

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**CIVIL REVISION APPLICATION NO. 782 OF 2014
WITH
CIVIL APPLICAITONS NO. 267 OF 2016 AND 381 OF 2014
IN CRA/782/2014**

Mrs. Sarojini Shetti & Ors.

..Applicants

Vs

Sudha wd/o Mohan S. Vernekar
& Anr.

.. Respondents

Mr. K.J.Presswala, Senior Advocate a/w Mr. Sandeep Goyal i/b Mulla & Mulla & C.B.C., Advocates for Applicants.
Mr. G.S.Godbole, Senior Advocate i/b Rahul Mestry, Advocate for Respondents.

CORAM : R.G.KETKAR,J.
RESERVED ON : 04/07/2016
PRONOUNCED ON : 19/07/2016

PC:

1. Heard Mr. K.J.Presswala, learned senior counsel for the applicants and Mr. G.S.Godbole, learned senior counsel for the respondents at length.
2. By this application under Section 115 of the Code of Civil Procedure, 1908, (for short, 'C.P.C.'), the applicants, hereinafter referred to as 'defendants', have challenged the Judgment and decree dated 5.8.2005 passed by the learned Judge, Court Room No.32 of the Court of Small Causes at Mumbai, (Bandra Branch), in R.A.E. Suit No. 1598/4827 of 1985 as also the Judgment and decree dated 5.5.2014 passed by the Appellate Bench of the

Small Causes Court, Mumbai, (Bandra Branch), in A-1 Appeal No. 655 of 2005. By these orders, the Courts below decreed the suit instituted by the respondents, hereinafter referred to as 'plaintiffs', under Section 13(1)(g) and 13 (1)(l) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (for short, "Act").

3. Civil Application No.267 of 2016 is taken out by the defendants for amending the Civil Revision Application as set out in Schedule. In the Schedule, the defendants intend to add paragraphs 7A to 7D. By paragraph 7A, the defendants contend that they came across public notice dated 4.8.1912 and came to know that Ms. Jyotsna Ashok Vernekar was claiming to be the owner of the property whereas in the plaint the plaintiff's wife Sudha and son Ashok were claiming to be owners of the property. The defendants made inquiries and came to know about pendency of Arbitration petition (L) No.1654 of 2015 filed on 19.8.2015 between Jyotsna Ashok Vernekar and others and one Avishkar Concreal Private Ltd. The Award made therein disclosed that original plaintiff Mohan Shankar Vernekar had bequeathed the property to Jyotsna Ashok Vernekar by his Will dated 16.11.1999. This Court had issued a probate on 6.11.2009.

4. By paragraph 7B, the defendants want to contend that original plaintiff had bequeathed the building known as as

'Ashokdeep' at N.C. Acharya Marg, Chembur, Mumbai where the suit premises is situate in favour of his daughter in law Jyotsna Ashok Vernekar and that Ashok and Jyotsna were appointed as executors of the Will.

5. By paragraph 7C, it is contended that the decision of the trial Court dated 5.8.2005 is materially affected. By paragraph 7D, it is contended that plaintiff no.2 Sudha, widow of original plaintiff, had no right to carry on with the suit, as she was not a legal representative and his son Ashok Mohan Vernekar as the legal representative had right to carry on the suit. Though Ashok was substituted as plaintiff in the place of his deceased father, the fact of original plaintiff executing the Will and appointing him and his wife Jyotsna as executors, was suppressed. The trial Court in ignorance thereof decreed the suit which was in clear breach of Section 213 of the Indian Succession Act, 1925 (for short, 'Succession Act'). Section 213 of the Succession Act lays down that no right as executors or legatee can be established in any court of justice, unless the court of competent jurisdiction in India had granted probate of the Will.

6. By the proposed amendments, the defendants want to incorporate ground E-1 after ground E and intend to add prayer clause (b)(i) after prayer clause (b).

7. On behalf of the plaintiffs, Tanna Vernekar has filed affidavit

in reply dated 18.4.2016. In paragraph 6, it is asserted that it is an admitted position that Ashok Mohan Vernekar has been collecting rent and issuing rent receipts in respect of tenements of the suit property to all the occupants of the suit property. He is, therefore, a landlord as per the definition enumerated in Section 5(3) of the Bombay Rent Act and Section 7(3) of the Maharashtra Rent Control Act.

8. As Civil Revision Application is pending admission, Civil Application for amendment is allowed. As far as Civil Application No.381 of 2014 for production of additional evidence is concerned, I will deal with the application separately.

9. In support of this Application, Mr. Presswala strenuously contended that in view of section 213 of the Succession Act, the learned trial Judge could not have passed a decree in favour of the plaintiffs. In support of this proposition, he relied upon the following decisions:

- (i) Kiran Singh V. Chaman Paswan, A.I.R. 1954 S.C. 340;
- (ii) Mrs Hem Nolini Judah Vs. Mrs Isolyne Sarojbashini Bose, AIR 1962 SC 1471;
- (iii) Ramniklal Amritlal Shah V Bhupendra Impex Pvt Ltd, AIR 2001 Bombay 224;
- (iv) Sarwan Kumar Vs. Madanlal Aggarwal, (2003) 4 Supreme Court Cases 147.

Relying upon the aforesaid decisions, Mr. Presswala submitted

that bar under Section 213 of the Succession Act is against passing of the decree without a probate certificate. In short, he submitted that the learned trial Judge could not have passed a decree in favour of the plaintiffs and the said decree is nullity and is not executable.

10. On the other hand, Mr. Godbole supported the impugned orders. Mr. Godbole submitted that the suit was instituted in the year 1985 by original plaintiff Mohan Vernekar. Relationship of landlord and tenant is not disputed. He invited my attention to Section 28 of the Bombay Rent Act to contend that the suit was instituted in the Small Causes Court by a landlord against the tenant. During the pendency of the suit, original plaintiff Mohan Shankar Vernekar died on 21.1.2000 leaving behind his widow Sudha- Mohan Vernekar-plaintiff no.1 and son Ashok Mohan Vernekar- plaintiff no.2. He had executed Will on 16.11.1999 bequeathing the building where the suit premises is situate in favour of his daughter-in-law Jyotsna who is wife of plaintiff no.2 Ashok. The suit was decreed on 5.8.2005 and probate was granted by this Court on 6.11.2009.

11. He submitted that it is not disputed that original plaintiff Mohan had appointed Jyotsna Ashok Vernekar and Ashok Vernekar as executors of his Will. The Appeal preferred by the defendants was dismissed on 8.5.2014 and the decree passed by

the trial Court on 5.8.2005 merged in the Appeal Court's decree. He submitted that in any case bar under section 213 of the Succession Act will not be applicable before the appellate court.

12. Without prejudice to this submission, he submitted that it is admitted position that plaintiff no.2 Ashok was collecting rent from all the occupants of the building and this fact is specifically set out in paragraph 6 of the reply dated 18.4.2016 in Civil Application No.267 of 2015. As plaintiff no.2 Ashok has been collecting rent and issuing rent receipts, he falls in the expression of 'landlord' as defined under section 5(3) of the Bombay Rent Act. He also relied upon Order 22 Rule 4 of C.P.C. Mr. Godbole relied upon the decision of the Apex Court in FGP Ltd Vs. Saleh Hooseini Doctor (2009) 10 Supreme Court Cases 223 and in particular paragraphs 46 to 53 thereof.

13. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. Before I proceed with the matter, I must record that Mr. Presswala has not challenged the findings recorded by the Courts below on merits of the case. He fairly stated that these findings are recorded after appreciating the evidence on record. Thus, the controversy in this Application revolves around construction of Section 213 of the Succession Act.

14. It is not in dispute that original plaintiff Mohan Vernekar had instituted the suit against the defendants. After his death, his widow was brought on record as plaintiff no.1 and his son Ashok Vernekar is brought on record as plaintiff no.2. It is also an admitted position that plaintiff no.2 Ashok Vernekar was collecting rent from all the occupants as set out in paragraph 6 of the reply dated 18.4.2016 in Civil Application No. 267 of 2015. The Courts below have decreed the suit under section 13(1)(l) and 13(1)(g) of the Act. Mr. Presswala submitted that in view of Section 213 of the Succession Act, the learned trial Judge could not have passed a decree in favour of the plaintiffs. Sections 211 and 213 read thus:

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

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

“213. Right as executor or legatee when established.—

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

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

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

(ii) in the case of Wills made by any Parsi dying, after the commencement of the Indian Succession (Amendment) Act, 1962 (16 of 1962), where such Wills are made within the local limits of the ordinary original civil jurisdiction of the High Courts at Calcutta, Madras and Bombay, and where such Wills are made outside those limits, in so far as they relate to immoveable property situated within those limits.”

15. Section 211 lays down 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. Section 213 lays down that no right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in India has granted probate of the Will under which the right is claimed, or has granted letters of administration with the Will or with a copy of an authenticated copy of the Will annexed.

16. In FGP Limited (supra), the Apex Court has observed in paragraphs 46 to 53 thus:

“46. In this connection, we must see the distinction between Sections 211 and 213 of the Indian Succession Act. Under Section 211 of the said Act, 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. Here the legal

representatives will have the same meaning as has been given in Section 2(11) of the Code of Civil Procedure. Section 2(11) of the Code of Civil Procedure provides as under:

“2.(11) “legal representative” means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.”

47. Therefore, it is Section 211 and not Section 213 that deals with the vesting of property. This vesting does not take place as a result of probate. On the executor's accepting his office, the property vests on him and executor derives his title from the Will and becomes the representative of the deceased even without obtaining probate. The grant of probate does not give title to the executor. It just makes his title certain.

48. Under Section 213, the grant of probate is not a condition precedent to the filing of a suit in order to claim a right as an executor under the will. This vesting of right is enough for the executor or administrator to represent the estate in a legal proceeding.

49. It has been held in *Kulwanta Bewa v. Karam Chand Soni* reported in AIR 1938 Calcutta 714 that the whole scheme of the Act is to provide for the representation of the deceased's estate for the purpose of administration. That vesting is not only for the beneficial interest in the property but is also for the purposes of representation

50. Similarly, it has been held in *Meyappa Chetty v. Supramanian Chetty* (1915-16) 43 IA 113, that an executor derives his title from the Will and not from the probate and the right of action in respect of personal property of the testator vests in the executor on the death of the testator.

51. But Section 213 operates in a different field. Section 213 enjoins that rights under the Will by executor or a legatee cannot be established unless probate or letters of administration are obtained. Therefore, Section 211 and Section 213 of the said Act have different areas of operation.

52. Even if THE Will is not probated that does not prevent the vesting of the property of the deceased on the executor/administrator and consequently any right of action to represent the estate of the executor can be initiated even before the grant of the probate.

53. Similar opinion has been expressed by this Court in Commissioner, Jalandhar Division and Ors. v. Mohan Krishan Abrol and Anr (2004) 7 SCC 505 (See para 10 at page 513). So the suit filed by the respondents as executors is also maintainable.”

17. In paragraph 46, the Apex Court referred to Section 211 and observed that the legal representatives will have the same meaning as has been given in Section 2(11) of C.P.C.

18. In paragraph 47, it is observed that Section 211 and not Section 213 deals with the vesting of property. Vesting does not take place as a result of probate. On the executor's accepting his office, the property vests on him and executor derives his title from the Will and becomes the representative of the deceased even without obtaining probate. The grant of probate does not give title to the executor. It just makes his title certain. In paragraph 48, the Apex Court observed that under Section 213, the grant of probate is not a condition precedent to the filing of a suit in order to claim a right as an executor under the will. This vesting of right is enough for the executor or administrator to represent the estate in a legal proceeding. In paragraph 51, the Apex Court observed that Section 213 operates in a different

field. Section 213 enjoins that rights under the Will by executor or a legatee cannot be established unless probate or letters of administration is obtained. Section 211 and Section 213 of the said Act have different areas of operation. Thus, in view of Section 211 of C.P.C., I do not find any merit in the submission of Mr. Presswala.

19. Even otherwise, on plain reading of Section 213, it is evident that **no right as executor or legatee can be established in any Court of Justice**, unless a Court of competent jurisdiction in India has granted probate of the Will under which the right is claimed, or has granted letters of administration with the Will or with a copy of an authenticated copy of the Will annexed.

20. Mr. Presswala submitted that original plaintiff Mohan Vernekar died on 21.1.2000. He had executed Will on 16.11.1999. The probate was granted by this Court on 6.11.2009. Plaintiffs suppressed that original plaintiff Mohan Vernekar had executed Will on 16.11.1999. Original plaintiff had appointed Jyotsna Ashok Vernekar and Ashok Vernekar as executors of the Will. He, therefore, submitted that in view of bar under section 213, the trial Court could not have passed the decree. He relied upon the decisions referred in paragraph 9.

21. As noted earlier, original plaintiff died on 21.1.2000 leaving

behind his widow, plaintiff no.1 Sudha Vernekar and his son plaintiff no.2 Ashok Vernekar. Even under the Hindu Succession Act, 1956, they are heirs of the original plaintiff. It is also admitted position that plaintiff no.2 Ashok Vernekar was collecting rent from the occupants of the building. He, therefore, satisfies the requirement laid down section 5(3) of the Bombay Rent Act which defines the expression 'landlord'. In view of Section 211 of Succession Act being executor of the Will, he is a legal representative of original plaintiff Mohan Vernekar for all purposes and all the property of the deceased Mohan Vernekar vests in plaintiff no.2 Ashok Vernekar.

22. In any case, plaintiff no.2 was not asserting his right as executor of the Will of the deceased Mohan Vernekar while prosecuting the suit. That apart, when the Appeal was decided on 8.5.2014, admittedly, by that time probate was granted by this Court on 6.11.2009. It is not disputed that the original plaintiff had appointed Jyotsna Vernekar and Ashok Vernekar as executors of the Will. I, therefore, do not find any merit in the submission of Mr. Presswala based on Section 213 of the Succession Act.

23. Mr. Presswal also relied upon the decision of the Apex Court in the case of Kiran Singh (supra). In that case, appellants had instituted suit in the Court of the Subordinate Judge, Monghyr for

recovery of possession of certain lands, of which defendants no. 12 and 13 forming the second party were proprietors. The plaintiffs alleged that they were admitted by the second party as occupancy tenants on payment of a sum of Rs. 1,950/- as salami and put into possession of those lands. The first party consisting of defendants no. 1 to 11 trespassed on them and carried away the crops. The suit was instituted for ejecting defendants no. 1 to 11 and for mesne profits, past and future. It was valued at Rs. 2,950/-, made up of Rs. 1,950/- being the value of the relief for possession and Rs. 1000/- being the past mesne profits claimed. It is relevant to note at this stage that the defendants did not raise objection on the ground of pecuniary jurisdiction. The learned trial Judge dismissed the suit. The plaintiffs preferred appeal before the Court of District Judge, Monghyr who also dismissed the appeal. The plaintiffs preferred second appeal in the High Court Patna. Objection was taken for the first time by the Stamp Reporter to the valuation in the plaint and after inquiry, the Court determined that the correct valuation of the suit was Rs. 9980/-. The plaintiffs, therefore, contended that the appeal from the decree of the Subordinate Judge would lie not to the District Court but to the High Court and, therefore, request was made for treating the Second Appeal as First Appeal by the High Court. The Apex Court considered whether any prejudice

was caused to the plaintiffs and observed in paragraph 16 thus:

“16. We have now to see whether the appellants have suffered any prejudice by reason of the under-valuation. They were the plaintiff in the action. They valued the suit at Rs. 2,950. The defendants raised no objection to the jurisdiction of the Court at any time. When the plaintiffs lost the suit after an elaborate trial, it is they who appealed to the District Court as they were bound to, on their valuation. Even there, the defendants took no objection to the jurisdiction of the District Court to hear the appeal. When the decision went on the merits against the plaintiffs, they preferred S.A. No. 1152 of 1946 to the High Court of Patna, and if the Stamp Reporter had not raised the objection to the valuation and to the Court-fee paid, the plaintiffs would not have challenged the jurisdiction of the District Court to hear the appeal. It would be an unfortunate state of the law, if the plaintiffs who initiated proceedings in a Court of their own choice could subsequently turn round and question its jurisdiction on the ground of an error in valuation which was their own. If the law were that the decree of a Court which would have had no jurisdiction over the suit or appeal but for the over-valuation or under-valuation should be treated as a nullity, then of course, they would not be estopped from setting up want of jurisdiction in the Court by the fact of their having themselves invoked it. That, however, is not the position under section 11 of the Suits Valuation Act. Why then should the plaintiffs be allowed to resile from the position taken up by them to the prejudice of their opponents, who had acquiesced therein?”

24. In my opinion, the said decision is not applicable to the facts of the present case. It cannot be said that the decree passed by the learned trial Judge was a nullity.

25. Mr. Presswala relied upon the decision of Mrs. Hem Nolini Judah (*supra*). In that case, the respondent-plaintiff had instituted suit for declaration that she was the owner of house No.195 Ghasiari mandi Road, Lucknow or in the alternative a declaration

that she was the owner of two thirds of the house. The said house originally belonged to Dr. Miss Mitter who died in July, 1925 leaving behind her three sisters, namely, (1) the appellant Mrs Judah, (2) the plaintiff-respondent, (3) Mrs Momin and her mother Mrs Mitter. The plaintiff came with the case that Dr. Miss Mitter had made a will in favour of Mrs Momin in April 1921 by which she bequeathed the whole house to her. Mrs Momin in turn made a gift of the house to the plaintiff who thus became the owner of the said house. The defence of the appellant on the other hand was that Dr. Miss Mitter had executed a Will in June 1925 bequeathing the said house to her mother Mrs Mitter. Subsequently, the mother made a Will in favour of the appellant in April 1930. It is relevant to note at this juncture itself that no probates of the two alleged Wills by Dr. Miss Mitter of April 1921 and June 1925 were taken out.

26. Mrs Mitter died in 1934. On her death three Wills alleged to have been made by her were propounded one in favour of each of her three daughters, namely, petitioner-plaintiff Mrs Bose, Appellant Mrs Judah and Mrs Momin. Applications for letters of administration were made by the three sisters on that basis. Three Wills propounded by the three sisters also included the house in dispute. Letters of administration were granted to the appellant while the applications of Mrs Bose and Mrs Momin were

dismissed. This was followed by appeals to the then Chief Court of Oudh. Appeals preferred by Mrs Bose and Mrs Momin were dismissed. The said order attained finality. The Chief Court allowed the appeal against the grant of letters of administration to the appellant and dismissed her application also. The Privy Council set aside the order of the Chief Court and restored that of the trial Court granting letters of administration to the appellant.

27. In the trial Court, the respondent-plaintiff gave up her case based on the Will of Dr. Miss Mitter and only pressed her alternative prayer for a declaration that she was entitled to two thirds of the house. The learned trial Judge held that the appellant was entitled to the house by virtue of letters of administration granted to her of Mrs Mitter's Will. It repelled the contention of the respondent-plaintiff that as no letters of administration were taken out of the Will of Dr. Miss Mitter in favour of Mrs Mitter, no right to the house could be established by the appellant on the basis of the letters of administration granted to her. The learned trial Judge also held that the suit was barred by the principles of res judicata and estoppel and accordingly dismissed the suit.

28. The respondent-plaintiff preferred appeal in the High Court. The main contention raised on behalf of the respondent before the High Court was that in view of Section 213 of the Succession

Act, the appellant could not claim any right to the house in dispute as the Will of Dr. Miss Mitter in favour of her mother was neither probated nor letters of administration were obtained with respect thereto. The High Court accepted this contention and also negatived the other contentions raised on behalf of the appellant and allowed the appeal in part. The High Court pointed out that on the death of Dr. Miss Mitter her three sisters and mother were alive and they were entitled equally to the property left by her. But as the share of Mrs Mitter must be deemed to have been willed away to the appellant and as the share of Mrs Momin must be deemed to have been gifted to the respondent-plaintiff, the plaintiff was entitled to half share in the house in dispute.

29. The Apex Court reproduced Section 213 (1) and observed in paragraph 7 thus:

“ This section clearly creates a bar to the establishment of any right under a will by an executor or a legatee unless probate or letters of administration of the will have been obtained. It is now well-settled that it is immaterial whether the right under the will is claimed as a plaintiff or a defendant; In either case s. 213 will be a bar to 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 : (see *Ghanshamdoss v. Gulab Bi Bai*) I.L.R. (1927) Mad. 927 (F.B.). But it is urged on behalf of the appellant that this section will not bar her because she obtained letters of administration of the will of her mother Mrs. Mitter under which she is claiming and that it was not necessary for Mrs. Mitter to have obtained probate of the will of Dr. Miss Mitter

in her favour. Now it is not in dispute that the grant of probate or letters of administration does not establish that the person making the will was the owner of the property which he may have given away by the will, and any person interested in the property included in the will can always file a suit to establish his right to the property to the exclusion of the testator in spite of the grant of probate or letters of administration to the legatee or the executor, the reason being that proceedings for probate or letters of administration are not concerned with titles to property but are only concerned with the due execution of the will. Therefore, when the plaintiff respondent contended in effect that the appellant could not establish her right to the full ownership of this property on the basis of the will of Mrs. Mitter because Mrs. Mitter had not obtained probate or letters of administration of the will of Dr. Miss Mitter, she was really contending that Mrs. Mitter was not the full owner of this property so that she could dispose it of as she willed. The plaintiff-respondent was thus disputing the title of Mrs. Mitter to dispose of the entire disputed house by her will on the ground that Mrs. Mitter was not the sole owner of this house after the death of Dr. Miss Mitter. In order therefore that the appellant should succeed on the basis of the letters of administration of the will of Mrs. Mitter which had been granted to her with respect to this house, she had to show that Mrs. Mitter was the full owner of this house at the time she made the will in her favour. Now the appellant could show this by other evidence; but if the appellant wanted to rely on any will of Dr. Miss Mitter in favour of Mrs. Mitter, in proof of full ownership of Mrs. Mitter of this house, it would amount to this that the appellant was saying that Mrs. Mitter was the owner of the house as the legatee under the will made by Dr. Miss Mitter. The appellant would thus be asserting the ownership of Mrs. Mitter of the whole house as a legatee, and this is what sub-s. (1) of s. 213 clearly forbids, for it says that no right as a legatee can be established in a Court of Justice, unless the probate or letters of administration have been obtained of the will under which the right as a legatee is claimed. It is true that so far as the will of Mrs. Mitter in favour of the appellant is concerned, she has obtained letters of administration of that and she can maintain her right as a legatee under that will; but that will in her favour only gives her those properties which really and truly belonged to Mrs. Mitter, that will however does not create title in the appellant in properties

which did not really and truly belong to Mrs. Mitter but which Mrs. Mitter might have thought it fit to include in the will. Therefore, as soon as the appellant, in order to succeed on the basis of the will in her favour of which she obtained letters of administration, alleges that Mrs. Mitter was full owner of the property able to will it away to her, she had to prove the title of Mrs. Mitter to the property. Now if that title rests on Mrs. Mitter's being legatee of Dr. Miss Mitter the appellant will have to prove that Mrs. Mitter had the right as a legatee under the will of Dr. Miss Mitter. As soon as the appellant wants to prove that, S. 213 will immediately stand in her way for no right as an executor or a legatee can be proved unless probate or letters of administration of the will under which such right is claimed have been obtained. The words of S. 213 are not restricted only to those cases where the claim is made by a person directly claiming as legatee. The section does not say that no person can claim as a legatee or as an executor unless he obtains probate or letters of administration of the will under which he claims. What it says is that no right as an executor or legatee can be established in any Court of Justice, unless probate or letters of administration have been obtained of the will under which the right is claimed, and therefore it is immaterial who wishes to establish the right as a legatee or an executor. Whosoever wishes to establish that right, whether it be a legatee or an executor himself or somebody else who might find it necessary in order to establish his right to establish the right of some legatee or executor from whom he might derive title, he cannot do so unless the will under which the right as a legatee or executor is claimed has resulted in the grant of a probate or letters of administration. Therefore, as soon as the appellant wanted to establish that Mrs. Mitter was the legatee of Dr. Miss Mitter and was therefore entitled to the whole house she could only do so if the will of Dr. Miss Mitter in favour of Mrs. Mitter had resulted in the grant of probate or letters of administration. Admittedly that did not happen and therefore s. 213(1) would be a bar to the appellant showing that her mother was the full owner of the property by virtue of the will made in her favour by Dr. Miss Mitter. The difference between a right claimed as a legatee under a will and a right which might arise otherwise is clear in this very case. The right under the will which was claimed that Mrs. Mitter became the owner of the entire house. Of course, without the will Mrs. Mitter was an equal heir with her

daughters of the property left by Dr. Miss Mitter, as the latter would be taken to have died intestate, and would thus be entitled to one-fourth. It will be seen from the judgment of the High Court that it has held that the appellant is entitled to the one-fourth share to which Mrs. Mitter was entitled as an heir to Dr. Miss Mitter and granted the plaintiff-respondent a declaration with respect to only half the house. Therefore, the High Court was right in holding that s. 213 would bar the appellant from establishing the right of her mother as a legatee from Dr. Miss Mitter as no probate or letters of administration had been obtained of the alleged will of Dr. Miss Mitter in favour of Mrs. Mitter. The contention of the appellant on this head must therefore fail."

In my opinion, the said decision has no application to the facts of the present case. As noted earlier, after the death of the original plaintiff Mohan Vernekar, his widow Sudha Vernekar and his son Ashok Vernekar were brought on record as plaintiffs no.1 and 2 as heirs and legal representatives of the deceased. In other words, plaintiff no.2 Ashok vernekar was not enforcing his right as an executor of the Will of the deceased Mohan Vernekar.

30. Mr. Presswala relied upon the decision of this Court in the case of Ramnikal Amritlal Shah (supra). The Division Bench of this Court considered the decision of the Apex Court in Mrs. Hem Nolini Judah case (supra). After considering that decision, the Division Bench observed thus:

"In our view, the Supreme Court in this judgment has distinguished laying claim as an executor or a legatee from establishing the right as a legatee or an executor. A reading of the judgment does not even remotely suggest that a suit brought in the capacity of legatee or executor would fall

unless the probate certificate is filed with it. Nor does it suggest, as Mr. Doctor does, that where a person is brought on record as an executor to represent the estate of a deceased plaintiff, unless he produces a probate certificate, the suit must be held to have abated. We are, therefore, of the view that section 213 is merely a bar to a person "establishing" his right as an executor or legatee in an action. This does not suggest that the said person cannot claim the capacity of executor or legatee so long as he is able to produce the probate certificate before the actual decree is passed. In other words, the bar is really one against the passing of a decree without a probate certificate and not the entertainment of the suit itself."

31. The Division Bench held that Section 213 is merely a bar to a person "establishing" his right as an executor or legatee in an action. In my opinion, even this judgment is not applicable for the reasons already indicated.

32. Mr. Presswala relied upon the decision of the Apex Court in Sarwan Kumar (supra). In that case, question that really fell for consideration was whether a decree for ejectment passed by a civil court qua a commercial tenancy in the State of Delhi before the declaration of law by the Supreme Court in Gian Devi Anand V. Jeevan Kumar, (1985) 2 SCC 683 that such a tenancy is heritable, is executable or the judgment debtors can successfully object to the execution of the decree on the ground that the same was passed by a court lacking inherent jurisdiction and was therefore inexecutable. Mr. Presswala relied upon this decision to contend that the decree passed by the trial Court is

nullity as the Trial Court lacked inherent jurisdiction and decree is not executable. I do not find that the said decision advances the case of the defendant. In the present case, it cannot be said that the decree passed by the trial Court is inexecutable on the ground that it is nullity. At the costs of repetition, plaintiff no.2 Ashok Vernekar was not enforcing his right as an executor of the Will executed by deceased Mohan Vernekar.

33. That apart, as held by the Apex Court in the case of FGP Limited (supra), plaintiff no.2-Ashok Vernekar is a legal representative of deceased Mohan Vernekar. Section 211 and not Section 213 deals with the vesting of property. Vesting does not take place as a result of probate. On the executors accepting his office, the property vests on him and the executor derives his title from the Will and becomes representative of the deceased even without obtaining probate. In view thereof, I do not find any merit in the submission of Mr. Presswala based on Section 213 of the Succession Act.

34. In the light of the aforesaid discussion, I do not find that in view of Section 213 of Succession Act, the decree passed by the trial Court is nullity and, therefore, is inexecutable. No other contention was raised. Hence, Application fails and the same is dismissed.

35. At this stage, Mr. Presswala orally applies for stay of this order for a period of eight weeks from today. He states that the applicants are in possession and nobody else is in possession. The applicants have neither created third party interest nor parted with the possession. They will hereafter neither create third party interest nor part with possession and will deposit the arrears of rent, if any, in this Court within two weeks from today.

36. In view thereof, notwithstanding dismissal of Civil Revision Application, this order shall remain stayed for a period of eight weeks from today, subject to the applicants and all the adult family members residing in the suit premises filing undertaking in this Court within two weeks from today with advance copy to other side, incorporating therein :

- (i) that they are in actual possession of the suit premises and nobody else is in possession;
- (ii) that they have so far neither created third party interest nor parted with the possession of the suit premises;
- (iii) that they will hereafter neither create third party

interest nor part with the possession of the suit premises;

(iv) that they will deposit the arrears of rent, if any, in this Court within two weeks from today; and

(v) that in case the applicants are unable to obtain suitable orders within eight weeks from today from the higher Court, they will deliver vacant and peaceful possession of the suit premises to the respondents.

In case the applicants do not file undertaking in the above terms and/or arrears of rent, if any, are not deposited in this Court within two weeks from today, the interim order shall stand vacated without further reference to the Court.

37. List the application for reporting compliance after three weeks. Order accordingly.

(R.G.ketkar, J.)