matter, as mentioned supra, the appellant was a minor at the time of grant of probate. She attained majority on 9-9-1965. She got married on 27-10-1965. In our considered opinion, three years' limitation as prescribed under Article 137 runs from the date of the appellant attaining the age of majority i.e. three years from 9-9-1965. The appellant did not choose to initiate any proceedings till the year 25-1-1996 i.e. a good 31 years after she attained majority. No explanation worthy of acceptance has been offered by the appellant to show as to why she did not approach the court of law within the period of limitation. At the cost of repetition, we observe that the appellant failed to produce any evidence to prove that the will was a result of fraud or undue influence. The same will has remained unchallenged until the date of filing of application for revocation. No acceptable explanation is offered for such a huge delay of 31 years in approaching the Court for cancellation or revocation of grant of probate."

17. In the present case, the letters of administration were granted in ancillary proceedings on 25-11-1994. The High Court took note of the fact that the notice of motion (in the disposed of proceeding) was filed on 29-3-1997; it was withdrawn on 1-4-1998. The petition for revocation of the letters of administration was filed on 29-7-1999. Proceedings were clearly time barred, given that the original grant of the ancillary letters took place on 25-11-1994;

they constituted notice to all concerned. Clearly, the petition for revocation of letters of administration was time barred. It is accordingly held that there is no infirmity in the concurrent findings impugned; the appeal fails and is dismissed with no order as to costs.

(4) This extract is taken from *Sameer Kapoor v. State*, (2020) 12 SCC 480 : 2019 SCC OnLine SC 630 at page 487

9. Two questions arise for consideration before this Court in the present appeal:

9.1. (*i*) Whether Article 137 of the Limitation Act shall be applicable for application for grant of probate or letters of administration?

9.2. (*ii*) Whether the application under Section 228 of the Succession Act shall be barred by the period of limitation prescribed under Article 137 of the Limitation Act, and whether the period of limitation for application under Section 228 of the Act would start to run from the date of grant of probate by a court of competent jurisdiction situated beyond the limits of the State, whether within or beyond the limits of India?

10. Now so far as the first question is concerned, the same is now not res integra in view of the direct decision of this Court in *Kunvarjeet Singh Khandpur* [*Kunvarjeet Singh Khandpur* v. *Kirandeep Kaur*, (2008) 8 SCC 463] and in *Krishan Kumar Sharma* v. *Rajesh Kumar Sharma* [*Krishan Kumar Sharma* v. *Rajesh Kumar Sharma*, (2009) 11 SCC 537 : (2009) 4 SCC (Civ) 555] . In both the aforesaid decisions, this Court has specifically observed and held that Article 137 of the Limitation Act shall be applicable to the petitions for grant of probate or letters of administration also. Therefore, Question 1 is answered in the affirmative and it is observed and held that Article 137 of the Limitation Act, 1963 shall be applicable to the applications for grant of probate or letters of administration.

11. Now so far as Question 2 is concerned, it is the specific case on behalf of the appellants that the application submitted by Respondent 2 for letters of administration under Section 228 of the Act is barred by the law of limitation as provided under Article 137 of the Limitation Act. As observed and held hereinabove, Article 137 of the Limitation Act shall be applicable to the application for grant of probate or letters of administration submitted under Section 276 of the Act. Similarly, even the application under Section 228 of the Act shall also be covered by Article 137 of the Limitation Act. Therefore, it is observed and held that Article 137 of the Limitation Act shall be applicable to the applications under Section 228 of the Act also.

12. However, the next question which is posed for consideration before this Court is, when the "right to apply" can be said to have accrued?

12.1. As per Article 137 of the Limitation Act, the period of limitation prescribed is three years and the three years begin to run when the "right to apply" accrues. The crucial expression under Article 137 of the Limitation Act is "right to apply". It is the case on behalf of the appellants that in the present case the "right to apply" for letters of administration had accrued in the year 1997, more particularly on 21-11-1997 when the High Court of Justice, District Probate Registry, Birmingham (UK) passed an order for grant of probate of will dated 16-5-1990 in favour of Respondent 2. It is the case on behalf of the appellants that therefore "right to apply" under Section 228 of the Act had accrued in favour of Respondent 2 on 21-11-1997 and, therefore, Respondent 2 was required to submit an application for letters of administration within a period of three years from 21-11-1997. However, the application for letters of administration has been submitted on 28-2-2001 i.e. after a lapse of limitation of three years as prescribed under Article 137 of the Limitation Act and therefore Probate Case No. 15 of 2001 is clearly barred by law of limitation and, therefore, the same was required to be rejected in exercise of powers under Order 7 Rule 11 CPC. It is also the case on behalf of the appellants that so long as the will is not probated, the period of limitation would not start running. However, once the will is probated, in that case, the period of limitation as provided under Article 137 of the Limitation Act would begin to run from the date on which the will is probated.

14. At the outset, it is required to be noted that the relevant provisions for grant of probate or letters of administration with the will would be Section 276 of the Act. Section 276 of the Act reads as under:

> "**276.** ***Petition for probate***.—(1) Application for probate or for letters of administration, with the will annexed, shall be made by a petition distinctly written in English or in the language in ordinary use in proceedings before the court in which the application is made, with the will or, in the cases mentioned in Sections 237, 238 and 239, a copy, draft, or statement of the contents thereof, annexed, and stating—
>
> (*a*) the time of the testator's death,
>
> (*b*) that the writing annexed is his last will and testament,

(*c*) that it was duly executed,

(*d*) the amount of assets which are likely to come to the petitioner's hand, and

(*e*) when the application is for probate, that the petitioner is the executor named in the will.

(2) In addition to these particulars, the petition shall further state—

(*a*) when the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge; and

(*b*) when the application is to a District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.

(3) Where the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another State, the petition shall further state the amount of such assets in each State and the District Judges within whose jurisdiction such assets are situate."

14.1. When an application under Section 276 of the Act is submitted for probate or for letters of administration with will, if any objection is raised by anybody with respect to execution of the will, in that case, the applicant is required to prove the will and thereafter the will shall be probated and the court may pass an order for letters of administration. However, in a case where a will has been proved or deposited in a court of competent jurisdiction situated beyond the limits of the State, whether within or beyond the limits of India, in that case, as provided under Section 228 of the Act, when a properly authenticated copy of the will is produced, the letters of administration may be granted in favour of such person. Meaning thereby, in such a situation, the will is not required to be proved again and it shall be conclusive. Therefore, Section 228 of the Act shall be an enabling provision and it confers an additional right to apply for letters of administration on the basis of such authenticated copy of the will. Therefore, as rightly observed by the learned Single Judge and the Division Bench that Section 228 is akin to Section 276 of the Act.

15. Now the next question which may arise for consideration would be, whether for an application for probate or letters of administration with will, the period of limitation would begin to run from which date?

16. While considering the issue involved, the decision of this Court in *Kunvarjeet Singh Khandpur* [*Kunvarjeet Singh Khandpur* v. *Kirandeep Kaur*, (2008) 8 SCC 463] is required to be referred to and considered. In the said decision, this Court considered the decision of the Bombay High Court in *Vasudev Daulatram Sadarangani* v. *Sajni Prem Lalwani* [*Vasudev Daulatram Sadarangani* v. *Sajni Prem Lalwani*, 1983 SCC OnLine Bom 54 : AIR 1983 Bom 268] , as well as, the decision of the Madras High Court in *S. Krishnaswami, In re* [*S. Krishnaswami, In re*, 1990 SCC OnLine Mad 200 : AIR 1991 Mad 214] . In the said decision, this Court (at SCC pp. 467-68, para 13) referred to and considered para 24 of the decision of the Madras High Court in *S. Krishnaswami* [*S. Krishnaswami, In re*, 1990 SCC OnLine Mad 200 : AIR 1991 Mad 214] , which reads as under: (*S. Krishnaswami case* [*S. Krishnaswami, In re*, 1990 SCC OnLine Mad 200 : AIR 1991 Mad 214] , SCC OnLine Mad)

> "*24*. In a proceeding, or in other words, in an application filed for grant of probate or letters of administration, no right is asserted or claimed by the applicant. The applicant only seeks recognition of the court to perform a duty. Probate or letter of administration issued by a competent court is conclusive proof of the legal character throughout the world. An assessment of the relevant provisions of the Succession Act, 1925 does not convey a meaning that by the proceedings filed for grant of probate or letters of administration, no rights of the applicant are settled or secured in the legal sense. The author of the testament has cast the duty with regard to the administration of his estate, and the applicant for probate or letters of administration only seeks the permission of the court to perform that duty. There is only a seeking of recognition from the court to perform the duty. That duty is only moral and it is not legal. There is no law which compels the applicant to file the proceedings for probate or letters of administration. With a view to discharge the moral duty, the applicant seeks recognition from the court to perform the duty. It will be legitimate to conclude that the proceedings filed for grant of probate or letters of administration is not an action in law. Hence, it is very difficult to and it will not be in order to construe the proceedings for grant of probate or letters of administration as applications coming within the meaning of an "application" under Article 137 of the Limitation Act, 1963."

16.1. This Court approved the observations made in para 24 by the Madras High Court in *S. Krishnaswami* [*S. Krishnaswami, In re*, 1990 SCC OnLine Mad

200 : AIR 1991 Mad 214] insofar as the nature of the petition for grant of probate or letter of administration is concerned. However, this Court did not agree with the finding that the application for grant of probate or letters of administration is not covered by Article 137 of the Limitation Act.

16.2. In the aforesaid decision, this Court also considered and referred (at SCC p. 468, para 15) to para 16 of the decision of the Bombay High Court in *Vasudev Daulatram Sadarangani* [*Vasudev Daulatram Sadarangani* v. *Sajni Prem Lalwani*, 1983 SCC OnLine Bom 54 : AIR 1983 Bom 268] in para 15, which reads as follows: (*Vasudev Daulatram case* [*Vasudev Daulatram Sadarangani* v. *Sajni Prem Lalwani*, 1983 SCC OnLine Bom 54 : AIR 1983 Bom 268] , SCC OnLine Bom para 16)

> "*16*. Rejecting Mr Dalpatrai's contention, I summarise my conclusions thus—
>
> (*a*) under the Limitation Act no period is advisedly prescribed within which an application for probate, letters of administration or succession certificate must be made;
>
> (*b*) the assumption that under Article 137 the right to apply necessarily accrues on the date of the death of the deceased, is unwarranted;
>
> (*c*) such an application is for the court's permission to perform a legal duty created by a will or for recognition as a testamentary trustee and is a continuous right which can be exercised any time after the death of the deceased, as long as the right to do so survives and the object of the trust exists or any part of the trust, if created, remains to be executed;
>
> (*d*) the right to apply would accrue when it becomes necessary to apply which may not necessarily be within 3 years from the date of the deceased's death;
>
> (*e*) delay beyond 3 years after the deceased's death would arouse suspicion and greater the delay, greater would be the suspicion;
>
> (*f*) such delay must be explained, but cannot be equated with the absolute bar of limitation; and
>
> (*g*) once execution and attestation are proved, suspicion of delay no longer operates."

This Court did not agree with/approve Conclusion (*b*). However, approved Conclusion (*c*), reproduced hereinabove.

17. Therefore, considering the law laid down by this Court in *Kunvarjeet Singh Khandpur* [*Kunvarjeet Singh Khandpur* v. *Kirandeep Kaur*, (2008) 8 SCC 463] , it can be said that in a proceeding, or in other words, in an application filed for grant of probate or letters of administration, no right is asserted or claimed by the applicant. The applicant only seeks recognition of the court to perform a duty. Probate or letters of administration issued by a competent court is conclusive proof of the legal character throughout the world. That the proceedings filed for grant of probate or letters of administration is not an action in law but it is an action in rem. As held by this Court in *Kunvarjeet Singh Khandpur* [*Kunvarjeet Singh Khandpur* v. *Kirandeep Kaur*, (2008) 8 SCC 463] : (SCC p. 468, para 15)

> "*15. … '16. … (c) … an application [for grant of probate or letters of administration] is for the court's permission to perform a legal duty created by a will or for recognition as a testamentary trustee and is a continuous right which can be exercised any time after the death of the deceased, as long as the right to do so survives and the object of the trust exists or any part of the trust, if created, remains to be executed.*' [**Ed.**: As observed in *Vasudev Daulatram Sadarangani* v. *Sajni Prem Lalwani*, 1983 SCC OnLine Bom 54, para 16.] "
>
> (emphasis supplied)

Therefore, even if the will is probated by any court mentioned in Section 228 of the Act, right to get the letters of administration is a continuous right which can be exercised any time, as long as the right to do so survives and the object of the trust exists or any part of the trust, if created, remains to be executed.

18. Applying the law laid down by this Court in the aforesaid decision and the observations made hereinabove, the submission on behalf of the appellants that Probate Case No. 15 of 2001 filed by Respondent 2 for letters of administration under Section 228 of the Act, read with Section 276 of the Act is barred by law of limitation, cannot be accepted. At this stage, it is required to be noted that even in the plaint, it is specifically pleaded that after passing away of the father of the parties in the year 2000, the appellants started intermeddling with properties bequeathed to Respondent 2, which were situated in Delhi and, therefore, left with no option, he was compelled to apply for letters of administration. Therefore, even as per the pleadings in the application, the cause of action started from the date on which the appellants

started intermeddling with the properties bequeathed to Respondent 2, after passing away of the father of the parties in the year 2000. Therefore, in the facts and circumstances of the case, both the learned Single Judge and the Division Bench have rightly refused to reject the application in exercise of powers under Order 7 Rule 11 CPC**. In the facts and circumstances of the case and as observed hereinabove, it cannot be said that the application for letters of administration was clearly barred by the law of limitation** which was required to be rejected in exercise of powers under Order 7 Rule 11(*d*) CPC. We are in complete agreement with the view taken by the High Court.

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(1) This extract is taken from *H.S. Bhatnagar*, 1999 SCC OnLine All 1197 : (2000) 40 ALR 676 : 2000 All LJ 2708 : (2000) 38 ALR (SUM 35) 13 : 2001 AIHC 165 : (2000) 91 RD 97 : (2001) 1 HLR 180 : (2000) 1 Civ LT 273 at page 677

4. The core question is whether after the death of the petitioner in a testamentary suit his heir or any other person is entitled to be substituted in his place and if so, who shall be entitled to be substituted or in other words, to continue the proceedings for grant of probate/letters of administration under the provisions of Indian Succession Act 1925 (in short 'the Act'). The probate is granted only to an executor appointed by the Will as provided under Section 222 of the Act. In case the executor has not been appointed the letters of administration is to be granted to an universal or residuary legatee under Section 232 of the Act. In case the person who had applied for probate/letters of administration dies, there are two courses open, either the proceedings be dropped or permitted to be continued by a person who shall otherwise be entitled for probate/letters of administration.

5. Where any suit filed in the Civil Court, on the death of the plaintiff the suit shall not abate if the right to sue survives. On the death of the plaintiff the court can permit a legal representative of the deceased plaintiff to be made a party under Order 22, Rule 3 of the Code of Civil Procedure. Similarly, if the defendant dies, his legal representatives can be substituted under Rule 4 of Order 22 C.P.C. The Code of Civil Procedure was amended in 1976 and Order 4-A was added which provides that if, in any suit, it shall appear to the Court that any party who has died during the pendency of the suit has no legal representative, the Court may, on the application of any party to the suit, proceed in absence of the person representing the estate of the deceased person, or may by order appoint the administrator general, or an officer of the Court or such other person as it thinks fit to represent the estate of the deceased person for the purpose of the suit.

6. There is a difference between the proceedings of a suit and that of proceedings for the grant of probate/letters of administration. On the death of the plaintiff the Court allowed the application for substitution. The Court on an application of the legal representative of the deceased plaintiff shall make him a party in the suit if the right to sue survives. The Court has to examine whether such an applicant is entitled to be substituted in relation to the cause of action in the suit and the relief claimed. A petition for probate/letters of

administration is filed on the allegation that the petitioner is entitled to probate or letters of administration under the provisions of the Act. One view is that the right to claim probate/letters of administration is personal and on the death of the petitioner the right to obtain probate/letters of administration does not devolve on his heir. In one case, the suit is decreed on the basis of the relief claimed in the suit but in the other case probate/letters of administration is granted under the provisions of the Indian Succession Act. But in that respect he has to establish that he is entitled to such grant being an executor universal or residuary legatee under the Will.

7. The Calcutta High Court in *Sarat Chandra Banerjee* v. *Nani Mohan Banerjee* [(1909) 36 Cal. 799.] , where executor claiming right of probate on the basis of Will, having died during the pendency of the probate proceedings, his widow sought to be substituted as being his heir, Harrington, J rejected the application holding that the executor's right to sue did not survive. This decision was followed in *Hari Bhushan Datta* v. *Manmath Nath Datta* [A.I.R. 1919 Cal. 197.] . In this case one *Him Bhushan Datta* applied for grant of letters of administration with a copy of the Will annexed to the estate of the deceased. He died leaving Hari Bhushan Datta as his heir and legal representative. Greaves J. held that the right for grant of letters of administration was a personal right and this right did not devolve on his heir. It was however, observed that the applicant may apply for grant of letters of administration and adopt such material proceedings as had been taken in the testamentary suit filed by his father. These two decisions came up for consideration before a Division Bench of Patna High Court in *Mst. Phekni* v. *Mst Manki* [A.I.R. 1930 Pat. 618.] . Fazl Ali, J. (as he then was), noted that the view taken by Greaves, J. will cause considerable hardship when the applicant, after death of the petitioner may be entitled to obtain letters of administration. The facts in this case were that an application was filed for letters of administration on the basis that the applicant was legatee under the Will. The application was resisted by the widow of the deceased. The District Judge rejected the application on the finding that the Will was not proved to his satisfaction. Against this decision the applicant filed appeal. During the pendency of the appeal the appellant died. An application for substitution was filed by his heir. It was resisted by the respondent on the ground that the right to obtain letters of administration was personal and the applicant could not be substituted. The Court repelled the contention with the following observation:—

"But it is not so clear why a person who has, admittedly, under the law, right to apply for letters of administration, and who derives this right from the legatee by virtue of being an heir of the legatee, should be debarred from carrying on the proceedings if the legatee happens to die after he had applied for letters of administration and before the letters have been granted."

8. In *Chandramani Maity* v. *Bipin Bihari* [AIR 1932 Cal. 206.] , a distinction was drawn that though right to obtain probate of a Will does not survive, in an appeal in a case where the judgment appealed against may operate as one in rem, different consideration will arise and substitution should be allowed. The above noted decisions of the Calcutta High Court were also discussed in *P. Ram Naidu* v. *Rangayya Naidu* [A.I.R. 1933 Mad. 114] , and were dissented from. The Division Bench of the Madras High Court took the view that an executor named under the Will, acts in a representative capacity, i.e. for the benefit of whole class of persons including himself, interest in having the Will established. The concept that the right to obtain a probate/letters of administration is limited to a person who has applied for was not taken as correct because if the Will is proved and probate/letters of administration is granted it will benefit not only him but others who are equally interested in it. Any person interested in the matter can intervene in the proceedings. The position of a petitioner for probate was taken as that of a plaintiff under Order 1, Rule 8 C.P.C. It is based on the principle that one of the necessary incident of a representative suit is that any person for whose benefit it is instituted may intervene and ask to be made a party under Order 1, Rule 8(3) C.P.C. The petition for probate stands on a footing similar to that of a representative suit. It was observed that if the petition for probate stands on the footing similar to that of a representative suit, it is a right in principle to extend the analogy and hold that any legatee or beneficiary may, on a proper case being made intervene at any stage and claim to come on the record.

9. The above noted decisions were surveyed in detail in *Jadeja Pravinsinhji Anandsinhji* v. *Jadeja Mangalsinhji Shivsinhji* [A.I.R. 1963 Guj. 32.] . The view taken by the Madras High Court in *Rama Naidu's case* (supra) was followed. Mehta, J did not agree with the view taken by Justice Harrington in *Sarat Chand's case* (supra). It was held that on the death of the executor before having proved the Will, the residuary legatee who claimed to be beneficiary under the Will is entitled to continue the proceedings on the principle that an executor named under the Will and who may happen to be beneficiary under

the Will, in applying for probate does not fight a personal action but fights for the interest of all the beneficiaries under the Will.

9. The above noted decisions were surveyed in detail in *Jadeja Pravinsinhji Anandsinhji* v. *Jadeja Mangalsinhji Shivsinhji* [A.I.R. 1963 Guj. 32.] . The view taken by the Madras High Court in *Rama Naidu's case* (supra) was followed. Mehta, J did not agree with the view taken by Justice Harrington in *Sarat Chand's case* (supra). It was held that on the death of the executor before having proved the Will, the residuary legatee who claimed to be beneficiary under the Will is entitled to continue the proceedings on the principle that an executor named under the Will and who may happen to be beneficiary under the Will, in applying for probate does not fight a personal action but fights for the interest of all the beneficiaries under the Will.

10. The action of an executor in applying for probate is not in substance a personal action. There is no reason that after his death the person claiming the benefit under the Will cannot apply to continue the proceedings. On the other hand, to ask the applicant to file another application for probate/letters of administration, will unnecessarily cause hardship and it will spoil all the proceedings which have already been taken.

11. Learned counsel for the respondent relied upon the decision in *Edward Waston Coleston* v. *Mrs. Theresa Chitty* [A.I.R. 1934 All. 1053.] . In this case the learned Judge had granted probate to the Administrator General as the executor, to administer the estate of the deceased on the ground that the executor named under the Will was not in sound financial position, this Court held that the probate can be granted only to the person who has been named under the Will under Section 222 of the Succession Act and not the Administrator General who was not named under the Will. The proper course to adopt would be to take proceedings under Section 232 of the Act, under which when an executor dies, after having proved the Will, but before having administered all the estate of the deceased, a universal or a residual legatee may be admitted to prove the Will and letters of administration with the Will annexed may be granted to him of the whole estate or so much thereof may be administered. It was not a case whether an executor had died and the heir had applied for substitution.

(2) This extract is taken from *Thrity Sam Shroff v. Shiraz Byramji Anklesaria*, 2007 SCC OnLine Bom 200 : (2007) 4 Mah LJ 56 : AIR 2007 Bom 103 : (2007) 109 (1) Bom LR 606 : (2007) 55 AIC 480 : (2007) 2 Bom CR 560 : (2007) 4 AIR Kant R (NOC 515) 195 : (2007) 4 All LJ (NOC 706) 245 : (2007) 3 AIR Bom R 106 : (2007) 3 AIR Jhar R (NOC 979) 354 : 2007 AIHC 1912 : (2007) 3 Civ LT 63 : (2007) 4 KLT (SN 10) 10 at page 66

30. Considering all the above decisions, it is abundantly clear that the probate proceeding, though on being contested, becomes contentious proceeding, and therefore, it is to be proceeded in the form of a suit, but that by itself does not transform the proceeding into a suit under the Code of Civil Procedure. The provisions of Code of Civil Procedure would apply to such proceedings to the extent they are not inconsistent with the provisions of law comprised under the said Act. Section 226 of the said Act specifically provides that in case of death of an executor, representation would survive to the surviving executor or executors, as the case may be. At the same time, section 222 clearly specifies that the probate can be granted only to an executor. In other words, the probate proceedings are essentially at the instance of the executors so named in the Will, and can survive till the executors survive. Moment the sole executor dies or all the executors die, the question of proceeding being kept alive does not arise at all, as there would be no occasion in such a case to grant any probate. Such a proceeding would die a natural death as a consequence of non survival of any executor. In such circumstances, the question of applicability of Order XXII of the Code of Civil Procedure does not arise at all.

31. Merely because the proceeding may be appearing to be in the form of a representative character in relation to the execution of the Will of the deceased, that by itself will not make the proceeding to be a representative suit within the meaning of the said expression under the provisions of the Code of Civil Procedure. Order 1, Rule 8 of the Code of Civil Procedure which deals with the concept of a representative suit speaks of representation of interest of numerous persons and not the numerous interest of same person. Merely because the probate proceedings may relate to numerous properties of the deceased person, having so covered by the Will executed by the deceased person, that will not transform the proceeding into a representative suit within the meaning of the said expression as understood under Order 1, Rule 8 of the Code of Civil Procedure.

32. Once it is clear that the proceeding does not survive on the death of last surviving executor, such proceeding is bound to abate. The question of entertaining any application for substitution in an abated proceeding cannot arise, till and until the abatement is set aside. The question of setting aside the abatement would arise only in a case where right to sue survives and sufficient case is made out by moving the Court to set aside the abatement and to bring the legal representatives on record. Once it is clear that in a probate proceeding, there is no right to sue which can survive, the question of setting aside of the abatement does not arise. Once the abatement cannot be set aside, it means, proceeding cannot be revived. Once a proceeding is dead, the question of entertaining any application therein does not arise. Hence, the contention about the substitution of the deceased executor and thereafter transforming the proceeding into a proceeding for Letters of Administration does not arise.

33. The question of transformation from one form of proceeding into another form of proceeding would arise only when the proceeding in the first form is surviving or pending. In a case where the proceeding itself has abated and is neither surviving nor pending, the question of transforming the same into another form does not arise.

34. It is well settled that merely because the provisions of Code of Civil Procedure are made applicable to a proceeding, that by itself will not transform such proceeding into a suit within the meaning of the said expression under the Code. The Apex Court in *Diwan Brothers* v. *Central Bank of India*, reported in AIR 1976 SC 1503 while dealing with the decision of a Tribunal under Displaced Persons (Debts Adjustment) Act, 1951 which is referred therein as a decree, held that it would not be a decree within the meaning of section 2(2) of Code of Civil Procedure or of Schedule II, Article 11 of the Court Fees Act, 1870, nor the proceeding before the Tribunal would be a suit merely because the provisions of the Code of Civil Procedure are made applicable to such proceedings.

35. Besides, as observed by Justice Vimadalal in *Manekji Manchersha Javeri's case* (supra), the right of a person to obtain a grant of Letters of Administration is quite different from the right of a person who derives title as Executor under a Will to obtain a grant of Probate. The averments which would be necessary for an application in the proceeding for letter of administration may not be necessary in the case of an application for the grant of probate by a

person named in the Will as executor. This is evident from comparison of the provisions of section 276 with section 278 of the said Act read with Rules 374 and 375 of the Bombay High Court Original Side Rules.

36. As regards Rule 4A of Order XXII of the Code of Civil Procedure is concerned, it would have no application to such proceedings. Firstly that the right to sue does not survive in such proceeding. Secondly the said rule applies to "suits" within the meaning of the said expression under the Code of Civil Procedure and not to proceedings like those for grant of probate. Thirdly, section 226 read with section 222 of the said Act clearly indicates that the proceeding would abate on the death of all the executors. Being so, in probate proceedings, the provisions of Order XXII, Rule 4A of the Code of Civil Procedure are not attracted.

(3) This extract is taken from *Vatsala Srinivasan v. Narisimha Raghunathan*, 2011 SCC OnLine Bom 78 : (2011) 2 Mah LJ 953 : AIR 2011 Bom 76 : (2011) 3 Bom CR 78 : (2011) 102 AIC 764 : (2011) 2 AIR Bom R 629 : 2011 AIR CC 1155 at page 958

9. The submission that has been urged on behalf of the Appellant is that while the right of the legatee to institute a proceeding for the grant of letters of administration cannot be questioned and is not questioned, the legatee must necessarily institute a separate proceeding for the grant of administration. In other words what is sought to be urged is that the proceeding for the grant of probate initiated by the sole executor abates on the death of the executor since the right to obtain a probate is personal to the executor. Therefore it is urged that the legatee under the Will must institute a separate proceeding for the issuance of letters of administration and cannot seek continuation of the proceedings which were instituted by the sole executor, which must be construed as having died a natural death following the death of the executor. It is that submission which must now fall for consideration.

10. This issue which the Court is called upon to decide has been considered in judgments of several High Courts to which it would be necessary to turn. **The first set of judgments** which holds the field are judgments which take the view that it is only an executor appointed under a Will who can seek probate and that consequently upon the death of the sole executor or as the case may be of the last surviving executor, the heirs of the executor are not entitled to be impleaded as parties to the proceeding.

11. In the judgment of a Division Bench of this Court in *Thrily Sam Shroff* v. *Shiraz Byramji Anklesaria*, (supra), the Will executed by a testatrix in 1989 was sought to be administered in a Petition filed in 1993. Five executors appointed under the Will had died. The petition had been amended after the death of the first two executors. However, no steps were taken after the death of the third executor. The applicant had not sought a continuation of the suit by substitution of herself in place of the deceased executors but had applied for various reliefs in the administration of the estate of the deceased. The Division Bench held that probate proceedings are essentially at the instance of the executors named in the Will and can survive until the executors survive. If the sole executor dies or upon the death of all the executors named in the Will no question would arise of the proceeding being kept alive as there would be no occasion to grant a probate. The Division Bench was of the view that such a

procedure would die a natural death as a consequence of the non-survival of any executor and the applicability of the provisions of Order XXII would not arise. The Division Bench relied inter alia upon the judgment of the Calcutta High Court in *Sarat Chandra Banerjee* v. *Nani Mohan Banerjee*, 1909 Vol. III Indian Cases 995 (Calcutta). That was a case where pending the hearing of a contested application for probate by a sole executor the executor had died. His widow as legal representative applied that her name be substituted for the deceased executor and the petition for probate be amended by substituting a prayer for the grant of letters of administration. The application was rejected on the ground that the right to sue did not survive and the suit stood abated. In *Hari Bhusan Datta* v. *Manmatha Nath Datta*, 1919 (Vol. II) Indian Cases 76 (Calcutta) a residuary legatee under a Will had applied for letters of administration with a copy of the Will annexed. During the pendency of the proceedings the legatee died and his son applied for being substituted in the place of the deceased father and to be granted letters of administration. The Calcutta High Court held that the right of the legatee to obtain a grant was personal and would not devolve on his heir. In *Manekji Manchersha Javeri* v. *Phiroze Boman Javeri*, 1970 Mh.L.J. 324, a learned Single Judge of this Court followed the decision of Harington J. of the Calcutta High Court in *Sarat Chandra Banerjee* (supra) and held that in the case of an application for probate no question of a right to sue arises at all. The learned Single Judge was of the view that when a petition is filed on the testamentary side for the grant of representation it is not a suit in any sense of the word for, if it remains non-contentious. It does not even assume the form of a suit. Though section 295 provides that the proceedings take as nearly as may be a form of the regular suit, that does not really render the proceedings a suit in the real sense of the term and no question would arise of the right to sue surviving on the death of the executor even though the executor had died after the testamentary proceedings had become contentious. These decisions were followed in the judgment of the Division Bench of this Court in *Thrify Sam Shroff* v. *Shiraz Byramji Anklesaria*, where the Court came to the conclusion that the proceedings for the grant of a probate under section 295 are not proceedings in a suit. Following this, the Division Bench held that an application of the nature that was made before the learned Single Judge was not maintainable.

12. Now from a reading of the facts contained in the judgment of this Court in *Thrity Sam Shroff* it is evident that the situation which arose before the Court in the case was one where during the pendency of the probate proceedings all the executors appointed under the Will had died. The appellant

was one of the legal heirs of the deceased testator. It was her contention that the property was mismanaged and was being wasted and that it was necessary to appoint an administrator consequent upon the death of the executors named in the Will. The appellant took out a motion seeking various reliefs including the appointment of an official administrator and for the governance of the estate of the deceased testator. It was in this background that the Division Bench came to the conclusion that the suit stood abated and the motion in such a suit for interim orders could not be entertained. No question of the substitution of the legatee upon the death of a sole executor in testamentary proceedings arose before the Division Bench. The ratio of the judgment is on what arose before the Court for determination and hence what the Court has decided on that issue.

13. The Madras High Court has had occasion to consider as to whether in a pending application for the issue of a probate, upon the death of a sole executor before proving the Will it would be competent for a legatee or any other person interested to intervene and continue the proceedings to prove the Will and obtain letters of administration in his own right. This issue was considered initially in a judgment of a Division Bench in *P. Rama Naidu* v. *Rangayya Naidu*, AIR 1933 Madras 114. One of the Judges constituting the Division Bench, Venkatasubba Rao, J. held that the proper view is that the object of the executor in commencing the proceeding is to get an adjudication in the interest not only of himself but of others that the Will which is propounded is genuine and valid. Reilly, J. in a separate judgment dealt with the contention that when an executor prays for probate, he prays for something which is personal to himself since no one but the executor can get the probate. Holding that the submission looks more at the form of the proceedings while ignoring the real effect, the learned Judge held as follows:

> "An executor who prays for probate prays in form for something which can be granted to no one else. But the essence of the proceedings is that he seeks to establish a Will, not for himself, but as the representative of those who take benefits under it. If he fails in his duty, any of those whom he represents may intervene to cany on the proceedings, having in effect by representation through the executor been a party to the proceedings from the outset. And, if in the course of the proceedings the executor drops out through death, it follows that any of those he has represented may similarly carry on the proceedings with the unessential modification that the prayer must then be for letters of administration with the Will annexed."

A subsequent judgment of the Madras High Court in *Govind M. Asrani* v. *Jairam Asrani*, AIR 1963 Madras 456, reiterated the same view. The Division Bench held that both in a case where an executor applies for issue of a probate and also where a legatee or other person applies to the Court for the grant of letters of administration with the Will annexed, the question that has to be decided is the same, namely, (i) whether the Will is true; (ii) whether it was executed in accordance with law; (iii) whether there was capacity in the testator to make the Will; and (iv) there being no fraud or other infirmity attending the execution of the document. Whether it be an executor or an administrator, the right or interest possessed by them in the properties of the testator is the same and both have to administer them in accordance with the directions contained in the Will. In this context the Division Bench held as follows:

> "To put it in other words, the proceedings taken out either for the grant of probate or letters of administration with the Will annexed are in the interest of the legatees and the question involved in such proceedings will be the same, namely, about the truth and genuineness of the Will. In both the cases it will be open to a person interested to intervene. Final adjudication as to the genuineness of the Will in both cases Will operate as a judgment in rem.
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> "..... It is true that in form a probate is different from a letters of administration with the Will annexed; there is also difference in procedure regarding necessity to take security; but it cannot be denied that an adjudication in an application or suit for obtaining probate or letters of administration will be binding on all the persons interested in the estate of the deceased testator."

The Division Bench recognized that the impleading of a legatee in the place of the deceased executor would involve an alteration of the petition which was originally filed for the issue of the probate into one for the grant of letters of administration but held that this was a technicality not affecting the substance of the matters to be decided in the case.

14. The Supreme Court had occasion to consider a similar issue in ***Shambhu Prasad Agarwal* v. *Bhola Ram Agai-wal*, (2000) 9 SCC 714**. In that case the testatrix had by her Will bequeathed her estate to a nephew. On the death of the testatrix the legatee filed a petition for probate. The legatee

died during the pendency of the proceedings and on his death his heirs filed an application in the probate proceedings for substitution in place of the deceased legatee. Another application for amendment of the petition was filed by which it was prayed that instead of a probate, the legal heirs may be granted letters of administration. These applications having been dismissed and the order of dismissal having been confirmed in revision by the High Court an appeal was filed before the Supreme Court. The Supreme Court noted that the legatee, it was true should have applied for the issuance of letters of administration and not for probate. However, this would not debar his heirs from getting the probate petition amended. The Supreme Court ruled that the view of the trial Court in rejecting the applications on the ground that the probate petition filed by the legatee related to his personal right and hence no right accrued to the appellants for substitution in his place was incorrect. **The judgment of the Supreme Court lays down that while it is true that where an executor dies his heirs cannot be substituted because the executor possesses a personal right, this is not applicable where the heirs of a legatee apply for issue of letters of administratio**n. The Supreme Court noted that it could not be disputed that the heirs of the legatee could file a petition for the issuance of letters of administration. Having regard to the time that had elapsed, the interest of justice would require that the proceeding should come to an end as early as possible and the appeal should not be rejected on what was regarded as being a "highly technical ground".

15. The judgment of the Supreme Court is therefore authority for the principle that the right to seek probate of a Will executed by a deceased testator is personal to the executor appointed under the Will. Upon the death of the executor the heirs of the executor cannot be substituted in his place. However, this would not debar the legatee and upon the death of the legatee his heirs from seeking substitution.

16. The Court in a proceeding for probate, it is well settled, does not decide questions of title. The Court is in probate proceedings only concerned with the issue as to whether the document set forth has been duly executed by the testator; and whether the testator was at the time of the execution of the document in a sound and disposing state of mind. The testamentary court, does not determine questions of ownership of or title to the property but whether the testator has executed his testamentary instrument voluntarily and with a free will.

17. Under the Indian Succession Act, 1925 the effect of the grant of letters of administration is to entitle the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death. Under the Act, probate of a Will, when granted establishes the Will from the death of the testator and renders valid intermediate acts of the executor as such. Where an executor is named in the Will probate can be granted only to an executor named in the Will. On the other hand where the Will does not appoint an executor a universal or residuary legatee may be admitted to prove the Will. The right of the beneficiary to seek letters of administration continues to survive notwithstanding the death of the testator. Where an executor resigns or refuses to act as such the beneficiary named under the Will can assert his right to seek letters of administration. In a situation where the executor has, even after the presentation of a petition, failed to act it is open to the beneficiary or legatee under the Will to seek the issuance of letters of administration. In all these situations, there is no conceivable reason as to why the beneficiary or legatee should be relegated to file independent proceedings. The executor does not derive any interest in the property which forms the subject-matter of the bequest unless he is also a beneficiary under a Will.

18. Both a proceeding for the grant of probate as well as a proceeding for the grant of letters of administration with the Will annexed is initiated for protecting the interest of the legatees under the Will. The essence of the enquiry in both the proceedings is the same and relates to the genuineness and authenticity of the Will. Having regard to these fundamental similarities in both the proceedings there is no conceivable reason' as to why the law must be regarded as prohibiting a beneficiary from seeking to continue the proceedings upon the death of the sole executor and as incidental thereto for seeking formal conversion of the proceeding from one for the grant of a probate to one for the issuance of letters of administration. If there were to be a specific prohibition in law enacted by the legislature the position may have well been different. In the absence of a legal prohibition to the contrary the Court would not readily accept a submission, the effect of which would be to result in delaying the proceedings for the administration of the estate and a resultant multiplicity of proceedings. This is amplified in the present case where the recording of evidence is complete. Nearly eight years have elapsed since the institution of the suit. Evidence of seven witnesses has been recorded and the suit is ripe for final hearing. There is no dispute about the position that in any event the beneficiary would have been entitled to institute separate proceedings

independently for the grant of letters of administration. That right can well be espoused by the beneficiary by seeking a continuation of the existing proceedings. It must be noted, that this right which is available is recognized with reference to a beneficiary under the Will. A fundamental difference has to be made between a situation where the legal heirs of a sole executor seek impleadment in the proceedings on the death of the executor. The legal heirs of the sole executor cannot be brought on record since the right to seek *probate* of the Will subsists in the executor alone. But that is not to say that a beneficiary under the Will is prohibited from continuing the existing proceedings. The proceedings enure to the benefit of the legatee. The appointment of the administrator is but a step in aid of the proper administration of the estate of the deceased. Section 273 provides that probate or letters of administration shall have effect over all the properties and estate of the deceased through the State in which the same is or are granted and shall be conclusive as to the representative title against all debtors of the deceased and all persons holding property which belongs to him. Parties, documents and facts are similar in both sets of proceedings. In this view of the matter and particularly having regard to the judgment of the Supreme Court to which we have made a reference earlier we are of the considered view that the learned Single Judge was not in error in allowing the Chamber Summons.

19. We have not considered it necessary to refer the judgment of the Division Bench of this Court in *Thrity Sam Shroff's case* to a larger Bench for reconsideration. A judgment is authority for the issues which the Court decides; the issues being those which arose before the Court for decision. In that case after all the executors under the Will of the testator had died, an application for interim reliefs was made by one of the heirs of the deceased testator. The facts in that case were therefore on a completely different foundation. The issue as to whether a legatee can upon the death of a sole executor continue the proceeding and seek formal conversion of the proceedings from one for probate into a proceeding for grant of letters of administration did not fall for determination. We are in respectful agreement with the view taken by two Division Benches of the Madras High Court which is also consistent with the law laid down by the Supreme Court subsequently. The judgment of the Supreme Court was not cited before the Court in *Thrity Sam Shroff*. The law laid down by the Supreme Court is binding and must be followed.

(4) This extract is taken from *Vatsala Srinivasan v. Shyamala Raghunathan*, (2016) 13 SCC 253 : (2017) 2 SCC (Civ) 424 : 2016 SCC OnLine SC 568 at page 254

4. Being aggrieved by the aforestated judgment rendered by the Division Bench [*Vatsala Srinivasan* v. *Narisimha Raghunathan*, 2011 SCC OnLine Bom 78 : AIR 2011 Bom 76] of the High Court, the appellant has preferred this appeal with a prayer that the impugned judgment of the Division Bench be quashed so that the proceedings be undertaken by the respondent afresh for grant of letter of administration.

5. We have heard the learned counsel for the parties and gone through the various judgments cited by them. While dismissing the appeal, the Division Bench of the High Court relied upon the following judgments — *Govind M. Asrani* v. *Jairam Asrani* [*Govind M. Asrani* v. *Jairam Asrani*, 1963 SCC OnLine Mad 46 : AIR 1963 Mad 456] , *Kamalamma* v. *Somasekharappa* [*Kamalamma* v. *Somasekharappa*, 1962 SCC OnLine Kar 58 : AIR 1963 Mys 136] and *Jadeja Pravinsinhji Anandsinhji* v. *Jadeja Mangalsinhji Shivsinhji* [*Jadeja Pravinsinhji Anandsinhji* v. *Jadeja Mangalsinhji Shivsinhji*, 1961 SCC OnLine Guj 62 : AIR 1963 Guj 32].

6. In view of law laid down in the aforestated judgments, the Division Bench observed that both the proceedings with regard to the probate and the letter of administration are of the same nature and therefore, the proceedings cannot abate. The essence of both the proceedings is the same and they relate to ascertainment of genuineness and authenticity of the will. By considering the aforestated judgments, the Division Bench has rightly confirmed the view expressed by the learned Single Judge.

7. We also agree with the view expressed by the Division Bench of the High Court, which has followed the judgment delivered in *Govind M. Asrani* [*Govind M. Asrani* v. *Jairam Asrani*, 1963 SCC OnLine Mad 46 : AIR 1963 Mad 456] , as the logic behind dismissing the appeal, in our opinion, is just and proper. In any case, so as to establish the will, the probate proceedings are required. The function of the executor is to execute the will. The main purpose can be very well achieved by obtaining a letter of administration so that the property can be administered by the administrator as per Section 232 of the Succession Act, 1925. In the instant case, the said practice has been rightly followed.

8. We are also in agreement with the view expressed in the impugned judgment, which has also relied upon law laid down in *Jadeja Pravinsinhji Anandsinhji* [*Jadeja Pravinsinhji Anandsinhji* v. *Jadeja Mangalsinhji Shivsinhji*, 1961 SCC OnLine Guj 62 : AIR 1963 Guj 32] , in which it has been held: (SCC OnLine Guj paras 6 & 9)

> "*6.* ...An executor, in the capacity of an executor, has no personal interest in the estate of the deceased. ... The object of the executor in these proceedings is to get an adjudication not of any dispute in which he is personally interested but the object is to propound the will of the deceased for the benefit of those who take an interest in the will.
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> *9.* It is, therefore, clear that an executor in applying for probate is not fighting a personal action but fighting for the interests of all the beneficiaries under the will. Therefore the action of an executor in applying for a probate is not in substance a personal action and as observed earlier by me the maxim *actio personalis moritur cum persona* could not apply to such a case. If the executor fails in his duty, any of those whom he represents are entitled to intervene and carry on the proceedings with a "formal modification" that the prayer must then be for letters of administration with the will annexed."

9. We are in agreement with the view expressed by all the three High Courts and in the interest of justice, for the aforestated reasons, we dismiss the appeal. There shall be no order as to costs. Pending applications, if any, stand disposed of. We hope that hearing before the testamentary court shall be expedited and proceedings for grant of letter of administration shall continue in accordance with law.

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