

Shernaz Faroukh Lawyer vs 3. Manek Dara Sukhadwalla on 24 December, 2013

Author: R.D.Dhanuka

Bench: R.D.Dhanuka

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NMT-138-1

IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.138 OF 2012
IN
TESTAMENTARY SUIT NO.29 OF 2012

1. Shernaz Faroukh Lawyer,
Age: 60 years, Parsee Zoroastrian,
Indian Inhabitant of Pune, residing

at Silver Dale Survey No.61/2B1,
Mumdhwa Road, Pune 411 036

being one of the executrices
named under the Will of the
deceased Purvez Burjor Dalal.

2. Villy Pirojsha Avasia (also
known as, Villie Pirojsha Avasia)

Age : 80 years, Parsee Zoroastrian,
Indian Inhabitant of Mumbai,

residing at B/19, Keval Mahal, 64,
Marine Drive, Mumbai 400 020

being one of the executrices
named under the Will of the
deceased Purvez Burjor Dalal.

... Plaintiffs/Ori. Petitioners

V/s.

3. Manek Dara Sukhadwalla
Parsee Zoroastrian, Indian
Inhabitant, residing at 6/8 Rustom
Baug, Victoria Road, Byculla,

Mumbai 400 027.

4. Shiavax Hoshie Dolikuka, of
Thane, Indian Inhabitant, residing
at Shantiniketan CHS, 1st Floor,
Flat No.102, Achole Road, Next to
Achole Talao, Nallasopara (East),

Asmita

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Thane.

... Defendants/Ori. Caveators.

Mr Iqbal Chagla, Senior Advocate a/w Mr F.E. D'vitre, Senior Advocate a/w
Mr D.D. Madan, Senior Advocate a/w N. A. Agarwal, a/w P.A. Kadi & Ms.
A. R. Borkar i/b M/s Doijode & Associates for Petitioners/plaintiffs.

Ms Fereshteh Sethna a/w Ram Kakkar, a/w Chirag Dave a/w Aagam Doshi
i/b M/s Dutt Menon Dunmorr Seth for Caveators/Defendants.

CORAM : R.D.DHANUKA J.

CLOSED FOR ORDERS ON : NOVEMBER 21, 2013.

PRONOUNCED ON : DECEMBER 24, 2013.

JUDGMENT :

Learned counsel appearing for parties concluded their arguments on 08/07/2013. Matter was closed for orders. This matter was mentioned by the learned counsel on 20/08/2013 and informed that in SLP (Civil) 20165 of 2013, which was filed by defendant No.1, both the parties had indicated that they were making an effort to settle the dispute amicably and the said petition was adjourned. Learned counsel requested the Court not to pronounce the Judgment in the above matter in view of the talks of settlement between the parties. Matter was accordingly adjourned to 16/11/2013 for directions. On 21/11/2013, learned counsel appearing for parties mentioned the matter again and informed that settlement was not possible and that the Special Leave Petition filed by defendant No.1 is dismissed. The learned counsel requested to pronounce the Judgment in the above matter. On 21/11/2013, matter was accordingly closed for pronouncement of Judgment.

2. By this Notice of Motion, plaintiffs seek appointment of a fit and .. 3 .. NMT-138-12 proper person as an administrator/officer of the estate/property of the deceased Mr.Purvez Burjor Dalal alias Purvez Burjorji Dalal alias Purvez Dalal alias P.B.Dalal, a Parsee Zoroastrian, Bachelor under section 247 of the Indian Succession Act, 1925 and also seeks injunction against the first defendant, his employees, servants and agents in respect of the properties of the estate of the said deceased. The plaintiffs also seek disclosure on oath the moveable and immovable assets of the said deceased and an order against the first defendant to render true and full inventory and accounts of his dealings with the assets and properties of the deceased and the profits, if any therefrom.

Some of the relevant facts which emerges from the pleadings and documents filed by both parties and which are necessary for the purpose of deciding this Notice of Motion are as under :-

3. Plaintiffs as well as defendant No.1 have filed two separate testamentary petitions for seeking probate of the alleged Will and testament of the deceased Mr.Purvez Burjor Dalal (for short 'the said deceased') and both those petitions are pending.

4. Sometimes in the year 1955, plaintiff no.2 was married to the brother of the deceased viz. Mr Jamshed Burjor Dalal who pre-deceased the said deceased. On 15th October, 1959, a decree for annulment of the marriage between the plaintiff no.2 and the said Mr Jamshed Burjor Dalal came to be passed. It is the case of the plaintiffs that the relations of the plaintiff no.2 however with Mr Jamshed Burjor Dalal and the said deceased were cordial. On 14th August, 2010, Mr Jamshed Burjor Dalal expired. It is the case of the plaintiffs that on 22nd November, 2010, the said deceased executed a Will and Testament thereby appointing plaintiff nos. 1 and 2 as executrices and .. 4 .. NMT-138-12 Mr.Jimmy Pirojsha Avasia as the executor. The said Mr Jimmy Pirojsha Avasia however renounced his right as executor for probate and execution of the said Will dated 22nd November, 2010.

5. It is the case of the plaintiffs that one domestic servant by name 'Shaku' who had been in the service of the said deceased and Mr Jamshed Burjor Dalal for over 20 years expired in the month of April 2011. defendant No.1 engaged the domestic help Sushila Sagar Nirbhavne to reside at the residence of the deceased. It is the case of the plaintiffs that defendant No.1 in collusion with one Mr Doodhmal and Pandey started exercising complete dominion over the deceased and control over the properties of the said deceased. According to the plaintiffs during last few months of his life, the said deceased was suffering from both physical and mental infirmities and was not of a sound and disposing mind.

6. On 23rd August, 2011, according to the plaintiffs one Dr L. S. Balani who was stated to be the family physician of the said deceased, examined the said deceased and certified at the foot of a purported Will dated 23rd August, 2011 that the deceased was not in a fit condition to sign the said purported Will with proper understanding. On 8 th September, 2011 defendant No.1 has alleged to have fraudulently set up another Will of the said deceased. On 7th December, 2011 the said deceased expired who was aged about 75 years at the time of his death. On 23rd December, 2011, plaintiffs through their advocate addressed a letter to defendant No.1 and Mr Doodhmal and Pandey inter alia informing that the plaintiffs were executrices and trustees under the Will dated 22 nd November, 2010 and called upon them to handover to the plaintiffs as executrices on the estate of the said .. 5 .. NMT-138-12 deceased, all papers, documents, records and other property of the deceased that might be in their possession or control and for the keys to the doors and locks and other information available with them regarding the affairs, assets and properties of the deceased.

7. By letter dated 29th December, 2011, B. Amin & Co., advocates informed the plaintiffs that they were representing defendant No.1 and one Mr Pandey only and called upon the plaintiffs to abstain from representing and/or holding themselves out as executors or trustees to administer the estate of the said deceased before all/any government authorities, forums, banks etc. and alleged that the plaintiffs do not have any rights regarding any matter pertaining to the estate of the said deceased. Vide letter dated 11 th January, 2012 plaintiffs through their advocates called upon defendant No.1 and Mr Pandey to state their purported capacity, authority or connection if any, with regard to the

estate of the said deceased and alleged that defendant No.1, Mr Doodhmal and Pandey had effectively prevented the deceased from meeting persons and effectively kept him and his properties under their control. The plaintiffs called upon defendant No.1 and Pandey to forthwith disclose and forward all documents and papers in their possession relating to the estate of the deceased, assets such as jewellery, gold, cash that were mainly kept by the deceased at his residence, and to provide full true and complete details of all actions on the part of defendant No.1 and Pandey with regard to the estate of the deceased.

8. Vide letter dated 23rd January, 2012 defendant No.1 and Pandey through their advocates questioned the genuineness of the plaintiffs' claim of existence of Will dated 22 nd November, 2011 propounded by the plaintiffs and .. 6 .. NMT-138-12 alleged that defendant No.1 was in charge and possession of the estate of the said deceased to the knowledge of the plaintiffs and their apprehension of unlawful possession of the flats at Modern flats was ill-founded.

9. On 23rd December, 2011, defendant No.1 filed a Probate Petition (5 of 2012) inter alia praying for last Will and Testament dated 8 th September, 2011 in this court. It is the case of the plaintiffs that defendant No.1 and Mr.Pandey had taken possession of the flat No. 17/18 of Modern flats. It is the case of the plaintiffs that defendant No.1 suppressed the existence of the alleged Will dated 8th September, 2011 and of the filing of Probate Petition No. 5 of 2012 on 23rd December, 2011. On 3rd February, 2012, plaintiffs filed Testamentary Petition No. 341 of 2012 inter alia praying for probate of the alleged Will and testament dated 22 nd November, 2012 in this court.

10. On 7th February, 2012, the plaintiffs advocate received a letter from M/s Tata Power Limited, occupant of the part of the building 'Love Dale' at Peddar Road owned by the deceased informing that the advocates for defendant No.1 had addressed a letter dated 2 nd January, 2012 to them stating that the defendant No.1 was the executor under an alleged Will dated 8th September, 2011 and therefore the earlier Will dated 22 nd November, 2010 should be ignored. Tata Power Limited however clarified that their clients were ready and willing to pay the license fees to the rightful owner/executor and/or deposit the license fee amount in court if so directed by the court. It is the case of the plaintiffs that plaintiffs came to know about the alleged Will dated 8th September, 2011 propounded by the first defendant for the first time only from the letter sent by the advocates of Tata Power Limited. The plaintiffs thereafter conducted the search of the website of this court and .. 7 .. NMT-138-12 learnt that defendant No.1 had filed a probate petition (5 of 2012) in this court.

11. On 9th February, 2012, Asiatic Textiles Ltd. alleged that it is a statutory tenant of part of the building 'Love Dale' at Peddar Road.

12. On 17th February, 2012, plaintiffs through their advocates addressed a letter to the advocates for defendant No.1 and Mr.Pandey and called upon them to forward copy of the alleged Will dated 8 th September, 2011 and papers and proceedings in Probate Petition No. 5 of 2012 forthwith and also to provide details of the dealings with the estate of the deceased and to desist from unlawfully dealing therewith. On 17 th February, 2012, plaintiffs filed caveat in the probate petition NO. 5 of 2012 filed by the defendant No.1 and applied for certified copy of the said petition and alleged Will propounded by defendant No.1. On 24 th February, 2012, plaintiffs filed affidavit in support of the

caveat in probate petition no. 5 of 2012 objecting to the grant of probate of the alleged Will propounded by defendant No.1. On 24th February, 2012 defendant No.1 forwarded a caveat filed by him in testamentary petition bearing No. 341 of 2012 filed by the plaintiffs in this court.

13. On 25th February, 2012 defendant No.1 and Mr.Pandey through their advocates addressed a letter to the advocates of the plaintiffs alleging that defendant No.1 had a caveatable interest in the plaintiffs' petition and requested for a copy of the probate petition filed by the plaintiffs. On 1 st March, 2012 defendant No.1 and Mr.Pandey forwarded a copy of the affidavit in support of the caveat of defendant No.1 filed in the probate petition filed .. 8 .. NMT-138-12 by the plaintiffs containing various allegations in the said affidavit in support.

It is alleged by the defendant No.1 that the conveyance was executed between the said deceased and one Sun Vision Arcade with regard to the property at Vile Parle.

14. On 12th March, 2012, the plaintiffs received a copy of the alleged Will dated 8th September, 2011 and Probate Petition No. 5 of 2012 from the office of this Court pursuant to the praecipe dated 17 th February, 2012. On 14th March, 2012, plaintiffs received a letter from HSBC Bank inter alia stating that as a precautionary measure in accordance with the deceased depositors policy followed by the bank, they had blocked the deceased's accounts for security purpose upon receipt of plaintiffs' advocates' notice dated 22 nd December, 2011. On 19th March, 2012 defendant No.1 and Pandey through their advocates addressed a letter to the advocates of the plaintiffs and made various allegations.

15. On 22nd March, 2012, plaintiffs received a letter from Tata Power Ltd. through their advocates stating that in view of the rival claims, they would deposit the leave and licence amount with their advocates firm every month. On 22nd March, 2012, the plaintiffs received a letter from the advocates for M/s. Modern Flats confirming that defendant No.1 was frequently seen at flat in which the deceased resided. Vide letter dated 25 th April, 2012, plaintiffs' advocates replied to the letter dated 19 th March, 2012 and denied the allegations made therein.

16. On 2nd May, 2012, the plaintiffs through their advocates addressed a letter sending a reminder to Al-Karim Manzil Co-operative Housing Society .. 9 .. NMT-138-12 Ltd. requesting for copies of certain documents and information as to whether anybody had made any claim over flat nos. 8 and 22 in the said flats in Al-

Karim Manzil Building belonging to the said deceased.

17. On 3rd May, 2012, the plaintiffs filed this Notice of Motion (138 of 2012). defendant No.1 filed Misc. Petition (L) NO. 915 of 2012 for dismissal of caveat alleging that plaintiffs had no caveatable interest which was filed on 17th February, 2012. defendant No.1 also filed a Notice of Motion (152 of 2012) inter alia praying for dismissal of the suit filed by the plaintiffs alleging failure to disclose the cause of action.

18. On 21st June, 2012, learned Single Judge of this Court passed ad- interim order in this Notice of Motion granting injunction in terms of prayers

(b) and (C) except bracketed portion and directed the first defendant to file the disclosure affidavit in two weeks. defendant No.1 through his counsel made a statement that flat in A1 Karim Manzil had already been disposed off in the lifetime of the said deceased.

19. It is the case of the plaintiffs that on 26 th June, 2012 and 27th June, 2012 plaintiffs took search of the original alleged Will dated 8 th September, 2011 propounded by defendant No.1 and it was revealed that the said alleged Will was not a genuine document but one that was got up and fabricated by defendant No.1. It is the case of the plaintiffs that on 2 nd July, 2012, defendant No.1 filed a false police complaint against the plaintiffs and Jimmy Avasia in an attempt to intimidate them, for allegedly obtaining the signatures of the deceased and preparing the false Will.

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20. By an order dated 4th July, 2012, the Division Bench confirmed the ad-interim order passed by the learned Single Judge of this Court with minor modifications to the extent that affidavit of disclosure be filed in a sealed envelope and depending on the order the learned Testamentary Judge that may be has been passed on the notice of motion, learned Single Judge would give appropriate directions whether the sealed envelope should be opened or not. On 12th July, 2012, the defendant No.1 tendered affidavit of disclosure in court in a sealed envelope pursuant to order passed by this Court.

21. On 25th July, 2012, this court in the Notice of Motion No. 152 of 2012 filed by the first defendant and Misc. Petition (L) No. 915 of 2012 held that the plaintiffs had a caveatable interest and dismissed the said Misc. Petition as well as Notice of Motion filed by the first defendant.

22. Mr Chagla, learned senior counsel submits that the said deceased was owner of the flat i.e. flat No.8 in Al-Karim Manzil Building, Crawford Market, Mumbai 400 001. It is submitted that defendant No.1 handed over possession of the said flat to one Mr Vaseem Kapadia on 21/12/2011. In the testamentary suit (25/12) filed by the first defendant which was filed on 23/12/2012 at item No.3 of Exhibit-C, defendant No.1 had disclosed the said flat on oath therein to be "Self occupied and no income fetched". On 21/06/2012 this Court had passed an ad interim order of injunction against the defendants which was also in respect of the said flat. It is submitted that it is thus clear that the alleged handing over of possession of flat No.8 to Mr Vaseem Kapadia was in willful and deliberate defiance of the ad interim order passed by this Court on 21/06/2012 by backdating the documents.

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23. My attention is invited to Statement and FIR dated 10/09/2011 which is annexed to the compilation of documents filed by defendant No.1 in which deceased had made a complaint against three alleged trespassers of the said flat No.8 and had stated that he had seen the Deed of Transfer

in which signature of his late brother was there and his signature was false. It was mentioned in the said Deed that the said flat had been alleged to have been purchased for Rs.85,00,000/- but the actual market price of the room was more than a crore of rupees and thus his brother would not have sold the said flat to those alleged trespassers for such a low price and his brother would have consulted the said deceased before dealing with the said flat.

24. Mr Chagla, learned senior counsel submits that though on 29/11/2011 according to defendant No.1, the said deceased had allegedly agreed to sell the said flat for Rs.75,00,000/-, defendant No.1 did not produce any agreement in support of such false allegation. In the disclosure affidavit dated 12/07/2012, it is alleged that the purchaser had allegedly handed over three post dated cheques to the deceased, dated 29/11/2011, 07/12/2011 and 14/12/2012 for Rs.25,00,000/- each respectively. It is submitted that the bank statement of the said deceased which is produced on record however shows credit of cheque on 29/11/2011 in the sum of Rs.25,00,000/- in the account of the said deceased with HSBC bank on Value date 30/11/2011. On 07/12/2011, the said deceased expired. It is submitted that the story of defendant No.1 in the disclosure affidavit that in view of the demise of the said deceased, the balance two post dated cheques of Rs.25,00,000/- each could not be deposited, is on the face of it is false and is without any basis because account of the said deceased with the HSBC bank was frozen only .. 12 .. NMT-138-12 after 22/12/2011.

25. Mr Chagla learned senior counsel invited my attention to the alleged letter dated 21/12/2011 from defendant No.1 to the purported purchaser after 14 days of the death of the said deceased confirming surrender by defendant No.1 of all his "occupancy rights" of the said flat No.8 in favour of the said purported purchaser Mr Vassem Kapadia and granting him liberty to deal with the said premises in any manner the said purported purchaser likes. It is submitted that since the alleged two cheques towards alleged consideration were not deposited in the bank account or issuance of such cheques itself not proved or not even produced by the first defendant and in view of the fact that two fresh cheques were alleged to have been issued only on 14/03/2012 and 20/03/2012 in the sum of Rs.20,00,000/- and Rs.30,00,000/- respectively, defendant No.1 could not have entered into such alleged letter of possession on 21/12/2011. It is submitted that on 23/12/2011, the first defendant filed testamentary petition in this Court that is just two days after the issuance of alleged possession letter wherein defendant No.1 has stated on oath before this Court that the said flat was "

Self occupied and no income fetched" . It is submitted that defendant No.1 has alleged that on 14/03/2012 and 20/03/2012, the alleged two fresh cheques issued by the purported purchaser in the sum of Rs.20,00,000/- and Rs.30,00,000/- respectively in the name of " Estate of Mr Purvez Burjor Dalal"

were allegedly credited in account opened by defendant No.1 with Kotak Mahindra Bank. The first defendant has not produced any copies of such alleged cheques or bank statement of the said account till the date of arguments.

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26. It is submitted by learned senior counsel that only in affidavit in reply dated 24/04/2013 filed in contempt petition filed by the plaintiffs, first defendant disclosed the alleged articles of agreement executed by defendant No.1 in favour of the alleged purchaser confirming the sale in his favour in respect of the said flat No.8. It is submitted that admittedly on 26/03/2012, both the parties were already in Court and have already filed probate petition separately for obtaining probate of the Will propounded by both the parties. The plaintiff had already filed a caveat in the probate petition filed by the first defendant on 17/02/2012. Plaintiff had already filed probate petition in this Court on 03/02/2012 in which defendant No.1 had filed a caveat on 24/02/2012. Learned senior counsel submits that the first defendant was not legally entitled to deal with the estate after filing of the caveat by the plaintiffs in the probate petition filed by the first defendant. Defendant No.1 was required to have applied to this Court for leave to execute the alleged Articles of Agreement or would at least have informed this Court of his intention to do so or of his having allegedly done so. The said alleged Articles of Agreement dated 26/03/2012 has been admittedly not registered.

27. Mr Chagla learned senior counsel submits that on the date of hearing on 21/06/2012, learned counsel appearing for defendant No.1 made a statement on instructions that the flat in Al-Karim Manzil building had already been disposed off during the lifetime of the said deceased. This court had passed an ad interim order of injunction on 21/06/2012 in terms of prayer clauses (b) and (c) except the bracketed portion. Defendant No.1 was directed to file disclosure affidavit in two weeks. Defendant No.1 falsely denied having made any such statement as recorded by this Court on 21/06/2012. It is submitted that though pursuant to the order passed by this .. 14 .. NMT-138-12 Court on 14/08/2012 directing defendant No.1 to furnish copy of the disclosure affidavit to the plaintiff which was affirmed on 12/07/2012, defendant No.1 deliberately suppressed and did not annex a single document in support of what was stated by him in the said disclosure affidavit in respect of flat No.8. Though there was a reference made for the first time to the alleged agreement dated 26/03/2012, there was no reference with regard to any alleged possession letter or allegedly handing over of possession to Mr Vaseem Kapadia by the first defendant. It is submitted that only a cryptic averment was made at the end of the para (iii) that possession of flat No.8 was with Mr Vasseem Kapadia. Learned senior counsel submits that though defendant No.1 filed a compilation of document on 17/08/2012, defendant No.1 deliberately suppressed copy of the alleged agreement dated 26/03/2012, copy of alleged possession letter dated 21/11/2011, copies of the two post dated cheques dated 07/12/2011 and 14/12/2011. It is submitted that the first defendant has not produced any alleged agreement between the said deceased and Mr Vaseem Kapadia in respect of alleged sale of flat No.8, copies of the alleged two fresh cheques dated 14/03/2012 and 19/-3/2012, bank statement of the alleged account in Kotak Mahindra Bank or proof in support of deposit of the two fresh cheques therein.

28. Learned senior counsel submits that the fact that this Court has issued notice to defendant No.1 in the contempt petition (4 of 2012) filed by the plaintiffs, prima facie, shows that this Court was satisfied with the correctness of the averments made by the plaintiffs alleging contempt against the first defendant. Defendant No.1 served copy of reply dated 24/04/2013 in contempt petition with the exhibits to the plaintiffs for the first time disclosing inter alia, the alleged possession letter dated 21/12/2011 and .. 15 .. NMT-138-12 alleged agreement dated 26/03/2012. It is submitted that defendant No.1 thus has suppressed various true and correct facts and has fabricated some of the

documents to show the alleged transaction between the said deceased and the said Mr Vaseem Kapadia and/or between defendant No.1 and the said Mr Vaseem Kapadia and the possession was alleged to have been handed over to him by the first defendant.

29. Mr Chagla, learned senior counsel then submits that defendant No.1 has suppressed and deliberately concealed various movable and immovable assets forming part of the estate of the said deceased in affidavit of disclosure dated 12/07/2012 and has failed to render true and correct accounts. Defendant No.1 has made various statements which are false to the knowledge of defendant No.1.

30. Learned senior counsel submits that in the FIR dated 16/07/2012 annexed to contempt petition filed against the plaintiffs and Mr Jimmy Avasia which was filed after the passing of the ad interim order by this Court on 21/06/2012, the first defendant has admitted that the properties of the deceased included lands at Nashik and Bachav and shops and hotels at Andheri and Vile Parle. The papers with regard to one "Bharat Bone Mills" at Bachav in Gujarat were annexed by defendant Nos.3 and 4 in their reply dated 12/12/2012 in Misc. Petition (L) No.916 of 2012. It is submitted that defendant No.1 has failed to render a true and full inventory and account of his dealings with such assets and properties of the said deceased and the profits earned therefrom as directed to disclose by an order passed by this Court. Mr Chagla, learned senior counsel submits that defendant No.1 has provided limited alleged particulars of only some of the bank accounts of the .. 16 .. NMT-138-12 said deceased in the said disclosure affidavit and Mutual Funds as of varied dates as far back as of November 2011 that is of all being dates prior the death of the deceased and did not disclose deliberately the particulars of the bank accounts and mutual funds as on the date of filing of disclosure affidavit of his dealings and profits if any therefrom. Defendant No.1 did not provide details of numerous bank accounts of the said deceased and no statements of mutual funds supporting the documents. Defendant No.1 did not disclose the particulars, details, balance standing in the account opened by defendant No.1 in the name of "Estate of Mr Purvez Burjor Dalal". It is submitted that defendant No.1 has deliberately omitted the Items 10 and 13 of the list of shares disclosed by defendant no.1 in his schedule to probate petition (5 of 2012) without any explanation. Defendant No.1 did not annex any Demat account statements, supporting documents with regard to the shares in the disclosure affidavit. No particulars whatsoever of any dividends, interest, or bonus or shares or other accretions to the bank account/mutual funds/shares or any debits to the bank account or sales of mutual funds or shares on and after November 2011 have been furnished. It is submitted that in the alleged Will dated 08/09/2011 propounded by the first defendant and the statement of the deceased dated 10/09/2011, it was stated that the deceased had investments in Government Sector. Those documents were suppressed by the first defendant.

31. It is submitted that defendant No.1 did not provide any inventory with regard to any movable assets lying at any of the other immovable properties though has purported to provide an inventory as of 15/03/2012 of the movable assets with regard to the flat where the said deceased was residing in Modern flats. Defendant No.1 has not provided the particulars .. 17 .. NMT-138-12 whatsoever with regard to what was contained in cupboard Nos.10, 13, 14 and 15 though recorded in disclosure affidavit in paragraph 3v.

32. Mr Chagla, learned senior counsel submits that Suit No.2763 of 2008 has been filed in this Court with regard to the property at Vile Parle known as "Dalal House" and the said suit is pending. Suit No.3903 of 1990 was filed in this Court with regard to residential flat No.9-A Modern Flats at Colaba which is withdrawn on 08/02/2012. Suit No.137 of 2010 is filed in relation to flat No.17/18 Modern Flats in this Court which is transferred to City Civil Court. All these suits relate to the properties of the said deceased.

33. Mr Chagla, learned senior counsel submits that in respect of tenanted properties, rents/licence fees will have to be recovered from the occupants and have to be invested, nature of the rights of occupation of those occupants will have to be ascertained. Plot of land with building known as "Love Dale" at Peddar Road, Mumbai is allegedly occupied by Tata Power Ltd., Asiatic Textiles Ltd., and one Mr Shinde. M/s Asiatic Textiles Ltd. has alleged to be statutory tenant. M/s Tata Power Ltd. has offered to deposit Leave and License amount with their advocate every month in view of the rival claims which amount will have to be invested with a view to safeguard and interest accrues thereon. It is submitted that defendant No.1 himself has disclosed in affidavit that there is another tenant Mr Shinde occupying 2 garages in the said Love Dale building. It is submitted that taxes in respect of various assets forming part of the estate of the said deceased will have to be paid, maintenance will have to be undertaken/paid etc.

34. Mr Chagla, learned senior counsel invited my attention to various .. 18 .. NMT-138-12 orders passed by this Court in this proceedings as well as in the proceedings filed by defendant No.1. It is submitted that the proceedings filed by defendant No.1 for dismissal of caveat filed by plaintiff has been dismissed by the learned single Judge and appeal arising therefrom is also dismissed by the division bench. When the parties had concluded their arguments in this proceedings, Special Leave Petition filed by defendant No.1 was pending impugning the order passed by the division bench dismissing the appeal filed by defendant No.1. The parties have now informed that the said Special Leave Petition filed by the first defendant has been rejected by the Supreme Court.

35. Learned senior counsel submits that since both the parties have filed probate petitions in this Court propounding two separate Wills and Testaments of the said deceased and the proceedings are pending, both the parties have filed caveats in testamentary petition filed by either party, defendant No.1 thus cannot be allowed to deal with and/or transfer any part of the estate of the said deceased. Value of the estate of the said deceased is more than 100 crores and considering the fraudulent conduct on the part of the first defendant who has not taken any steps to protect the estate of the deceased but has made an attempt to create third party right in respect of such estate by antedating the documents, it is a fit case for appointment of administrator.

36. Mr Chagla, learned senior counsel also invited my attention to various documents including the copy of Will and Testament propounded by both the parties and also affidavits filed by the alleged attesting witness in both the matters and the alleged doctor's certificate and made extensive argument that defendant No.1 had fabricated the Will propounded by the first .. 19 .. NMT-138-12 defendant and also made submissions that the Will propounded by the plaintiff was genuine and validly executed documents. I am not narrating those submissions which are made by Mr Chagla alleging fraud and fabrication on the part of the first defendant in respect of the Will propounded by

the first defendant, in view of the fact that scope of inquiry in this notice of motion is limited and those allegations would be subject to adjudication at the time of trial.

37. Mr Chagla learned senior counsel placed reliance on the Judgment of this Court in case of Pandurang Shamrao Laud and others Vs. Dwarkadas Kallindas and others reported in A.I. R. 1933 Bombay 342 and submits that since both the parties have filed proceedings for probate of two separate alleged Wills and are pending in this Court, defendant No.1 cannot be allowed to act as executor and particularly when the Wills propounded by both the parties are challenged on various grounds, this court has to appoint an administrator pendente lite. Relevant paragraphs of the said Judgment which are relied upon by both the parties read thus :

" 1. This is a notice of motion taken out by the defendants for the appointment of the Court Receiver as the administrator pendente lite and receiver of all the moveable and Immovable properties belonging to the estate left at the death of Pultibai, widow of Runchhoddas Tribhowandas Mody, and of the claims and documents referred to in prayer (1) of the notice of motion, and also for an injunction against the plaintiffs in terms of prayer (2) thereof. Putlibai died in Bombay on April 25, 1932, leaving a will dated August 30, 1931, of which the plaintiffs are the executors. Plaintiffs have filed their petition for probate of the said will. Putlibai died childless, and the defendants would be some of her heirs as on an intestacy, and are also the reversionary heirs of her deceased husband. They filed a caveat and have made an affidavit in support thereof with the result that the petition has been turned into a testamentary suit. Defendants allege that the will was obtained by the plaintiffs by means of a fraudulent conspiracy between themselves and by the exercise of undue influence, coercion and importunity on the testatrix, and that, therefore, it is void and of no effect. Under the will plaintiff No. .. 20 .. NMT-138-12 4, who is the son of plaintiff No. 3, gets a specific bequest of ten lakhs of rupees together with the house of the deceased situate at Ridge Road, Bombay, and a bungalow at Mahabaleshwar and also ornaments and jewellery which have been estimated somewhere between two and five lakhs of rupees. There is a bequest of a large amount to charity, and the residue is also given for charitable purposes. Defendants allege that the bequest to charity is illusory, for there will not be much left after paying off the legacies and defraying all the costs of administration. The plaintiffs deny that the bequest is illusory as alleged. Defendants allege that in the latter half of July 1931 the testatrix was taken to Nasik by plaintiffs Nos. 2 and 4, and" plaintiff No. 1 and his wife came there later, that she was in bad health, that she was kept in duress, and on her return she was made to execute a will on July 29 which was replaced by the will now propounded. Plaintiffs on their side deny each and every one of these allegations, and they contend that the testatrix was a free agent, knew what she was about, and that she was also anxious that defendants should have no benefit under the dispositions contained in her will. All these allegations and counter-allegations will have to be gone into at the hearing of the suit, and I do not wish at this stage to say anything one way or the other which may prejudice the plaintiffs or the defendants in respect of their contentions at the hearing. All that I can say at present is, judging by the number of affidavits put in and

their length and the number of statements therein contained, that it will take some appreciable time before the suit is heard and finally disposed of.

2. Defendants have made their present application under Section 247 of the Indian Succession Act which is the same as Section 70 of the old Court of Probate Act of 1857 in England, 20 & 21 Vic. c. 77. Section 70 applied only to personal estate. Section 71 of that Act gave the Court of Probate power to appoint a receiver even of the real estate of the deceased pending the suit, so far as the validity or otherwise of the will might affect the real estate. Both these sections are now, with regard to deaths, occurring after the year 1925, repealed by Section of the Supreme Court of Judicature (Consolidation) Act of 1925, 15 & 16 Geo. V. c. 49, and Section 247 of the Indian Succession Act corresponds to Section of the Judicature Act of 1925. Section 247 provides that pending a suit touching the validity of the will of a deceased person the Court may appoint an administrator of his estate, and such administrator 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. In other words, the position of an administrator pendente lite is similar to that of a receiver, with this distinction that the administrator pendente lite represents the estate of the deceased for all purposes except distribution. Before granting administration pendente lite the Court has to be satisfied in the first place that there is a bona fide suit pending, touching the validity of the will of the deceased. In England proceedings on a caveat do not constitute an action, but here we are governed by Rule 632 of the High Court Rules which provides that upon the affidavit in support of the caveat being filed, the petitioner for probate shall be called upon by notice to take out a summons, and the proceedings shall be turned into a suit in which the petitioner shall be the .. 21 .. NMT-138-12 plaintiff and the caveator shall be the defendant. The caveat having been filed in this case and also an affidavit in support thereof, there can be no doubt that there is a lis pendens in this Court. Secondly, the Court, before exercising its jurisdiction to grant administration pendente lite, has also to be satisfied whether there is a necessity for such a grant. In *Rendall v. Rendall* it was held by the Vice Chancellor that where no probate or administration had been granted, a receiver was appointed as a matter of course pending a bona fide litigation in the Ecclesiastical Courts to determine the right to probate or administration unless a special case for not doing so had been made out. In *Bellew v. Bellew* s. c. 4 Sw. & Tr. 58 Sir J.P. Wilde intimated that he would not in future follow the established practice of requiring a case of necessity before making a grant of administration pendente lite, but would make it whenever the Chancery Court would have appointed a receiver, and that he would in future appoint an administrator pendente lite where a bona fide suit was pending irrespective of the property of the deceased being in any particular danger. We are, however, governed by Section 247 of the Indian Succession Act, and the appointment is purely discretionary, as the word "may" in the section clearly indicates, but that discretion has to be exercised judicially and not arbitrarily. In my opinion the Court has to be satisfied as to the necessity of such an administration and

as to the fitness of the proposed administration, and it must also be satisfied that it is just and proper under the circumstances of the case to appoint an administrator before subjecting the estate to the cost of such administration. The Court has, apart from the Indian Succession Act, general jurisdiction to appoint a receiver in any case in which it may appear just and convenient to do so. Such an appointment cannot be claimed as of right merely because the proceedings are contested, but whenever there is a bona fide dispute and a case of necessity has been made out, the Court in its discretion generally makes the grant, Counsel for the plaintiffs relied on a Calcutta decision in *Jogendra Lal Chowdhury v. Atindra Lal Chowdhury* In that case the District Judge appointed an administrator pendente lite, but his order was set aside by the High Court of Calcutta. According to the facts of that case the caveator, who was the grandson of the testator, had raised no objection in the probate proceedings to the appointment of the appellant who was the son of the testator as an executor, nor did he raise any objection to the son acting in his capacity as executor, nor did he for more than one year between the death of the testator and the application for probate take any objection to the estate of the deceased remaining in the hands of the executor, nor did he object for four months even after the application for probate had been made. Various charges were made against the executor. The District Judge dealt with all of them, and held that none of them was proved.

Nevertheless, the District Judge made an order appointing an administrator pendente lite on the ground that the accounts of the estate did not seem to him to have been properly kept by the executor, which ground was not even taken by the caveator. Each case must depend upon its own facts, and upon the facts of that case the Appeal Court came to the conclusion that no necessity for the appointment of an administrator pendente lite had been made out.

3. Under Section 211 of the Indian Succession Act an executor is the legal representative of the deceased for all purposes, and all the property of the deceased .. 22 .. NMT-138-12 vests in him even before probate is granted. The probate of a will is operative only as the authenticated evidence of the executor's title and not as the foundation thereof, for he derives his title from the will itself, and the property of the deceased vests in him from the moment the testator dies. Under Section 213, however, no right as executor can be established in any Court of justice without inter alia a grant of probate, and under Section 214 no Court can pass a decree against an heir of a deceased person for payment of his debt to any person who does not hold either probate or letters of administration or a succession certificate. It follows, therefore, that an executor before he proves the will may do almost all acts which are incidental to his office except those relating to suits in connection with the Estate; and when he has filed his petition for probate and the petition is turned into a suit as in this case, and while that suit is pending, there is no one legally entitled to receive or hold the assets or give valid discharges. As was pointed out in *Watkins v. Brent* there is no doubt that if the representation to the estate is in contest, and no person has been constituted executor, the Court interferes not because of the contest,, but

because there is no proper person entitled to receive the assets. In this case the representation to the estate of the deceased Putlibai is in contest, and without saying anything with regard to the merits of the allegations and counter-allegations made in the suit, there can be no doubt that a bona fide litigation is pending between the parties.

4. The question which then arises is whether the necessity for a grant of administration pendente lite has been made out, and if it is, who should be appointed administrator pendente lite ? It appears that within a week after the death of the deceased, plaintiffs themselves filed a petition in this Court stating that it was necessary for the preservation of the estate that letters of administration may be granted to them under Section 253 limited to the collection and preservation of the estate and the giving of discharges for debts and claims due to the estate, but the petition was dropped. Plaintiff's say in one of the affidavits that the reason for dropping the petition was that the application was thought unnecessary as there was no real difficulty in recovering the debts and outstandings, and that as a matter of fact that had been done. Defendants on the other hand allege that the reason was that they objected and wanted letters of administration to be granted to the Court Receiver instead of to the plaintiffs, to which the plaintiffs objected. This allegation made by the defendants in para. 28 of their affidavit in support has not been specifically denied. The gross value of the estate, according to the schedule to the petition for probate, is about thirty two lakhs of rupees, and deducting the amounts and liabilities payable under the consent decree in suit No. 1869 of 1930 which was filed by defendant No. 2 in respect of the estate of Ranchhoddas Tribhowandas Mody, the deceased husband of the testatrix, the estate is valued at about rupees twenty-three lakhs. The estate mainly consists of Government Securities the value of which with interest is estimated at rupees two lakhs, of shares of various companies which together with dividends are valued at about rupees two and a half lakhs, Immovable properties worth about rupees four lakhs, and a large number of claims under mortgages, four of which were taken in the name of Ranchhoddas Mody and about thirteen in the joint names of Ranchhoddas Mody and his wife the testatrix. In respect of the .. 23 .. NMT-138-12 mortgages standing in these joint names about eleven suits were filed by the Receiver appointed in that suit, and in place of the Court Receiver who filed them the name of the testatrix was subsequently substituted, and the testatrix and plaintiff No. 3 were appointed joint receivers without security and without remuneration. Amongst these mortgages are mortgages executed by plaintiff No. 1. It appears that he had equitably mortgaged his properties at Queen's Road and Haines Road to Ranchhoddas Mody for KB. 2,11,980 and Rs. 71,815 respectively with interest. The due date having expired, the time for payment was extended. Thereafter, plaintiff No. 1 took reconveyances of the property from the testatrix about the end of December 1931 when the mortgage debt with interest stood at over three lakhs of rupees, and on the same day plaintiff No. 1 executed fresh equitable mortgages for the said amounts in favour of the testatrix. It was alleged, when the notice of motion was argued, that interest on those mortgages for seven

months had been in arrears, but I have now been informed that since the argument commenced plaintiff No. 1 has paid up all the arrears of interest. Interest is also due by other mortgagors. Rents have also to be recovered, and the testatrix and plaintiff No. 3 having been appointed joint receivers, plaintiff No. 3 in the absence of a fresh order appointing him sole receiver is not in law entitled to recover the rents which, according to the affidavits, amount to about Rs. 6,000 per month. It is also alleged that dividends have not been recovered. It is further alleged that books of account are in the plaintiffs' possession. It was also contended that if suits were filed by the executors no decrees could be passed pending the grant of probate. There is no dispute that various suits are pending, and that suits may have to be filed and interest and rents and dividends recovered, and there is also a large residue in favour of charity. The estate is of considerable value and extent, and for the safeguarding and preservation of it proper arrangements ought, in my opinion, to be made, especially when very wide discretionary powers have been given to the executors under a will which is challenged by parties who are interested in the estate.

5. The next question is what arrangement should be made. The general principle is that the Court does not as a rule appoint a receiver as against executors whenever they have obtained probate, unless there is gross misconduct or mismanagement and waste on their part. If they are rightly in possession and there is no dispute as to their title they will not be replaced by the Court Receiver except on very strong grounds. Their appointment itself shows that the testator had confidence in them, and the Court gives effect to the expression of the confidence reposed in parties by one who knew them best. It has also been held that the Court refuses to appoint an administrator pendente lite where there is a person named in the will as executor whose appointment is not questioned and who can discharge the functions of an administrator: see *Mortimer v. Paull*. In this case, however, the appointment of the executors is questioned, and their title is in dispute because the will itself is challenged on various grounds. Under the circumstances there should be, in my opinion, a grant of administration pendente lite.

6. The last question is, who should be the administrator or administrators pendente lite ? I have to be satisfied as to the fitness of such an administrator or .. 24 .. NMT-138-12 such administrators. Plaintiff No. 1 is a solicitor of this Court and has prepared the will, and if he was the sole executor, the Court would appoint a receiver of the estate as was done in *Hamilton v. Girdleston*. There are, however, co-executors along with plaintiff No. 1, But nevertheless plaintiff No. 1 is a debtor to the estate of the deceased. He claims a large sum of costs against the estate, and says in his affidavit that he informed the testatrix that he would claim his professional costs even if he acted as executor which he would be entitled to. It has, however, been held by the Privy Council in *Bai Gungabai v. Bhugwandas Valji* MANU/PR/0018/1905 that the insertion of a clause that the solicitor executor should charge for his professional work hardly raises any suspicion about the genuineness of the will. In view, however, of the position in which plaintiff No. 1 stands to the estate, his

interests are to a large extent in conflict with his duties. Plaintiff No. 2, it is alleged, was a share-broker and an estate broker, and though at present he is in affluent circumstances, the allegation against him is that he is a friend of the other plaintiffs and has helped them in getting the testatrix to execute the will. This of course is an allegation which will have to be substantiated at the time of the hearing. Plaintiff No. 4 is a young man of about twenty to twenty-five years and is the son of plaintiff No. 3 and lives with his father, and plaintiff No. 4 gets a legacy of between twelve to fifteen lakhs of rupees under the will. It is a well known principle that when executors propounding a will take a large and appreciable benefit thereunder, the Court treats the will with suspicion of more or less weight according to the facts of each case, and the onus lies on such an executor to prove to the satisfaction of the Court that the testator understood what he did and that it was his will, and no probate can issue unless the conscience of the Court is satisfied that the person propounding the will has led sufficient evidence which on a close and careful examination entirely removes that suspicion. This has been laid down in a series of cases such as *Barry v. Butlin Vellasawmy Servai v. Sivaraman Servai : Rangavva v. Sheskappa and Mallappa v. Tipava* MANU/MH/0105/1930 : AIR 1930 Bom 539 . The same principle has also been laid down in the case cited to me in *Bai Gungabai v. Bhugwandas Valji*. I have carefully considered whether the plaintiffs or any one or two or more of them should be appointed administrator or administrators pendente lite, and there is also the offer made to me through their counsel that they are willing to give security. It is, however, a general principle, though not an absolute rule of law, not to put a litigating party in position by granting administration pending the suit unless by consent of all parties, and, in my opinion, this is not a case in which I should make an appointment out of the plaintiffs. In saying this I wish to make it clear that the Court is making no imputation whatsoever against the plaintiffs or any of them. An instance was cited to me in which the late Mr. Justice Russell in T. & L.J. 8 of 1903 appointed one of the executors of a disputed will along with another administrators pendente lite, but, as I have said before, each case must stand on its own facts and circumstances, and the facts and circumstances in that case are not before me. It is, in my opinion, in the interests of all parties to appoint an impartial person as an administrator pendente lite, and the Court Receiver is an officer of the Court who is independent of and is bound to be indifferent between the contesting parties. Moreover, under Section 247 all the .. 25 .. NMT-138-12 powers that he exercises are subject to the immediate control of the Court and he acts under its direction.

7. Under the circumstances I will make an order in terms of prayers (1) and (2) of the notice of motion. Costs of all parties to come out of the estate of the deceased Putlibai, those of the executors as between attorney and client.

8. It is agreed between the parties that plaintiffs Nos. 3 and 4 should remain undisturbed in occupation of the Ridge Road house and the contents thereof including the motor car subject to the rights and contentions of the parties. I further direct the receiver not to take possession of the family idol or idols at present until

the further orders of the Court.

9. Receiver to act on the Prothonotary's certificate."

38. Mr Chagla, learned senior counsel placed reliance on the Judgment of Travoncore-Cochin in case of Thayammal v. Sivaraman reported in A.I. R. 1953 TRA-CO. 228 in support of his submission that since there is bonafide dispute as to the right to the present possession of the property in the hands of defendant No.1, it has to be taken that a case of necessity has been made out for the exercise of the Court's discretion for appointment of administrator. Relevant paragraphs 2, 4, 5 and 6 of the said Judgment read thus :

(2) The plaintiff's case is that her husband had executed four Wills in all, one superseding another; while, according to defendant No.1, Dever had executed only three Wills. The three Wills, the execution of which is not in dispute, are those which were executed and got registered on 03/07/1945, 09/06/1947 and 07/06/1951. The disputed Will is the one stated to have been executed by Dever on 30/07/1951, just a few weeks prior to his death. It was not registered during his lifetime. A few days after Dever's death, the plaintiff produced this Will before the Sub-Registrar of Periakulam and applied to have it registered. Notice of that application was given to the present defendants 1 and 2 and the other near relation of the deceased testator. Defendant 1 alone appeared in pursuance of such notice and contested the genuineness of the Will. He impeached it as a false and fabricated document.

The Sub-Registrar conducted an elaborate enquiry into the question of the genuineness of the Will and examined several witnesses, inclusive of the four attestors to the disputed document. After considering the evidence thus recorded at the enquiry in the light of the outstanding circumstances and probabilities .. 26 .. NMT-138-12 which were urged before him, he came to the conclusion that it is a genuine document and is the last Will executed by Dever in supersession of all previous Wills and accordingly passed an order directing the registration of the document. Exhibit B is copy of the order passed by the Sub-Registrar on 08/01/1952.

Exhibit A is copy of the Will registered as per that order.

(4) In the nature of the dispute between the contesting parties, the main question for decision in the suit is whether the original of Ex.A is a genuine document representing the last Will and testament of deceased Dever executed by him in supersession of his previous Wills. That question can be properly decided only after the parties have adduced all their evidence and after the due consideration of all such evidence in the light of all the attendant circumstances and probabilities. No doubt in dealing with the application for the appointment of a receiver for the suit properties, the Court has to consider the 'bona fides' of the claim put forward by the plaintiff and also the question whether there are circumstances made out to justify the appointment of a receiver. At the same time, the Court has to be very guarded in committing itself one way or the other on the main and the crucial question involved in the suit. Any commitment likely to leave impression of the main issue having been prejudged should be avoided.

We are laying particular stress on this aspect of the matter, because we find from the lower Court's order that it has already come to a definite conclusion that the original of Ex.A is a forged and fabricated document. The lower Court is seen to have entered into a full discussion of the several circumstances urged in support of as well as against the genuineness of the document and has chosen to accept the circumstances urged against its genuineness and to reject those urged in support of its genuineness. When the whole evidence has been recorded the lower Court has to approach the question with an open mind and without in any way being influenced by the impressions already formed when it had not the benefit of such evidence before it.

(5) On behalf of the parties these circumstances have again been urged in this Court also. By way of illustration we may mention a few of the circumstances strenuously urged on behalf of defendant-respondent 1 in support of his contention that the Will propounded by the plaintiff is a forged document. The original of Ex.A is seen to be written on a single sheet of paper and it is in the handwriting of one Kamachi Naidu who was the clerk of P.T. Dever. At the foot of the document the address of the testator is put down as "Advocate, B.A., B.L." The letters "B.A., B.L." seem to have been put down in the place where the expression "for plaintiff" had been written. The suggestion is that a blank paper signed by P. T. Dever as Advocate for plaintiff and left with the clerk, might have been made use of for fabricating the Will, after procuring the services of the clerk who was only a low paid employee.

Then again it is stated that the space between the lines in the body of the Will would show that an attempt was made to compress the whole matter and bring it .. 27 .. NMT-138-12 within the space available above the signature. It is then pointed out that in punctuation and spelling there are very many mistakes in the document and on the basis of such mistakes it is argued that if the document was prepared as per a draft given by Dever himself and if the copy had been perused by him as alleged by the plaintiff, Dever would not have put his signature to such a document containing wrong expressions and several mistakes in punctuations and spelling. On the strength of a series of letters Exs. 8 to 17 written by deceased Dever both before and after the date of the disputed document, it is argued that he could write a steady hand and that, therefore, it is unlikely that he would have utilised the services of his clerk to prepare the Will in such a shabby manner as is evidenced by the Will in question.

Another argument advanced is that if he really wanted to execute a Will like that, he would have prepared it in his own handwriting and would have got it registered on the same date as was done in the case of the three prior Wills. The explanation offered by the scribe of the document in respect of some of those apparent infirmities is said to be unsatisfactory and unacceptable. Even though the copy of the deposition given by him before the Sub-Registrar was produced in the present enquiry, it has to be remembered that he has not been examined in this case. It may also be stated that every one of the circumstances urged on behalf of defendant 1 is met by the explanations offered on behalf of the plaintiff. In addition to such explanations, other grounds are urged on behalf of the plaintiff to show that the will in question was really executed by Dever.

It is pointed out that when P. T. Dever was seriously ill, the plaintiff who was for sometime living away from him, went over to him and after ascertaining the nature of his illness as well as the nature

of the disposition of his properties as per the Will dated 07/06/1951 under which the junior widow was specially treated by conferring on her an absolute estate in respect of 34 acres of the plaint properties, the plaintiff begged of him to treat his two wives equally and that it was such an appeal that induced him to execute the disputed document as his last will. In answer to defendant 1's allegations that the Will was fabricated at the instance of Vativel, brother of the plaintiff, it is pointed out that he derives absolutely no benefit under the disputed Will. Then again it is pointed out that under this document the reversionary right in respect of all the estate of P. T. Dever is vested solely in defendant 1 and that only a life estate is given to the two widows.

Over and above these and other circumstances relied on by the plaintiff, the direct evidence regarding the execution of the document, which was given before the Sub-Registrar, is also relied on as proving the genuineness of the Will. We do not think that it will be proper and safe to enter into a discussion as to the acceptability or otherwise of the circumstances relied on by the plaintiff or those relied on by defendant 1. Any such discussion at this stage is likely to prejudice the trial and decision of the suit. These circumstances may have a bearing on the ultimate decision regarding the genuineness or otherwise of the Will. The direct evidence that has to be adduced in the case will have a greater bearing on that question. Such being the case we refrain from expressing any opinion on the .. 28 .. NMT-138-12 merits of the circumstances urged on behalf of both sides.

(6) For the purpose of the present appeal we confine our attention to certain other undisputed facts and circumstances. There has already been an enquiry followed by a decision on the question of the genuineness of the original of Ex.A. Defendant 1 was also a party to such enquiry. The order Ex.B shows that the enquiry was thorough one. Even though the decision arrived at by the Sub- Registrar as a result of such enquiry is not binding on the Court, that decision has to be given its due weight unless and until the Court arrives at a different conclusion after an independent enquiry of its own. The order of the Sub- Registrar cannot now be tally ignored. It is seen from the order Ex.B that a lady Doctor who was attending on deceased Dever for some time even subsequent to the date of the disputed document, when he was staying at Periakulam, was examined as a witness before the Sub-Registrar and that she has deposed that Dever had mentioned to her that he had executed a fourth will as his last testament.

Such a statement is alleged to have been made by Dever to his own brother Vativel also. This Vativel too is seen to have been examined before the Sub-

Registrar. No doubt the evidence of these witnesses has not been recorded in the present suit. All the same Ex.B shows that they had stated before the Sub-registrar that Dever had admitted that he had executed a fourth Will. Another outstanding feature of the disputed Will as well as the undisputed Wills is that the legatees in all these four documents are the same persons viz, the testator's two wives and his nephew defendant 1. The important change noticed in the disputed will as compared with the Will dated 07/06/1951 is that the absolute estate conferred on the junior widow in respect of 34 acres of cardamon land was taken away and she too was given a life estate over the entire estate of Dever just as is conferred on the senior widow, the plaintiff. Similarly the absolute estate conferred on the nephew has been made subject to the life estate in favour of these two widows.

The question as to who should immediately succeed to the estate left by Dever depends on the question whether the original of Ex. A is really the last Will and testament of Dever. Until that matter is decided one way or the other, no one of the legatees can assert a right to the present possession of the properties. It was defendant 1 who first went to Court for a declaration that the Will is not genuine and that it does not affect his right under the preceding Will. That suit (O.S. No.5 of 1952 on the file of the Madura Sub-Court) is still pending. The plaintiff in turn has filed the present suit for a declaration that the will propounded by her is genuine. The question has yet to be investigated and decided. It may also be mentioned that it was just on the eve of the production of the disputed document for registration that defendant 1's father rushed to take possession of the properties.

Even though defendant 1 would contend that the junior widow through her brother surrendered to him possession of the plaint properties except to the extent .. 29 .. NMT-138-12 of 20 acres, it is significant to note that defendant 2 in her objection petition does not concede that fact, but maintains that she is still in possession of the 34 acres of land set apart to her under the Will dated 07/06/1951. she has not chosen to question the genuineness of the will propounded by the plaintiff, but has only stated that she is not aware of the execution of such a document. Even when the enquiry was going on before the Sub-Registrar, defendant 2 did not choose to contest the plaintiff's claim to have the Will registered as a genuine documents.

Under these circumstances the possession claimed by defendant 1 cannot be said to be lawful possession, unless and until it is established that the Will propounded by the plaintiff is not genuine and the rights of the parties are as provided in the earlier will dated 07/06/1951 and that he has obtained possession of the properties as a matter of right and in a peaceful manner. These facts and circumstances are sufficient to attract the provisions contained in S. 247, Indian Succession Act. That sections lays down that :

" pending any suit touching the validity of the Will of a deceased person or for obtaining 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 position of such an administrator is similar to that of a receiver appointed by the Court. The section does not make it obligatory that in every suit touching the validity of the Will of the deceased person the Court should appoint an administrator or receiver to manage the estate of the deceased person pending final decision of the question of genuineness of the Will. But the section gives a wide discretion to the Court in that matter. This discretion has to be exercised in a judicial manner after a due consideration of the facts relating to the particular case. Where the Court is satisfied that neither of the contesting parties can be said to be in lawful and undisputed possession of the property, it has to be taken that a case of necessity has been made out for the exercise of the Court's discretion in favour of the appointment of a receiver or administrator.

This is the view taken in --- ' Pandurang v. Dwarkadas', AIR 1933 Bom 342 (A) wherein S. 247, Succession Act came up for consideration. Form the circumstances of the present case as already adverted to, it can be seen that the above-mentioned conditions are amply satisfied so as to justify the appointment of a receiver. There is a 'bona fide' dispute as to the genuineness of the Will dated 30/07/1951 and until that matter is settled neither the party can be said to have established a right to the present possession of the properties. The possession claimed by defendant 1 is challenged as wrongful. The mere fact that one party has hastened to assert his claim for possession of the properties will not by itself be a reason to uphold such possession and give him an undue advantage over the opposite party, pending decision on the question of the right to the possession of the properties. On a consideration of all the facts and circumstances of the case, we are satisfied that it is just and proper to keep the properties under the direct control of the Court pending final decision of the question as to the genuineness .. 30 .. NMT-138-12 of the Will dated 30/07/1951 and that the necessity for the appointment of a receiver has been made out."

39. Mr Chagla, learned senior counsel placed reliance on the Judgment of Supreme Court in case of Rani Purnima Debi & Anr. vs. Kumar Khagendra Narayan Deb & Anr. Reported in AIR 1962 Supreme Court 567 in support of his submission that though the alleged Will propounded by defendant No.1 is registered Will, that by itself would not be sufficient to dispel all suspicion regarding it where suspicion exists, without submitting the evidence of registration to a close examination. It is submitted that alleged execution of the Will and attestation of the Will propounded by the first defendant itself is surrounded by suspicious circumstances and thus administrator has to be appointed on that ground alone and defendant No.1 who claimed to be administrator of such Will cannot be allowed to deal with the estate of the said deceased. Reliance is placed on paragraph 23 and 24 of the said Judgment which read thus :

" 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 is 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 taken place without .. 31 .. NMT-138-12 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, Vellasaway Sarvai v. L. Sivaraman Servai (), Surendra Nath Lahiri v. Jnanendra Nath Lahiri MANU/WB/0025/1932 : AIR1932Cal574 and Girji

Datt Singh v. Gangotri Datt Singh) MANU/SC/0092/1955 : AIR1955SC346 . 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."

40. Mr Chagla placed reliance on the Judgment of Calcutta High Court in case of Brindaban Chandra Shaha v. Sureswar Shaha Paramanick & Ors.

Reported in 1909 (X) Calcutta L. J. 263 in support of his submission that since there are number of suits pending in different Court relating to properties forming part of the estate of the deceased and the estate is of considerable value and extent, appointment of administrator is warranted for the preservation of such properties and the necessity for appointment of arbitrator is made out. Relevant paragraph of the said Judgment reads thus :

" Appeal from order No.82 of 1909 is directed against the order of refusal of the District Judge to appoint an administrator pendente lite. His refusal is based on the ground that there was no pending proceeding before him, and that the widow .. 32 .. NMT-138-12 was quite competent to manage the estate. It is manifest however that the effect of the revocation of the probate was to revive the original proceeding for the grant of probate and it would be quite competent therefore to the Court to make an order under section 34 of the Probate and Administration Act. As was observed in the case of Bellew v. Bellew (1965) 4 Sw. & Tr. 58, the Court of probate would grant administration pendente lite in all cases where the necessity for the grant is made out; and this is so because while the suit is pending, there is not one legally entitled to receive or to hold the assets or to give discharges. In the case before us, it is not disputed that various suits are pending indifferent Courts and the estate is of

considerable value and extent, for the preservation of which proper arrangement ought to be made. We therefore set aside the order of the District Judge and appoint the widow to be administratrix pendente lite, on condition that she furnishes a bond for Rs.20,000 and that her father, the present appellant, do stand surety in the sum of Rs.10,000. Upon failure to carry out this order the applicant for revocation will be at liberty to apply for further orders. This appeal is therefore decreed, but there will be no separate order for costs."

41. Mr Chagla, learned senior counsel submits that even in the alleged Will propounded by defendant No.1, the testator has permitted the first defendant to sell the properties of the estate only after obtaining probate, whereas the first defendant has sold flat No.8 without obtaining probate and has been inter-meddling with the estate of the said deceased. Mr Chagla, learned senior counsel took me to various affidavits and the alleged Will propounded by the first defendant and would submit that the alleged Will is on the face of it fabricated and is false. Affidavit of Mr Dastoor is also false and inconsistent. It is submitted that since the Will propounded by the first defendant is surrounded by suspicious circumstances, plaintiffs have made out a prima facie case for appointment of an administrator.

42. Ms Sethna, learned counsel appearing on behalf of the first defendant submits that for the purpose of appointing the administrator of the estate of the deceased under Section 247 of the Indian Succession Act 1925, .. 33 .. NMT-138-12 Court has to see as to whether there is bonafide litigation in respect of the title to represent the estate. It is submitted that the deceased was 75 years old bachelor and was leaving with his brother who died on 14/08/2010. The said brother of the deceased was managing the properties of the said deceased and was assisting him till the said brother expired though there were other relatives and legal heirs of of the said deceased. It is submitted that the Will and Testament executed by the said deceased was registered and the later Will in point of time. The said Will was drafted by the family solicitor who had also drafted the Will of brother of the said deceased. Learned counsel submits that all the apprehensions of the deceased about the objectionable acts of the plaintiffs were highlighted by the said deceased in his Will. It is submitted that plaintiff No.2 was married to the brother of the said deceased in the year 1955. Her marriage was already annulled in 1959. Plaintiff No.2 thereafter married to another person but plaintiffs have not disclosed these facts in the Will propounded by the plaintiff. Doctor who claims to be one of the attesting witness of the Will propounded by the plaintiffs had never treated the said deceased. The other alleged witness of the Will propounded by the plaintiffs is family friend of the plaintiffs. It is submitted that since the said deceased wanted help, defendant No.1 was working and helping the said deceased since last two years prior to his death and was appointed to look after the said deceased and to take him to Fire temple. Defendant No.1 who is 62 years old is bachelor and was getting honorarium from the said deceased. Learned counsel submits that plaintiffs have not furnished any particulars of alleged fraud, undue influence, coercion or unsound mind in the affidavit in support of notice of motion against defendant No.1. Learned counsel submits that the said deceased had filed FIR himself. Learned counsel made an attempt to explain the alleged discrepancy in the letter pad of Dr .. 34 .. NMT-138-12 Bhute who had issued certificate of fitness of the deceased. Learned counsel submits that from the bank statement of the deceased produced on record of this proceedings of the account with HSBC Bank, it is clear that the said deceased during

his lifetime had received the sum of Rs.25,00,000/- from Mr Vaseem Kapadia which cheque had already been deposited in the bank account of the deceased on 29/11/2011 i.e. during his lifetime. It is thus clear that the said deceased had agreed to sell the said flat No.8 to the said Vaseem Kapadia during his lifetime and had received part of the consideration. Defendant No.1 however could not find any writing between the said deceased and the said Mr Vaseem Kapadia in respect of such flat.

43. On 05/07/2011, Dr Balani had issued a certificate to the Manager of HSBC Bank to depute someone to the residence of the said deceased as he was not in a position to sign properly. On 04/08/2011, the said deceased had put his thumb impression on the application to the bank for deleting the name of his brother Mr Jamshed.

44. Ms Sethna, learned counsel then submits that the deceased himself had filed probate petition (130 of 2010) inter alia praying for probate of the Will and Testament of his brother and had affirmed and verified the pleadings. Probate of the Will & Testament of the brother is granted in favour of the said deceased by this Court on 10/06/2011. Learned counsel submits that on comparison of the Will of the brother of the said deceased and the Will propounded by defendant No.1, it is clear that there was a common mistake about the word "ob-sequel" and both these Wills were drafted by the same solicitor. Learned counsel submits that the deceased himself had lodged a complaint about the excess bill of the Municipal Corporation on 27/01/2011 .. 35 .. NMT-138-12 and 24/02/2011. Learned counsel took me to various correspondence annexed to the pleadings in support of her submission that the said deceased was active in life and he himself was having correspondence with various authorities, was filing various complaints and filed pleadings in testamentary petition in respect of his brother's Will, addressing letter to the society about trespassers on the property in Al-Karim Co. Op. Housing Society Ltd.

45. Ms Sethna, learned counsel for defendant No.1 submits that unless there is pending bonafide litigation and there is necessity, appointment of administrator which power can be exercised in extreme circumstances, cannot be exercised in this case. Learned counsel submits that allegations of fraud made by the plaintiffs against Mr Doodhmal and Mr Pandey cannot be allowed to be made in this proceedings who is not a party. Learned counsel submits that as per the Will propounded by the first defendant, the entire property of the said deceased is bequeathed to the charities and defendant No.1 is not a beneficiary in any manner whatsoever, whereas in the Will propounded by the plaintiffs, the entire property of the said deceased is alleged to have been bequeathed to plaintiff No.2 which itself shows that the Will propounded by the plaintiffs is false and fabricated. It is submitted that Dr Golwala is alleged to be one of the attesting witness had never treated the said deceased. Learned counsel submits that defendant No.1 is willing to hand over entire estate to the three trusts and if necessary with the assistance of the plaintiffs so as to protect the estate of the said deceased. Learned counsel submits that since the plaintiffs are not the heirs and next of kin of the said deceased and have played active roll in propounding the Will, there is serious cloud of suspicion over the Will propounded by the plaintiffs. There is thus, no bonafide litigation which is one of the mandatory requirement for the .. 36 .. NMT-138-12 purpose of appointing an administrator under Section 247 of the Indian Succession Act, 1925 and thus no relief for appointment of administrator can be granted by this court.

46. Learned counsel submits that defendant No.1 has already filed probate petition. There is no question of any suppression on his part as alleged by the plaintiffs. It is submitted that the deceased himself had highlighted in the Will propounded by defendant No.1, the conduct of Dr Balani. Learned counsel submits that Mr D.P. Dastoor who had attested the Will propounded by the first defendant is family priest of the said deceased and has filed affidavit in this proceedings confirming that he had attested the Will of the said deceased.

47. In so far disclosure of the estate by the first defendant is concerned, it is submitted that in the schedule to the petition filed by the first defendant, he has fairly disclosed all the estate which was to the knowledge of the first defendant in the probate petition. M/s Tata Power Co. Ltd. who is claiming to be tenant is willing to deposit the rent with their advocate every month. M/s Asiatic Textiles is also claiming to be a tenant. Defendant No.1 will file proceedings against the tenants and/or occupants. It is submitted that in so far as account of the said deceased with HSBC Bank is concerned, the said account has been already blocked on the request of the plaintiffs and no one can operate the said account. In so far as Vile Parle property is concerned, it is submitted that the entire property is tenanted. The rent/income from the said property is Rs.300/- per month. Defendant No.1 will file proceedings with permission of this Court against those occupants.

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48. In so far as flat No.8 and 22 in Al-Karim Manzil is concerned, learned counsel submits that defendant No.1 had handed over possession of flat No.8 to the purchaser of the said flat after the demise of the said deceased, in view of the transaction already having been concluded between the said deceased during his lifetime and the said Mr Vaseem Kapadia.

Learned counsel submits that in so far as remaining two cheques of Rs.20,00,000/- and Rs.30,00,000/- respectively are concerned, the said cheques have been already deposited by the first defendant in a separate bank account opened and thus estate of the said deceased is protected. It is submitted that since there was no order of injunction from executing any writing on 26/03/2012, defendant No.1 has entered into Articles of Agreement with the said Mr Vaseem Kapadia. Stamp duty has been already paid on the said agreement. The said agreement however could not be registered. Learned counsel submits that under Section 211 of the Indian Succession Act, properties of the estate of the said deceased vest in defendant No.1 who was appointed as executor by the said deceased. Learned counsel submits that in view of the said flat No.8 having been tress-passed upon during the lifetime of the said deceased, there was a distress sale in respect of the said flat and the consideration agreed was at Rs.75,00,000/-. Possession of the flat was handed over to said Mr Vaseem Kapadia on paper. Mr Vaseem Kapadia had obtained possession from third party in possession who had trespassed the said flat. The property was under litigation. It is submitted that the estate of the said deceased is not exposed to any risk by the acts of the first defendant who was appointed as an executor.

49. Ms Sethna learned counsel appearing for defendant No.1 then Submits that there was no statutory requirement to approach the Court for .. 38 .. NMT-138-12 protecting the properties of the estate of the deceased which defendant No.1 has alleged to do so. Even in the plaint filed by the

deceased during his lifetime, possession in respect of the said flat No.8 was admitted and suit for injunction from dispossessing the deceased was filed. It is submitted that the articles of agreement was drafted by the advocate of the purchaser which was signed by defendant No.1 with a view of protect the estate of the said deceased.

50. In so far as Manmad property is concerned, learned counsel submits that the said property was disclosed in the Will of the brother of the said deceased and was disclosed in the schedule of the testamentary petition filed by the said deceased. In so far as property situated at Bachav Gujarat is concerned, it is submitted that the said properties were not even disclosed by the said deceased in the testamentary petition for obtaining probate of his brother. It is stated that what properties were disclosed in the schedule of the property in the testamentary petition filed by the said deceased for obtaining probate of the Will and Testament of his brother were disclosed in the probate petition filed by the first defendant. The first defendant did not have any documents regarding Bachav properties and could not search any document in spite of diligent inquiry. The said properties were neither included by Mr Jamshed, the brother of the said deceased in his Will nor by the deceased himself in his Will and Testament and thus it would not amount of any suppression on the part of the first defendant by not disclosing the said properties in the schedule of the estate of the said deceased in the testamentary petition filed by the first defendant. Learned counsel submits that if the plaintiffs were aware of any other properties which are not disclosed by the first defendant, plaintiff also could have disclosed such .. 39 .. NMT-138-12 properties by making appropriate amendment in the testamentary petition filed by the plaintiff which plaintiffs have failed to do so. Plaintiffs did not make any application for amendment of schedule annexed to the testamentary petition filed by the plaintiffs so as to include Bachav properties. It is submitted that defendant No.1 was not aware of the properties of the deceased alleged to have been situated at Manmad or Bachav.

51. In so far as shops and hotel at Dalal House is concerned, it is submitted that the said properties were not disclosed by the brother of the said deceased even in his Will or in the schedule to the testamentary petition filed by the deceased for obtaining probate of his brother's Will. Allegations made by the plaintiffs alleging non disclosure of these properties is based on the FIR filed by defendant No.1 and no cognizance thereof can be taken. It is submitted that statement made by defendant No.1 before the police that he knew the properties of the said deceased and was keeping accounts of the properties cannot be read in isolation.

52. It is submitted that M/s Sun Vision Arcade had fraudulently transferred Rs.1.45 crores from the account of the said deceased which was returned. It is submitted that plaintiff could have applied for their impleadment in the suit bearing No.2763 of 2008 filed by a third party against Mr Jamshed Dalal and the said deceased. Defendant No.1 was impleaded in the said suit on application of defendant No.1, by an order passed by this Court. Plaintiffs also could have taken steps to ensure that plaintiff was impleaded as party defendant in the said suit. Defendant No.1 has taken steps for impleadment in that suit which shows that defendant No.1 had taken care of the estate and represents the estate of the said deceased.

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53. In so far as pendency of the suit is concerned, Ms Sethna submits that as far as Suit No.3903 of 1990 is concerned, the said suit has been withdrawn on 08/02/2012. In so far as Suit No.137 of 2010 is concerned, the said suit has been transferred to Bombay City Civil Court. Defendant No.1 has been impleaded as defendant in the said suit.

54. In so far as flat No.22 in Al-Karim society is concerned, it is submitted that the party claiming to be a tenant in respect of that flat is claiming tenancy for more than 20 years i.e. even during the lifetime of the said deceased. Possession in respect of the said flat is with that tenant. In so far as shares of DCM Ltd., is concerned, it is submitted that the same were not disclosed in the affidavit of disclosure since there was no record available with the first defendant in respect of such shares. These details are disclosed in affidavit on reverifying the details. In so far as D-MAT account statement is concerned, it is submitted that under Original Side Rules of this Court, D-MAT account statement is not required to be disclosed. Defendant No.1 is however willing to submit relevant D-MAT account statement if required.

There is no variation in shares. In so far as flat 9-A in Modern Flats is concerned, it is submitted that by an ad interim order passed by this Court, defendant No.1 is not restrained from access/dealing with that flat. Defendant No.1 as an executor is entitled to represent the said estate of the said deceased. Defendant No.1 is not restrained from receiving any income or dividend or deposits in respect of the estate of the said deceased. Whatever dividend or income is received is deposited by the first defendant in the separate bank account opened by the first defendant after the demise of the said deceased. In so far as saving account and Fixed Deposits with HSBC Bank is .. 41 .. NMT-138-12 concerned, it is submitted that all such accounts are freezed on the application of the plaintiff, by HSBC Bank. Even Mutual Fund standing in the name of the deceased with HSBC bank are also freezed. Defendant No.1 is not able to find any record regarding government sector investments standing if any, in the name of the said deceased. In so far as movable assets/inventory alleged in page 14 of the written arguments of the plaintiff is concerned, no such items are found. If any such articles are lying in the locker of the HSBC bank, defendant No.1 is not aware of the same. It is submitted that it is not the case of the plaintiff that defendant No.1 has operated any bank locker.

Inventory of the articles lying in the cup-board and locker has to be done by a valuer to be appointed by this Court. Learned counsel submits that the plaintiff has not furnished any details of the assets which are alleged to have been dealt with by the first defendant in affidavit in support or any other pleadings and in support of their plea for appointment of administrator of the estate of the said deceased and such plea is based on mere apprehension.

55. In so far as allegation about suppression/non disclosure of the names of all the next of kin of the said deceased is concerned, it is submitted that the names of so called kins disclosed by the plaintiff, in their testamentary petition incorrect.

Ms Sethna, learned counsel tendered compilation of various Judgments of Supreme Court and this Court which deals with the issues such as duties of an executor, about suspicious surrounding circumstances in execution of Will and Testament, undue influence, presumption regarding

registered Will and jurisdiction of this Court to pass orders relating to estate. Learned counsel submits that there is no provision for interim order in Indian .. 42 .. NMT-138-12 Succession Act and a testamentary matter regarding properties of the deceased and placed reliance on the Judgment of this Court reported in AIR 2007 Bombay 62. Learned counsel also placed reliance on the Judgment of Division Bench of this Court reported in 2011 (4) ALL Mah. L.R. 189 in which division bench of this Court has referred to Judgment of learned single Judge reported in AIR 2007 Bombay 62 on the powers of this Court for appointment of administrator and/or receiver in a testamentary suit.

57. Learned counsel placed reliance on the Judgment of Calcutta High Court reported in (2007) ILR 2 Cal 151 on the issue that discretion of Court to appoint administrator has to be exercised judicially. Reliance is placed on the Judgment of this Court reported in 2012 (4) ALL M.L. 718 in support of submission that exercise of powers under Section 247 can be only for good and valid reasons. It is submitted that no such case is made out by the plaintiff for appointment of administrator. Learned counsel submits that since administrator cannot be appointed in this proceedings, even injunction cannot be granted.

58. Ms Sethna, learned counsel made an attempt to distinguish the Judgment of this Court reported in 1933 Bombay 242 which is relied upon by Mr Chagla, learned senior counsel appearing for the plaintiff. It is submitted that in any event, there is no bonafide suit pending and thus this Court cannot appoint any administrator in this proceedings. Learned counsel submits that since plaintiffs have not disputed the handwriting on Will, they cannot dispute the registration of such Will. Since plaintiffs have not made out any case in support of allegations of fraud, coercion and undue influence, administrator cannot be appointed by this Court. It is submitted that plaintiffs have not .. 43 .. NMT-138-12 made out any case that any unfair advantage is obtained by the first defendant. It is submitted that in any event before appointment of administrator, Court has to record findings of fact on misappropriation or that the executor is incapable of handling the estate of the deceased. Learned counsel submits that on the other hand there are various suspicious circumstances in so far as the Will propounded by the plaintiff is concerned. Plaintiffs have not disclosed about the draftsman of the alleged Will. Plaintiff No.2 who is beneficiary under the said alleged Will has participated in making of Will and is which is alleged to have been executed at her residence. It is submitted that the Will produced by the plaintiffs is produced from the custody of plaintiff No.2. Learned counsel submits that alleged bequest in favour of plaintiff No.2 who was divorced by the brother of the said deceased 55 years ago is on the face of it unnatural. The deceased himself in his Will had stated that blank papers were given to plaintiff No.2 which are misused by plaintiff No.2. It is submitted that handwriting expert appointed by the State Government has opined forgery in the Will propounded by the plaintiff.

This Court can call for copy of such report from the state government for its perusal. It is submitted that no particulars are given by the plaintiffs in support of allegations of fraud.

59. Mr Chagla, learned senior counsel in rejoinder submits that defendant No.1 has challenged all the orders passed by this Court from time to time, Irrespective of merits, refused to disclose documents and estate of the said deceased, filed various false affidavits and has committed breach of

an ad interim order passed by this Court. It is submitted that the conduct of the first defendant itself discloses that defendant No.1 is not opposing this proceedings for the cause of charity but for his personal gain. It is submitted .. 44 .. NMT-138-12 that plaintiffs were not even disclosed about filing of testamentary petition by the first defendant which came to the knowledge of the plaintiffs from third party. Defendant No.1 had suppressed the alleged Will propounded by him from the plaintiff. It is submitted that defendant No.1 has relied upon two alleged doctor's certificates which itself indicate that both the certificates are false and incorrect. It is submitted that various suspicious circumstances pointed out by the plaintiffs are not denied by the first defendant. Mr Chagla reiterated that the alleged Will and Testament propounded by defendant No.1 is totally fabricated. Even stand of Mr Dastoor, alleged attesting witness on the Will propounded by the first defendant is totally inconsistent and contradictory and creates suspicious circumstances. Placing reliance on Section 211 and 213 of the Indian Succession Act, learned senior counsel submits that executor can represent the estate of the deceased but when there is challenge to the Will or a caveat is filed, such alleged executor cannot be allowed to represent the estate and to deal with the estate. It is submitted that Judgment of this Court in case of Rupali Mehta Vs. Narinder S. Mehta reported in AIR 2007 Bombay 62 is not applicable to Parsis and reliance placed on this Judgment is misplaced. It is submitted that the said Judgment was dealing with a case of appointment of Court Receiver and not administrator. Mr Chagla distinguished the Judgments relied upon by Ms Sethna. Defendant No.1 has acted in collusion with Mr Vaseem Kapadia for his personal gain. The said deceased himself had alleged in the suit that the trespassers were removed from flat No.8 and had applied for injunction from dispossessing him from the said flat. There was no question of there being any distress sale. There is no reference to the cheque alleged to have been deposited in the account of the said deceased in any document or writing.

.. 45 .. NMT-138-12 Defendant No.1 has alleged to have handed over the possession to Mr Vaseem Kapadia within 14 days from the death of the deceased without any further consideration. Allegation of alleged handing over possession was false and inconsistent with the averments made in the testamentary petition filed by defendant No.1 himself that the said flat No.8 was self occupied and no income was being received from the said flat. Affidavit of disclosure filed by defendant No.1 does not disclose that possession was handed over in respect of flat No.8 or any agreement was entered into. Though defendant no.1 had made a statement before this Court on 21/06/2012 through his counsel in this regard, even such statement is falsely disputed by the first defendant.

60. Mr Chagla, learned senior counsel invited my attention to letter dated 27/09/1988 from the affidavit in reply to the contempt petition filed by defendant No.1 and submits that the said alleged document is not rent a receipt. In any event, no subsequent receipt is disclosed by defendant No.1 showing any rent alleged to have been recovered. Mr Chagla, learned senior counsel submits that though there was an ad interim injunction granted against defendant No.1 not to act as an executor, defendant No.1 continued to act as executor, opened the bank account in the name of the estate of the said deceased, recovered rent and dividend, had not disclosed the amount recovered and spent. It is submitted that though an appeal filed against the ad interim order passed by this Court on 21/06/2012 is dismissed, defendant No.1 has not complied with the order passed by this Court. Contempt petition filed by the plaintiff against the first defendant for violation of ad interim order is pending. Learned senior counsel submits that injunction order is not adequate to safeguard the

estate of the deceased and hence, appointment of administrator is warranted in this case.

.. 46 ..

REASONS AND CONCLUSION

61. This court in case of Pandurang Shyamrao Laud (supra) has held that all allegations pertaining to the execution of Will and counter-allegations will have to be gone into at the hearing of the testamentary suit and any finding and/or observation of the Court at the stage of considering application for appointment of Court Receiver or administrator by the parties in respect of their contentions at the hearing. It is held that before granting administration pendente lite, the Court has to be satisfied in the first place that there is a bona fide suit pending touching the validity of the Will of the deceased. It is held that discretion to appoint an administrator has to be exercised judicially and not arbitrarily. Court has to be satisfied as to the necessity of such an administration and as to the fitness of the proposed administration and where it is just and proper under the circumstances of the case to appoint a administrator before subjecting the estate to the cost of such administration. Such an appointment cannot be claimed as a right merely because the proceedings are contested, but whenever there is bona fide dispute and a case of necessity has been made out, the Court in its discretion generally makes the grant.

62. This court has held that if an executor before he proves the Will is unable to do almost all acts which are incidental to his office except those relating to suits in connection with the estate and when he has filed his petition for probate and the petition is turned into a suit and when suit is pending, there is no one legally entitled to receive or hold the assets or give valid discharges. This Court has held in the said Judgment that under Section 213 of the Indian Succession Act, no right as executor can be .. 47 .. NMT-138-12 established in any Court of justice without inter alia a grant of probate. In the said Judgment, this Court has considered a situation that representation of the estate of the deceased was in contest and without saying anything with regard to the merits of the allegations and counter-allegations made in the suit, there was no doubt that a bona fide litigation is pending between the parties. The defendants had filed caveats and had made affidavit in support thereof with a result the petition had been turned into testamentary suit. There were allegations of fraudulent conspiracy against the parties and of exercise of undue influence, coercion and that the Will was void and of no effect. This Court considered that in that matter where the estate was of considerable value. Various suits were pending in respect of the estate of the deceased. Various interests, rents, dividends were recovered and were to be recovered. This Court held that since the appointment of executor was questioned and their title was in dispute because the Will itself was challenged on various grounds, administration pendente lite was granted.

63. High Court of Travancore-Cochin in case of Thayammal (supra) has held that in so far as allegation made by the parties whether Will was a genuine document or not, such question can be properly decided only after the parties have adduced all their evidence and after a due consideration of all such evidence in the light of all the attendant circumstances and probabilities. It is held that the possession of the executor cannot be said to be lawful possession unless and until it is established that the Will propounded by the executor is not genuine and the rights of the parties are as provided in the earlier Will and that he had obtained possession as a matter of right in peaceful manner. It is held that when the Court is satisfied that neither of the contesting parties can be said to be in lawful and undisputed possession of the property and that there is a 'bona fide' dispute as to the right .. 48 .. NMT-138-12 to the present possession of the property, it has to be taken that a case of necessity has been made out for the exercise of the Court's discretion in favour of the appointment of a receiver or administrator. The Travancore-Cochin High Court appointed a receiver and issued various directions so as to safeguard the estate of the deceased.

64. This Court in case of Smt. Prachi Prakash Pandit & Ors. Vs. Sou. Pushpa Sharad Ranade & Ors., in Appeal From Order No.854 and 903 of 2004, has held that it is only where a bonafide dispute and the case of necessity is made out that the Court in its discretion could grant appointment of receiver. Unless the Court is of the view that the property is being wasted or that the estate of the deceased is being depleted and and this extreme step is the only appropriate means to protect the property, administrator would be normally not appointed. In that matter the trial Court had observed that the property was not being wasted or damaged and there was no danger to the same and thus there was no need to appoint the Court Receiver.

Considering the facts of that case, this Court has held that no purpose would be served by appointing Court Receiver and granted injunction in respect of the property of the estate of the deceased.

65. The question that arises for consideration of this Court in this notice of motion thus is whether the bonafide litigation is pending between the parties relating to the estate of the said deceased, right to represent the estate of the deceased by both the parties propounding different Will and Testament of the deceased is in issue and whether a case is made out for grant of administration pendente lite.

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66. This Court in case of Pandurang Shamrao Laud (supra) has held that the authority of the executor who was alleged to have been appointed by the said deceased was questioned by the defendant by filing caveat and affidavit in support. It is held that there was a bona fide dispute between the parties.

67. Considering the facts of this case, it is not in dispute that both the parties have propounded different Will of the said deceased and have filed testamentary petitions inter alia praying for probate in respect of the respective Will propounded by both the parties. Both the parties have filed caveats in the testamentary petitions filed by against each other. Upon filing of such caveat and

affidavit in support in respective petitions, both the testamentary petitions have been turned into suits. Both the parties have made serious allegations against each other regarding execution and validity of the Will propounded by each other. Defendant No.1 has challenged the caveatable interest of the plaintiffs in the testamentary petition filed by the first defendant. By an interim order passed by this Court, it is held that the plaintiffs have caveatable interest and has rejected the petition for dismissal of caveat filed by the first defendant. The said order passed by the learned single Judge has been upheld not only by division bench but also by Supreme Court. The caveatable interest of the plaintiffs in the testamentary petition filed by the first defendant is thus established and cannot be questioned by the first defendant in this proceeding. The right of the plaintiffs to contest and challenge the Will propounded by the first defendant is recognized by this Court. It is not in dispute that defendant No.1 has also simultaneously filed a caveat in testamentary petition filed by the plaintiffs for probate of the Will .. 50 .. NMT-138-12 propounded by the plaintiffs and even the said petition is turned into a contested suit. Since both the parties have propounded separate Will and parallel proceedings filed by both the parties in respect of the estate of the said deceased is pending in this Court, I am of the view that a bonafide litigation is pending between the parties and the same cannot be disputed.

68. Though both the parties have addressed this Court at great length in support of their submissions that the Wills propounded by either party is fraudulent and fabricated and is vague and in support of such allegations invited my attention to several documents and pleadings forming part of the record in this notice of motion and also testamentary petitions and contempt petition, in my view, this Court cannot go into such issues at this stage and the same can be decided after recording evidence at the stage of trial. I do not propose to deal with any of these allegations and/or counter-allegations made by either party regarding allegations of fraud, fabrication and forgery at this stage which would prejudice either party in respect of their rival contentions at the time of hearing.

69. Next question that arise for consideration of this Court is whether the plaintiffs have made out a case for appointment of administrator under Section 247 of the Indian Succession Act 1925. It is not in dispute that respondent No.1 claiming to be an executor of the Will propounded by him and claims to be in possession of various properties forming part of the estate of the deceased. Defendant No.1 has claimed to be a caretaker of the said deceased in the pleadings filed before this Court. In the affidavits filed by the plaintiffs and in written arguments, plaintiffs have highlighted some of the instances which according to the plaintiffs disclose that the first defendant has .. 51 .. NMT-138-12 been misappropriating, mishandling and is wasting the estate of the said deceased for his personal gain, estate being depleted which allegations are seriously disputed by defendant No.1. In the backdrop of the facts highlighted aforesaid, I have to consider whether defendant No.1 has misappropriated the estate, wasted any part of the estate which warrants appointment of an administrator under Section 247 of the Indian Succession Act, 1925.

70. It is not in dispute that the said deceased was owner of flat No.8 in Al-Karim Building, Crafford Market, Mumbai-1. It is also not in dispute that defendant No.1 could not produce any writing alleged to have been entered into between the said deceased and Mr Vaseem Kapadia if any, during his lifetime in respect of the said flat. It is also not the case of defendant No.1 that during the life

time of the said deceased, he had already sold that flat to Mr Vaseem Kapadia or someone else. In the testamentary petition filed by defendant No.1 on 23/12/2012, the first defendant has disclosed on oath that the said flat appears to be "self occupied and no income fetched". On 21/06/2012, this Court has passed an ad interim order in this notice of motion against the first defendant which was also in respect of the said flat.

71. A perusal of the statement and FIR dated 10/09/2011 indicates that the said deceased had made a complaint against three alleged trespassers in respect of the said flat No.8 and had stated that he had seen the deed of transfer. Signature of his late brother on the document was false. It was stated that the said flat had been alleged to have been purchased as mentioned in the said deal for Rs.85 lacs by those three trespassers whereas actual market price was more a crore of rupees and his brother would not have sold the said flat to those trespassers for a such a low price. On perusal .. 52 .. NMT-138-12 of the disclosure affidavit dated 12/07/2012, it is revealed that it is the case of defendant No.1 that purchaser had allegedly issued three post dated cheques to the deceased i.e. dated 29/11/2011, 07/12/2011 and 14/12/1012 for Rs. 25 lacs each respectively. Bank account of the said deceased produced on record however, indicates that the credit of cheque of Rs.25 lacs dated 29/11/2011 was given in the said account with HSBC bank on value date 30/11/2011. On 07/12/2011, the said deceased expired. It is not in dispute that account in the name of the said deceased with the HSBC bank was freezed only after 22/12/2011. In my view, if defendant No.1 already had the cheques of Rs.25 lacs each dated 07/12/2011 and 14/12/2011 respectively with him, he could have certainly deposited the said two cheques in the account of the said deceased with HSBC bank prior to the said account having been freezed. Defendant No.1 has not produced any such proof of deposit of any such cheques or issuance of such cheques in this proceedings.

Reliance is placed by the first defendant on the alleged letter dated 21/12/2011 addressed by the first defendant to Mr Vaseem Kapadia after 14 days of the death of the said deceased and confirming surrender by defendant No.1 of his alleged occupancy rights of the said flat No.8 in favour of the said alleged purchaser and granting him liberty to deal with the said premises in any manner the said purported purchaser liked. In my prima facie view, the alleged writing dated 21/12/2012 is contrary to the statement made by defendant No.1 in his testamentary petition filed on 23/12/2011 showing the said flat as self occupied and fetching no income. In my view, since no agreement of sale or any such writing was admittedly entered into by the said deceased during his lifetime or by the first defendant prior to 23/12/2011 and since the alleged balance consideration was admittedly not received, no prudent person and particularly a person who claims to be an executor and .. 53 .. NMT-138-12 trustee, would have handed over the possession of the valuable property to an outsider and that also with liberty to deal with the said premises in any manner the said purported purchaser like.

72. It is the case of defendant No.1 himself that the said Mr Vaseem Kapadia had issued two fresh cheques dated 14/03/2012 and 20/03/2012 in the sum of Rs.20 lacs and Rs.30 lacs respectively and thus there was no question of handing over possession of the flat to the alleged purchaser on 21/12/2011. Learned counsel for the first defendant tried to justify the said writing dated 21/12/2011 by contending that the possession of the flat was already with trespasser and the said Mr Vaseem Kapadia was permitted to obtain possession from such trespassers directly. I am afraid I cannot

accept such explanation which is neither pleaded nor it is possible to accept when the said deceased during his lifetime had filed a suit claiming to be in possession of the said flat and had applied for injunction against the third party in respect of the said flat from dispossessing the said deceased in respect thereof.

In my view, the submission of the learned counsel appearing for the first defendant is totally inconsistent and is contrary to the alleged writing dated 21/12/2011.

73. On perusal of the record, it is revealed that defendant No.1 has disclosed the alleged writing dated 26/03/2012 for the first time in affidavits in reply dated 24/04/2013 in contempt petition filed by the plaintiffs. The said alleged writing is not registered. It is not in dispute that admittedly on 26/03/2012, both the parties were already in Court and have filed their respective probate petition for obtaining probate propounded by both of them. Plaintiffs have already filed a caveat in the probate petition filed by first .. 54 .. NMT-138-12 defendant on 17/02/2012. Defendant No.1 had filed caveat on 24/02/2012 in the probate petition filed by the plaintiffs. There was thus no urgent necessity to enter into any such alleged writing in favour of the alleged purchaser on 26/03/2012 during pendency of this proceeding. In my view, in ordinary course, defendant No.1 ought to have applied for permission to enter into any such alleged agreement with third party or to deal with the valuable property of the deceased which was forming part of the estate and when both the parties had disputed the authenticity of the Will propounded by each other and interim injunction was already sought by the plaintiffs against the first defendant from creating any third party rights and/or dealing with the property. In my view, since the authority of the plaintiffs was challenged by the first defendant and vice versa, none of the parties could deal with the property of the estate claiming to be executors or otherwise without obtaining prior permission of the Court. In my view, first defendant has acted illegally by allegedly handing over possession of the said flat to third party and entering into any such writing dated 26/03/2012. Such an act on the part of the first defendant is not with a view to protect the interest of the estate as claimed by the first defendant but is for his personal gain. Defendant No.1 has disclosed the said alleged possession letter dated 21/12/2011 and alleged agreement dated 26/03/2012 only in affidavit in reply dated 24/04/2013 in contempt petition filed by the plaintiffs. In my view, the first defendant has suppressed true and correct facts before this Court. A party who claims to be executor cannot be allowed to inter-meddle with the estate of the deceased.

74. Perusal of the record also indicates that though in the police complaint filed by the first defendant, he has made a reference to one Bharat Bone Mills at Bachav in Gujarat and property at Manmad, no disclosure is .. 55 .. NMT-138-12 made by the first defendant in the schedule to the testamentary petition filed by him in respect of Bachav property. Defendant No.1 has also not disclosed the particulars of the bank accounts and mutual fund as on the date of disclosure affidavit if any thereof. The current position or balance standing in account opened by the first defendant in the name of Purvez Burjor Dalal is also suppressed. Various shares which were disclosed by the first defendant in his schedule to probate petition were not disclosed with explanation. He has not annexed any D-MAT account statement, supporting documents with regard to the shares in the disclosure affidavit. The recovery of dividends, interest or bonus shares or other accretions to the bank account/mutual funds/shares or any debits to the bank account or sales of mutual funds or

shares on and after November 2011 have been suppressed. Defendant No.1 also has not disclosed any investments of the said deceased in government sector.

75. Perusal of the record indicates that the first defendant has also not furnished any inventory in respect of the movable assets lying in cup-boards or other immovable properties of the said deceased. It is not in dispute that in respect of Vile Parle property of the said deceased known as "Dalal House", Suit No.2763 of 2008 is pending in this Court. Suit in respect of residential flat at Colaba has been withdrawn on 08/03/2012. Suit No.137 of 2010 filed in respect of flat No.17/18 Modern Flats in this Court is transferred to City Civil Court. All these suits were relating to the properties of the said deceased. Some of the properties of the said deceased are allegedly tenanted. Defendant No.1 is allegedly recovering rent from the occupants. Plot of land known as "Love Dale" at Peddar Road is allegedly occupied by Tata Powers Ltd., Asiatic Textiles Ltd. and one Mr Shinde. M/s Asiatic Textiles Ltd., has .. 56 .. NMT-138-12 claimed to be statutory tenant, M/s Tata Powers Ltd., has agreed to deposit Leave and License amount with their advocate in view of the dispute. Even according to defendant No.1, Mr Shinde is occupying two garages is claiming to be tenant. Defendant No.1 has not placed material on record to as to what steps are taken to dispute the alleged rights claimed by the occupants or as to how the said properties are being maintained by the first defendant. Defendant No.1 has also not given any account about the recovery of rent or license fee from the occupants.

76. I am not inclined to accept the submission made by Ms Sethna, learned counsel appearing for defendant No.1 that defendant No.1 be permitted to take appropriate steps to file appropriate proceedings against the occupants as a executor. In so far as bank account of the said deceased with HSBC bank is concerned, the said account has already blocked in view of the letter addressed by the plaintiffs through their advocate.

77. In my view, even in respect of those tenanted properties which are forming part of the estate, steps for recovery of possession and/or rent in respect thereof will have to be taken. For taking such steps, appropriate proceedings may be required to be filed. Whatever alleged writing is entered into by the first defendant in favour of Mr Vaseem Kapadia or in respect of allegedly handing over possession of flat No.8, appropriate proceedings may be required to be filed to protect the estate of the said deceased. I am not inclined to accept the submission of learned counsel appearing for the first defendant that the consideration of RS.75 lacs in respect of flat No.8 was proper, it being a distress sale. The said deceased himself had claimed the property to be in his possession during his lifetime and thus there was no .. 57 .. NMT-138-12 question of there being any distress sale.

78. In so far as property situated at Bachav, Gujarat is concerned, I am not inclined to accept the submission of learned counsel for defendant No.1 that since the said property was not disclosed by the said deceased in the testamentary petition for obtaining probate of his brother, defendant No.1 could not have disclosed such property in the schedule of the property in the testamentary petition filed by him. Defendant No.1 himself has disclosed the property at Bachav as well as Manmad properties of the deceased in his police complaint/statement. Defendant No.1 claimed to be having possession of the properties of the said deceased and was maintaining accounts, defendant No.1 thus could not have suppressed those properties in the schedule to the testamentary petition filed by

him. Perusal of the record indicates that various statements of D-MAT accounts were not furnished by the first defendant. At the same time inventory and valuation of the articles lying in the cup-boards and locker of the said deceased will have to be made and to be valued by a valuer to be appointed by this Court to ascertain all the properties forming part of the estate.

79. On perusal of the record, it is clear that in spite of the ad interim order passed by this Court directing defendant No.1 to disclose all the properties of the deceased, defendant No.1 did not comply with the said order and filed an appeal. The order passed by the learned single Judge of this Court directing defendant to give all the details and to file disclosure affidavit was also vehemently opposed by the first defendant. Defendant No.1 has also disputed the caveatable interest of the plaintiffs by filing proceedings. This Court dismissed the interlocutory proceedings filed by the first defendant.

.. 58 .. NMT-138-12 Appeal filed by the first defendant impugning such orders passed by this Court are also dismissed. SLP filed by the first defendant challenging the orders passed by this Court accepting the caveatable interest is also dismissed.

80. On perusal of record, it is clear that several applications are filed by first defendant on one or the other grounds and was not successful. In my prima facie view, a person who claimed to be an executor of a Will and alleges that he is not even concerned or has no interest of any nature whatsoever in the estate of the said deceased in view of the said deceased having bequeathed all such properties to charities except few having been given to the servants, would not file such type of proceedings one after another raising all sorts of untenable objections under guise of protecting interest of the estate. Defendant No.1 claimed to be a caretaker getting honorarium from the said deceased during his lifetime. However, considering the number of proceedings filed by first defendant, I am of the prima facie view that no person who claimed to be a caretaker with no income from the estate would file such proceedings and would oppose each and every relief claimed by the plaintiffs on one or the other ground with or without merits and without having any interest in the properties directly or indirectly.

81. Since the properties forming part of the estate of the said deceased which are of substantial value and in view of the pending proceedings and considering such attitude and acts of the first defendant which is prejudicial to the interest of estate in my view, case is made out for appointment of administrator under Section 247 of the Indian Succession Act 1925. None of the parties who are parties to these proceedings and have put up their rival claims against the estate of the said deceased can be permitted to deal with the property.

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82. In so far as Judgment of this Court in case of Rupali Mehta (supra) relied upon by Ms Sethna, learned counsel appearing for the first defendant is concerned, the said Judgment as well as Judgment of Division Bench of this Court in case of Ramchandra Hande Vs. Vithalrao Hande, in my view, is not applicable to the facts of this case, since the provisions considered by this Court in those judgments are not applicable to parsis. Reliance thus placed by the learned counsel for the first

defendant on the said Judgment is totally misplaced. In so far as other Judgments referred to by Ms Sethna are concerned, those Judgments deal with the issue of caveatable interest, surrounding suspicious circumstances in execution of alleged Will which issues are not decided by this Court in this order nor can be decided in this notice of motion and will have to be decided at the time of trial and thus it is not necessary for this Court to deal with those judgments at this stage.

I, therefore pass the following order :

i) Mr Cyrus Ardeshir, Advocate is appointed as Administrator of this Court to administer the estate of the deceased Mr Purvez Burjor Dalal @ Purvez Burjorji Dalal.

ii) the plaintiffs as well as defendant No.1 are directed to hand over possession of the properties of the said deceased in their possession if any including movables, all the documents in respect of the estate of the deceased, details of the bank accounts of the said deceased, all the properties disclosed in the schedule to their respective testamentary petitions within four weeks from today to the learned administrator.

iii) Learned administrator shall open a bank account in the name of "

.. 60 .. NMT-138-12 Administrator- Estate of Mr Purvez Burjor Dalal" and can operate the said account for the purpose of administering the estate of the deceased.

iv) Learned administrator is directed to appoint a valuer for the purpose of ascertaining the valuation of the movable and immovable properties standing in the name of the deceased as disclosed in the schedule to the testamentary petition filed by both the parties. The administrator shall recover the rent from the occupants, recover the dividends, interest etc. on the shares, debentures, fixed deposits etc., and to deposit the same in the bank account directed to be opened as aforesaid. The learned administrator is free to avail of secretarial assistance.

v) Learned administrator shall write to all the companies and financial institutions in which shares, securities and bonds of the deceased are invested to deposit those investments with the learned administrator to be deposited in the aforesaid account.

vi) Learned administrator shall also ascertain current status of the pending proceeding in respect of the said estate filed in this Court or in any other Court from the plaintiffs and the first defendant and to apply for impleadment so as to represent the estate in those proceedings by engaging advocates.

vii) Learned administrator is also directed to file appropriate proceedings for recovery of properties forming part of the estate of the said deceased and to engage advocates and is permitted to incur expenses in that regard from the estate of the said deceased.

vii) Learned administrator is directed to submit report to this Court within three months from the date, the plaintiffs and defendant .. 61 .. NMT-138-12 No.1 handing over charge of the estate of the properties of the said deceased in their respective possession if any, and subsequently at the interval of not more than every six months.

ix) Learned administrator is at liberty to recover expenses and charges incurred for administering the estate of the said deceased from the bank accounts of the estate and also fees as may be approved by this Court periodically.

x) Learned administrator is directed to take all steps so as to discover all the properties forming part of the estate of the said deceased and seeks necessary information from both the parties in that regard.

xi) Learned administrator is at liberty to seek appropriate directions from this Court if and when any need so arises.

xii) Notice of motion is disposed of in aforesaid terms. Notice of motion is also made absolute in terms of prayer clause (b).

Plaintiffs are also directed not to create any third party rights in respect of any of the properties disclosed in the schedule to the testamentary petition filed by the plaintiffs as well as defendant No.1.

xiii) No order as to costs.

(R.D.DHANUKA,

Learned counsel for the respondents seek stay of operation of the order of appointment of administrator for a period of one week from today. Since I have directed both the parties to handover possession of the assets of the deceased in their respective possession within a period of four weeks from today, stay of the order is not warranted. Application for stay is rejected.

(R.D.DHANUKA, J.)