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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.954 OF 2019

IN

SUIT NO.807 OF 2018

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Chetan Dalal

... Applicant /
Ori. Defendant
No.5.

In the matter between

Bharat Kantilal Dalal

...Plaintiff

Versus

Surendra Kantilal Dalal and 32 Ors.

...Defendants

Mr. Haresh Jagtiani, Senior Counsel with Mr. Yashpal Jain, Jahnavi Vora, Pranay Kamdar for the Applicant in NMS No.954 of 2019 – Defendant No.5.

Mr. Karl Tamboly, Mr. Malcolm Siganporia, Ms. Monisha Mane Bhangale, Mr Ashutosh Agarwal and Ms. Bijal Vora i/b. Parinam Law Associates for the Plaintiff.

Mr. Vaidehi Bhatt i/b. Mehta and Padamsey for Defendant Nos.2 to 4.

CORAM : R.I. CHAGLA J.

Reserved on : 25TH AUGUST, 2025.

Pronounced on : 08TH JANUARY, 2026.

ORDER :-

1. By this Notice of Motion the Applicant / Original Defendant No. 5 has sought for rejection of the Plaint under Order

VII Rule 11 read with Section 151 of the Code of Civil Procedure (CPC), 1908. The Applicant has also sought an alternate prayer viz. that till the final disposal of the proceedings for probate of the Will dated 21st May, 2012 read with Codicil dated 11th September, 2015 and 8th December, 2016 being Testamentary Petition No. 812 of 2017 pending before the Testamentary / Probate Court, this Court stay the above Suit and proceedings arising thereunder including the present Notice of Motion Lodging No. 2606 of 2017.

2. The Applicant has stated that the Plaintiff has filed the Captioned Suit *inter-alia* seeking administration of the Estate of the deceased in terms of the Will dated 24th September, 1994 (“Will of 1994”) which he claims to be the last Will and Testament of the deceased and under which he and Defendant No. 1 are claimed to have been appointed as the Executors of the Estate of the deceased. It is further stated that the Plaintiff has disclosed in the above Suit that the Applicant has propounded a Will dated 21st May, 2012 along with Codicil dated 11th September, 2015 and 8th December, 2016 as the last Will and Testament of the deceased, under which the Defendant No. 6 herein and the Applicant / Original Defendant No. 5 have been appointed as the Executors and further that a Testamentary Petition

for grant of probate of the said Will of 2012 has already been filed by the Applicant before the Probate / Testamentary Court.

3. The Applicant has stated that in the present Suit, the Plaintiff has *inter alia* sought for administration of the Estate of the deceased and in the alternative has prayed that in the event the said Will of 1994 is held to be not valid, then the Estate of the deceased be administered as per inter-state succession. It is claimed that the Plaintiff along with 22 others are equal beneficiaries of the Estate of the deceased as per inter-state succession.

4. Mr. Haresh Jagtiani, learned Senior Counsel appearing for the Applicant has submitted that once a Plaintiff propounds a Will and files for probate he must necessarily administer the Estate as an Executor especially since he has not relinquished his executorship. This necessity implies that the Plaintiff / Executor cannot delegate his role to this Court by seeking a declaration to administer the Estate of the deceased. He has submitted that the delegation, if at all, to this Court is possible only if the Plaintiff who is also a beneficiary / legatee under the said Will of 1994 which he propounds categorically makes out a case of him being incompetent as an Executor or having

given up his execution. He has submitted that such is not the cause of action in the present Suit. Accordingly, the Plaintiffs' right to administer the Estate in accordance with the said Will of 1994 is to be determined exclusively by the Testamentary / Probate Court and the doors of a Civil Court are shut for him since the Testamentary / Probate Court alone has exclusive jurisdiction to determine such an issue.

5. Mr. Jagtiani has submitted that any Suit which is founded and / or based on bequest under the Will is maintainable only after the decision of the validity of the Will is rendered. In the instant case, Prayer Clause (a) precisely pertains to and emanates from the said Will of 1994 propounded by the Plaintiff.

6. Mr. Jagtiani has submitted that it is settled law that only after the decision on the validity of the Will by the Probate Court is established can the Will in question be admitted in evidence and taken into consideration by the Civil Court. He has submitted that this proposition is fully supported by the decision in the case of ***Satula Devi vs. Rajeev Sharma and Ors***¹, at Paragraphs 87 (v), (vi), (vii), 97, 99 to 104.

¹ 2023 SCC Online Del 2066

7. Mr Jagtiani has submitted that the issue of a Suit for administration of Estate of the deceased being maintainable at the instance of a Plaintiff who has propounded a Will (in this case the Will of 1994) and has infact filed for probate of the said Will as an Executor thereof, which is still pending before the Testamentary Court, is maintainable, has been considered in judgments of the Supreme Court as well as other High Courts including this Court. He has relied upon the following judgments:

(i) ***Chiranjilal v. Jasjit Singh*** – (1993) 2 SCC 507 – Exclusive jurisdiction of Probate Court – civil court sitting in its ordinary civil jurisdiction has no jurisdiction to grant or revoke probate [Paragraphs 15, 16, 18 & 20];

(ii) ***Mohamed Renu Mia v. SabitaKhatoon*** – (1918) CWN V XXIII 658 – It is for the Probate Court to determine whether the Will has been duly executed and it is for the civil court to determine what effect has to be given to it;

(iii) ***Malvika Anand v. Dattaprasanna Nandkari*** – (2016) SCC OnLine Bom 10322 – Claim on basis of

beneficiary under the Will is dependent on the outcome of the Testamentary Petition for grant of Letters of Administration of the Will **[Paragraphs 7 to 10]**;

(iv) *Dharam Tiwari v. Badri Prasad* – (2002) 4 ICC 972 (Cal)(DB) – Even letters of administration cannot be granted to the executor of a Will **[Paragraphs 4 & 39]**;

(v) *Ram Shankar v. Balakdas* – (1991) SCC OnLine MP 195 – No hesitation to hold that in a Civil Court Suit instituted by any party, claiming right, title and interest in any property on the basis of a Will, no issue can be struck to decide if that Will was the last Will and was a valid Will and the other Will which it purported to revoke had been duly and validly revoked by the Will relied on by the plaintiff. The jurisdiction of the Civil Court as per section 9 of the Code of Civil Procedure, 1908 mandates that the plaint is to be rejected where the suit appears from the statement in the plaint to be barred by any law **[Paragraphs 15, 18 & 19]**

8. Mr. Jagtiani has submitted that the role of an Executor in

case of a Will is precisely to administer the Estate of the deceased as per the Will. By filing a Petition for probate of the Will, the Executor takes such responsibility to administer the Estate of the deceased / Testator. He has placed reliance upon Sections 213 read with 227 of the Indian Succession Act, 1925 and Rules 374 and 376 of the Bombay High Court (O.S.) Rules, 1980 in this context. These provisions prescribe the duty of the Executor to disclose to the Court the role of administering the property within the period initially of 6 months and thereafter 12 months and further as permitted by the Court. Such declaration is taken in the form of an Executors' Oath / Administrators' Oath as prescribed under the said Original Side Rules. Such rules and format prescribed under the High Court Rules signify that the Executor is the only person entitled to administer the Estate of the deceased.

9. Mr. Jagtiani has submitted that since an Order directing administration of Estate would necessarily amount to determining the entitlement of the beneficiaries / legatees under the Will before such Will is proved by due process of law, any Order to this effect would amount to a decree to the extent of granting such entitlement and assuming jurisdiction of the Testamentary Court. This is not

permissible.

10. Mr. Jagtiani has submitted that the Plaintiff is seeking declaratory reliefs to the effect that the Estate of the deceased be administered in accordance with the Will of 1994. This relief is completely misconceived because the only Court which has exclusive jurisdiction to permit an administration in accordance with a Will is the Testamentary / Probate Court. Thus, in the absence of such a finding by a Probate Court no relief by way of declaration as sought for in the present Suit is maintainable.

11. Mr. Jagtiani has submitted that as a corollary to the first issue is the question whether a conflict of two Wills can be decided by a Civil Court in its ordinary civil jurisdiction. He has submitted that the Plaintiff himself has pleaded and adverted to the existence of a later Will of 2012 in respect of which a Probate Petition has been filed by the Applicant / Defendant No. 5 as Executor thereof but in respect of which the Plaintiff has entered a Caveat and challenged its validity as being a forged and fabricated Will. He has submitted that this necessarily postulates that this Court would have to frame an issue as to which is the last Will of the deceased in this case

[Girdharlal Nathubhai Dalal (for short “**GND**”)]. He has submitted that such an issue cannot be entertained by this Court in view of the decision in *Ram Shankar vs. Balakdas*², as it is in the exclusive domain of the Testamentary Court.

12. Mr. Jagtiani has submitted that in the facts of the present case theoretically one or the other Will namely the Will of 1994 or the Will of 2012 must prevail. He has submitted that Defendant No. 5 has not impugned the validity of the Will of 1994 on any ground save and except the same has been superseded by a later Will of 2012. In the event, the Plaintiff successfully demonstrates that the Will of 2012 is not valid then the Estate will only devolve in accordance with the Will of 1994 and therefore there is no question for filing the present Suit for administration. On the other hand if the Will of 2012 is proved to be valid by the Testamentary Court, the Plaintiff would be disinherited by the deceased GND as per the said Will of 2012. In any eventuality the Suit in the present form is unmaintainable.

13. Mr. Jagtiani has submitted that the Plaintiff in the alternative to Prayer (a) has sought for administration of the Estate of the deceased on intestacy. Therefore, the issue arises whether such

² (1991) SCC OnLine MP 195.

a Prayer on the face of it is maintainable. He has submitted that for a comprehensive understanding of this issue, the provisions of Section 30 and 213, 227 and 254 of the Indian Succession Act, 1925 must be borne in mind. He has submitted that the above provisions make it abundantly clear that a prayer for intestacy cannot be maintained by a Plaintiff who either propounds a Will as an Executor thereof or who files for probate as Executor in respect of such a Will. He has submitted that it would be blowing hot and cold in the same breath, for a declaration / relief for administration on intestacy completely militates against existence of a Will which is propounded by the very same Plaintiff because intestacy is premised on the fact that the Testator died without a Will.

14. Mr. Jagtiani has submitted that it is an elementary proposition of law that a Suit cannot be founded on two contradictory and self destructive causes of action . He has submitted that to put it plainly either there is a Will or there is no Will, it cannot be both. The absurdity of seeking these reliefs is that the very same Plaintiff was propounding a Will of which he is the Executor is seeking administration on intestacy as if there is no Will.

15. Mr. Jagtiani has placed reliance upon the judgment of the Supreme Court in *Praful Manohar Rele vs. Krishnabai Narayan Ghosalkar & Ors*³, at Paragraph 10. He has submitted that this judgment lays down that a Plaintiff may seek reliefs in the alternative but when the pleadings are mutually opposite, such pleas cannot be raised by the Plaintiff. He has submitted that there is an essential difference between contradictory pleas and alternative pleas. When the Plaintiff claims relief in the alternative, the cause of action for the reliefs claimed is the same. However, when the contradictory pleas are raised, such as in the present case, the foundation of these contradictory pleas is not the same.

16. Mr. Jagtiani has submitted that Section 30 of the Indian Succession Act is apposite and provides a statutory bar from seeking to administer an Estate on the grounds of intestacy when the Plaintiff himself has propounded a Will which he asserts to be genuine.

17. Mr. Jagtiani has also placed reliance upon *Dharam Raj Tiwari vs. Badri Prasad Tiwari*⁴ at Paragraphs 4 & 39. He has submitted that in the absence of either relinquishing his executorship

3 (2014) 11 SCC 316.

4 (2002) 4 ICC 972 (Cal) (DB).

or abandoning propounding the Will of 1994, a Suit for administration on the basis of intestacy is clearly barred.

18. Mr. Jagtiani has submitted that the Plaintiff being the Executor in respect of the Will of 1994 in respect of which he seeks a declaration as to its legality and validity is already vested with the Estate of GND upon his demise (This is of course on the presumption that the Will of 1994 is proved to be the last Will and Testament of GND). He has submitted that if that be so nothing precludes the Plaintiff from taking such steps as to preserve the Estate without giving effect to any form of benefits to any of the legatees or beneficiaries named in the Will. Such vesting of the Estate is distinct from administering the Estate as sought for by the Plaintiff vide the present Suit. The vesting under Section 211 of the Indian Succession Act, 1925 merely recognizes the Executors right to represent the Estate. Thus, the Executor can represent the Testator and step into his shoes in all legal proceedings dealing with the Estate. Such right of representation is subject to the outcome of the probate proceedings.

19. Mr. Jagtiani has submitted that Section 213 of the Indian

Succession Act, 1925 categorically states that no Executor can establish his role as an Executor unless a Court of competent jurisdiction has granted probate of the Will. The role as an Executor pursuant to such right is to administer the property only after obtaining probate of the Will, and as noted above it is only the Testamentary Court which can determine the validity or otherwise of a Will to the exclusion of any other Civil Court. He has submitted that pending probate, Suit for administration of Estate by the same Executor would render Section 213 of the Indian Succession Act otiose and redundant. For that matter even the Executor is prohibited under Section 213 of the Indian Succession Act, 1925 to implement and administer the bequest made under the Will until a Probate is obtained. He has submitted that the present Suit must necessarily be rejected as being not maintainable and contrary to law. He has relied upon the judgment of the Supreme Court in ***Mrs. Hem Nolini Judah (Since deceased) and after her Legal Representative Mrs. Marlean Wilkinson vs. Mrs. Isolyne Sarojbashini Bose & Ors***⁵. He has submitted that the Supreme Court has held that it is now well settled that it is immaterial whether the right under the Will is claimed as a Plaintiff or as a Defendant; in either case Section 213 will be a bar to

5 1962 SCC Online SC 35

any right being claimed by a person under a Will whether as a Plaintiff or as a Defendant unless Probate or Letters of Administration of the Will have been obtained.

20. Mr. Jagtiani has submitted that in so far as limitation for filing the Administration Suit is concerned as contended by the Plaintiff, such contention would be academic, given the submission that the Suit as filed is itself not maintainable at the instance of the Plaintiff who has propounded a Will of 1994 and has filed for probate in respect thereof. He has submitted that if the Suit for administration of Estate at the behest of an Executor who has propounded a Will by filing a Testamentary Petition is not maintainable then the question of limitation for such proceeding does not arise. He has submitted that without prejudice to the aforesaid submission, an Executor can file a Testamentary Petition seeking probate of a Will as and when he requires the same or when the right to apply accrues. There is no period of limitation for such an Executor as held in *Hanuman Prasad Agarwal vs. Satyanarain Agarwal and Ors*⁶. Article 137 of the Limitation Act would give 3 years for filing such Petition from the date the right to apply accrues.

6 2020 SCC Online Cal 973

21. Mr. Jagtiani has submitted that the need to obtain a probate can be set up by an Executor at any point of time and therefore there is no specific period of limitation which would bar filing of a Testamentary Petition. Consequently, for any grant or for obtaining any grant of probate or Letters of Administration with or without a Will, there would be no period of limitation becoming an obstacle for maintaining the Petition. He has submitted that the judgments relied upon by the Plaintiff are from the facts of those cases, proceedings initiated against the Executor and hence not maintainable to sustain the argument of limitation.

22. Mr. Jagtiani has submitted that in the present situation the right to apply for Suit for administration of Estate will arise only when the Probate Court determines that neither the Will of 1994 nor the Will of 2012 are valid in law. Which therefore means that the period of limitation will begin from a date in the future which event is yet to take place. He has submitted that thus the apprehension that the Plaintiff will be non-suited if he is required to wait till the outcome of the Testamentary Court is wholly misconceived. He has placed reliance upon the judgment of the Calcutta High Court in ***Hanuman Prasad Agarwal (Supra)*** at Paragraph 15 onwards.

23. Mr. Jagtiani has submitted that in the alternative and without prejudice, the period of limitation will be attracted from when either the Plaintiff gives up his claim as an Executor or abandons the propounding of the Will of 1994. That event not having taken place, the apprehension that the present Suit would be barred by limitation till the Testamentary Court comes to a decision is again misconceived.

24. Mr. Jagtiani has submitted that it is manifest that the Suit as filed is primarily for a declaration in terms of Prayer Clauses (a) to (c) and since for the aforesaid reasons those prayers are not maintainable, it follows that the ancillary and subsidiary prayers which are for ostensible protection of the Estate of GND cannot be maintainable in their own right. He has submitted that such reliefs may be sought under Section 269 of the Indian Succession Act, 1925 by a person eligible under that Section from a Testamentary Court in a pending Testamentary Petition. In the instant case, since the deceased was Hindu, Section 269 of the Indian Succession Act would prohibit the Plaintiff from moving a Testamentary Court and the Plaintiff may pursue his remedy for the aforesaid protective reliefs in a Civil Court by way of a simplicitor injunction Suit which by its nature

would not be susceptible to monetary valuation. He has submitted that this position in law is clarified by the judgment in the case of ***Rupali Mehta vs. Smt. Tina Narinder Sain Mehta***⁷, and ***Ramchandra Ganpatrao Hande alias Handege vs. Vithalrao Hande & Ors***⁸, both of which are misconceivedly relied upon / cited by the Plaintiff. None of these judgments arise out of a situation where the Plaintiff seeks intervention of the Civil Court for administration of an Estate of a deceased while simultaneously propounding a Will of the said deceased.

25. Mr. Jagtiani has submitted that until a probate has been granted by the Competent Court no person can stake a claim / title over a property by way of administration of the Estate of the deceased or otherwise, and therefore, the protective reliefs sought for cannot be subject to monetary valuation.

26. Mr. Jagtiani has differentiated the judgments cited by the Plaintiff viz. ***Rupali Mehta (Supra)*** and ***Ramchandra Ganpatrao Hande (supra)*** which dealt with the bar under Section 269 of the Indian Succession Act, 1925 for Hindus to claim protective reliefs in

⁷ (2006) SCC OnLine Bom 846.

⁸ AIR 2011 Bom 136.

Testamentary Petition before Testamentary Court. He has submitted that these are not cases regarding maintainability of the Suit for administration filed by the Plaintiff, who has simultaneously filed a Petition for a Probate of a Will.

27. Mr. Jagtiani has submitted that the judgment of this Court in *Sajanbir Singh Anand vs. Raminder Kaur*⁹, relied upon by the Plaintiff is a judgment only concerning limitation period for filing an Administrative Suit and that there is no straight jacket formula fixed to determine the period of limitation for filing such a Suit. He has submitted that this judgment is contrary to the judgment of *Hanuman Prasad Agarwal (Supra)* as there is no limitation period specified for filing such a Suit.

28. Mr. Jagtiani has submitted that the judgment relied upon by the Plaintiff viz. *Gangarum Sakharam Dhuri vs. Gangubai Raghunath Ayare*¹⁰ spells out the nature and scope of an Administration Suit and it is essentially a Suit for an account. He has submitted that this judgment is not concerned with the present matter as in the present matter, the same person who has

⁹ (2018) 3 Mh.L.J. 892.

¹⁰ (2007) 5 Mh.L.J. 136.

propounded a Will has filed an Administrative Suit which is not permissible.

29. Mr. Jagtiani has also distinguished the judgment relied upon by the Plaintiff viz ***Anil Dattatray Parab & Ors. vs. Jayadev Bal Thackeray***¹¹. He has submitted that this is a judgment with reference to Testamentary Suit where the property left behind by the deceased is not the subject matter of the Testamentary Suit and thus has no relevance to the present matter.

30. Mr. Jagtiani has distinguished ***Jamshedji Dubash vs. Meharbai Rustumji Dubash & Ors***¹², relied upon the Plaintiff, to be a judgment which holds that in absence of a probate, Suit is maintainable and a Legatee can file Suit and produce probate subsequently before decree is passed. He has submitted that the facts in that judgment did not contain a contest of two Wills and whether the fact that when there are two Wills can a Suit be maintainable. He has submitted that the reference to filing of a Suit pending obtaining of probate is not a Suit for administration of Estate of the deceased but a Suit seeking possession of property. In such Suit the probate can

¹¹ (2014) SCC OnLine Bom 594.

¹² (2003) 3 M.PL.J. 322.

be produced subsequently.

31. Mr. Jagtiani has submitted that the judgment relied upon the Plaintiff viz ***Surendra Chandra Jena & Ors. vs. Laxminarayan Jena & Ors***¹³ regarded a Suit for partition and not a Suit for administration of Estate of the deceased. Thus, this judgment is not applicable in the present case.

32. Mr. Jagtiani has also distinguished the judgment in ***K. Chandrasekara Rao & Ors. vs. C. Masilamani & Ors***¹⁴, relied upon by the Plaintiff, to be a judgment regarding when a matter would be a contentious proceeding and that an entry of a Caveat would not convert the Petition into a contentious proceeding. The Petition would become contentious only after the Caveator files Affidavit in support of the Caveat. He has in turn placed reliance upon Paragraph 83 of the said judgment.

33. Mr. Jagtiani has submitted that the judgment relied upon by the Plaintiff viz. ***Kamakhaya Prasad Gupta & Anr. vs. Jibon Lal Gupta***¹⁵ is a judgment where the Executor who had propounded the

¹³ (1987) SCC OnLine Ori 80.

¹⁴ (2012) 2 MWN Civil 705.

¹⁵ (2010) 6 Gauhati Law Reports 467.

Will does not have to file a Suit for administration. He has submitted that the question of Testamentary proceedings is not really a Suit or a Complaint does not arise.

34. Mr. Jagtiani has distinguished the judgment in ***Bilquis Zakiuddin Bandookwala & Ors. vs. Shehnaz Shabbir Bandukwala***¹⁶, relied upon by the Plaintiff to be a judgment where a Will was executed by a deceased who was a Mohammedan in favor of the Defendant and the marriage between the parties was registered under the Special Marriage Act. Therefore, the Defendant was not required to obtain a probate of the Will of her deceased husband. However, in the present case the parties are Hindus, thus for any bequest under Will to take effect, a probate of a Will would be necessary as per Section 213 of the Indian Succession Act. Thus, this judgment would not apply in the facts of the present case.

35. Mr. Jagtiani has submitted that the judgments relied upon by the Plaintiff viz. ***Indian Evangelical Lutheran Church Trust Association vs. Sri Bala & Co***¹⁷, and ***Madhav Prasad Aggarwal & Anr. vs. Axis Bank Ltd. & Anr***¹⁸ are judgments which hold that a Plaintiff

¹⁶ (2011) 1 Mh.L.J. 963.

¹⁷ (Civil Appeal No.1525 of 2023) Supreme Court of India, Judgment dated 8th January, 2025.

¹⁸ (2019) 7 SCC 158.

cannot be rejected in parts. He has submitted that in the present case the Pleint as a whole needs to be rejected. Thus, these judgments are not applicable.

36. Mr. Jagtiani has submitted that the judgment relied upon by the Plaintiff viz. *Mayur (H.K.) Ltd. & Ors. vs. Owners and Parties, Vessel M.V Fortune Express & Ors*¹⁹. is a judgment on whether the Pleint discloses a cause of action. This being a question of fact it has to be gathered on the basis of averments in the pleint in its entirety taking those averments to be correct and has no relevance to the present case.

37. Mr. Jagtiani has submitted that the other judgments relied upon by the Plaintiff viz. *Sarva Shramik Sangh vs. Indian Oil Corporation & Ors*²⁰., and *Praful Manohar Rele (Supra)* are judgments on alternative pleas available in law can be taken when there is no inconsistency in facts. It also holds that on the same facts, different alternative reliefs can also be claimed. He has in this context placed reliance upon *Sarva Shramik Sangh (Supra)*, where it has been held that mutually repugnant and contradictory pleas,

¹⁹ (2006) 3 SCC 100.

²⁰ (2009) 11 SCC 609.

destructive of each other may also not be permitted to be urged simultaneously by the Petitioner – Plaintiff. He has also placed reliance upon Paragraph 10 of ***Praful Manohar Rele (Supra)***, wherein it is held that it is now well settled that a Plaintiff may seek reliefs in the alternative but infact where pleadings are mutually opposite, such pleas cannot be raised by the Plaintiff.

38. Mr. Karl Tamboly, learned Counsel appearing for the Plaintiff has submitted that there is no dispute with the Probate Courts' exclusive jurisdiction to adjudicate the genuineness and execution of the Will. It is the Plaintiffs' case that the question of administration of the Estate of the deceased is to be decided by a Civil Court and not a Testamentary Court. He has submitted that the Defendants have conflated the requirement to prove a Will with a separate remedy of administering the Estate by citing the judgment of the Supreme Court in ***Chiranjilal Shrilal Goenka (Deceased) Thru. Lrs. vs. Jasjit Singh & Ors (supra)***. He has submitted that the legal position is that Section 269 (2) of the Indian Succession Act excludes the use of a Probate Court's inherent civil powers but does not bar independent civil remedies for issues concerning administration and protection. He has in this context placed reliance upon the judgment

of this Court in ***Ramchandra Ganpatrao Hande (Supra)*** at Paragraph 14, wherein it is held that Section 269 (2) does not preclude recourse to a Civil Suit for obtaining relief necessary for the protection of the property.

39. Mr. Tamboly has submitted that a Suit for administration of the Estate of the deceased is filed under the CPC, whereas the sole question that is decided by the Testamentary Court is the validity of a Will. He has placed reliance upon ***Rupali Mehta (Supra)***, in particular Paragraph 12 thereof, which has in turn relied upon Paragraph 5 & 6 of the judgment of the Supreme Court in ***Shanta G. Z. Mehta Vs Sarla J Mehta***²¹. He has submitted that this has also been echoed by the Division Bench of this Court in ***Ramchandra Ganpatrao Hande (Supra)***.

40. Mr. Tamboly has referred to the nature and scope of a Suit for administration as laid down by the Full Bench of this Court in ***Sanjanbir Singh Anand Vs. Raminder Kaur Anand(Supra)*** at Paragraphs 12 and 21. He has submitted that it has been held that an Administrative Suit is essentially one where reliefs claimed relate to seeking administration of the Estate of a deceased under the orders

²¹ AIR 2004 SC 1238

of the Court.

41. Mr. Tamboly has submitted that in the judgment of the learned Single Judge of this Court in ***Gangaram Dhuri (through LRs) Vs Gangubai Raghunath Ayare and Ors (Supra)*** at Paragraphs 24 – 26, it has been held that the entire administration and settlement of the estate are assumed by the Court and assets are marshalled and decree is made for the benefit of all Creditors. The Division Bench of the Punjab High Court in ***Mt. Shafiul-Nisa Vs. Mt. Fazal-ul-Nisa***²² has been referred to in the said judgment, which holds that if the main object of the Suit is to administer the estate and if the Court in the Suit has to decide as to the existence or otherwise of alienation, an Administration Suit will lie.

42. Mr. Tamboly has submitted that the Testamentary Court does not decide about the property of the deceased and as to how the same has to be distributed on grant of the probate or refusal to grant such probate. The Testamentary Court has no power to pass an Order for distribution of the Estate of the deceased in favour of the legal heirs on the basis of the deceased having expired intestate in the absence of any proper Petition for Letters of Administration or Suit

22 AIR 1950 East Punjab 276

for administration of estate of the deceased on the records of the Court. He has in this context placed reliance upon the judgment of this Court in ***Anil Parab and Ors. Vs Jayadev Bal Thackeray (Supra)*** at Paragraphs 13 and 14.

43. Mr. Tamboly has submitted that the institution of a Suit for administration is not barred in the absence of a probate / before the grant of probate. He has in this context placed reliance upon the judgment of the learned Single Judge of this Court in ***Jamshedji Dubash (supra)*** at Paragraphs 5 – 8. It has been held therein that it is immaterial, that the grant of probate follows the Suit so long as it is granted before the date of the decree. It is further held that Section 213 of the Indian Succession Act does not operate as a bar to institution of an action before obtaining probate of the Will. It is well settled that a Legatee can file a Suit and produce a probate subsequently before the decree is passed in the Suit. The institution of the Suit is not barred in the absence of the probate. It may become necessary for the Executor to institute the Suit and request for time to produce the Probate.

44. Mr. Tamboly has referred to upon Sections 211 and 213

of the Indian Succession Act, 1925. He has submitted that under Section 213, it is provided that no right as Executor or Legatee can be established in any Court of justice, unless a Court of Competent Jurisdiction has granted probate of the Will under which the right is claimed, or has granted Letters of Administration with the Will or with a copy of an authenticated copy of the Will annexed. He has submitted that under Section 211 (1), it is provided that the Executor or Administrator as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such. However, in the case of the deceased being a Hindu, as in the present case, under Section 211(2) it is provided that nothing herein contained shall vest in an Executor or Administrator any property of the deceased person which would otherwise have passed by survivorship to some other person.

45. Mr. Tamboly has submitted that in the Learned Single Judge of the High Court of Orissa in ***Surendra Chandra Jena (Supra)*** has in paragraph 4 held that according to the scheme of Section 211 of the Act, the Executor is not required to wait for the grant of the probate but can *ipso facto* being the legal representative prosecute the lis in view of the devolution of the interest under Order 22 Rule

10 of the CPC in as much as the Testators' Title stands vested in the Executor on his death.

46. Mr. Tamboly has submitted that it is well settled that a Testamentary proceeding is not really a Suit but has the trappings of a Suit. Section 295 of the Indian Succession Act, 1925 deals with the procedure in contentious cases and provides that the proceeding shall take, as nearly as may be, the form of a regular Suit. He has placed reliance upon the Division Bench judgment of the High Court at Madras in *K. Chandrasekhara Rao (Supra)* where it is held that one cannot ignore the very vital fact that a Testamentary Proceeding is not really a Suit, but it has all the trappings of a Suit.

47. Mr. Tamboly has also relied upon the judgment of the Gauhati High Court in *Kamakhyia Prasad Gupta Vs Jibon Lal Gupta*²³ where it is held that nowhere does Section 295 provide that once a proceeding becomes a contentious proceeding, the proceeding shall be treated as a "Regular Suit". What Section 295 says is that a contentious proceeding shall be treated or shall be dealt with, as nearly as may be possible, in the form of a "Regular Suit". In short a contentious proceeding becomes a Suit only in its form and not in its

²³ 2010 SCC OnLine Gau 307

substance.

48. Mr. Tamboly has submitted that where the deceased Testator is a Christian or Mohammeden, and Section 213 of the Indian Succession Act, 1925 is not applicable to such Wills, probate of the Will is not required. However, the Will will need to go through the rigors of the Evidence Act, as held by the Learned Single Judge of this Court in ***Bilquis Zakiuddin Bandookwala (Supra)*** at Paragraph 7.

49. Mr. Tamboly has submitted that the averments in the Complaint as a whole have to be seen to find out whether Clause (d) of Rule 11 Orders VII of the CPC is applicable and a Complaint cannot be rejected in parts. He has in this context placed reliance upon the judgment of the Supreme Court in ***Indian Evangelical Lutheran Church Trust Association (Supra)*** at paragraph 6 (iii) & (vii). He has also placed reliance upon the judgment of the Supreme Court in ***Madhav Prasad Agarwal (Supra)*** at Paragraphs 10, 12 and 14.

50. Mr. Tamboly has submitted that essentially whether the Complaint discloses a cause of action, is a question of fact which has to be gathered on the basis of averments made in the Complaint in its entirety taking those averments to be correct. The Supreme Court in ***Mayar H.***

K. Limited Vs. Owners & Parties (Supra) has held that whilst deciding an application under the provisions of Order 7 Rule 11 of CPC, pleas taken in the written statement are only relevant and whether the Plaintiff discloses a Cause of Action, is a question of fact which has to be gathered on the basis of the averments made in the plaint in its entirety, taking those averments to be correct (Paragraph 12 of the said judgments).

51. Mr. Tamboly has submitted that alternative Pleas available in law can be taken when there is no inconsistency in facts. He has in this context placed reliance upon ***Sarva Shramik Sangh (Supra)*** at Paragraph 19 wherein it is held that when there is no inconsistency in the facts alleged, a party is not prohibited from taking alternative pleas available in law. Similarly, on the same facts, different alternative reliefs can also be claimed.

52. Mr. Tamboly has submitted that the Supreme Court in ***Praful Manohar Lele (Supra)*** at Paragraph 19 has held that the general rule regarding inconsistent pleas raised in the alternative is settled by long line of decisions rendered by this Court. It has in turn relied upon ***Firm Srinivas Ram Kumar Vs. Mahabir Prasad***²⁴ at

²⁴ 1951 SCC 136

Paragraph 9.

53. Mr. Tamboly has submitted that this Court in its decision in the matter between *Funds and Properties of Parsi Punchayet and Ors Vs. Minoo Keki Mistry and Ors.*²⁵ followed the decision in *Praful Rele (Supra)* as well as other decision to *inter alia* reiterate that there is no absolute bar against taking of inconsistent pleas by a party.

54. Mr. Tamboly has submitted that in the present matter, the Plaintiff is not praying for this Court to rule on the genuineness of the Will but for the appointment of an Administrator which is entirely within the Civil Courts' domain.

55. Mr. Tamboly has submitted that the Plaintiff in the present Suit is merely seeking protection of the Estate and therefore the same does not require the Civil Court to determine the Wills' validity.

56. Mr. Tamboly has accordingly submitted that the present Interim Application taken out by the Applicant / Original Defendant No. 5 under Order 7 Rule 11 (d) of the CPC is entirely misconceived and be dismissed in *limine*.

²⁵ 2024 SCC OnLine Bom 3275

57. Having considered the submissions, the paramount issue raised in the Application for rejection of Plaint under Order 7 Rule 11 of CPC is whether the Suit for administration of the Estate of the deceased is maintainable at the instance of a Plaintiff who has propounded a Will i.e. Will of 1994 and filed for Probate of the said Will as Executor thereof which is pending before the Testamentary Court.

58. The contention of the Applicant is that the Plaintiff who has filed for probate of the Will of 1994 has to necessarily await the decision of the Probate Court which will determine the validity of the said Will and it is only upon such determination, that the Suit may be maintainable.

59. This contention is in my view is misconceived. There is much merit in the Plaintiffs' contention that the question of administration of the Estate of the deceased is to be decided by the Civil Court and not by a Testamentary / Probate Court. The Defendants have conflated the requirement to prove a Will with the separate remedy of administering the Estate of the deceased. The Plaintiff does not dispute the Probate Court's exclusive jurisdiction to

adjudicate the genuineness of the Will. Section 269 (2) of the Indian Succession Act excludes the use of a Probate Court's inherent civil powers but does not bar independent civil remedies for issues concerning administration and protection. The judgment of this Court in ***Ramchandra Ganpatrao Hande (Supra)*** relied upon by the Plaintiffs is apposite. It has been held that Section 269 (2) would not preclude recourse to a Civil Suit for obtaining relief necessary for the protection of property.

60. There is no merit in the attempt made on behalf of the Applicant for distinguishing this judgment on the ground that it was dealing with bar under Section 269 of the Indian Succession Act for Hindus to claim protective reliefs in Testamentary Petition before a Testamentary Court and not a case regarding maintainability of a Suit for administration filed by the Plaintiff who has simultaneously filed a Petition for a probate of a Will. It has been laid down by this Court that a Suit for administration of Estate would be maintainable irrespective of whether the Plaintiff has filed Probate Proceedings in the Testamentary / Probate Court. A Suit for administration of Estate of the deceased is filed under the CPC whereas the sole question that is decided by the Testamentary Court is the validity of a Will.

61. This has also been laid down by this Court in ***Rupali Mehta Vs Tina Mehta (supra)***, relied upon by the Plaintiff, which is apposite. The distinction drawn by the Applicant is on the same lines as in the case of ***Ramchandra Ganpatrao Hande (Supra)*** and hence cannot be accepted.

62. The mere fact of the Plaintiff having propounded the Will of 1994 and in its pleadings advertent to a later Will of 2012 left by the deceased – GND which if proved would supersede the Will of 1994, does not come in the way of the present Suit being determined by the Civil Court. This in view of the settled legal position that in an Administrative Suit, the reliefs sought relate to seeking administration of the Estate of a deceased under Orders of the Court. It does not concern the validity of a Will which is best left to the Testamentary / Probate Court.

63. Further, under Section 211 of the Indian Succession Act, the executor of a deceased person is his legal representative for all purposes and as held by the Orissa High Court in ***Surendra Chandra Jena (supra)*** the executor is not required to wait for the grant of probate but can *ipso facto* being the legal representative prosecute

the *lis* in view of devolution of interest under Order XXII Rule 10 of the CPC in as much as the testator's title stands vests in the executor on his death.

64. Amongst the judgments relied upon by the Plaintiff, include ***Jamshedji Dubash (Supra)***, where it has been held that the grant of probate follows the Suit so long as it is granted before the date of the Decree and that Section 213 of the Indian Succession Act does not operate as a bar to institution of an action before obtaining probate of the Will. The Applicant has sought to distinguish his judgment on the ground that it did not contain a contest of two Wills and whether the fact that when there are two Wills can a Suit be maintainable. This in my view is a misconceived distinction, in that the principle of law laid down in the said judgment is that the grant of probate is not a pre-requisite for filing the Suit for administration of the Estate so long as it is granted before the Decree. This follows from the settled law that the Testamentary Court does not decide about the property of the deceased and as to how the same has to be distributed on grant of probate or refusal to grant of such probate. This has also been held by this Court in ***Anil Parab and Ors. Vs Jayadev Bal Thackeray (Supra)***. I do not find any merit in the

attempt to distinguish these judgments by the Applicant.

65. In so far as the issue with regard to whether the Plaintiff can raise an alternative prayer to Prayer (a), by seeking for this Court to administer the Estate of the deceased on intestacy and whether such prayer is maintainable, this is to be considered from the well settled principle that where alternative pleas are available in law, they can be taken where there is no inconsistency in facts. In the present case there is no inconsistency in facts as there is no dispute that there are two Wills i.e. Will of 1994 and Will of 2012 and which the Testamentary Court is seized of for determining the validity of the Wills. The alternative prayer would arise when the Testamentary / Probate Court arrives at a finding that both Wills are not genuine. It is in such a eventuality that the alternate prayer has been made by the Plaintiff in the present Suit.

66. It has been laid down by the Supreme court in ***Sarva Shramik Sangh (Supra)***, relied upon by the Plaintiff, that when there are no inconsistencies in the facts alleged, a party is not prohibited from taking alternative pleas available in law. Similarly, on the same facts, different alternative reliefs can also be claimed. This has also

been held by the Supreme Court in *Praful Manohar Rele (Supra)* and which has been followed in *Funds and Properties of Parsi Punchayet (Supra)* which has reiterated the general rule regarding inconsistent pleas raised in the alternative.

67. There is accordingly no merit in the contention of the Defendant that the alternate prayer in the present Suit being contradictory to the main prayer is self destructive of the causes of action. Further, there is no merit in the contention on behalf of the Defendant that in seeking the alternate relief, the very same Plaintiff on the one hand is propounding a Will of which he is the Executor and on the other is seeking administration on intestacy as if there is no Will. The attempt made by the Applicant to distinguish the judgment cited by the Plaintiff is misconceived as it is well settled that inconsistent pleas can be raised in the alternative.

68. Further, there is no merit in the contention of the Applicant that the remainder prayers cannot on their own right be maintainable. This in view of finding that the main prayer and the alternative prayer in the Suit are themselves maintainable. The remainder prayers are infact a corollary to the main and alternate

prayers i.e. for administration of the Estate of the deceased and hence would certainly be maintainable.

69. It is also pertinent to note that a Testamentary proceeding is not really a Suit but has trappings of a Suit as laid down by the Madras High Court - *Chandrasekhara Rao (Supra)* and the Gauhati High Court in *Kamakhyia Prasad Gupta (supra)* which have been relied upon by the Plaintiff.

70. I find merit in the submission on behalf of the Plaintiff that the averments in the Plaint as a whole have to be seen to find out whether Clause (d) of Rule 11 Order VII of the CPC is applicable and a Plaint cannot be rejected in parts. This has been laid down by the Supreme Court in *Indian Evangelical Lutheran Church Trust Association (supra)* and *Madhav Prasad Aggarwal (supra)*. Further, whether the plaint discloses a cause of action, is a question of fact which has to be gathered on the basis of averments made in the Plaint in its entirety by taking those averments to be correct. In the present case, the Applicant is seeking for rejection of part of the Plaint i.e. that part from which Prayer Clause (a) to (c) follow and this is not permissible in law. Further, one cannot consider the

written statement in an Application under Order 7 Rule 11 and pleas taken therein are wholly irrelevant. This has been laid down by the Supreme Court in ***Mayar H. K. Limited Vs. Owners & Parties (Supra)***.

71. Now dealing with the judgments relied upon by the Applicant, the judgment in ***Chiranjilal Shrilal Goenka (Deceased) Thru. Lrs.*** has been relied upon in support of the Applicant's contention that a Civil Court sitting in its ordinary civil jurisdiction has no jurisdiction to grant or revoke probate. This is a well settled proposition and the Plaintiffs have not disputed the Probate Court's exclusive jurisdiction to adjudicate the genuineness and execution of the Will.

72. Further, the judgment relied upon by the Applicant viz. ***Dharam Raj Tiwari vs. Badri Prasad Tiwari (supra)*** is not relevant to the present proceedings. This was a case wherein the question arose as to whether an Arbitrator has jurisdiction to decide the probate Suit. The Defendants have relied upon Paragraph 16 of the said judgment which holds that Civil Court has no jurisdiction to impugn the grant of probate by the Court of competent jurisdiction. This would apply only when the parties are attempting to prove the

genuineness of the Will by way of Civil Proceeding. This is not the case here as has been observed above.

73. The judgment relied upon by the Applicant viz. ***Ram Shankar vs. Balakdas (Supra)*** is a judgment which holds that as per settled law there is a clear jurisdictional bifurcation between the Probate Court and the Civil Court and that concurrent proceedings can go on as long as the Civil Court doesn't usurp jurisdiction of the Probate Court. This judgment in fact supports the Plaintiff's case viz. that there is no bar on concurrent proceedings in a Civil Court but there is merely a limit on the contest therein. The Civil Court cannot go into the genuineness of the Will but the appointment of an administrator is entirely within the Civil Court's domain.

74. The judgment relied upon by the Defendant viz. ***Malvika Anand v. Dattaprasanna Nandkari (Supra)*** is inapplicable in the present case since in that case there was a challenge to the Will itself. In the present case the Plaintiff has merely prayed for appointment of an Administrator / Court Receiver for protection of the Estate and thus the captioned Suit falls squarely within the Civil Courts' jurisdiction to grant reliefs necessary for the protection and

proper administration.

75. In so far as the judgment in *Peter John De'souza Vs. Armstrong Joseph D'souza*²⁶ relied upon by the Applicant, this judgment has held that the Testamentary Court does not decide the title in respect of the property of the deceased. This is well settled and not disputed by the Plaintiff in the present case and infact supports the Plaintiff. Further, the judgment relied upon by the Applicant in *Vidur Impex and Traders Pvt. Ltd. And Ors Vs. Pradeep Kumar Khanna and Ors*²⁷ was a case which involved “clandestine, collusive” transactions carried out in direct violation of Court injunctions which were condemned by the Supreme Court. This can be contrasted with the present matter which involves a *bona fide* Testamentary Petition confined to the question of the validity of a Will, without any prior finding of fraud, illegality or suppression of judicial proceedings. Therefore this cited case is not comparable in the factual situation. Further, the present case unlike that case is not seeking adjudication of ownership. The Plaintiff herein is merely seeking protection of the Estate and therefore, the same does not require the Civil Court to determine the Wills' validity.

²⁶ 2014 (3) Mh.L.J.

²⁷ 2017 SCC OnLine Del 8925

76. Accordingly, I find no merit in the present Notice of Motion filed by the Applicant / Original Defendant No. 5, particularly in view of Order 7 Rule 11 of CPC having been incorrectly invoked for rejection of the Plaint. In the present case, the Plaint filed in the captioned Suit cannot be rejected at the threshold as it would be a death knell to the present Suit, particularly, where the Plaintiff has sought to protect the Estate of the deceased, and as held above, such relief cannot be granted by the Testamentary Court.

77. The captioned Suit as well as the proceedings filed in the Testamentary Court would in my view be required to go on concurrently, but for the final decree in the present Suit which would have to await the outcome of the proceedings in the Testamentary / Probate Court and the grant or non-grant of the Probate. This in view of the genuineness of the Wills which are to be determined by the Testamentary / Probate Court and which would have a bearing on the final outcome of the present Suit.

78. The present Notice of Motion No. 954 of 2019 is accordingly rejected. There shall be no order as to costs.

[R.I. CHAGLA, J.]

79. After pronouncement of the Order, Mr. Haresh Jagtiani, the learned Senior Counsel applies for stay on effect, operation and implementation of this Order in order for the Applicant / Original Defendant No.5 to carry it higher.

80. In view of this application, I grant a stay on the effect, operation and implementation of this Order for a period of four weeks from today.

[R.I. CHAGLA, J.]