

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 15..10..2015

Pronounced on : 06..11..2015

C O R A M

The Hon'ble Mr. Sanjay Kishan Kaul, CHIEF JUSTICE

and

The Hon'ble Mrs. Justice Pushpa Sathyanarayana

Original Side Appeal No.117 of 2015

Hussain A. Jodhpurwala

... Appellant

versus

1. Yusuf A. Jodhpurwala

2. Mrs. Nafisa N. Chokawala

3. Shabbir Abbas Jodhpurwala

4. Taha Shabbir Jodhpurwala

... Respondents

Prayer : Memorandum of Original Side Appeal filed under Order XXXVI Rule 9 of the Original Side Rules read with Clause 15 of the Letters Patent Act against the fair order of a learned single Judge of this Court dated 30.9.2008 made in Application No.4572 of 2008 in O.P. No.516 of 1988.

For Appellant : Mr. Shubharanjaniananth

For Respondents-1 & 2 : Mr. K.S. Ravikumar

For Respondents-3 & 4 : Mr. V. Raghavachari for
M/s. A.B.Fathima Sulthana

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J U D G M E N T

The Hon'ble Chief Justice

Late Mrs. Batul Bai passed away on 18.6.1987, leaving behind her husband Mr. Abbas Bhai (now deceased), the appellant herein, Respondent Nos.1 and 3 (sons) and Respondent No.2 (daughter) as her legal heirs. Since late Mrs. Batul Bai passed

away intestate, O.P. No.516 of 1988 was filed by her husband Mr. Abbas Bhai for grant of Letters of Administration. In the said proceedings, consent affidavits were filed by the sons and the daughter, giving no objection for grant of Letters of Administration in favour of Mr. Abbas Bhai. The Letters of Administration were granted on 9.3.1989 in respect of the estate left behind by late Mrs. Batul Bai.

2. A Memorandum of Understanding and a Deed of Family Settlement was executed on 1.10.1997 at Bangalore amongst the family members, in terms whereof the estate of late Mrs. Batul Bai was distributed among her legal heirs. Mr. Abbas Bhai, however, did not take any share in the property. The settlement notes that in view of the indifferent health and advanced age of Mr. Abbas Bhai and his being not involved with the family business, the children would pay a sum of Rs.5,000/- each per month from the partnership firms towards his maintenance and expenses till his lifetime, more so as he was a partner in three firms, having 25% share in each of them. It is, however, not necessary for the present proceedings to go into in detail in respect of this undisputed document; suffice to say that one of the properties remained undivided, being a land measuring 803 sq.ft. together with a commercial building comprised of four floors with open space situated at No.36, Venkata Maistry Street, Muthialpet, Mannady, George Town, Chennai-600 001, bearing O.S. No.481, R.S. No.5279, Collector Certificate No.4385, having tenants, which formed a part of the estate of late Mrs. Batul Bai.

3. It is relevant to note at this stage that apparently, some differences did arise among the legal heirs even qua maintenance of Mr. Abbas Bhai and the role of the legal heirs came into question. It is the case of the fourth respondent (son of the third respondent), as also the third respondent, that they were the only ones looking after Mr. Abbas Bhai, while this position is disputed by the others, more specifically the appellant herein, who has filed on record a document signed by Mr. Abbas Bhai to the effect that the third respondent, his wife and the fourth respondent were torturing him and beating him since the past few days (document dated 15.5.2003) and thus, he had asked the appellant and the other legal heirs to make a complaint in respect thereof. If one may say, the insecurities of old age are often in this form taken advantage of by legal heirs one way or the other and that appears to be the cause for the allegations among the legal heirs.

4. The aforesaid issue is relevant in the context of Application No.4572 of 2008 being filed in O.P. No.516 of 1988 by Mr. Abbas Bhai seeking permission of the Court to settle the one remaining commercial property in favour of his grandson, the fourth respondent herein, and that was granted on 30.9.2008,

albeit without notice to the other legal heirs. This was succeeded by a settlement deed executed by Mr. Abbas Bhai dated 3.10.2008, settling the property accordingly.

5. The aforesaid settlement deed, however, is to the effect that Mr. Abbas Bhai (settlor) had purchased the property and constructed the superstructure on the land out of his own earnings. This property was thereafter settled in favour of his wife late Mrs. Batul Bai by a registered settlement deed dated 30.4.1969 and as Mrs. Batul Bai had passed away on 18.6.1987, the settlor had approached the High Court to appoint him as Administrator of the estate of his wife, for which consent was granted by the other legal heirs of late Mrs. Batul Bai. The settlee is the grandson of the settlor and the settlor had great love and affection towards him, as he was looking after him and attending to his needs in his old age and fragile health and thus, the property was being sought to be settled on the settlee by the settlor keeping in mind the permission having been obtained from the Court on 30.9.2008.

6. In respect of the aforesaid property, the fourth respondent in the year 2009 filed petitions for eviction against the tenants on the basis of the settlement deed. Mr. Abbas Bhai passed away on 9.4.2010. The endeavour made by the legal heirs to get impleaded in the proceedings before the Small Causes Court in the eviction proceedings were, however, unsuccessful as the application was dismissed on 25.7.2011 on the plea that the contention of the legal heirs deserved to be adjudicated by the competent civil court of law and not in the proceedings for eviction.

7. The controversy in the present appeal really emanates from the order passed on 30.9.2008 by the learned single Judge in Application No.4572 of 2008, which is sought to be assailed before us. The said order, while granting permission to the Administrator to settle the property in favour of his grandson/fourth respondent, is predicated only on one rationale set out as under :-

"The applicant was appointed as an Administrator of the petition mentioned property. The other legal heirs have already given consent affidavits while granting Letters of Administration. Now the permission is sought to settle the property in favour of his grandson."

8. The learned single Judge thus proceeded to grant the permission on the premise of the consent affidavits taken from the other legal heirs while granting the Letters of Administration to Mr. Abbas Bhai, who is now no more.

9. The plea of the appellant in the present appeal is that this impugned order has been obtained by playing a fraud and through misrepresentation and in the absence of the learned single Judge failing to notice that the consent which had been granted by the appellant (or for that matter by the other legal heirs) in the year 1988 was only for grant of Letters of Administration in favour of Mr. Abbas Bhai and no consent had been granted to convey the property in respect of which he had been appointed as an Administrator. The appellant had not been made a party to the original petition for grant of Letters of Administration in view of the consent and once the property was sought to be settled, notice ought to have been given to the appellant for conveyance of the property by the Administrator. Thus, the learned single Judge is alleged to have fallen into an error in assuming that the consent affidavits given for granting Letters of Administration in pursuance to the provisions of Section 278 of the Indian Succession Act, 1925 (Act 39 of 1925), hereinafter referred to as the 'said Act', could be construed as consent under Section 307 thereof.

10. It is also sought to be pleaded in the appeal that keeping in mind the documents placed on record by the appellant, the application filed by the Administrator seeking permission for settlement of the estate in favour of his grandson was shrouded in suspicious circumstances and no other legal heir was there before the Court (since they were not put to notice) to point the same out. The document propounded by the appellant dated 15.5.2003 was in fact a complaint by Mr. Abbas Bhai against the third and fourth respondents. No doubt, Mr. Abbas Bhai was the Administrator, but this prime property, after twenty years, was suddenly sought to be settled on his grandson and thus, the learned single Judge ought to have shown greater care by at least issuing notices to the other legal heirs.

11. Insofar as the application filed by the Administrator is concerned, the plea is that the Administrator is to administer the property and not to create another line of succession - in the absence of a testamentary document, only the law of inheritance would have to be applied, unless there was agreement to the contrary.

12. The conspectus of the aforesaid facts and the provisions of law thus give rise to a question as to whether an Administrator, in the performance of his duties, can settle a property exclusively on a legal heir or even the children of a legal heir without the consent of the other legal heirs of the deceased, i.e. does it give an absolute right to the Administrator to do what he wants with the property or whether he is required to administer the property and divide and appropriate the same as per the laws of succession or by consent of parties.

13. We have heard the learned counsel for the parties at length. An endeavour was made to resolve the dispute, which had initially succeeded, but then the fourth respondent had a change of heart, requiring us to decide the issue on merits.

14. The documents on record, in our view, leave no manner of doubt that all the legal heirs of late Mrs. Batul Bai, being her sons and daughter, had given consent to their father Mr. Abbas Bhai to be the Administrator of the estate of late Mrs. Batul Bai. This, in turn, required Mr. Abbas Bhai to administer the estate in accordance with law. It is towards this objective that Mr. Abbas Bhai and the other legal heirs entered into a Memorandum of Understanding and the Deed of Family Settlement dated 1.10.1997. Thus, the estate of late Mrs. Batul Bai in fact came to be divided amongst her legal heirs, though Mr. Abbas Bhai took no portion of the property. One of the properties, which is the subject matter of the dispute, however, remained undivided and thus, continued to be administered by Mr. Abbas Bhai.

15. The aforesaid fact is relevant, for it is not as if the property in dispute came to be settled on Mr. Abbas Bhai in lieu of his share in the estate of late Mrs. Batul Bai. Otherwise, the deed of family settlement would have stated so. The status of the property remained that of the estate of late Mrs. Batul Bai, being on rent and continued to be administered by Mr. Abbas Bhai. Thus, the property continued to partake the character of a part of the estate of late Mrs. Batul Bai.

16. The application filed by Mr. Abbas Bhai in the proceedings for grant of Letters of Administration seeking permission for settling the property in favour of his grandson, as also the subsequent settlement deed executed by Mr. Abbas Bhai dated 3.10.2008 in favour of the fourth respondent have some divergence on the premise, keeping in mind the facts of the case. The application is predicated on a plea of the Administrator wanting to settle the property in favour of his grandson as if it is the exclusive domain of the Administrator to do what he wants with the property. The settlement deed is predicated on the acquisition of the property originally by Mr. Abbas Bhai, its settlement on his wife in the year 1969 and thereafter Mr. Abbas Bhai acting as an Administrator therefor - as if he had absolute right to deal with the property in view of having acquired it originally. Not only that, it presupposes that once the consent of the other legal heirs is available to act as an Administrator, that power can be exercised unhindered.

17. We are of the view that the aforesaid presumptions suffer from more than one legal defects. Firstly, even if Mr. Abbas Bhai had originally purchased the property out of his own funds and constructed thereon, on the settlement being made in

favour of his wife, it became an absolute property of his wife late Mrs. Batul Bai and formed a part of her estate. Thus, all the legal heirs of late Mrs. Batul Bai would have a share in that property as per the law of succession.

18. Secondly, at the time of execution of the deed of family settlement on 1.10.1997 inter se the parties, while other properties and businesses were divided and settled, this property continued to remain as one which was part of the estate of late Mrs. Batul Bai and had to be administered by the Administrator. It thus remained an undivided property. Mr. Abbas Bhai did not exclusively become entitled to this property as per the settlement merely because he did not take a share in the other properties. That was his choice. At the stage of execution of the deed of family settlement in the year 1997, if this property was to fall to the share of Mr. Abbas Bhai, then it was required to be said so. This is not how the deed of family settlement reads.

19. Thirdly, the power of an Administrator to administer the property cannot entitle him to carry out a division or settlement contrary to the law of succession or to create a new line of succession and that too, without the consent of the other legal heirs.

20. Fourthly, the consent assumed by the Administrator and unfortunately by the learned single Judge also was only towards his appointment as an Administrator and not consent in terms of Section 307 of the said Act.

21. We do believe that since the Administrator was seeking to effectively create another line of succession in favour of his grandson, the least that was expected was for notices to be issued to the other legal heirs, who would have had an opportunity to say what their stand was. The role of an Administrator in a sense is akin to a trustee and not an absolute right to deal with the property in any manner he deems proper, more so when he seeks to exclude the other legal heirs.

22. An application for grant of Letters of Administration has to be in conformity with Section 278 of the said Act. Order XXV Rule 5 read with Form 58 of the Madras High Court Original Side Rules required compliance and thus, the legal heirs ought to have been impleaded in the application filed by the Administrator and notices ought to have been issued to them. The permission to settle the property exclusively in favour of the grandson was granted in the absence of any notice to the legal heirs.

23. In terms of Section 317 of the said Act, an executor or administrator is required within six months from the grant of probate or letters of administration to exhibit in the Court, an inventory containing a full and true estimate of all the properties in possession, as also within one year all assets which have come into his hands. The powers of an executor or an administrator under Section 307 of the said Act have to be thus read in that context. It would be appropriate to reproduce the provisions of Section 307 of the said Act :-

"307. Power of executor or administrator to dispose of property.-(1) Subject to the provisions of sub-section (2), an executor or administrator has power to dispose of the property of the deceased, vested in him under section 211, either wholly or in part, in such manner as he may think fit.

(2) If the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, the general power conferred by sub-section (1) shall be subject to the following restrictions and conditions, namely, -

- (i) The power of an executor to dispose of immovable property so vested in him is subject to any restriction which may be imposed in this behalf by the will appointing him, unless probate has been granted to him and the Court which granted the probate permits him by an order in writing, notwithstanding the restriction, to dispose of any immovable property specified in the order in a manner permitted by the order.
- (ii) An administrator may not, without the previous permission of the Court by which the letters of administration were granted,-
 - (a) mortgage, charge or transfer by sale, gift, exchange or otherwise any immovable property for the time being vested in him under section 211, or
 - (b) lease any such property for a term exceeding five years.
- (iii) A disposal of property by an executor or administrator in contravention of clause (i) or clause (ii), as the case may be, is voidable at the instance of any other person interested in the property.

(3) Before any probate or letters of administration is or are granted in such a case, there shall be endorsed thereon or annexed thereto a copy of sub-section (1) and clauses (i) and (iii) of sub-section (2) or of sub-section (1) and clauses (ii) and (iii) of sub-section (2), as the case may be.

(4) A probate or letters of administration shall not be rendered invalid by reason of the endorsement or annexure required by sub-section (3) not having been made thereon or attached thereto, nor shall the absence of such an endorsement or annexure authorise an executor or administrator to act otherwise than in accordance with the provisions of this section."

24. In addition to the aforesaid powers conferred under Section 307 of the said Act on the Administrator, there are general powers on the Administrator under Section 308 of the said Act, which read as under :-

"308. General powers of administration.-An executor or administrator may, in addition to, and not in derogation of, any other powers of expenditure lawfully exercisable by him, incur expenditure-

(a) on such acts as may be necessary for the proper care or management of any property belonging to any estate administered by him, and

(b) with the sanction of the High Court, on such religious, charitable and other objects, and on such improvement, as may be reasonable and proper in the case of such property."

25. If the aforesaid provisions are read in their true meaning and intent, the purpose of appointment of an Administrator is to give him powers to administer the estate unhindered, but subject to accountability. There may be necessity to deal with the estate, transfer or mortgage it, for which permission can be sought from the Court. There is undoubtedly no necessity in that sense in the present case nor has there been any realization of proceeds which was to be applied for the said necessity. If the Administrator, on account of his advanced age, was of the view that it would be difficult for him to administer the estate, then the requirement was to settle it appropriately on the legal heirs. It is not even a case where the property has been disposed of and proceeds divided among the legal heirs. In fact, the objective of moving the application resulting in the settlement deed itself was to confer title on a person who is not directly a legal heir, being the grandson, without any consideration. The Administrator could not have treated the estate of the deceased as that of his own.

26. Now turning to the precedents referred to by the learned counsel for the appellant in support of the proposition to satisfy the impugned order, we enumerate and discuss their significance as under :-

(a) In *Saryooparin Pathshala Samiti vs. District Judge, Allahabad*, (1931) I.L.R. Allahabad 422, it was observed that the object of the rule enunciated under Section 307, sub-section (2), clause (ii) is for the court of testamentary jurisdiction to see that the transfer applied for is necessary in the interest of the administration of the estate. In that case, there was nothing to administer and the property in the hands of the Administrator should have been handed over to the legatee and the administration should have ended.

The aforesaid proposition thus is stated to apply on all fours since identically in the present case, the suit property was liable to be distributed among all the legal heirs and the object could not be to enrich a grandson, who was a legal heir to one of the legal heirs.

(b) (i) *Janardan Badrinarayan Patel and Another vs. Sheth Ambalal Himatlal* (since deceased by his LRs) and Others reported in A.I.R. 1999 Gujarat 162.

(ii) *Mt. Kulwanta Bewa and Ors. vs. Karam Chand Soni and Ors.* reported in A.I.R. 1938 Calcutta 714, wherein in paragraph 17, it has been observed as under :-

“17. The next question is a more difficult one, as to whether the capacity of the two sons to create the mortgage was affected by the grant of letters of administration to their mother Mt. Kulwant. We have not been referred to any authority to show that merely because an estate is in the hands of an administrator, the beneficiaries are thereby rendered incompetent to deal with their interest in the estate. Section 211, Succession Act, 1925, merely provides that the estate of a deceased person vests in his executor or administrator as such; these words ‘as such’ are important, and show that the vesting is not of the beneficial interest in the property, but only for purposes of representation. The present case is one of intestate succession, and is not complicated by any question of the assent of the executor or administrator being necessary to complete the legatee’s title (S.332). In such a case it does not, in our opinion, admit of any doubt that the beneficial interest vests in the heir-at-law, and we are unable to find anything in the Succession Act which limits the power of disposal of the Succession Act which limits the power of disposal of the heir-at-law over such estate merely because a grant of administration has been made nor does the Transfer of Property Act make the interest of the heir-in-law in the estate property which may not be transferred.”

An administrator has no right to set up an independent line of succession. When the deceased Mrs. Batul Bai had herself left behind no will nominating the successor to her interest, the Administrator was not empowered to treat the assets of the deceased as his own, as that would defeat the rights of the legal heirs recognised under Section 307, sub-section (2), clause (ii) and would be opposed to Section 211 of the said Act, which provides that the character vested in the Administrator would only be to the extent of possession and not ownership.

The relevant portion of Section 211(1) of the said Act is extracted as under :-

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

The above words thus indicate that the Administrator is not the absolute owner of the property vested in him in the sense of being the beneficiary and owner thereof, but the property vests with him only for the purpose of administration.

(c) In G.F.F. Foulkes and Ors. vs. A.S. Suppan Chettiar and Another reported in (A.I.R. 1951 Mad 296), it has been observed in paragraph 16 as under :-

"16. In our opinion, on the findings of the learned trial Judge that the sales were for adequate consideration, that the sales were not nominal transactions and that they were not vitiated by fraud or other similar defect, it must be held that the sales, as such, in favour of the several alienees must stand, unless the purchasers were privy to a breach of trust committed by the administrator. Under Section 307(1), Succession Act, an executor or administrator has power to dispose of the property of the deceased, vested in him under Section 211, either wholly or in part, in such manner as he may think fit. The restrictions and the conditions to which this general power is subject under Sub-section (2) do not apply to the present case as the deceased did not belong to the class of persons enumerated in that sub-section. It is a general rule of law and equity in England--and that rule is followed in India--that an executor may dispose of the testator's assets over which he has an absolute power and they cannot be followed either by the creditors or by the legatees into the hands of the alienee. But neither jurisdiction will permit the rule to be observed so as to protect a disposition founded on fraud or a transaction amounting to a breach of trust, concerted between the executor or administrator and the

purchaser. There is no duty cast on the purchaser to see to the application of the purchase money. He is not obliged to ascertain whether the executor is discreetly exercising his power, but the purchaser will not be protected if he is privy to a breach of trust and if the transaction of sale is in its nature incompatible with the legitimate administration of the testator's estate. A purchaser would not have the benefit of the general rule protecting a purchaser from an executor, if the purchaser concurs in any act which manifests from the transaction itself that it is not the legitimate mode of administering the estate. If the nature of the transactions imports notice to him that the executor is dealing with the assets otherwise than in due course of administration, then, he would have participated with the administrator in an improper conversion and application of the estate of the deceased and the sale in his favour would be invalid."

...

(emphasis supplied)

"31. It was not disputed before us that an administrator who pays certain creditors out of the available assets of the estate, deliberately leaving other creditors who have equal claims against the estate, will be guilty of a breach of duty. Such a misapplication of the assets goes by the technical name of *devastavit* in English law. We have already expressed the view that payments made in contravention of the provisions of Section 323 make an executor or administrator liable for *devastavit* see *Asiatic Banking Corporation v. Amador Viegas*, 8 Bom. H. C. R. 20. As the executor or administrator occupies a fiduciary position towards the creditor of the estate and the beneficiaries, including the legatees, if he is guilty of *devastavit*, he is guilty of breach of trust. Now it is a cardinal principle of English law--and that principle is applicable to India also--that a person, who joins a trustee in the commission of a breach of trust and earns a benefit by that wrongful act of the trustee, shall hold the advantage so obtained for the benefit of all the beneficiaries: vide Section 68 of the Trusts Act."

...

(emphasis supplied)

In the context of the facts of our case, the property in suit is practically gifted to the 4th respondent by the settlement deed and not executed among the legal heirs, a fact available within the knowledge of the 4th respondent.

(d) In Badami (deceased) by her LR vs. Bhali reported in (2012 (11) S.C.C. 574), it has been held that a decree obtained through fraud is a nullity.

27. Learned counsel for the 4th respondent, however, sought to dispel our view on the submission that the Administrator has the whole and sole power as if he owns the property. It was submitted that under the original family settlement deed dated 1.11.1997, Mr. Abbas Bhai had not taken any share and thus, the property in suit be construed as having fallen to his share, especially keeping in mind that he had originally purchased the property before settling the same on his wife. In the alternative, it was suggested that the settlement deed in favour of the 4th respondent by his grandfather at least be construed as his intent to transfer his share in the property to the 4th respondent. The property in suit was pleaded to be orally allotted to his share to maintain himself out of the income derived from it. It is alleged that in the memorandum of understanding dated 01.10.1997, amounts specified therein were not paid by the other legal heirs to him and that his other children failed to maintain him, while it was the third respondent's son and the 4th respondent who took care of him. As a token of love and affection, Mr. Abbas Bhai, after getting oral consent from the other children and obtaining prior permission from the Court, settled this suit property in favour of the 4th respondent by settlement deed dated 3.10.2008. The belated plea to unsettle the settled position is stated to have been raised by the appellant when his grandfather is no more.

28. The aforesaid plea of an oral settlement is difficult to accept for more reasons than one. The matter pertained to immovable property and has to be dealt with by the document. Also, the family settlement of the year 1997 dealt with each of the other properties specifically and it cannot be perceived as to why if this property was to fall to the share of Mr. Abbas Bhai, why some other understanding, with the consent of the legal heirs, could not have been reduced into writing. The only corollary which can be drawn is that this property was kept as the estate of late Mrs. Batul Bai undivided and was yet to be administered in accordance with the law of succession.

29. The law propounded in Crystal Developers vs. Asha Lata Ghosh (Smt) (Dead) through LRs and Others reported in (2005) 9 S.C.C. 375 that a property would vest in the Executor by virtue of the Will, whereas the property will vest in the administrator by virtue of grant of Letters of Administration by the Court in the context of Sections 211, 212 and 213 of the said Act was sought to be utilized by the learned counsel for the 4th respondent. It has been observed that under Section 307 of the said Act, the powers of the Administrator to dispose of the property of the deceased vested in him under Section 211 either

wholly or in part in such manner as he thinks fit. But then, the discretion of the Administrator cannot be utilized to create an independent line of succession contrary to law and the method of disposition of the property can only be by a testamentary document or by succession. The Administrator administers the property in a manner so that the benefit accrues to the legal heirs as per their shares by the law of succession.

30. We derive strength from the observations of the Honourable Supreme Court in *Vishin N. Khanchandani and Another vs. Vidya Lachmandas Khanchandani*, (2006) 6 S.C.C. 724, where while dealing with nomination in case of National Savings Certificate, it was observed that the nominee has a right to be paid sum due on such savings certificate after the death of the holder, yet he retains the amount for the benefit of persons who are entitled to it under the Law of Succession applicable in the case.

31. Insofar as the legal pleas are concerned, it is alleged that there was no challenge made to the authority of the Administrator, but after his demise, the consent of 31.07.1988 given for grant of Letters of Administration, which had been used to pass orders in Application No.4572 of 2008 on 30.09.2008, was sought to be disputed. In this behalf, reference was made to *Sneh Gupta vs. Devi Sarup* reported in (2009) 6 S.C.C. 194 to contend that the appellant cannot be termed as "aggrieved person".

32. The aforesaid plea is raised for the reason that there was no consent granted for the Administrator to dispose of any immovable property through depriving some of the legal heirs, while conferring title exclusively on one successor of the legal heirs. The consent was clearly to act as an Administrator and once the property which had remained unadministered was sought to be gifted away, it was mandatory that notices be issued to the legal heirs in terms of the provisions of Section 307, sub-section (2), clause (ii) of the said Act. It was pleaded by the learned counsel for the 4th respondent that the appellant could not seek to collaterally annul the settlement deed in the present proceedings, once power has been vested with the Administrator to dispose of the property vested in him by virtue of Section 211 of the said Act and prior permission had been obtained. Even otherwise, if such permission had not been applied for, the alienation so made is only voidable at the instance of the aggrieved person. Thus, the alienation could have been set aside only in a duly constituted suit instituted within three years as prescribed under Article 59 of the Limitation Act, 1963 (See *Goriram Nathu Mendra vs. Sonabai and Others* reported in A.I.R. 1970 Bombay 72, *Khetra Mohan Mitra vs. Sm.Nalini Bala Dassi* and another reported in A.I.R. 1932 Calcutta 828 and *Manki Kaur vs. Hansraj Singh* reported in A.I.R. 1938 Patna 301).

33. The aforesaid plea has to be understood in the context of preserving third parties' rights, to whom the assets may have been sold or dealt with by the Administrator. In the present case, it is not as if there is any title derived for consideration. The settlement is practically a gift and that too under a presumption as if the Administrator had some special rights as originally the property was purchased by him before it was settled on his wife, Late Mrs. Batul Bai. This plea is only stated to be rejected, as once voluntarily the settlement was made by the Administrator in favour of his wife in 1969 and was dealt with as an estate of Late Mrs. Batul Bai till her death in 1987, even thereafter, it was to be dealt with like any other property of Late Mrs. Batul Bai, and the role of the Administrator conferred on Mr. Abbas Bhai was limited to that aspect.

34. The issue is not one of the settlement deed in favour of the 4th respondent dated 3.10.2010 being set aside, but the question raised is about the grant of permission as per the impugned order. This permission was issued without notice to the other legal heirs, who were deprived of their share in the property.

35. If we may say so, the proceedings have gone on a wrong presumption as if the no objection given for the Administrator to be so appointed amounts to the legal heirs giving up their rights in the property. If such a course of action is perceived to be permitted, then an Administrator can gift away all properties to any one of the legal heirs or to third parties and claim that he is entitled to do so, forgetting that he is not the owner of the property, but the administrator of the property. This is the very failure which permeates the impugned order.

36. In view of what we have discussed above, we have no doubt that the impugned order cannot be sustained, which has been passed on a wrong premise that the appointment of Mr. Abbas Bhai to act as an Administrator with the consent of the other legal heirs amounted to conferring on him, the power to deal with the property as his own and that in the permission to settle the property in favour of 4th respondent sought from the court, there was no need to take the views of other legal heirs. The result is that the impugned order must be set aside and consequently all actions taken in pursuance thereto.

37. Mr. Abbas Bhai is no more. The sole property left undistributed is part of the estate of Late Mrs. Batul Bai. It is not for us to opine how that property has now to be distributed or dealt with, but we are only specifying the character of the property and proceedings have to be initiated in accordance with law for dividing the undivided part of the estate of Late Mrs. Batul Bai.

38. The appeal is accordingly allowed, leaving the parties to bear their own costs. Consequently, the connected miscellaneous petitions are closed.

-s/d-
Assistant Registrar

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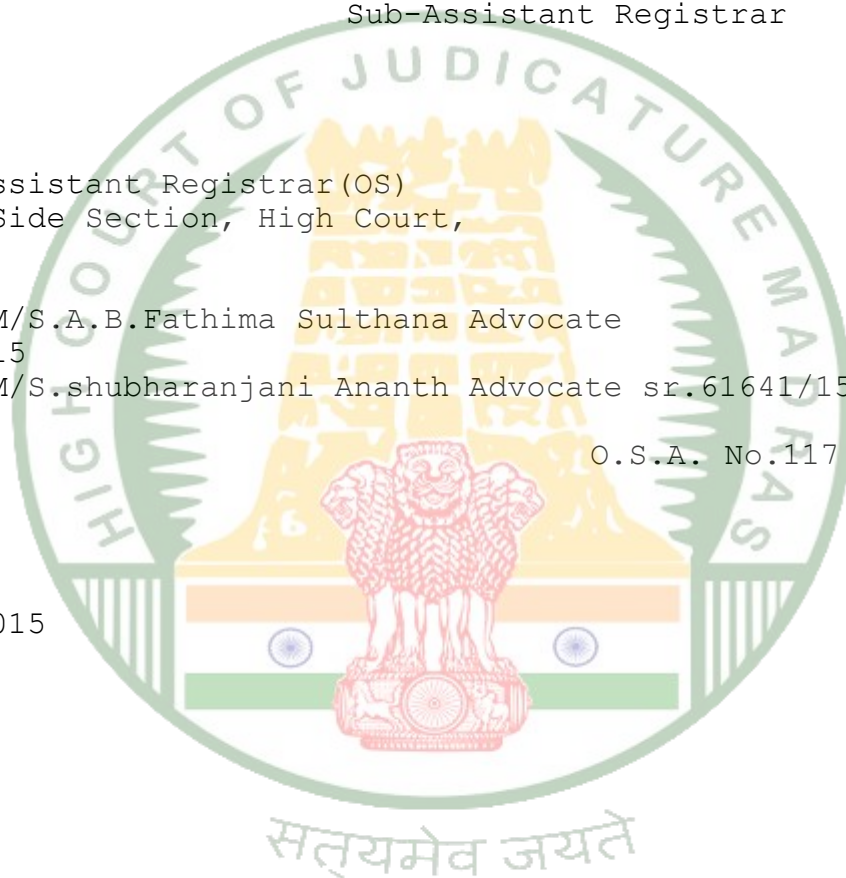
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