Manek Dara Sukhadwalla vs Shernaz Faroukh Lawyer on 8 August, 2014

Author: A.K. Menon

Bench: V.M. Kanade, A.K. Menon

Appl-7-14.sx

sas

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL (L) No.7 OF 2014

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

IN
PROBATE PETITION NO.341 OF 2012

Manek Dara Sukhadwalla]

Age about 62 years, a Parsi Zorastrian,
ig]
Indian Inhabitant of Mumbai, residing at]
6/8, Rustom Baug, Victoria Road,]

Mumbai - 400 027.] ..Appellant.

V/s.

1. Shernaz Faroukh Lawyer,]

Age: 60 years, Parsi Zorastrian,]
Indian Inhabitant of Pune, residing]
at Silver Dale Survey No.61/2B1,]

Mudhwa Road, Pune - 411 036.]

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

Age: 80 years, Parsi Zorastrian,]
Indian Inhabitant of Mumbai,]
residing at B/19, Keval Mahal, 64,]
Marine Drive, Mumbai - 400 020.]

1/56

Appl-7-14.sxw

3. Shiavax Hoshie Dolikuka of Thane,]
Indian Inhabitant, residing at]

Shantiniketan CHS, 1st floor, Flat]
No.102, Achole Road, Next to Achole]

Talao, Nallasopara (East), Thane.] ..Respondents.

Ms. Fereshte Sethna with Ram Kakkar and Adhiraj Malhotra Advocates

i/b. Duttmenon Dumorrsett for the appellant.

Mr. D.J.Khambata Advocate General with Mr. F.E.DeVitre and Mr. D.D.Madon, Senior Advocates with Parag Kabadi and Ms. Geetanjali Joshi i/b. Doijode Associates for respondent Nos.1 & 2.

ig CORAM : V.M. KANADE AND
A.K. MENON, JJ.

RESERVED ON : 6TH MAY, 2014

PRONOUNCED ON : 8TH AUGUST, 2014

JUDGMENT (PER A.K. MENON, J.)

1. Admit. By consent appeal taken up for hearing and final disposal.

2. Counsel for parties concluded arguments on 6th May 2014 after which at the request of both parties time was granted upto 9th June 2014 to enable them to file written submissions. Written submissions were accordingly filed by both sides. The respondents have sought to rely upon two judgments in their written submissions which they have clarified were not cited during oral arguments. Since the appellants have not had the benefit of addressing the Court on these two Appl-7-14.sxw judgments we are not taking them into consideration. More so because they are not crucial to any of the matters in issue before us.

Before we deal with the merits it is appropriate that a factual background be provided.

FACTUAL BACKGROUND

3. The Dramatis personae in the present appeal are persons claiming to be executors and heirs of the late Purvez Burjor Dalal, Indian, Parsi who died in Mumbai on or about 7 th December 2011. A brief background of how this appeal comes about is now set out. In the year 1955, respondent No.2 was

married to one Jamshed Burjor Dalal, the brother of the deceased Purvez. On 15th October, 1959 their marriage was annulled despite which the relationship between the two was believed to be cordial. Jamshed expired on 14 th August, 2010. He pre-deceased his brother Purvez. It is the case of the respondents that on 22nd November, 2010 the deceased Purvez ("the deceased") executed a Will appointing the respondents and one Mr. Jimmy Pirojsha Avasia, as executors. Jimmy Pirojsha Avasia has since renounced his right to act as executor. The respondents further contend that after expiry of the said Jamshed, during lifetime of the deceased, one Burjor Doodhmal began visiting the deceased and began interfering in the affairs of the deceased and introduced two persons one Jamshed Pandey and the appellant to the deceased.

Appl-7-14.sxw

4. At the time, the deceased had a trusted domestic servant one 'Shaku' who expired in April, 2011 after which the appellant is believed to have engaged one domestic help Sushila to reside along with the deceased. The appellant along with the said Doodhmal and Pandey started exercising complete dominion over the deceased and the properties of deceased who was suffering from age related infirmities. Apparently, the appellant started staying with the deceased and under the guise of assisting the deceased and along with Doodhmal and Pandey, the appellant began controlling the property and credits of the deceased.

5. After the demise of Purvez Dalal, the respondents commenced steps in relation collecting the assets of the deceased and wrote to various shareholders of the respondent's rights to represent and administer the estate. On 23rd December, 2011 the Advocates for respondent no. 1 and 2 addressed a letter to the appellant and the said Doodhmal and Pandey informing them that respondents 1 and 2 were the executors of the deceased's Will dated 22 nd November, 2010 ('the 2010 Will') and called upon them to hand over the estate of the deceased and documents in their possession and custody.

6. On 29th December, 2011 the appellants Advocates Appl-7-14.sxw informed the respondents that they were representing only the appellant and one Mr.Pandey and called upon the respondents to abstain from holding themselves as executors or trustees entitled to administer the estate of the deceased. The respondents then called upon the appellant and said Pandey to disclose their purported capacity and authority relating to the properties of the deceased and to hand over the documents and papers in their possession with regard to the estate of the deceased and to provide complete details of all actions on the part of the appellant and the said Pandey regarding the estate of the deceased.

7. The appellant claimed that the deceased executed a Will dated 28th September, 2011 ("the 2011 will") which came to be registered on 28th September, 2011 with the Sub-Registrar of Assurances, Mumbai. It was then revealed that on 23 rd December, 2011, the appellant had filed a probate petition in this Court seeking probate petition No.5 of 2012.

8. Vide a letter dated 23rd January, 2012, Advocates for the appellant and Pandey questioned the genuineness of the 2010 Will.

The respondents meanwhile alleged that the appellant and said Mr. Pandey had taken possession of certain property of the deceased situated at Colaba, Mumbai known as 17/18, Modern Flats and that the Appl-7-14.sxw appellant had suppressed the existence of the 2011 Will and the filing of the probate petition.

9. On 3rd February, 2012, respondent No.1 filed Testamentary Petition No.341 of 2012 seeking probate of the 2010 Will. On 7 th February, 2012, Advocates for respondent received letter from Advocates for M/s. Tata Power Limited, occupant of part of the building which was owned by the deceased informing them that the Advocate for the appellant had addressed a letter claiming to be the executor of the 2011 Will and that the earlier 2010 Will should be ignored.

10. On 17th February, 2012, the respondents called upon the appellant and Pandey to submit a copy of the 2011 Will and papers of the probate petition No.5 of 2012. They also filed a Caveat in probate petition No.5 of 2012 and applied for certified copies of said petition and the 2011 Will propounded by appellant. Since the appellant did not respond, on 24th February, 2012 the respondents filed an affidavit in support of the caveat in probate petition No.5 of 2012 filed by the appellant. On 24th February, 2012 the appellant and Pandey addressed a letter to the Advocate for the respondent alleging that the appellant had a caveatable interest in the respondent's petition and requested for a copy of the probate petition filed by the respondent.

Appl-7-14.sxw

11. On 1st March, 2012 the appellant and Pandey provided a copy of the affidavit of the appellant in support of the caveat. On 12 th March, 2012 the respondent received a copy of the 2011 Will and probate petition No.5 of 2012 from the office of this Court. Meanwhile HSBC Bank blocked the deceased's accounts for security purposes upon receipt of the respondents' Advocate's notice dated 22 nd December, 2011.

12. On 19th March, 2012, the appellant and Pandey addressed a letter to Advocates of the respondents and made various allegations against the respondents, claiming the 2010 Will to be forged and fabricated. The respondents have accused the appellant of misappropriation and mismanaging the deceased properties. The parties have since traded allegations and denials in respect of the deceased's properties. On 3rd May, 2012 Notice of Motion no. 138 of 2012 in probate petition no.341 of 2012 forming the subject matter of the present appeal was taken out by the respondent while the appellant filed Misc. Petition (L) No.915 of 2012 for dismissal of caveat, alleging that respondent No.1 had no caveatable interest. The appellant also filed a Notice of Motion for dismissal of the respondents' suit on the ground that the suit did not disclose a cause of action.

13. The prayers in Notice of Motion No.138 of 2012 are Appl-7-14.sxw reproduced below for ease of reference;

(a) that pending the hearing and final disposal of the Suit, this Hon'ble Court be pleased to appoint a fit and proper person as an administrator / Officer of the estate / property of the Deceased (including the movable and immovable properties set for at Schedule at Exhibit 'D' to the present

Suit, as well as the Schedule at Exhibit 'C' of Testamentary Suit No.25 of 2012);

(b) that pending the hearing and final disposal of the Suit, the Defendant No.1, his employees, servants and agents be restrained by an order of injunction of this Hon'ble Court from in any manner:-

(i) accessing, occupying, receiving any benefit from, alienating, selling, transferring, encumbering, dealing with, disposing of, party with possession of, inducting any persons into, or creating any third party rights or interest in or over the assets forming a part of the estate of the deceased (including the movable and immovable properties set for at Schedule at Exhibit 'D' to the present Suit, as well as the Schedule at Exhibit 'C' to Testamentary Suit No.25 of 2012), or any part thereof,

(ii) receiving any benefit, making any representations to any person on the basis of, and / or from acting upon or in furtherance of the alleged Will dated 8th September, 2011 (Exhibit 'L' to the Affidavit in support);

(c) that pending the hearing and final disposal of the suit, the Defendant be ordered and directed to:

Appl-7-14.sxw

(i) disclose on oath the movable and immovable assets left behind by the deceased at the time of his death, and all acts deeds and things done by the Defendant No.1 with regard thereto, including the cash, jewellery, gold and other assets taken charge of or otherwise dealt with by him and all amounts earned and / or realised therefrom;

(ii) render a true and full inventory and accounts of his dealings with the assets and properties of the deceased and the profits, if any therefrom;

14. On 21st June, 2012 a learned Single Judge of this Court granted injunctions in terms of prayer clauses (b) & (c) of the Notice of Motion restraining the appellant from disposing or creating third party rights in the estate of the deceased and directed the appellant to file a disclosure affidavit within two weeks.

15. The appellant contended that the 2010 Will was got up and fabricated by the respondents. On 2nd July, 2012 the appellant filed a police complaint against the respondents and said Jimmy Avasia for allegedly obtaining signatures of the deceased on the 2010 Will. On 4 th July, 2012 a Division Bench of this Court confirmed the ad-interim disclosure order passed by the Single Judge with a minor modification thereby directing the affidavit of disclosure to be kept in a sealed Appl-7-14.sxw envelope pending a decision by the learned Single Judge as to whether or not the envelope should be opened.

16. On 12th July, 2012 the appellant filed the affidavit in a sealed envelope. On 25th July, 2012 the Single Judge dismissed the Notice of Motion and Misc. Petition filed by the appellant and held that respondents had a caveatable interest. The respondents allege that the appellant handed over possession of flat No.8, Al-Karim Manzil Building, Crawford Market, Mumbai to one Mr. Vaseem Kapadia on 21 st December, 2011 though the said flat had been described in the schedule to the petition filed by the appellant as 'self occupied and no income fetched". According to the respondents, the handing over of possession of this flat to Mr. Vaseem Kapadia was in willful disobedience of the order passed by this Court by back dating documents.

17. On 21st November 2013 the learned Single Judge allowed the Notice of Motion No.138 of 2012 and appointed an Advocate of this Court as administrator to administer the estate of the deceased. The appellant and the respondents were directed to hand over possession of all the properties to the administrator along with several other consequential reliefs. The appellant has challenged the order dated 21st November, 2013. As far as the respondents are concerned, they Appl-7-14.sxw have not filed any appeal.

Submissions of Counsel for the appellant

18. According to Ms. Sethna the learned counsel for the appellant, the 2011 will is the last will and testament of the deceased.

She alluded to the deceased having taken several measures described hereafter to preclude a challenge to the Will dated 8th September, 2011. According to her, the deceased caused the 2011 Will to be drawn up by the family Solicitors and ensured its registration. He had obtained a doctor's certificate about the state of his mental faculties and also provided an explanation for not seeking the opinion of his doctor Dr.Arun Bhute. Apparently, the deceased's regular doctor Dr.Balani is believed to have declined to attest the deceased's Will on an earlier occasion i.e. on 23rd August 2011, allegedly in view of lack of a bequest favouring him. The deceased had apparently written in his own hand, apprehensions about the possible misuse of the blank signed papers reportedly in the custody of respondent No.2. She submitted that barring minor pecuniary legacies, the estate had to be bequeathed to charity. Ms.Sethna submitted that none of the bequests are in favour of the appellant and that the probate Court had no jurisdiction to grant the interlocutory relief sought in the Notice of Motion. That the appellant was a retired person who looked after the Appl-7-14.sxw deceased in the last 14 months of his life for a small monthly compensation. He stakes no claim to the estate and will ensure the entire estate inures to charitable causes.

19. Ms.Sethna submitted that respondent No.1 is the step daughter of respondent No.2, who had married one Pirojsha Avasia after her marriage to Jamshed, the brother of the deceased came to be annulled in 1959. The step son of respondent No.2 the said Jimmy Avasia had, in recent years, acted as a lawyer of the deceased in connection with property disputes. She submitted that the appellant had instituted a criminal complaint of forgery of the 2010 Will against the said Jimmy Avasia and respondents 1 and 2 which was under

investigation.

20. According to the learned counsel for the appellant, respondents 1 and 2 and the said Jimmy Avasia intended to take control of the estate by first ousting the appellant by appointment for an administrator and thereafter getting into the 'driver's seat'. Ms.Sethna then submitted that even assuming that the impugned order were to be upheld, it would be in the fitness of things that the administrator appointed should not be from the same community as the deceased and should preferably be a retired Judge of this Court. She submitted that apart from the lack of jurisdiction in the probate Court to appoint Appl-7-14.sxw such an administrator, the case does not disclose existence of a bonafide dispute and there is no necessity of appointing an administrator.

21. Apropos the contention that the Testamentary Court lacks jurisdiction to appoint the administrator pendente lite in the testamentary proceedings for grant of probate, it is submitted that the only issue to be tried in a testamentary suit is the validity of the Will and matters of title to or existence of property are not the subject matter of the dispute / suit. Learned counsel submitted that a probate Court ought not to go into matters of title or existence of the property that has been bequeathed and the Court is only concerned with the validity of the Will. Relying upon Rule 374 read with Form No.97 of the Bombay High Court Original Side Rules, 1980, counsel submitted that the sole prayer clause in a petition for probate reads as follows. The appellant prays that "probate may be granted to him having effect throughout the State of Maharashtra."

22. Ms.Sethna further submitted that interim relief can be granted only as an aid to final relief and that there was little or no scope of the respondents succeeding on the basis of a fabricated will and therefore, no occasion arises to grant any interim relief. In support of Appl-7-14.sxw her submission the learned counsel relied upon the judgment of the Supreme Court in Cotton Corporation of India V/s. United Industrial Bank.

23. Ms. Sethna then submitted that the scheme of the Indian Succession Act, 1925 stipulates that powers granted to an executor of a Will are not liable to be circumscribed except in rare circumstances.

Ms. Sethna relied on the provisions of sections 221, 222, 227, 229, 305 to 308 and 316 to 331 of the Succession Act in support of her submission that probate can be granted only to an executor and not to a third person unless the executor renounces his appointment. That the estate vests in an executor at the time of the demise of the testator.

The executor is thus the legal representative of the deceased. Merely challenging the Will does not take away the rights of the executor. Our attention was specifically drawn to section 295 dealing with the procedure in contentious cases and it was submitted that no part of the section contemplates a status quo situation simply because a Will is contested. That even section 285, which deals with proceedings after entry of a caveat, does not contemplate any restrictions on the rights of an executor. The legislature imposed no bar on the rights and duties of the executor. It is submitted that the reliefs sought in the subject motion can only be sought in a suit as evident from form No.42 of 1 (1983) 3 SCR 962 Appl-7-14.sxw Appendix A to the C.P.C. read with sections 17 & 18 of the Code of Civil Procedure, 1908.

24. Ms. Sethna then submitted that sections 247 and 269 of the Indian Succession Act operate in different areas. Section 269 did apply to Parsis but only in case of real necessity of appointment of an administrator in the discretion of the Court viz when the Court feels that there is risk of loss or damage to the estate of a deceased. In such cases the party seeking relief would be bound to make out a prima facie case which the respondents had failed to do. She contended that section 269 is to be read with sections 283, 300 and clause 34 of the Letters Patent. She further submits that section 247 operates in situations which are not covered by sections 240 to 246 and 269 and when it relates to grants limited in duration and where there is no risk of loss or damage to the estate.

25. Ms. Sethna further submits that it is clear from section 269(2) that 269(1) does apply to persons mentioned in sub-section (2) and it is to be construed as a complete bar to appointment of an administrator under section 269(1) for Hindus, Muhammadans, Buddhists, Sikhs or Jainas or other exempted persons or to Indian Christians who have died intestate. According to her the respondents' arguments before the learned single judge were premised on the Appl-7-14.sxw applicability of section 247 and not 269.

26. It will be useful at this stage to consider the two sections;

Section 247 reads as under:-

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

Section 269 reads as under:-

> " 269 - When and how District Judge to interfere for protection of property. - (1) Until probate is granted of the Will of a deceased person, or an administrator of his estate is constituted, the District Judge, within whose jurisdiction any part of the property of the deceased person is situate, is authorised and required to interfere for the protection of such property at the instance of any person claiming to be interested therein, and in all other cases where the Judge considers that the property incurs any risk of loss or damage; and for that purpose, if he thinks fit, to appoint an officer to take and keep possession of the property.
>
> (2) This section shall not apply when the deceased is a Hindu, Appl-7-14.sxw Muhammadan, Buddhist, Sikh or Jaina or an exempted person, nor shall it apply to any part of the property of an Indian Christian who has died intestate."

27. According to Ms. Sethna, section 269 is the sole repository of power in a situation where it is found that it is necessary to appoint an administrator to prevent risk of loss or damage to an estate.

It is submitted that reliefs which cannot be granted under section 269(1) to the classes of persons stipulated in section 269(2) cannot be available against such exempted classes under section 247. That an order under section 247 is warranted only in the following circumstances:-

A. If there is a Will (forged or otherwise) and ;

(b) no executor has been appointed;

(b) when there is dispute as to who is to be the executor;

(c) when there is more than one executor appointed and disputes have arisen inter se the executors;

(d) when the executor appointed declines to act or is not competent to act;

B. If there is no Will in existence and ;

(a) there are disputes between the legal heirs as regards the right to administer the estate;

(b) where there are no legal heirs;

Appl-7-14.sxw Section 247, it is submitted is not a solution for all the disputes in relation to legal representation but could be resorted to only in cases where there is no risk of loss or damage to the estate. Section 269 may be resorted to only if there is a bonafide dispute and there is risk of loss or damage.

28. Ms.Sethna submitted that the respondents have canvassed that the deceased may have executed the 2011 Will being of unsound mind at the time, but had failed to offer any explanation and / or provide other material to show how the deceased filed an F.I.R. on 10th September, 2011 and thereafter affirmed a plaint and affidavit and Vakalatnama dated 21st October, 2011 in relation to a suit filed by him in the City Civil Court and applied for probate of his late brother's will and addressed a host of other letters concerning his affairs, all of which were subsequent to execution of the 2011 Will. It is submitted that the allegations in relation to 2011 Will are intended to prejudice the Court and keep the estate engaged in litigation, on the instructions given by the brother of respondent No.1 and it is not believable that the deceased had suffered sudden deterioration in mental health within 10 months of execution of the 2010 Will propounded by the respondents.

29. Alluding to the respondents' contention that the 2011 Will was got-up through fraud, coercion and undue influence, Ms.Sethna submitted that these allegations are inconsistent with the respondents' Appl-7-14.sxw further allegations of the 2011 Will being forged and fabricated. She further submitted that the contention of the respondents that the land-

line telephone of the appellant was not working was baseless. The allegations that the appellant was residing with the deceased and had taken charge and control of the person and properties of the deceased and then procured a Will are denied on the basis that the 2011 Will was prepared by family

lawyers to whom fees were paid by the deceased and was then registered. The appellant has denied the allegations against Mr.Doodhmal and Mr.Pandey. Specific stress is laid on the fact that the appellant is not a beneficiary of the 2011 Will which bequeaths the estate to charity. It is submitted that the appellant seeks that this Court may decide the identities of the charitable trusts so as to avoid any controversy.

30. It is further submitted that allegations that the 2011 Will was suppressed is misleading since the appellant filed for probate on 23rd December, 2011. According to Ms.Sethna, the allegations seeking to question the validity of the registration of the 2011 Will and the capacity of Dr.Bhute to make himself available on the date of registration and on account of the non-availability of Dr.Unwala are all unwarranted. Similarly, the allegations of inconsistency in the affidavit of Mr. Ervad Palanji P. Dastoor, an attesting witness has been denied.

It is submitted that there are no bonafide disputes in relation to the Appl-7-14.sxw 2011 Will that justify the appointment of an administrator and the respondents cannot claim any right to have an administrator appointed merely because the proceedings are contested.

31. Ms.Sethna then submitted that 2010 Will was executed under suspicious circumstances (a criminal complaint has been filed in this respect) including the fact that the 2011 Will makes no reference to the 2010 Will and it urges the need for precautions to be taken regarding the blank signed sheets of paper believed to be lying with respondent No.2. It is submitted that this would negate the contention that bonafide disputes exist She submits that the 2010 Will being unregistered and the bequest to the former sister in law whose marriage with the deceased's brother was annulled 55 years ago rendered the 2010 Will questionable.

32. An interesting twist surfaces with the appellant contending that the respondents have a past record of being beneficiaries of a Will of one late Jemi Nowroji Jasawala. Ms.Sethna submits that neither deceased (Purvez Dalal nor Jemi Jasawala) had legal heirs. They both left common beneficiaries namely the respondents and Mr. Jimmy Avasia. Both deceased expressed an intention to bequeath their estates to charity and a common doctor certified their mental capacity.

Ms.Sethna submitted that the order appointing administrator was also Appl-7-14.sxw bad since (i) majority of the assets comprised immovable properties,

(ii) all income from the estate including rent received are deposited in the bank accounts which were frozen and (iii) all shareholding and mutual funds remain intact.

33. It was contended that there are no properties which are unaccounted for and in any event the probate Court cannot carry out any such exercise to identify properties. In support of this contention Ms.Sethna relied upon the judgment of this Court in 2Ramchandra Ganpatrao Hande alias Handege V/s. Vithalrao Hande & Ors., judgment of 3Rupali Mehta V/s. Smt. Tina Narindersain Mehta and of the Kerala High Court in 4K.M.Verghese & Ors. V/s. K.M. Oomen.

34. It was submitted that the deceased disposed of the Al-

Karim property during his lifetime. It is submitted that although the impugned judgment has held that "It is also not the case of defendant No.1 that during the lifetime of the said deceased, he had already sold that flat to Mr. Vaseem Kapadia or someone else" it ignores the fact that the HSBC Bank statement of account relied upon by the appellant reflects that part of consideration had been deposited during the lifetime of the deceased. The appellant further submitted that the flat at 2 2011 (4) All MR 189 3 AIR 2007 Bombay 62 4 AIR 1994 KER 85 Appl-7-14.sxw Al-Karim is being protected by Vaseem Kapadia, who has moved a Chamber Summons bearing (L) No.60 of 2013 to seek orders of this Court (which remains to be decided) that he would be bound to deliver such property as directed by the Court, if this Court was to conclude that he has no right to retain possession thereof.

35. Relying upon the decision of this Court in the case of 5Smt.

Prachi Prakash Pandit V/s. Sou.Pushpa Sharad Ranade, Ms.Sethna submitted that there is no evidence that the property was in grave danger of being wasted and that the appointment of an administrator would only deplete the estate. On the question whether injunctive reliefs are sufficient to prove to protect an estate, counsel submitted that in Ramchandra Ganpatrao Hande's case (supra), the Division Bench of this Court has cited with approval the decision in 6Thrity Sam Shroff V/s. Shiraz Byramji Anklesaria & Anr., wherein it is held that powers not specifically conferred under the Act to the probate Court can only be exercised in a suit, which includes the power to determine existence or title of property and to pass injunctive orders. It is submitted that the ground (GG) in the appeal whereby the appellant had stated that an injunction would serve the purpose in this case, had been raised only as an alternative plea. That an order of injunction is sufficient to protect the estate particularly when according to counsel, 5 APPEAL FROM ORDER NO.854 and 903 OF 2004 6 2007 (2) ALL MR 856 Appl-7-14.sxw respondents arguments had transgressed the pleadings thereby depriving the appellant from dealing with some arguments.

36. We do not see any disadvantage on this count since both sides have now filed written submissions. We may add that, notwithstanding the submission on behalf of the appellants that this ground is taken in the alternative, both ground (GG) and the written submission to that effect are not alternative submissions but we read them as admissions / concessions and treat them as such. Although, the appellant has now contended that the ground was in the alternative, from the earlier written submissions filed in the matter on 22nd January, 2014 on behalf of the appellant it is clear that the submission is not treated as an alternative submission. The appellant has in our view conceded that the injunction in force vide order dated 21st June, 2012 would be sufficient to protect the estate.

37. Reliance is placed by the appellant on the decision of Rajendra Singh Lodha V/s. Ajoy Kumar Newer & Ors. in support of the appellant's contention that an injunction would be sufficient to protect the estate, in the facts of the present case. It is further submitted that the probate Court lacks power for ordering discovery of an estate and the assets comprising the estate. As regards the 7 (2007) ILR 2 Cal 151 Appl-7-14.sxw pending litigation, the appellants submitted that all litigation is being adequately handled and the appellant will file reports from time to time.

38. Ms.Sethna submitted that the impugned judgment fails to provide any analysis to support a finding that the principles of law in Ramchandra Ganpatrao Hande (supra) and Rupali Mehta (supra) have no application to the case at hand because those judgments were concerned with testamentary dispositions of Hindus and not Parsis.

39. Apropos the Contempt Petition filed in this Court it is submitted that it is a counter-blast to the criminal complaint filed by the appellant alleging fabrication of the 2010 Will. Ms.Sethna further submits that a presumption in support of the registered Will propounded by the appellant must operate till the same is rebutted. In support of this contention, she relied on the provisions of section 114(e) of the Evidence Act and the judgment in the case of 8Faggan (D) by L.R.'s & Ors. V/s. Bhagwan Sahay (D) by L.R.'s & Ors. and Muniammal V/s. Annadurai (Deceased) & other. It is contended that the presumption of genuineness and authenticity must operate in favour of the 2011 Will.

40. Ms.Sethna stressed upon her submission that no coercion 8 2008 (4) AWC 3462 9 2008 (8) MLJ 753 Appl-7-14.sxw or undue influence was exercised by the appellant who was not in a position to dominate the Will of the deceased and that there is nothing unconscionable about the Will. On the other hand, the step son of respondent No.2, Jimmy Avasia, who in his capacity as Advocate of the deceased was in a position to dominate the Will of the deceased. She then dealt with the judgments cited by the respondents before the learned Single Judge and submitted that reliance on the decision of Mrs.Hem Nolini Judah V/s. Mrs. Isolyne Sarojbashini Bose & Ors.

was misplaced inasmuch as, it was not the case of the appellant that his right as an executor is established, but merely that the statute enables him to act during the pendency of probate proceedings.

Learned counsel attempted to distinguish the judgment in the case of Sudhirendra Nath Mitter V/s. Arunendra Nath Mitter & Ors.

submitting that merely because there was an allegation of bonafide litigation, the court must not appoint an administrator. Ms.Sethna also reiterated that the registration of a will is a circumstance to be considered as proof of genuineness of the Will. For the aforesaid reasons she submits that the impugned order appointing the administrator requires to be set aside.

Submissions on behalf of the respondents 10 AIR 1962 SC 1471 11 AIR (39) 1952 Calcutta 418 Appl-7-14.sxw

41. Mr.DJ. Khambata, learned Senior Counsel appearing on behalf of the respondents has submitted that the Succession Act expressly confers special power in a probate Court. Reliance is placed on sections 247 and 269. It is submitted that section 269(2) has rendered the provisions of section 269(1) inapplicable to Hindus, Muhammadans, Buddhists, Sikhs or Jains or an exempted person and clarifies that it shall not apply to any part of the property of an Indian Christian who has died intestate.

42. In the present case, the deceased was a Parsi, therefore, section 269 squarely applies. Mr.Khambata submitted that the decision in Rupali Mehta's (supra) is not applicable to the present case since the deceased in that case was a Hindu and section 269(1) was not available to the Plaintiff therein. Furthermore, interim relief was sought in that case based on the plea that the Court had power under the Civil Procedure Code to grant protection. That Rupali Mehta's case recognises the power under section 269(1) but holds that the power could not be exercised in the case of Hindus. It is further submitted that Ramchandra Hande's case (supra) is also not applicable since the application was only for injunction under Order 39 Rule 2 of the Civil Procedure Code and not for appointment of an administrator pendente lite under section 247. Moreover, the deceased being Hindu, section 269(1) could not be applied.

Appl-7-14.sxw

43. He then canvassed the proposition that the Succession Act is a self-contained Code and the Court exercising jurisdiction cannot decide any question of title to the property and that the Civil Procedure Code is applicable only to the extent it is not inconsistent with the Succession Act. Mr.Khambata further submitted that sections 247 & 269 are applicable in the present case and questioned the appellant's reliance upon the case of Cotton Corporation (supra). It is submitted that the proposition that interim reliefs can only be in aid of final reliefs is wholly irrelevant and the said judgment has no applicability in cases where an express power to grant specific relief under a statute is invoked. According to him express statutorily conferred power to grant reliefs cannot be negated and rendered otiose.

44. Dealing with the appellant's contention based on the differences between sections 247 and 269, learned counsel submits that the two sections provide different reliefs in different sets of circumstances and the appellant's contention that section 269 can apply only in cases of intestacy is totally baseless. It is further submitted that in the present case, the order of injunction has become final since the ad-interim order of injunction dated 21st June, 2012 was confirmed by the Appeal Court on 4 th July, 2012 which was not challenged thereafter. The impugned order confirms the order of injunction and there is no challenge to the said order of injunction in the Appl-7-14.sxw present appeal. It is further submitted that in ground (GG) of the memo of appeal, the appellant has contended that an order of injunction would be sufficient.

45. On the question of appointment of an administrator, Mr. Khambata submits that before appointing an administrator pendente lite, the Court has to be satisfied there is a bonafide dispute relating to the estate. Furthermore, the appointment of administrator is discretionary as set out in the judgment of ig Pandurang Shamrao Laud & Ors. V/s. Dwarkadas Kallindas & Ors. and when a petition for probate is converted into a suit, there is no one legally entitled to receive or hold the assets or give valid discharge and the estate is "in medio". It is further submitted that when the estate is 'in medio', it is in the common interest of all parties that the Court should prevent a scramble and administrator is readily appointed [Sudhirendra Nath Mitter (supra)]. Mr.Khambata submitted that there were two testamentary petitions and suits pending and neither party can be said to be in lawful and undisputed possession and, therefore, a bonafide dispute as to the right to the claim possession does arise, justifying the appointment of an administrator. Mr. Khambata

further submitted that there must be somebody clothed with necessary authority to collect the assets and the necessity to do so arises when the estate is 'in medio'' 12 AIR 1933 Bombay 342 Appl-7-14.sxw as in the present case. He submitted that the principle that the Court will not appoint administrator pendente lite when a person is named as an executor, will only apply when such appointment is not questioned.

That the facts in present case are to the contrary, thereby justifying the appointment of an administrator. It is submitted that Courts will consider the criticisms on the Will only with a view to ascertain whether there is a bonafide litigation touching upon the validity of the Will.

Learned counsel then submitted that the case of Rajendra Singh Lodha (supra) does not lay down anything different but only reiterates that wherever necessary, an administrator, pendente lite can be appointed but in that particular case such necessity was not established. Despite this an injunction was granted restraining Lodha from dealing with the property. Furthermore, it was not the case of the Plaintiff therein that the estate was in medio and hence the finding of the Single Judge appointing an administrator was set aside. In the present case, it is submitted that the facts and pleadings demonstrate that immediate interference is warranted.

46. Mr. Khambata submitted that there is bonafide dispute as to the validity of the two Wills and the executor has no right to deal with the estate unless probate is granted and, therefore, in the present case any person claiming to be an executor cannot, on the basis of such claim alone, be entitled to claim possession. Furthermore, no beneficial Appl-7-14.sxw interest in the property vests in the executor but merely a right of representation. Dealing with the appellant's contention that the Act envisages vesting of the estate in an executor, therefore, rendering section 247 unavailable for seeking protection of the estate and that section 269 is not applicable where there is an executor appointed under a Will, Mr.Khambata submitted that the contention is misconceived since they are contrary to the plain language of sections 247 & 269. Mr. Khambata submitted that the registration of a Will does not dispel suspicious circumstances surrounding the Will.

ig Learned counsel submitted that a bonafide litigation does exist between the parties and the contention that respondent No.1 had a caveatable interest has been upheld by the Supreme Court in its order dated 19th November, 2013. It is further submitted that respondent Nos.1 & 2 do not contend that they should be put in possession of the estate but want an independent administrator to take charge pendente lite. Mr. Khambata also submitted that the relevant issue was whether the property or any part thereof is 'in medio' and whether the appellant's dealing with the property renders it open to risk of waste, alienation or mismanagement. It was further submitted that the caveatable interest of the respondents cannot be questioned and since there are two Wills and two suits pending in respect of the estate, it is sufficient to draw a conclusion that a bonafide dispute exists. Furthermore, it is submitted Appl-7-14.sxw that the question as to forgery could only be determined at the trial of the suits.

47. In response to the appellant's submissions regarding the suspicious circumstances surrounding the alleged 2011 Will, it is submitted that the fact that Dr.Ballani certified unsoundness of the deceased's mind is relevant. The respondents learnt of the existence of the alleged 2011 Will only

from the letter dated 8 th September, 2011 It is submitted that the alleged prior Will of 23rd August, 2011 was suppressed until the Court ordered its disclosure. It is also submitted that Dr.Unwalla's letter refers to the deceased enlisting him as his personal physician but the medical certificates purported to be issued by him were, for the first time referred to only in the reply filed by the appellant. Furthermore, it is submitted that the medical certificate of Dr.Bhute certifying the deceased as physically fit is highly suspicious.

Mr. Khambata submitted that all along it was the contention of the appellant that Dr.Ballani and Dr.Unwalla were the family physicians.

However, the contention and certificate that the deceased was physically fit is belied by the fact that the deceased was unable to go to the office of the Sub-Registrar or the HSBC, as a result, the Registrar had to make a house visit, so also the officer of HSBC had to make a home visit. The certificates of Dr.Bhute are highly suspect.

Furthermore, it is submitted that the registration of the 2011 Will has Appl-7-14.sxw not been properly done. Inter alia, it was not recorded that the deceased read the Will or that the registration officer concerned read it over to the deceased or that the deceased was even made aware that it was a Will that he was getting registered or nor did the Registrar record that he was satisfied that deceased knew that it was a Will.

48. Mr.Khambata assailed the affidavits of the attesting witnesses of the 2011 Will and submitted that the deponents claimed to have seen the deceased putting his signature and thumb impression on page 3 of the 2011 Will and that the deceased's signatures and thumb impression already existed on pages 1 & 2. It is submitted that the affidavits reveal that alleged 2011 Will does not bear the thumb impression on pages 1 & 2 and thumb impression on page 3 was taken at the time of registration as required under section 32A of the Registration Act.

49. Mr.Khambata further submitted that the affidavits annexed to the petition are false. Either the Will produced was not the document attested by the witnesses or the witness Mr.Dastoor has made false statements. That attempts were made by the appellant to retrieve himself from this position by filing an additional affidavit. The additional affidavit of the attesting witness Dastoor sought to retract the earlier statement that he saw the deceased put his thumb impression on 8 th Appl-7-14.sxw September, 2011 on page 3 only. His earlier statement of the deceased's thumb impression already existing on pages 1 & 2 was not retracted. The said attesting witnesses have made two irreconcilable statements on oath, both of them are false.

50. Mr.Khambata then relied upon the contradictory statements on oath as to the relationship between the parties. On the one hand, the appellant as a stranger who came into the life of deceased only in the last few months states in his affidavit dated 1 st March 2012 that he was introduced to the deceased by one Doodhmal and they struck up a friendship. However, in the sur-rejoinder it is submitted that the appellant was in service of the testator and his estate on a general basis and that he was handpicked by the testator. The F.I.R. filed by the appellant shows that Doodhmal gave him a job in the office of the deceased. In connection with the relations of deceased with the

respondents, the appellant initially states that it is doubtful whether the deceased knew the respondents. However, in the F.I.R. it is stated that the deceased disclosed to the appellant that his elder brother had knowledge that respondent No.2 had occasion to visit his house at Colaba and he was taking him occasionally to the Marine Drive house of respondent No.2, namely Keval Mahal. It is therefore submitted that false statements have been made on oath.

Appl-7-14.sxw

51. On behalf of the respondent, it is also submitted that the appellant suppressed the existence of the legal heirs of the deceased in his petition and contended that the deceased had no legal heirs.

Whereas, respondent Nos.1 & 2 have listed the names of the legal heirs in their probate petition, despite which the appellant persists in falsely stating that there are no legal heirs of the deceased. The suppression of the names of the legal heirs was an attempt to obtain a probate behind the back of respondents and the said heirs. It is further submitted that in two letters dated 29th December, 2011 and 23rd January, 2012 addressed by the Advocates for the appellant and Pandey, they deliberately omitted to mention the 2011 Will and probate petition No.5 of 2012.

52. Urging the necessity of appointing an administrator, Mr. Khambata cited the illegal sale of Al-Karim Manzil flat No.8 and the finding of the Single Judge disbelieving the version of the appellant.

He further submitted that in the testamentary petition filed by the appellant it was reiterated that flat No.8 at Al-Karim Manzil was self occupied and fetched no income. It transpires that the flat at Al-Karim Manzil was already disposed of in violation of the ad-interim order dated 21st June, 2012. Mr.Khambata submitted that the appellant is guilty of suppression and non-disclosure of assets in spite of an ad-

interim order. That the land and factory at Bachav known as Bharat Appl-7-14.sxw Bone Mills was not disclosed in the schedule of the testamentary petition. The shops and hotels of Andheri and Ville Parle were also not disclosed. So also particulars of the bank accounts, mutual funds, shares and investments in government sector were not provided. The disclosure if at all made was incomplete.

53. As regards the movable assets, it is submitted that these are also liable to be disclosed, but no inventory was given. Mr. Khambata submitted that the learned Single Judge had found that the appellant had not placed material on record so as to what steps are taken to dispute the alleged rights claimed by the occupants of the deceased's properties and the statements of demat accounts had not been furnished and valuation of the hypothecated goods was to be completed. In this regard, it is contended that the appellant suppressed the order of injunction restraining him from acting on or in furtherance of the alleged Will. It is submitted that the alleged bequest to charity is an eyewash. It is alleged that the estate would be easily and unlawfully usurped by the appellant since many charitable organisations take donations and recycle them back to the donor thereby benefiting both the donor and the donee.

54. Creation of tenancy in Al-Karim Manzil and non-disclosure of assets despite orders and suppression of legal heirs and subsequent Appl-7-14.sxw admission and procuring and filing false affidavits are indicative that an order of injunction would not suffice. The properties have to be defended and appropriate legal proceedings will have to be adopted for recovery of properties lost to the estate, including by the actions of the appellant. Properties forming part of the estate will have to be ascertained, rents / licence fees will have to be collected, taxes will have to be paid, investments made, maintenance will have to be undertaken. Furthermore, the conduct of the appellant will justify the appointment of the administrator. Mr.Khambata submits that no ground has been made out for interference with the order of the learned Single Judge. In order to assess whether the impugned order is so arbitrary, capricious or perverse, counsel relies upon the decision in Purshottam V. Raheja V/s. Srichand V. Raheja in support of this contention. Mr.Khambata thus supports the impugned order.

Issues that arise for consideration

55. Having considered the rival contentions of the parties, we find that the main issues which fall for our consideration are as follows:

> (a) Whether or not the learned Single Judge had jurisdiction to pass an order appointing an administrator under section 269(2), 13 (2011) 6 SCC 73 Appl-7-14.sxw
>
> (b) Whether the learned Single Judge had correctly applied the tests of
>
> (i) existence of bonafide litigation, (ii) suspicious circumstances surrounding the execution of the Will, (iii) the conduct of the parties, (iv) necessity of appointing an administrator, (v) scope and ambit of sections 247 and 269 and arrived at a correct finding in accordance with law.

We will consider the second issue, namely of the application of the appropriate tests first.

56. Both parties have propounded different Wills and have filed testamentary petitions for probate of the Wills. Caveats have been filed and the petitions have been converted into suits. The appellant-

defendant No.1 has challenged the caveatable interest claimed by the respondents. The fact that the respondent had a caveatable interest in the present case cannot be doubted. The test of caveatable interest can be seen in 14Krishna Kumar Birla V/s. Rajendra Singh Lodha & Ors. As a rule the executor can get a right only on the basis and upon the Will being probated. The respondents have taken into consideration the provisions of section 273 which provides that probate and letters of administration shall have effect over all the property and assets and the grant of probate establishes the legal character of the executor over all 14 (2008) 4 Supreme Court Cases 300 Appl-7-14.sxw property and assets of the deceased from the date of the death of the testator.

57. We have not heard the appellant to contend otherwise and there can be no denying the fact that the properties vest in the executor by virtue of a Will and not by probate and that probate is only a

method which law provides for establishing that a Will of the executor appointed thereunder. The appellant had also relied upon the judgment of a Single Judge of this Court in the matter of ig Rustom Ardeshir Gagrat which states that it is not permissible to appoint any person to assist an executor. In our view, this judgment will not have much relevance in view of the fact that an administrator is not appointed in this case to assist the executor but to administer the assets without the services of the executor.

58. By an interim order, this Court held that the respondents had a caveatable interest. This order has attained finality after the same was upheld by the Division Bench of this Court and also by the Supreme Court.

59. The test applied in the case of Hem Nolini (supra) will need to be applied to the present suit on facts. In Hem Nolini's case, 15 AIR 1990 Bombay 111 Appl-7-14.sxw the Supreme Court held that the executor has no right which can be established in a Court unless a probate is granted to him of the will under which he claims. Both the appellant and the respondents claim under different Wills, which name different executors. Unless the Court decides on these rival contentions, no person claiming to be executor under either of the Wills shall be entitled to administer the estate. It is evident that the estate is 'in medio' on account of the aggressive positions taken up by the parties concerned. The conduct of appellant in having filed the criminal case against the respondents indicates a firm resolve to burden the respondents with legal proceedings and this is a material aspect while considering whether the disputes exist. It is not difficult, therefore, to conclude that a bonafide litigation / dispute exists between the parties. We are of the view that the respondents have established beyond doubt the existence of bonafide disputes and the learned Single Judge has correctly tested the facts for existence of a bonafide litigation between the parties and arrived at an affirmative finding.

60. As for the circumstances surrounding the execution of the Wills, it is sufficient for the present purposes to note that although both the parties were propounding Wills, one of which was registered, the circumstances surrounding the registration of the Will have been called into question. So also, the circumstances surrounding the execution of Appl-7-14.sxw the 2010 Will propounded by the respondents have been called into question and the allegations inter-se parties will have to be gone into in detail. It must be borne in mind that the appellant was, admittedly, familiar with the deceased for only for a few months before his demise.

61. It seems unlikely that he could be so certain that the 2010 Will was fabricated by persons who admittedly knew the deceased for very many years that it actually prompted him to file a criminal complaint. In the present case, it cannot be said that the case of the respondents is frivolous and that the 2010 Will is fabricated merely because the appellant alleges factors such as absence of verification, alleged availability of blank signed papers with respondent No.2, contradiction in the relation to the state of the testator's mind in and around the time of execution of the Will, contradictions in the statement of medical advisors, etc.

62. While the estate was under the control of the appellant by virtue of his proximity to the deceased at the time of his death and the contentious disposal of the Al-Karim property has led to serious

doubts as to the validity of the 2011 Will. The allegations made by respondents as to the circumstances surrounding the execution of the 2011 Will and the use of services of the medical advisors from relatively faraway places when the testator's regular medical advisors were available Appl-7-14.sxw closer to home are not frivolous. In paragraph 78 of the impugned order, the learned Judge records that despite the appellant having disclosed the properties at Bachav as well as Manmad properties of the deceased in the police complaint, he did not disclose the said property in the schedule to the testamentary petition. Apart from the said properties, it appears that the appellant also did not disclose various statements of demat accounts, etc. The learned Single Judge also records a finding that such disclosure was not made despite an order of this Court directing the appellant to disclose all the properties.

Such conduct leads one to suspect the validity of the Wills including as to their execution. These are all issues to be left for resolution at the trial of the suit.

63. The appointment of an administrator is purely discretionary but at the same time such exercise of discretion must be judicious and not arbitrary. One of the tests is to see whether the Court is satisfied as to the necessity of such administration and the fitness of the proposed administrator and the circumstances justifying the case for appointing an administrator before subjecting the estate to the cost of such administration. Appointment of an administrator cannot be claimed as of right merely because there is a contest but such a request will be justified when there are bonafide disputes and the Court is convinced that it is necessary to appoint an administrator.

Appl-7-14.sxw

64. There can be no quarrel with the proposition that while the testamentary suits are pending, no one is legally entitled to receive or hold the estate or give a valid discharge. In the case of Rajendra Lodha (supra), the High Court considered appointment of an administrator pendente lite but came to a conclusion in the facts of that case, that there was no necessity of appointing an administrator pendente lite and that in their considered opinion the order of injunction passed was sufficient to preserve the estate. In the case of Rajendra Singh Lodha, the Court did not find any ground or material for arriving at a finding of "necessity" of appointing an administrator. There was no finding of waste, mismanagement, siphoning out of money, dilution of the property, etc. Whereas, in the present case, the learned Single Judge has found that the circumstances relating to the transfer of the Al-Karim property at least, was questionable apart from suppression/non disclosure of other assets.

65. The subject matter of the Will is the estate of the deceased. The succeeding party will be entitled to administer the estate and carry out the wishes of the testator, that is the final relief both the parties endeavour to obtain. The bitter dispute between the parties notwithstanding, it is inherent in the nature of the dispute that the estate of the deceased must be protected. In the facts and circumstances of the case, the existence of a bonafide dispute and Appl-7-14.sxw conduct of the appellant and others clearly demonstrates the necessity of safeguarding the estate and an injunction will not suffice. The findings of the learned Single Judge that it is necessary to protect the estate by appointing an administrator are thus justified.

66. Apropos the scope and ambit of Sections 247 and 269 of the Succession Act, it is certainly possible for the probate court to exercise its powers to appoint an administrator in the testamentary suit.

The difference between a suit under the Civil Procedure Code and a suit under the testamentary jurisdiction was dealt with by the Division Bench of this Court in the matter Thrity Sam Shroff (supra) holding that merely because a probate petition becomes contested, it does not transform the probate proceedings into a suit under the Code of Civil Procedure. The provisions of C.P.C. would apply to such proceedings only to the extent there is inconsistency between the CPC and the Succession Act. The fact situation in that case was not comparable to the present case. In that case, the issue before the Court was the right of a person in relation to operation of sections 222, 226 and 295 of the Succession Act. The case of Thrity Sam Shroff has been considered by this Court in the case of Ramchandra Ganpatrao Hande (supra) which reiterates the principle that the jurisdiction of the probate Court is confined only to considering the genuineness of the Will and it does not look into the title or even existence of the property itself and the Appl-7-14.sxw property of the deceased is not the subject matter in probate proceedings.

67. It was held that section 269 is the only provision which empowers the Court to interfere in the protection of the property. It is only relevant until the probate is granted or an administrator is constituted. It is further held that the legislature had enacted the said provision in order to enable the testamentary Court to pass an interim order of protection in relation to the property during the pendency of the petition. At the same time, the legislature excluded a class of persons, namely Hindu, Mohammadan, Sikh or Jaina or an otherwise exempted person as specified in sub-section (2) of section 269. In a regular suit, powers of the Court under Order 39 could be resorted to, to the extent the property forms the subject matter of the suit, whereas in a testamentary suit, the property left by the deceased is not the subject matter of the Petitioner's suit. In the present case, the proviso to section 269 has been pressed into service and in passing the impugned order, the learned Single Judge has concluded that the property forming the subject matter of the suit is under clear and present risk of loss or damage.

68. The deceased being a Parsi, the bar of section 269(2) does not apply and, therefore, an administrator can be validly Appl-7-14.sxw appointed pendente lite. The fact that section 247 falls under Chapter II dealing with limited grants does not in any manner preclude the testamentary Court from appointing an administrator. It is not necessary that the respondents are relegated to filing a separate suit and seek the relief sought in the present Notice of Motion. The filing of a suit in the present case is also not necessary in view of the fact that the situation before the testamentary Court involves two Wills with two sets of applications disclaiming any benefits under the Wills. Both sides propose that the estate should enure to charitable causes. As rightly noted by the learned Single Judge, the impugned order was passed not in respect of any specified property but generally to protect the estate in view of a serious contest which in the opinion of the learned Single Judge placed the estate to be at risk of loss or damage. When both the contesting parties are agreed on the fact that the estate must enure to charitable purposes, it cannot be gainsaid that a case is made out for appointing an administrator.

69. In the case of Rupali Mehta (supra), the learned Single Judge of this Court has held that by virtue of special powers section 269 conferred to interfere and make orders for protection of property till the probate is granted, the legislature did not intend to confer the power under section 269 to the category of persons specified under section 269(2). The Court also found that the provisions of sections Appl-7-14.sxw 192 and 193 may also be resorted to in circumstances requiring protection of the property of the deceased. However, those are instances where persons were claiming right of succession to the estate or any portion thereof. We may observe that the Court is not powerless in certain situations to ensure protection of the estate. In the event the Court is satisfied that a case has been made out, the Court has summary powers to decide on the right of possession and appoint an officer and curator if so required as specified in the sub-section.

Thus, it is not as though in every other instance concerning the property of a testator or those dying intestate that a suit must be filed in order to appoint a person to take charge of the estate.

70. As far as the other judicial pronouncements referred to by the parties are concerned, there can be no quarrel about the proposition that a Will need not be registered. There is nothing in law which requires the registration of a Will and an unregistered Will does not ipso facto draw an inference qua its lack of genuineness. In the case of 16Ishwardeo Narain Singh V/s. Smt. Kamta Devi & Ors., the Supreme Court held that the probate Court is only concerned whether the Will was duly executed, in accordance with law and whether at the time of such execution the testator was found to be of sound and disposing mind. The question whether a particular bequest is good or 16 AIR 1954 S.C. 280 Appl-7-14.sxw bad is not within the purview of the probate Court. The Court further observed that there is nothing in law which requires registration of a Will and in a majority of cases, Wills are not registered at all. To draw any inference against the genuineness of the Will on the ground of its non-registration is wholly unwarranted. In the present case, the challenge to the 2010 Will only on the ground of its non-registration of the 2010 Will is not sustainable.

71. As far the second issue is concerned i.e. jurisdiction of the Single Judge to appoint the administrator is concerned, it is not in dispute that under section 269, the court has jurisdiction to interfere and appoint an administrator for protection of property were to be considered only if the property subject to the risk of loss or damage at the instance of any person claiming to be interested therein. There can be no doubt that this section shall not apply when the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, nor shall it apply to any part of the property of an Indian Christian who has died intestate. It does however applies to the parties before us. Even under section under 247, pending any suit touching the validity of the Will, the Court may appoint an administrator of the estate of the deceased. These provisions are wide enough to empower the Single Judge to appoint an administrator once he is satisfied that reasonable grounds exist to believe that it is necessary to Appl-7-14.sxw empower a person with all the rights and powers of general administration of distributing the assets. The existence of such grounds were noticed in the fact situation before the learned Single Judge. The material and the basis on which the learned Single Judge has arrived at this finding is also been set out in detail by the learned Single Judge.

72. The appellant in the course of submissions had relied upon the decision of 17Chiranjilal Shrilal Goenka (Deceased) through LRs V/s. Jasjit Singh & Ors. and the decision of the Supreme Court in

Delhi Development Authority V/s. Mrs. Vijay C. Gurshaney & Anr.

in support of their contention that in a petition concerning the probate, matter of title are not subject matter of the suit. Thus, there can be no quarrel with this proposition and in this case, appointment of an administrator does not involve matters of decision of title especially since none of the contesting parties are claiming on the basis of title or questioning the title of the deceased to the estate. Furthermore, in the case of Chiranjilal (supra) the issue involved was whether or not a probate Court has exclusive jurisdiction to grant probate of the Will or refer to an arbitration. In the case of Delhi Development Authority (supra), the Court was concerned whether the DDA was precluded from inquiring into the true nature of the Will and these are of little assistance to the appellant.

17 1993(2) Scale 146 18 2003(6) Scale 685 Appl-7-14.sxw

73. No doubt, the appellant's contention that the testamentary Judge hearing the probate cannot go into the matters pertaining to the title to the properties is justified. In our view, the learned Judge has not enquired into issue of title. We find it is necessary that an administrator be appointed in order to take necessary steps and safeguard the properties of the deceased attend to recovery of properties lost to the estate, including those which the respondents contend were lost due to the actions of the appellant. Such properties, assets and liabilities forming part of the estate will have to be ascertained, rents / licence fees will have to be collected, taxes will have to be paid, investments made and maintenance will have to be undertaken.

74. We may mention here that the appellant has submitted, albeit in the alternative, that an injunction would suffice in the facts of the case. However, we are of the firm view that an order of injunction will not be sufficient to safeguard the properties. In the event of violation of the injunction, the property would be lost to the detriment of the estate which is required to be protected. As already observed, the estate is presently in medio and the Court would be failing in its duty if the estate is not sufficiently protected. The finding that the Al Karim property was dealt with despite the injunction on the basis of a questionable unregistered document speaks volumes. Various other circumstances have been alluded to which deal with the merits of the Appl-7-14.sxw parties contentions and which need not engage our attention in this appeal.

75. The core issue to be decided in the testamentary suits is whether the two Wills or either of them are genuine with the consequences that may follow. The estate left behind by the testator is not the subject matter of the testamentary proceedings. The impugned order seeks to protect not only the estate but also preserve the right of the party who succeeds in this litigation to administer the estate. This is sought to be achieved by appointing of an administrator. The dispute relating to the title of the property cannot arise in the present case in view of the fact that neither the appellant nor the respondents are questioning the testator's right to the title or interest to the estate in question or any part thereof and, therefore, by appointing an administrator, the learned Single Judge has not adjudicated upon any dispute as to the title. Should a dispute as to the title of the testator to certain property arise qua third parties, the administrator is expected to take steps to have the dispute adjudicated in accordance with law.

76. This Court in the matter of Pandurang Shamrao Laud (supra) upheld that the position of the administrator is similar to that of a Court Receiver except that the administrator does not distribute the subject matter.

Appl-7-14.sxw

77. We find it very unusual, in fact almost bizarre, that the alleged "purchaser" of the Al Karim property, Mr.Vaseem Kapadia has offered to restore the property to the estate should his Chamber Summons taken out in the Probate proceedings be allowed. One wonders why such an offer would be made if indeed he was a bonafide purchaser.

78. The estate will have to be protected in order to ensure that the party who succeeds is able to carry out the testator's last wishes.

To not appoint an administrator would amount to pre-judging the issues and exposing the estate to risk of loss and damage in the face of serious allegations by and against the parties. The appellant also has a right to come clean and establish his claim to be the executor under a valid Will should he succeed. The appointment of an administrator to ensure protection of the estate from depletion of any kind. The invocation of power vested in the testamentary Court by virtue of section 269 has been correctly exercised.

79. The case of Smt.Prachi Prakash Pandit (supra) relied upon by the appellant involved a case where the appellant executor of the Will filed probate proceedings and respondent No.1 therein filed an application for injunction opposing the grant of probate. The trial Court appointed a receiver on the ground that the Will was not genuine. It Appl-7-14.sxw was contended that prima facie, there is no evidence indicating the property to be in grave danger of being wasted and the Court observed that an administrator or receiver has to be appointed only rarely and under extreme circumstances. In that case, the Court found that there was no evidence on record to arrive at a finding that the property was in grave danger and accordingly it was held that no purpose will be served in appointing a receiver and an injunction would be suffice. In the present case, the learned Single Judge found real risk of loss and damage to the estate and concluded that appointing an administrator was necessary.

80. In the case of Vimla L. Rajani & Anr. V/s. Asha Kanayalal Bajaj & Anr., another Single Judge of this Court has held that as far as appoint of an administrator under section 247 if concerned, an administrator cannot be appointed merely because the Court has a power to do so, but only in a case where the misuse of the property was one of the very reason for appointing an administrator and it was not possible to enumerate all reasons in this respect. In that case, the application was made for appointment of an administrator on the ground that it was pleaded in an earlier application for appointment of a receiver. The earlier application was rejected. No case was made out for an administrator on a second application made on the same 19 2012(4) All MR 718 Appl-7-14.sxw ground.

81. As against this, in the case of Sudhirendra Nath Mitter (supra), it was held that the use of words "may appoint" indicate that the Court has discretion in the matter. As already stated above, the Court relied upon the point of view stated by the Court of Chancery and appointed a receiver where the property was stated to be 'in medio' i.e. in the enjoyment of no one and to prevent a scramble of the property.

The aforesaid judgment observed that if the allegations are relatable to the validity of the Will, it is obligatory on the part of the Court to appoint an administrator. In that case, the Court found that the estate was of a considerable value and there were various suits pending and no one was legally entitled to receive or to hold the assets or to give discharge.

Quoting from Tristram & Coote's, Probate Practice, the Court observed that as a general rule, a party unconnected with the suit is the most proper person to be appointed administrator pendente lite. A party to the suit is not, as a rule appointed unless other parties consent. We endorse this view completely in the fact situation. The administrator appointed should be an impartial person and not an executor or executors who are mixed up in the case.

82. In interpreting statutes the Courts must not promote and interpretation which leads to, results in or facilitates evasion of the Appl-7-14.sxw statutory provisions. We therefore cannot agree with the proposition that the probate Court lacks jurisdiction to appoint an administrator in its testamentary and intestate jurisdiction. We also hold that the appointment of the administrator pendente lite in the present case does not run counter to the proposition that interim relief can be granted only in aid of final relief. The final relief in the present case would be to grant probate of the Will.

83. In this behalf, we find that the learned Judge also took into consideration the conduct of the appellant in not having disclosed certain properties in the Schedule to the testamentary petition filed by the appellant. These factors certainly justify the appointment of an administrator in the interest of the estate. More so, when both the parties are of the view that the estate is to enure to charitable purpose.

84. We have, therefore, no hesitation in holding that the single judge acted within jurisdiction in appointing an administrator exercising discretion under section 269.

85. The appellant's submission that this litigation is intended to maneuver in a manner that the respondents take control of the estate seems inherently flawed inasmuch as the respondents seek to have the appellant ousted only with the intention of having a Court appointed Appl-7-14.sxw officer to administer the estate.

86. As far as the costs are concerned, considering the size and value of the estate, the legal costs for defending and prosecuting the litigation will have to be incurred by either the appellant or by administrator appointed. Given the moderate means disclosed by the appellant, notwithstanding his desire to administer the estate out of his own resources, there will be a temptation or real need to dip into the estate itself and both the appellant and the administrator are bound to incur costs. We

have no reason to believe that the costs of the administrator will be far in excess of the costs to be incurred by the appellant. Since the application for appointment of an administrator has been moved by the respondents, we will be justified in assuming that the respondents have no intention of bearing such costs themselves. Suffice it to say that it will have to be ensured that the costs are not unconscionable. Such costs It can be incurred and monitored by the testamentary Court. The testamentary Court must ensure that the costs of the administrator are reasonable and under control of the Court with proper checks and balances.

87. For the aforesaid reasons we find no reason to interfere with the impugned order. It is clarified that the suggestion of the appellant that in the event of an administrator being appointed, the Appl-7-14.sxw court should consider a retired judge of this court has no merit since the he/she would not possess the wherewithal in terms of staff and office support that will be required for such a huge exercise.

88. In the result the appeal fails and is dismissed. The interim direction dated 7th January 2014 is vacated. No Order as to costs.

(A.K. MENON, J.) (V.M.KANADE, J.)