

IN THE HIGH COURT OF JUDICATURE AT MADRASRESERVED ON : **19.07.2017**DELIVERED ON : **13.09.2017**

Coram

The Honourable **Mr.Justice RAJIV SHAKDHER**

and

The Honourable **Mr.Justice ABDUL QUDDHOSE****Original Side Appeal No.47 of 2017**
and C.M.P.No.4063 of 2017

G.Paras Singh Munoth

.. Appellant

Vs.

1. P.Gyanlatha

2. M/s.Sindu Buildings Equipments Limited,
31, (Old No.15), First Floor,
North Usman Road,
Chennai-600 017.

3. S.Ganesh

... Respondents

* * *

Prayer : Appeal filed under Order XXXVI Rule 1 of Original Side Rules read with Clause 15 of the Letters Patent, against the order dated 11.01.2016, in Application No.8355 of 2016 in T.O.S.No.12 of 2009, on the file of this Court.

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For Appellant : Mr.Raja Kalifulla, Senior Counsel
for M/s.Jayendra Krishnan

For Respondents : Mr.V.R.Thangavelu for R1

Mr.T.V.Ramanujan, Senior Counsel
for M/s.M.S.Murugesan for RR2 and 3

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J U D G E M E N T**Preface**

1. This is an appeal directed against the judgement and order dated 11.01.2016, passed in Application No.8355 of 2014, preferred in T.O.S.No.12 of 2009.

1.1. By virtue of the impugned judgement and order, Application No.8354 of 2014, was also disposed of.

1.2. In so far as Application No.8355 of 2014 is concerned, that application was filed to seek revocation of the probate granted by the Court, of Will dated 14.07.1986 (July, 1986 Will), vide order dated 30.04.2014, while Application No.8354 of 2014, was preferred to seek stay of all further proceedings which would follow the grant of probate.

2. The appellant before this Court is the brother-in-law of the deceased testator and the brother of respondent No.1. Respondent No.2 is the company, in which, respondent No.3 has been appointed, as the Director. More importantly, respondent No.2 and 3 are transferees of immovable property, over which, right, title and interest are claimed by them, by virtue of two separate registered sale deeds of even date, i.e., 06.02.2009. Importantly, these sale deeds have been numbered as document No.492 of 2009 and 493 of 2009.

2.1. It is pertinent to note, at this stage itself, that the appellant has been named as the Executor in the July, 1986 Will, and therefore, in that capacity, he had sought and obtained a judgement and decree dated 30.04.2014, whereby, the July, 1986 Will was probated.

2.2. Respondent Nos.2 and 3, who claim that they have interest in the estate of the testator, had filed the aforementioned applications for revocation of probate and stay of all further proceedings that would follow the grant of probate.

2.3. The application for revocation of probate was filed under Section 263 of the Indian Succession Act, 1925, (in short, "1925 Act").

3. The main issue, which arises for consideration, before us, is as to whether there subsisted "just cause" for the Court to revoke the July, 1986 Will ?

4. The appellant, as would be obvious, resisted the revocation of the July, 1986 Will, on the ground that respondent No.2 and 3 did not have a caveatable interest or for that matter any interest whatsoever to seek its revocation. In this stand taken by the appellant, respondent No.1 is one with the appellant.

4.1. Respondent No.1, as the record and our discussion would show, changed her position from someone, who first opposed the appellant and has now, in a sense, walked into the camp of the appellant and joined him in resisting and rebutting the stand taken by respondent Nos.2 and 3. As a matter of fact, it is respondent No.1, who has been instrumental in creating, if, one may say, respondent Nos.2 and 3's interest in the estate of the deceased testator.

Background Facts

5. Thus, before we proceed further, the following broad facts are required to be noticed :

5.1. The testator is one Mr.Parasmal Jain. He is said to have executed the July, 1986 Will. Parasmal Jain died on 11.08.1986. It appears that a lease agreement dated 05.01.2001, in respect of the immovable property ad-measuring 33,280 sq.ft., comprising of land and building, situate in Survey No.84 and 85 (parts), located in Velachery Village, bearing New Door No.21, (Old Door No.85A), Race Course Road, Guindy, Chennai-600 032 (in short, "the subject property), was executed between respondent No.1, on the one hand, and, one, Subbiah, and respondent No.3, i.e., S.Ganesh, on the other. This was followed with the aforementioned persons executing a Joint

Development Agreement, dated 08.02.2006, (in short, "JDA"), with respect to the subject property.

5.2. It appears that the nephews of Parasmal Jain, i.e., R.Anil Kumar, R.Sunil Kumar, R.Rajesh Kumar and R.Dinesh Kumar, who are the sons of his pre-deceased brother, got a whiff of the aforementioned JDA, and therefore, got a legal notice dated 06.06.2007, issued, via their Advocate. In the said legal notice, it was claimed that the aforementioned property was owned by them, subject to the life interest of their mother, one, Ms.Premalatha. It was further averred that the subject property was given in bequest to them via Will and Testament dated 31.05.1999, and Codicil dated 18.06.1999, by one, Ms.Sajjan Bai; their maternal grandmother. Ms.Sajjan Bai, who they claimed expired on 20.12.2004, was the mother of deceased testator, i.e., Parasmal Jain.

5.3. Respondent No.1 rebutted the claims made by the testator's nephews, vide her reply dated 11.06.2007. This reply was sent by her Advocates, albeit, on her instructions. In this reply, respondent No.1 claimed that she was the absolute owner of the subject property.

5.4. The manner, in which, she became the absolute owner of the subject property, was set out in the reply. Respondent No.1 went on to aver in the aforementioned letter dated 11.06.2007, that the

testator, i.e., her husband, and his mother Sajjan Bai had started a partnership business, in and about 1970. The partnership business was run under the name : Crystal Ice Company. According to her, the Deed of Partnership, dated 22.10.1970, bore this fact out. Respondent No.1 further averred that R.Anil Kumar and R.Sunil Kumar, who were minors, at that point in time, were admitted to the benefits of the partnership firm. Respondent No.1 also stated, that, though, the subject property was bought in the name of Sajjan Bai, the said property was used for the purposes of partnership business. This was sought to be substantiated by drawing attention to the fact that the address of the partnership business was the same as that of the subject property. Respondent No.1 further stated that the building set up thereon was erected by the partnership firm, and that, the plan was sanctioned in the name of the said firm. It was asserted that the property tax, and water and sewerage charges were paid all along by the partnership firm.

5.5. Respondent No.1 also averred that the partnership firm was dissolved vide a registered Deed of Dissolution dated 15.04.1974. This Dissolution Deed, according to respondent No.1, was executed between Sajjan Bai and the testator, i.e., Paramsal Jain. In the Dissolution Deed, according to her, it was specifically stated that the

subject property was treated as the property of the partnership firm, and accordingly, was mortgaged with Tamil Nadu Industrial Investment Corporation (in short, "TIIC"). Furthermore, as per respondent No.1, the Dissolution Deed also referred to the fact that the retiring partners, which included the minor partners, had received amounts, in full and final settlement of their share, albeit, prior to the execution of the Dissolution Deed. A reference was also made to a registered Release Deed of even date, i.e., 15.04.1974, which, apparently, was executed by Sajjan Bai. In sum, respondent No.1 claimed that the testator, i.e. her husband, had become the sole proprietor of Crystal Ice Company, and therefore, after his demise, in 1986, she became the absolute owner of the subject property.

5.6. Respondent No.1, emphatically, refuted the fact that Sajjan Bai had left any Will with respect to the subject property. It was also emphasised by her that, if, Sajjan Bai had left any Will, it would not only have alluded to the subject property, but also to another property situate at No.35, Pinjala Subramanian Street, T.Nagar, Chennai (in short, "T.Nagar property").

5.7. Respondent No.1 went on to aver that upon Sajjan Bai's death, she was prevailed upon by Messrs.R.Anil Kumar and others, to join in the execution of the sale deed, as the legal heir of the testator,

i.e., her husband, since, he had pre-deceased Sajjan Bai. Respondent No.1 claimed that the sale deed qua T.Nagar property was executed in October, 2006, and no part of the consideration received thereupon, had been paid to her.

5.8. Therefore, the stand of respondent No.1 was, as indicated above, that she was the absolute owner of the subject property, and that, she would not have been allowed to occupy the same for two (2) decades, if, there was a Will and / or Codicil executed by Sajjan Bai, as claimed by Messrs. R.Anil Kumar and others. More importantly, in this communication dated 11.06.2007, respondent No.1 had not referred to the July, 1986 Will.

5.9. The matter did not end there. The nephews of the testator, via their Advocates, sent a rejoinder dated 03.07.2007. This was followed by Advocates engaged by the nephews sending a notice dated 01.10.2007, to respondent No.1, in which, they informed her that in an yet to be numbered Original Petition (in short, "O.P."), filed to seek probate of the July, 1986 Will, they had moved an application (which was numbered as Application No.6053/2007), under Order 25, Rule 10 of the Original Side Rules of Madras High Court (in short, "O.S.Rules"), for issuance of a direction to her to produce the original of the July, 1986 Will. In the said notice, it was further stated that on 24.09.2007,

the learned Master of this Court had issued private notice, which was returnable on 29.10.2007. The Master's summons and the affidavit accompanying the same, seeking production of the July, 1986, Will, it appears, were also served on respondent No.1.

6. Respondent No.1 filed a reply to Application No.6053 of 2007, wherein, she took the following stand :

- (i).That in the unnumbered O.P., the appellant had sought probate of the Will, which was executed in 1986. (This was the O.P., which was subsequently, numbered as O.P.No.434 of 2008).
- (ii).That the appellant had not disclosed the facts and circumstances under which the original Will, purportedly, came to be placed in her custody.
- (iii).The Certified copy or the registered Will would show that it was executed in two counterparts, one of which was in the custody of the Executor i.e. the appellant, and the other was registered. The assertion that the original Will was in her custody, was false.
- (iv).That the appellant was fully aware that the July, 1986 Will, was not the testator's last Will and Testament.
- (v).That the appellant was also aware of the fact that the July, 1986 Will, was destroyed, as directed by the testator.

(vi).That the counsels, who were prosecuting the applications and the unnumbered Probate Petition, were the same counsels, who on behalf of the sons of the another brother of the testator, had served a legal notice dated 06.06.2007, on her, for handing over the subject property.

(vii).That since, the aforesaid attempt failed, the family had set up the appellant to seek the probate of July, 1986 Will, albeit, without the original, and that, the appellant, had come forward with the frivolous and vexatious claim to seek probate of the said Will at the behest of Messrs.R.Anil Kumar and others.

(viii).Therefore, the "needle of suspicion" would point to the appellant. In other words, the *bona fides* of the appellant in seeking probate of the July, 1986 Will, were suspect.

(ix).Respondent No.1, thus, sought revocation of the Probate Petition, as it was not accompanied by the original of the July, 1986 Will.

7. In and about July, 2008, the Probate Petition was as indicated above, numbered as O.P.No.434 of 2008. The prayer made in the said petition was to seek probate of the certified copy of the July, 1986 Will.

8. Since, respondent No.1 filed a counter affidavit in O.P. No.434 of 2008, resisting the prayer made therein, the said petition was converted into a Testamentary Suit. The suit was numbered as : T.O.S.No.12 of 2009. To be noted, a counter affidavit was filed by respondent No.1, on 11.08.2008. The aforesaid was followed by a Deed of Cancellation dated 04.02.2009, being executed vis-a-vis the JDA. Within two (2) days of the said event, on 06.02.2009, two sale deeds of even date, i.e., 06.02.2009, were executed by respondent No.1 in favour of respondent Nos.2 and 3.

9. Curiously, a case was attempted to be set up by the appellant then, and, now by respondent No.1 also, that a written statement was filed by respondent No.1 in the aforementioned suit in December, 2010, and since the written statement was not on record, on 24.06.2016, another written statement was filed by respondent No.1; which evidently, the Court took on record.

9.1. On the other hand the stand of respondent Nos.2 and 3 is that, respondent No.1 never filed a written statement in the first instance, and that, for the first time, a written statement was filed by her on 24.06.2016. This, of-course, is controverted both by the appellant and respondent No.1.

10. Interestingly, the appellant on his own sought to implead respondent Nos.2 and 3 in T.O.S.No.12 of 2009, by moving an application in that behalf. The application was moved in and about 2010. This application was numbered as: Application No.4971 of 2010. By an order dated 21.10.2010, the prayer made in the said application was allowed. Thus, respondent Nos.2 and 3 were arrayed as defendant No.2 and 3 respectively, in the Testamentary Suit.

10.1. However, at the stage of trial of the suit, the appellant, who is the plaintiff in the suit, gave up respondent No.2 and 3/defendant No.2 and 3 as parties to the suit, by making an endorsement to that effect on 12.02.2013. The Court, taking into account the endorsement, passed the following order on the very same date.

"The learned counsel appearing for the plaintiff submitted that D2 and D3 may be given up with liberty to file a fresh suit.

Heard the learned counsel appearing for the defendants.

The plaintiff is permitted to give (sic, "give") up D2 and D3. But the prayer sought for, to the effect that liberty may be given up to file a fresh suit as against D2 and D3 cannot be granted. Therefore, the suit is dismissed as against D2 and D3 as given

up.

It is reported that D1 has already filed change of vakalat and his name is not printed in the cause list. Therefore, the Registry is directed to print the name of new counsel for D1 in the cause list.

Post next week for framing issues."

10.2. As would be obvious upon perusal of the aforementioned order dated 12.02.2013, respondent Nos.2 and 3/defendant Nos.2 and 3 were represented by counsel.

11. It appears that in the testamentary proceedings, in support of his case, the appellant, apart from giving his own testimony, had cited two other witnesses, namely, Mr.Kishore Jain (P.W.2) and Mr.Prakash Jain (P.W.3). The testimony of the appellant, as P.W.1, and that of others (P.Ws.2 and 3) were recorded in April, 2013. In so far respondent No.1 was concerned, who at the relevant time, was the sole defendant, examined only herself. Respondent No.1 (i.e., D.W.1) deposed before the Court on 22.04.2013.

12. Based on the material on record and the testimonies of witnesses, which included P.W.1 to P.W.3 and D.W.1, the Probate Court passed a judgement and decree dated 30.04.2014 in T.O.S.No.12 of 2009.

13. It is, thereafter, that respondent Nos.2 and 3 filed two applications, to which, we have made a reference above, i.e., Application Nos.8354 of 2014 and 8355 of 2014, seeking a stay of all further proceedings following the grant of probate vide judgement and decree dated 30.04.2014 and the revocation of Probate which they claimed was granted behind their back. These applications were filed in and about December, 2014.

14. As indicated at the outset, the applications were allowed, vide, the impugned order and decree dated 11.01.2016. Post, the passing of the impugned order and decree, respondent No.2 and 3, who are now arrayed as defendant No.2 and 3, it appears, filed their written statement in T.O.S.No.12 of 2009, albeit, on 25.01.2016.

15. Respondent No.1/defendant No.1, as indicated above, filed her written statement on 24.06.2016, with an application for condonation of delay and an application to seek permission to bring the written statement on record. These applications are numbered as : Application Nos.4983 of 2016 and 3097 of 2016 respectively.

16. On 18.10.2016, the aforementioned applications were allowed. The Court condoned the delay and received the written statement filed by respondent No.1/defendant No.1. Respondent No.2 and 3 further filed two applications, being A.Nos.6201 and 6202 of 2016 in T.O.S.No.12 of 2009. By these applications, respondent No.2 and 3 not only sought clarification of the order dated 18.10.2016, but also prayed for framing of an additional issue. Qua, these applications the respondent No.1 filed a common counter affidavit dated 30.11.2016.

16.1. The A.No.6201 of 2016 was disposed of vide order dated 02.12.2016. The learned Judge, clarified as prayed by respondent No.2 and 3 that they would be entitled to cross examine P.Ws.1 to 3 and D.W.1. The relevant observations of the learned Judge read as follows:

"..... 7. In view of the above stated reasons, it is specifically clarified that P.Ws.1 to 3 and D.W.1 have to be cross-examined by applicants/defendants 2 and 3 and subject themselves also for cross examination by the other parties."

16.2. The rationale for passing the said direction, it seems, is rooted in the order dated 11.01.2016, whereby the probate granted earlier stood revoked.

16.3 It is, in this background that the appellant, being aggrieved by the impugned order and decree dated 11.01.2016, has preferred the instant appeal.

Submissions of Counsels :

17. On behalf of the appellants, arguments were advanced by Mr.Raja Kalifulla, learned senior advocate, instructed by Mr.Jayendrkrishnan, while, Mr.V.R.Thangavelu, advocate, advanced arguments on behalf of Respondent No.1. Mr.T.V.Ramanujan, learned senior counsel, instructed by Mr.M.S.Murugesan, made submissions on behalf of respondent No.2 and 3.

18. The submission made by Mr.Raja Kalifulla can, broadly, be paraphrased as follows:

(i) That the impugned judgement and decree was flawed for the reason that despite the fact that respondent No.2 and 3 had no caveatable interest, their application for revocation of probate granted vide judgement and order dated 30.04.2014, was allowed. The order was passed without any reference to Section 263 of the 1925 Act.

(ii) The learned Single Judge failed to note that respondent No.2 and 3, who had been given up as parties in the probate action - a fact

which was recorded in the order dated 12.02.2013, had raised no objection. The said order had become final inter se the parties. Respondent No.2 and 3, who had purchased the subject property during the pendency of the probate action, would have no caveatable interest and, hence, no locus standi to impugn the July, 1986 Will.

(iii) The respondent No.2 and 3 can get no better title than that which subsisted in the first respondent qua the subject property. Therefore, as a logical corollary, respondent No.2 and 3 cannot question the July, 1986 Will, as the genuineness of that Will had been accepted by respondent No.1. Respondent No.1 had neither any right nor did she intend to sell the subject property. Under the July, 1986 Will, respondent No.1 was given the right to only reside in the subject property. Respondent No.1 had no right to sell, mortgage or create any charge over the subject property.

(iv) The purported sale transaction entered into between respondent No.1 and respondent No.2 and 3 was not supported by any consideration. In this behalf, reference was made to the following extract obtaining in the two sale deeds of even date, i.e., 06.02.2009:

"..... (a) in consideration of Rs.2,68,70,800/- (Rupees two crores sixty eight lakhs, seventy thousand and eight hundred only) already paid / arranged for

payment by the purchaser to the Vendor between 01.07.2008 and 05.02.2009".

(b) "In consideration of Rs.1,14,18,750/- (Rupees One crore fourteen lakhs, eighteen thousand and seven hundred and fifty only), already paid / arranged for payment by the purchasers to the Vendor between 05.01.2006 and 05.02.2009."

(v) The charge that there was a collusion between the appellant and respondent No.1 was baseless. The appellant had proved the genuineness of the July, 1986 Will, by examining one of the attesting witness and, since, the other attesting witness had expired another witness was examined to establish the genuineness of the signature of the deceased attesting witness.

(vi) The fact that respondent No.2 and 3 had been impleaded at an earlier point in time would not lead to the assumption that they had a caveatable interest. The said respondents were impleaded only for the reason that they had commenced demolition of the subject property. That respondent No.2 and 3 did not have a caveatable interest was demonstrable from the fact that even though they were parties (at an earlier point in time) they had failed to file their written statement and/or objections for a period of more than three years.

(vii) Assuming without admitting that Mr.Parasmal Jain died intestate, respondent No.1 will only inherit half-share in the subject property, as on the date of his death his mother i.e. Ms.Sajjan Bai, was alive. The assumption being : that upon death of Ms.Sajjan Bai, in 2004, her share in the subject property devolved on the children of her pre-deceased younger son, one, Rishab Chand Jain. In other words, it was stated that Ms.Sajjan Bai's share would devolve on Messrs.Anil Kumar and others who were the children of the deceased Rishab Chand Jain under Section 15 of the Hindu Succession Act, 1956.

(vii)(a) In this behalf, our attention was also drawn to the fact that Mr.Anil Kumar and others, the children of Rishab Chand Jain were the ultimate beneficiaries under the July, 1986 Will.

(viii) Though respondent No.2 and 3 all along claimed that they had purchased the property for a valuable consideration, they had for the first time filed an affidavit in this Court - wherein, a stand has been taken that a sum of Rs.1,58,41,235/- was outstanding and payable to respondent No.1. This amount has been shown in the return filed by the respondent No.2 and 3 as unsecured loan.

(viii)(a) Respondent No.1 has taken the stand that the sale deeds were sham documents and were not supported by any

consideration, and that, she had only been paid a sum of Rs.50,000/- per month from March, 2009 towards rent and maintenance as agreed to under the JDA.

(viii)(b) Respondent No.1 has also taken the stand that until April 2012, she had no knowledge of the cancellation deed or the subject sale deeds. The respondent No.1 had no intention to sell the subject property.

(ix) That according to respondent No.1, the July, 1986 Will, was a genuine document.

(x) That respondent No.1 has further taken the stand that her Manager, one, Mr.Rajendran had colluded with respondent No.2 and 3.

9. On behalf of respondent No.1 Mr.V.R.Thangavelu, broadly, made the following submissions:

(i) The respondent No.2 and 3 had purchased a portion of the property covered under the July, 1986 Will, without paying any consideration. Respondent No.1 had no intention to convey the property under the aforementioned Will and that her intention was only to develop the property which was misused by respondent No.2 and 3 and Mr.Rajendran, who was assisting her in maintaining the property. Respondent No.1 did not have good relationship with her sisters or her

children who were the sole beneficiaries under the July, 1986 Will, because of which, she had to suffer. Respondent No.1 was, thus, exploited by Mr.Rajendran and others, that is, Respondent No.2 and 3.

(ii) Respondent No.2 and 3 having admitted that in respect of sale deed No.493 of 2009, a sum of Rs.1,58,41,235/- was due and payable, they cannot now seek revocation of the probate of the July, 1986 Will. Similarly, in respect of sale deed No.492 of 2009, since respondent No.2 and 3 have accepted that out of the total sale consideration of Rs.1,14,18,750/-, only a sum of Rs.72,68,750/- was paid, albeit, in cash, they cannot seek revocation of probate obtained in respect of the aforementioned Will. This apart, there is no conclusive proof of receipt of sums in cash by respondent No.1.

(iii) To demonstrate that sale consideration of Rs.1,14,18,750/- was not paid in respect of sale deed No.492 of 2009 the following was averred: that as per Annexure "A", out of the sale consideration of Rs.1,14,18,750/- a sum of Rs.8,53,560/- was paid to the account of respondent No.1, out of which, credit entries in respondent No.1's bank account were found only to the extent of Rs.5,03,560/-. Furthermore, as per the very same Annexure "A", a sum of Rs.32,46,440/- was paid into the account of Crystal Ice Company, out of which, credit entries in the bank account concerned was found only

to the extent of Rs.17,50,000/-. Thus, in effect, the amounts to the extent of Rs.3,50,000/- in the account of the respondent No.1 and Rs.14,96,440/- in the account of Crystal Ice Company were not reflected. Therefore, according to the counsel for respondent No.1, even as per the statement of accounts furnished to respondent No.2 and 3, there was a short payment in respect of sale deed No.492 of 2009.

(iv). The plea of respondent No.2 and 3 that they had interest in the estate of the deceased by virtue of the fact that they had purchased a portion of the property, covered by the July, 1986 Will, was, thus not sustainable. The recitals contained in the two sale deeds dated 20.02.2009 bearing Nos.492 and 493 of 2009, would show that title in the property had not passed on to respondent No.2 and 3 and, therefore, they could have no interest in the estate of the deceased, much less, caveatable interest.

(iv)(a) In this behalf reliance was placed on the judgement of the Supreme Court in **Janak Dulari Devi Vs. Kapildeo Rai, 2011 (6) SCC 555**.

12. On the other hand, Mr.T.V.Ramanujan, learned senior counsel, who appeared on behalf of respondent No.2 and 3 made the

following broad submissions:

(i) Respondent No.2 and 3 have an interest in the estate of the deceased testator. Despite the fact that respondent No.2 and 3 had interest in the estate of the testator, they were dropped from the array of parties. The probate, was granted qua July, 1986 Will, in the absence of respondent No.2 and 3.

(ii) The original of purported July, 1986 Will was not produced. What was produced before the Probate Court was only a certified photocopy of the purported Will. The certified photocopy was an illegible document. The registration-endorsement was illegible and that a perusal of the said document would show that a part of the registration-endorsement has been made in Telugu. A closer examination of the said document would show that the purported Will was presented at the Nature Cure Hospital, Hyderabad, between 05.00 and 06.00 p.m., on 18.07.1986, and that it was presented for registration on 19.07.1986.

(iii) Importantly, the testator Parasmal Jain had been admitted to Nature Cure Hospital for kidney failure in the first week of July, 1986. He was in coma and, finally, succumbed to his disease on 11.08.1986, at Chennai.

(iv) That the appellant in paragraph No.6 of the probate petition

had made a false statement. He had attempted to explain a delay of 21 years in filing the probate action by stating that he was not aware of the purported July, 1986 Will till almost the date of institution of the probate action. This plea of the appellant was false as a perusal of the purported July, 1986 Will would show that it was executed in two counterparts, one of which was kept with the appellant i.e. the executor. This aspect of the matter was also highlighted by respondent No.1 in the counter affidavit filed by her to Application No.6053 of 2007, in which, a prayer was made for issuance of direction to her, for production of the original of the purported July, 1986 Will.

(v) That respondent No.2 and 3 were not aware of the probate proceedings is reflected in the affidavit of the appellant filed in support of the application No.4971 of 2010; which was an application filed to implead the said respondents as parties to the probate proceedings.

(vi). The impleadment of respondent No.2 and 3 was opposed by respondent No.1; the said fact is reflected in her counter affidavit filed qua Application No.4971/2010. Furthermore, in that affidavit, respondent No.1 has averred that she had executed the subject sale deeds in favour of respondent No.2 and 3. Respondent No.1 had also gone on to say in the very same affidavit that truth and genuineness of

the purported July, 1986 Will, would have to be proved.

(vii) Respondent No.1 had, in this background, assured respondent No.2 and 3 that she would contest the probate proceedings, and thus, take care of their interest. The collusion between the appellant and respondent No.1 got revealed only, after respondent No.2 and 3 in the proceedings held on 12.02.2013, were dropped from the array of parties in the probate action.

(viii) The probate action proceeded, as if, respondent No.1 had filed a written statement. Issues were, erroneously, framed in the probate action without the written statement of respondent No.1 being on record.

(ix) The appellant who examined himself as P.W.1, in his examination-in-chief has falsely stated that Ex.P1 is the original Will. The original of the purported July, 1986 Will was never produced before the Court.

(x) P.W.2 was, one, "Kishore Jain", who projected himself as one of the attesting witness of the purported July, 1986 Will. Pertinently, the purported July, 1986 Will states the name of the attesting witness as "Kishan Jain" and not "Kishore Jain". Thus, the person who was examined as P.W.2 was not in fact the attesting witness of the purported July, 1986 Will.

(xi) The learned Single Judge, having evaluated the material on record and thereafter, exercised his discretion vested in him in law to revoke the probate, there was, no good reason for this Court that is, the appellate Court to interfere with the impugned judgement and order.

(xii) The instant appeal was not maintainable under Clause 15 of the Letters Patent Appeal.

(xiii) The probate action was, wrongly, filed under Section 222 and 276 of the 1925 Act, whereas, it should have been filed under Section 237 or, Section 239 of the very same Act.

(xiv) Respondent No.2 and 3 are entitled to seek revocation of the probate granted qua the purported July, 1986 Will, as they were interested in the estate of the testator. The provisions of Order 25, Rule 62 of the O.S. Rules employ the expression "any person interested in the property of the deceased". Therefore, the application filed for revocation of probate by respondent No.2 and 3 was maintainable, as rightly held by the learned Single Judge.

(xv) Furthermore, the application filed under Section 263 of the 1925 Act by respondent No.2 and 3 was sustainable, as the proceedings carried out for grant of probate were defective in

substance inter alia, for the following reasons: firstly, it had been obtained by concealing material facts; and secondly, it was based on untrue allegation and facts. In sum, given these lacuna's there was no justification to grant probate of the purported July, 1986 Will.

12.1. In support of his submissions, learned Senior Counsel for respondent No.2 and 3, relied upon the following judgements :

- (i).Elizabeth Antony V. Michel Charles John Chown Lengera, 1990 (3) SCC 333 ;
- (ii).Krishna Kumar Birla V. Rajendra Singh Lodha, 2008 (4) SCC 300;
- (iii).G.Gopal V. C.Baskar, 2008 (10) SCC 489 ;
- (iv).Jagjit Singh V. Pamela Manmohan Singh, 2010 (5) SCC 157 ;
- (v).G.Jayakumar V. R.Ramaratnam, AIR 1972 Mad 212 ;
- (vi).S.Bhaskaran V. R.Loganathan, 2007 (5) CTC 821 ;
- (vii).Panchanathan, S. V. Ellappan etc. and others, 1995 (2) L.W. 852 ;
- (viii).Gita alias Gita Ravi V. Mary Jenet James alias M.J.Jamesh and others, 1995 (2) L.W. 831 ;
- (ix).Basanti Devi V. Raviprakash Ramprasad Jaiswal, 2008 (1) CTC 698 ;
- (x).Syed Askari Hadi Ali Augustine Imam V. State (Delhi Administration), 2009 (5) SCC 528 ;
- (xi).Rai Br. Pannalal and others V. Lala Hansraj Gupta and others, AIR 1940 CAL 236 ;
- (xii).Ganeshammal and others V. Arunachalam, AIR 2002 MAD 417;
- (xiii).Bhagwandas Narandas V. D.D.Patel & Co., AIR 1940 BOM 131;

- (xiv).Kunvarjeet Singh Khandpur V. Kirandeep Kaur and others, 2008 (2) CTC 850 ;
- (xv).Alagammai and others V. Rakkammal, 1991 II MLJ 86 ;
- (xvi).Bopanna, A.C. V. Dr.K.T.Achaya and others, 1997 (2) L.W. 726 ;
- (xvii).Yella Krishnamma V. Kotipalle Mali, AIR 1920 Madras 164;
- (xviii).Sarala Sundari Dassya V. Dinabandhu Roy Brajaraf Saha, AIR (31) 1944 Privy Council 11 ;
- (xix).Bishundeo Narain Rai (Dead) by LRs V. Anmol Devi and Others, (1998) 7 SCC 498 ;
- (xx).Raveendran Nair v. Thankam, 1999-3-L.W. 162;
- (xxi).Kaliaperumal V. Rajagopal, (2009) 4 SCC 193 ;

12.2. As regards the defects, false and untrue averments, supposedly, made by the appellant in collusion with respondent No.1 were concerned, Mr.Ramanujan adverted to the following:

- (i).No written statement was filed by respondent No.1, as claimed by her. The written statement was filed by respondent No.1 along with Application No.3097 of 2016 and Application No.4983 of 2016. Via the latter application, condonation of delay of 2232 days in filing the written statement was sought. The written statement was taken on record only on 18.10.2016.
- (ii).The probate was obtained by making a false suggestion, which is, as if, Ex.P.1 was the original Will. A fraud was played by

concealing a material fact, which is, that the recitals in the purported Will, clearly, indicated that the executor, i.e., the appellant, was in possession of the original of the purported July, 1986 Will, since it was prepared in two counterparts.

- (iii).A false statement was made by the appellant that he became aware of the July, 1986 Will only recently, in order to explain in a way 21 years of delay in filing the probate action.
- (iv)."Just cause" obtained to revoke the grant of probate, as the probate was granted in the absence of respondent No.2 and 3, even though, they were interested in the estate of the testator.
- (v).Respondent No.1 was the sole Class I heir of the deceased testator, i.e., Mr.Parasmal Jain. In that capacity, respondent No.1 had entered into lease agreement dated 05.01.2001 with respondent No.3, i.e., Mr.Ganesh and, one, Mr.Subbiah. Respondent No.1, thereafter, entered into a JDA, once again, with respondent No.3, i.e., Mr.Ganesh and Mr.Subbiah. For the first time, after nearly 21 years, Messrs.Anil Kumar and others, the nephews of the testator, got a legal notice dated 06.06.2007, issued to respondent No.1, setting up a Will dated 31.05.1999, and Codicil dated 18.06.1999, said to have been executed by, one, Ms.Sajjan Bai, the mother of the deceased

testator, i.e., Mr.Parasmal Jain.

(vi).Respondent No.1, in her reply dated 11.06.2007, had categorically taken the stand that she was the absolute owner of the subject property. It was in the rejoinder dated 03.07.2007, to the reply sent by respondent No.1, wherein, a reference was made to the July, 1986 Will. It is in the rejoinder that it was stated that Messr.Anil Kumar and others were beneficiaries under the July, 1986 Will. Furthermore, an assertion was made in the said rejoinder that the original of the purported July, 1986 Will was with respondent No.1.

(vii).It is in this background that the appellant filed the Application No.6053 of 2007, seeking issuance of a direction to respondent No.1 to produce the original of the July, 1986 Will. Respondent No.1 filed a counter affidavit to the said application, in which, she took the stand that the original of the purported July, 1986 Will, was, in fact, in the custody of the executor, i.e., the appellant. Furthermore, in the very same counter affidavit, respondent No.1 asserted that the July, 1986 Will, had been destroyed. Importantly, to date, the original of the July, 1986 Will, has not been produced.

(viii).The prayer made in the probate petition by the appellant is to the effect that he may be "allowed to prove the certified copy of the July, 1986 Will of the deceased Mr.S.Parasmal Jain in common form and that probate thereof to have effect limited to the State of Tamil Nadu". There is no provision in the 1925 Act to seek such prayer. The so-called certified copy of the purported July, 1986 Will, is a photocopy and, as indicated above, is illegible.

(ix).The present probate action has been filed under Section 222 and 276 of the 1925 Act, whereas, it should have been filed under Section 237 and 239 of the very same Act, with the necessary pleadings being in place. Section 237 of the 1925 Act deals with probate of a copy of the draft of a lost Will. No such prayer has been made in the petition. There is no pleading or evidence placed on record, which is suggestive of the fact that the original of the purported July, 1986 Will, has been lost or destroyed by a wrong committed or an accident and not by any act of the testator. Section 239 of the 1925 Act also permits probate of a copy, where, the original exists. However, the said Section enables probate of a copy, only, if, the Will is in possession of the person residing out of the State, in which, the

application for probate is made, and that, the person has refused or neglected to deliver the original, but the copy has been transmitted to the executor, with the added circumstances obtaining, which is, that it must be necessary in the interests of the estate that the probate is granted on the copy, without waiting for the arrival of the original. Both, in situations contemplated under Section 237 and 239 of the 1925 Act, probate is granted only till such time the original or an authenticated copy is produced. As is evident upon a perusal of the prayer clause of the probate petition, no such prayer, in terms of Section 237 and/or 239 of the 1925 Act, has been made. Furthermore, in any event, there is no averments made in the petition, in terms of the ingredients of Section 237 and 239 of the 1925 Act.

(x).In the given circumstances, the entire petition filed by the appellant is defective.

13. In rejoinder, on behalf of the appellant, Mr.Raja Kalifulla, had made the following brief submissions:

(i) There is neither any suppression of fact nor any false assertion has been made in the probate petition. A perusal of

paragraph 6 of the petition and the prayer clause would show that the appellant has stated in no uncertain terms that the original of the July, 1986 Will, is in the custody of respondent No.1, who had refused to deliver up the same and that, only a certified copy was available with the appellant. The prayer made in the petition, therefore, sought the permission to prove the certified copy of the July, 1986 Will.

(ii) Section 222 of the 1925 Act provides that probate shall be granted only to the executor appointed by the Will, either expressly, or by necessary implication. Therefore, the appellant, who is the executor named in the July, 1986 Will, had to, necessarily, move for probate.

(ii)(a) In so far as Section 276 of the 1925 Act is concerned, it sets out what requires to be included in the petition seeking probate or letters of administration. Therefore, the petition had to be filed under the said provisions. Section 237, on the other hand, will be applicable, if the original Will is lost. Since, no such situation arose in the instant case, the said provision was not applicable. Similarly, Section 239 will apply, only when, a person residing out of the State, in which, the application for probate is made, has refused or neglected to deliver up the same and copy of the same has been transmitted to the executor. Once again, since, no such situation arose in the instant case, the provision would have no applicability. In any event, the absence of

these provisions will not render the petition defective, as long as there are averments made to that effect in the petition.

(iii) The averment made by the appellant that he was not aware of the existence of the July, 1986 Will has been taken out of the context. The appellant could have, perhaps, better explained the circumstances, which is, that the original July, 1986 Will, had been given to respondent No.1. However, the absence of these facts by itself will not, automatically, lead to the appellant being discredited or, render the probate petition defective.

(iv) The executor performs a gratuitous function. The appellant does not stand to gain personally upon probate of July, 1986 Will .

(v) The submission of respondent No.2 and 3 that they were not aware of the probate proceedings, till the notice was served for impleading them in the probate petition, is false; this is so for the following reasons: the appellant and respondent No.2 and 3 were, on their own showing, lessees under respondent No.1 in 2001; they entered into a JDA in 2004; and finally, purchased a portion of the subject property in 2009.

(vi) Respondent No.2 and 3 were aware that Ms.Sajjan Bai, the mother of the testator, i.e., Mr.Parasmal Jain, was alive, when, he passed away on 11.08.1986. This is evident upon a bare perusal of

paragraph 5 of the reply-affidavit filed in Application No.8355 of 2014. Since, the testator had no progeny, on his death, the successors to his estate were Class I heirs, i.e., respondent No.1 and Ms.Sajjan Bai. Ms.Sajjan Bai died only on 20.12.2004. Therefore, even assuming that the July, 1986 Will was not in existence, the estate would have devolved on respondent No.1 and Ms.Sajjan Bai. Upon the demise of Ms.Sajjan Bai, in 2004, her share would have devolved on the children of her other pre-deceased sons, who in any event, are the ultimate beneficiaries under the July, 1986 Will.

(vii) The ignorance of respondent No.2 and 3 of the probate proceedings cannot become the basis for challenging the validity of the July, 1986 Will.

(viii) The remedy that respondent No.2 and 3 have is to sue for recovery of sale consideration, if any, paid and not to question the July, 1986 Will.

(ix) While, it is true that the probate petition was filed after a delay of 21 years, there is no limitation for filing a probate petition. Order 25, Rule 9 of O.S. Rules mandates that reasons should be provided for delay.

(x) The fact that the July, 1986 Will had been registered and has been proved the factum of delay in seeking its probate has been

rendered inconsequential and therefore, cannot be a ground to revoke the probate.

(xi) The delay was occasioned, as respondent No.1 was residing in the subject property and enjoying income from the tenants. The appellant and other beneficiaries shared a cordial relationship with respondent No.1, which, they did not want to disturb, on account of her old age. Furthermore, on account of financial constraints and in order to avoid expenses of litigation, immediate recourse to court proceedings was not undertaken. The peaceful atmosphere got vitiated only upon the entry of respondent No.2 and 3 on the scene and with the execution of the JDA.

(xii) There cannot be, as alleged, a collusion between the appellant and respondent No.1. The appellant is the brother-in-law of respondent No.1. The witnesses to the July, 1986 Will are the sons of the elder brother of respondent No.1. One of the attesting witnesses (P.W.2) to the July, 1986 Will was examined and, since, the first attesting witnesses had expired, P.W.3 was examined to identify his signatures. Respondent No.1 examined herself as D.W.1. The probate Court, after examining the testimony of all witnesses, vide judgement and order dated 30.04.2014, came to the conclusion that the July, 1986 Will, was a genuine Will. Kishore Jain, who was examined as

P.W.2, is one of the attesting witnesses to the July, 1986 Will (Ex.P.1.). In fact, Kishore Jain, P.W.2, had also filed an affidavit along with the probate petition, in 2007. Respondent No.2 and 3 are taking advantage of the fact that his name is shown as "Kishan Jain".

(xiii) In the affidavit filed in support of Application No.8355 of 2014, respondent No.2 and 3 had, in the first instance, taken the stand that no witness was examined; however, after the counter was filed, a new defense was taken that there was a discrepancy, in as much as attesting witness and P.W.2 were not the same person.

(xiv) The submission of respondent No.2 and 3 that respondent No.1 (D.W.1) did not file a written statement, in the first instance, is incorrect. Respondent No.1 (D.W.1) had filed her written statement as early as in 2009. During the trial of the probate action, her written statement was available. The Court, while passing the order dated 30.04.2014, on the probate petition, referred to the written statement of respondent No.1 (D.W.1). Furthermore, when, respondent No.2 and 3 had filed an application for revocation of the probate granted, written statement of respondent No.1 (D.W.1) was available on record. Subsequent order passed by the Court dated 11.01.2016, whereby, probate was recalled, also refers to respondent No.1's written statement. As a matter of fact, respondent No.2 and 3 have,

elaborately, quoted extracts from the written statement filed by respondent No.1 (D.W.1) in their rejoinder. Confusion was caused only on account of the fact that the prayer made by respondent No.1 (D.W.1) in Application No.3097 of 2016, was not properly worded. Respondent No.1 (D.W.1), upon being informed by the Registry that the original written statement was not available, should have made a prayer for reconstructing the written statement. Respondent No.2 and 3 seek to take advantage of this discrepancy which is otherwise not material.

(xv) The application filed by respondent No.2 and 3 to seek revocation of the probate granted by this court does not refer Section 263 of the 1925 Act. As a matter of fact, in the application, there is no reference to the expression "just cause", which is essential for maintaining such a petition. All that respondent No.2 and 3 have stated, is that, they had purchased a part of the subject property in 2009 and hence, had a caveatable interest. Respondent No.2 and 3 are third party purchasers, who purchased a portion of the subject property, during the pendency of the proceedings. Their interest is remote, and therefore, they have no *locus standi* to seek revocation of the probate.

(xvi) Title to the probate cannot be determined in probate

proceedings. Respondent No.2 and 3 had claimed caveatable interest, based on having purchased a portion of the subject property during the pendency of the probate petition. Respondent No.2 and 3 now seek to change their position, by saying that they have an interest in the property of the testator.

(xvii) Respondent No.2 and 3 had filed their application for revocation nearly eight (8) months after probate was granted.

(xviii) It is well settled that a person, who keeps quiet and allows the proceeding to go on, cannot question the same at a later stage.

(xix) Respondent No.2 and 3 cannot get a better title than their vendor under the July, 1986 Will. Respondent No.1 has only a life interest and no right to sell. Even if it is assumed that no Will exists, respondent No.1 will be a co-owner, who would have no right to sell the property, without partition and allotment of her share.

(xx) Pertinently, respondent No.1 has admitted the execution of the July, 1986 Will (Ex.P.1) by her husband, i.e., Parasmal Jain. In her testimony, respondent No.1 has not disputed the identity of P.W.2, i.e., one of the attesting witnesses, who is none other than her own brother's son. Respondent No.1 has also not disputed execution of the sale deeds. She has further stated in her testimony that no consideration was passed on to her, and that, under the JDA,

respondent No.2 and 3 had agreed to pay Rs.50,000/- per month, to her, towards rent and maintenance till the construction was completed. This amount was paid according to respondent No.1 only for the period spanning between March 2009 and April 2012. According to respondent No.1, even after the JDA was cancelled, that is, on 04.02.2009, respondent No.2 and 3 paid Rs.50,000/- per month, by having her believe that the JDA was in force. It is only, when, the payment was stopped, she became aware of the fact that a fraud had been played upon her.

(xxi) Respondent No.2 and 3, fraudulently, now claim that the amount, which was paid towards maintenance, was part of the sale consideration. Furthermore, even according to respondent No.2 and 3, more than Rs.1,58,41,235/- remains unpaid.

(xxii) In so far as the receipts generated for amounts said to have been paid to respondent No.1 by respondent No.2 and 3 are concerned, they cannot be relied upon in law in the absence of registration.

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14. In support of his submissions, learned Senior Counsel for the appellant relied upon the following judgements :

(i).Krishna Kumar Birla V. Rajendra Singh Lodha, (2008) 4 SCC 300;

- (ii).Sunil Gupta V. Kiran Girhotra and others, (2007) 8 SCC 506;
- (iii).V.Mohanan V. Estate of E.Narayanan, 2008 (4) CTC 110;
- (iv).G.Shanmugham Chetti V. Chinnammal, 1991 L.W. 237;
- (v).Bopanna, A.C. V. Dr.K.T.Achaya and Others, 1997-2-L.W. 726;
- (vi).Ammu Balachandran V. U.T.Joseph (died) and others, AIR 1996 Mad 442;
- (vii).Corra Vedachalam Chetty V. G.Janakiraman, 2001 (3) CTC 283; and
- (viii).State Bank of India V. Sarathi Textiles and others, (2009) 16 SCC 328.

Reasons

15. We heard the learned counsel for the parties and perused the record. Upon a perusal of the record, what emerges therefrom is as follows :

- i. That the appellant, who is the brother of respondent No.1, had sought probate of a photocopy of certified copy of the purported July, 1986 Will.
- ii. The purported July, 1986 Will, was, apparently, executed by Mr.Parasmal Jain.
- iii. Mr.Parasmal Jain is the husband of respondent No.1.
- iv. The probate petition, i.e., O.P.No.434 of 2008 was filed by the

appellant in and about 09.08.2007, which was nearly, 21 years after the testator, i.e., Mr.Parasmal Jain, had expired.

v. Mr.Parasmal Jain died, admittedly, on 11.08.1986.

vi. Prior to probate petition being numbered, the appellant had moved an application being : A.N.o.6053 of 2007. The prayer made in the application was that respondent No.1 be directed to produce the original of the July, 1986 Will (Ex.P.1).

vii. In respect of this application, a counter affidavit had been filed by respondent No.1, wherein, she had taken the stand that the appellant had approached the Court for probate, after nearly 20 years, and that, in the petition, he had not even adverted to his relationship with her. Furthermore, respondent No.1 had taken the stand that a perusal of the certified copy of the purported July, 1986 Will, would show that it was executed in two counterparts, one of which, was in the custody of the executor, i.e., the appellant. This apart, respondent No.1 also took the stand that the appellant was aware that the testator, i.e., Mr.Parasmal Jain, who was her husband, had directed that the purported July, 1986 Will, be destroyed. This stand was also taken by respondent No.1, in her reply dated 11.06.2007, issued in response to the notice dated 06.06.2007, which was, served

upon her by Messrs.Anil Kumar and others, i.e., her nephews.

viii.Reference to purported July, 1986 Will, was made, for the first time, in the rejoinder dated 03.07.2007, issued on behalf of Messrs.Anil Kumar and others. It is this fact, which led to the filing of Application No.6053 of 2007, by the appellant. Pertinently, the Advocates, who acted on behalf of Messrs.Anil Kumar and others, were the same persons, who acted on behalf of the appellant.

ix. A perusal of the purported July, 1986 Will (Ex.P.1), would show that the said Will was signed in two counterparts, one of which, was left with the executor, i.e., the appellant. Respondent No.1, in her testimony before the Court, has, clearly, denied the stand that the purported July, 1986 Will, was the last Will of her husband, i.e., Parasmal Jain. It was respondent No.1's stand, during cross-examination, that her husband, i.e., Parasmal Jain had executed another Will dated 07.08.1986 (in short "August, 1986 Will). Respondent No.1's even, while claiming that the August, 1986 Will, which was, supposedly, an unregistered document, was with her - stated that she could not produce the same in Court. Respondent No.1, however, vehemently, denied

the suggestion that her husband, (i.e., late Parasmal Jain) had not executed the August, 1986 Will.

- x. Respondent No.1 also stated in her deposition before the Court that, though, the subject property had been purchased originally by her mother-in-law, it had been subsequently given to her husband, i.e. Parasmal Jain. Respondent No.1 went on to impute that her Manager, one, Mr.Rajendran, had got her to execute sale deeds in issue, in favour of respondent No.2 and 3, which covered, at least, a portion of the subject property.
- xi. Importantly, respondent No.1 deposed that, while, she had no intention to sell the subject property, which was covered under the purported July, 1986 Will (Ex.P.1), she admitted that she had intention to develop the property. Even while saying so, she went on to depose that she had not entered into a JDA. However, respondent No.1 did admit receipt of Rs.50,000/- per month over a period of two years from respondent No.2 and 3. She further admitted that she had visited the Sub Registrar's Office to subscribe her signature, at the instance of her Manager, i.e., Mr.Rajendran, who had represented to her that the document, on which, signatures were being appended by her, was related to development of the property. In other words, it is

her say that though she had appended her signature on the subject sale deeds, which were placed before her in the Sub Registrar's Office the act was carried out under a misrepresentation.

xii.The record also shows that respondent No.1 had filed two applications, i.e., Application No.4983 of 2016 and 3097 of 2016 for condonation of delay and to facilitate placing on record her written statement in the Testamentary Suit (TOS) No.12 of 2009. The said applications were allowed by the Court vide order dated 18.10.2016.

xiii.Interestingly, the Court, while, allowing the application filed by respondent No.1, made note of three aspects. First, the stand of respondent No.2 and 3 that respondent No.1 had filed a written statement with the Registry, to which, a reference was made by the Court, while granting probate, vide judgment and order dated 30.04.2014. Second, the Registry, on the other hand, had reported that no written statement had been filed by respondent No.1. Third, neither the appellant nor respondent No.2 and 3 were able to produce a copy of the written statement, which, ought to have been served on them, if the same had been filed.

xiv.There is no denial of the fact that a lease deed was executed by

respondent No.1 with respondent No.3 and, one, Subbiah. The lease deed pertained to a portion of the property. The record also shows that a JDA, had been executed between the same parties, i.e., respondent No.1, respondent No.3 and Subbiah. The cancellation deed dated 04.02.2009, has also brought on record. By virtue of the said cancellation deed, the JDA which was executed on 08.02.2006, was cancelled. During the course of hearing of this appeal, an affidavit was filed by respondent No.2 and 3, whereby, it is emerged that the entire sale consideration under two sale deeds issued had not been paid to respondent No.1. According to respondent No.2 and 3, a sum of Rs.1,14,18,750/- has been paid in respect of sale deed dated 06.02.2009, registered as Document No.492 of 2009; while, a sum of Rs.2,68,70,800/- has been paid in respect of sale deed dated 06.02.2009, registered as Document No.493 of 2009.

xv.The purported July, 1986 Will (Ex.P.1), has been attested by two persons, i.e., Ratan Lal and Kishan Jain. The appellant, in order to prove the genuineness of July, 1986 Will (Ex.P.1), produced, one, Kishore Jain, P.W.2, who has claimed in his testimony that he had attested the July, 1986 Will, at the request of the testator, i.e., Parasmal Jain. He further went on to say that the

other person, who attested the July, 1986 Will (Ex.P.1), was, one, Ratan Lal Gupta. Kishore Jain (P.W.2) has also stated, in his testimony, that the testator, i.e., Parasmal Jain, was admitted to the hospital for kidney failure.

xvi. The third witness produced by the appellant, i.e., one Prakash Jain (P.W.3), has stated, in his testimony, that he was present, when, the testator executed the Will (Ex.P.1), at the Nature Cure Hospital in Hyderabad, and that, Ratan Lal Gupta and Kishore Jain had appended their signatures onto the said Will as witnesses. Prakash Jain (P.W.3) also identified the signatures of Ratan Lal Gupta and those of Kishore Jain. Prakash Jain (P.W.3) has further deposed that Ratan Lal Gupta, i.e., the first witness, was not his relative. He has also adverted to the fact that Ratan Lal Gupta, who had died, was the testator's family friend.

xvii. The record, as indicated above, would also show that respondent No.2 and 3, in the first instance, were impleaded as parties to the probate action, at the behest of the appellant, and thereafter, were deleted from the array of parties, once again, at the behest of the appellant, vide order dated 12.02.2013. Importantly, this order was passed in the presence of counsels for respondent No.2 and 3.

16. Given the aforesaid state of facts and the testimonies on record, what requires to be answered, in the first instance, is : as to whether respondent No.2 and 3 could rely upon the provisions of Section 263 of the 1925 Act to seek revocation of the probate granted vide judgement and order dated 30.04.2014 ? The application filed, in that behalf, by respondent No.2 and 3 (A.No.8355 of 2014) does specifically advert to, contrary to what has been contended before us, not only the provisions of Section 263 of the 1925 Act, but also to provisions of Order 14 Rule 8 of the O.S. Rules read with Section 151 of the Code of Civil Procedure (in short, "CPC"). The revocation application of respondent No.2 and 3, *inter alia*, also alludes to the following: that they have purchased a portion of the subject property, which is covered under the purported July, 1986 Will (Ex.P.1); that they were in possession of the said property, pursuant to the execution of the two sale deeds dated 06.02.2009; that respondent No.2 had indicated to them that she would contest the testamentary proceedings; that they had discharged the mortgage loan created on the property by paying Rs.16,37,580/- to United Bank of India; that respondent No.1 had shifted to another place located at Pallikaranai,

after having handed over possession to them, pursuant to execution of the aforementioned sale deeds; that they had "caveatable interest" in the testamentary suit; that the appellant and respondent No.1 had colluded in obtaining the judgement and decree dated 30.04.2014; that the judgement and decree had been obtained behind their back; and lastly, a perusal of the judgement and decree dated 30.04.2014, would show that none of the attesting witnesses had been examined.

16.1. Having regard to these assertions, it is relevant to extract the provisions of Section 263 of the 1925 Act :

"263. Revocation or annulment for just cause

– The grant of probate or letters of administration may be revoked or annulled for just cause.

Explanation – Just cause shall be deemed to exist where –

(a) the proceedings to obtain the grant were defective in substance; or

(b) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case ; or

(c) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently ; or

(d) the grant has become useless and inoperative through circumstances; or

(e) the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect.”

16.2. A perusal of the said provision would show that a Court can revoke the grant of probate or letters of administration for “just cause”. The explanation to Section 263 of the 1925 Act provides that “just cause” shall be deemed to exist, where, circumstances provided in clause (a) to (e) subsist.

16.3. In the instant case, therefore, first of all, what needs to be examined as to whether the circumstances adverted to in clause (a) to (e) of the explanation appended to Section 263 are exhaustive. In other words, can the Court can revoke the grant of probate and letters of administration on grounds that they present “just cause” in circumstances other than those set out in clause (a) to (e) of Section 263 of the 1925 Act.

16.4. This aspect of the matter came up for consideration before a Division Bench of the Madras High Court in **Gita alias Gita Ravi V. Mary Jenet James alias M.J.James and others, 1995-2-L.W. 831.** The Division Bench, after considering a plethora of case law, both,

under Section 50 of the Probate and Administration Act, 1881, and the 1925 Act, came to the conclusion that the circumstances as set out in clauses (a) to (e) of the explanation to Section 263 of the 1925 Act, were only illustrative and not exhaustive of the circumstances, in which, the Court could revoke the probate. In other words, according to the Division Bench, the expression "just cause" was not limited to the circumstances set out in clause (a) to (e) of the explanation to Section 263 of the 1925 Act.

16.5. One of the cases, on which, reliance was placed by the Division Bench in coming to this conclusion was the judgement of the Supreme Court in the matter of : **Moonga Devi V. Radha Ballabh, AIR 1972 SC 1471**. This was a case, in which, an Advocate had filed a caveat on behalf of the testator's widow and daughter, whereby, the execution and the genuineness of the Will was seriously challenged. The Advocate, however, thereafter, perhaps without instructions of his clients, admitted due execution of the Will and refrained from cross-examining the attesting witness. The Court granted probate, after comparing the disputed signatures with the admitted signatures of the testator, albeit, without ascertaining the circumstances, which led to the concession being made by the Advocate of the testator's widow and daughter to the effect that the Will in issue was genuine. The

Court did not, as it appears, grant full opportunity for contesting the grant of probate or to cross-examine the attesting witness. The matter travelled to the Supreme Court. The Supreme Court held that there was miscarriage of justice and that the grant of probate ought to be revoked. The Court, thus, allowed the appeal and set aside the grant of probate with a direction to dispose of the probate application afresh, in accordance with law.

16.6. The ratio laid down therein, clearly, establishes that the circumstances set out in clause (a) to (e) to the explanation to Section 263 of the 1925 Act, are only illustrative and not exhaustive. As a matter of fact, the judgement of the Supreme Court in **Moonga Devi's case** is suggestive of the fact that, once, material is available on record before the Court, which is suggestive of the fact that the revocation of grant of probate is necessary in the given facts and circumstances, it matters little, as to who brought on record the material.

17. This, in fact, answers the other question as to whether the subsistence of "caveatable interest" is necessary ingredient for an applicant to move an application under Section 263 of the 1925 Act.

17.1. In **Elizabeth Antony V. Michel Charles John Chown**

Lengera, (1990) 3 SCC 333, the Supreme Court held that the presence of a slightest interest, or, even a bare possibility of an interest would be sufficient for a person to enter a caveat in the probate proceedings.

17.2. As a matter of fact, the Court drew a distinction between “caveatable interest” and the right available to an applicant under Section 263 of the 1925 Act. The relevant observations, which are contained in paragraphs 5 and 9 of the said judgement, for the sake of convenience, are extracted hereinbelow :

“..... 3. The learned counsel for the petitioner contended that both the courts below have erred in holding that the petitioner has no caveatable interest. It is submitted that the petitioner is executor and legatee of the will dated 23.6.1975 executed by Miss Zoe Enid Browne daughter of Mrs. Mary Aline Browne and that Miss Zoe has also executed a registered gift-deed dated 29.3.1974 in respect of the second item of the estate and that the petitioner was also appointed a trustee of John Browne Trust on 11.6.1975 and therefore, in law the petitioner has an interest in the property which is the subject matter of the will and thus have caveatable interest.

4. XXXXX

5. In **Nabin Chandra Guha V. Nibaran Chandra Biswar and Ors.**, AIR 1932 Calcutta 734, the Division Bench held that a person who has a real interest in the estate which is or is likely to be

prejudicially affected or adversely affected by the will can oppose the grant of probate or letters of administration. In **Gourishankar Chatteraj V. Smt.Satyabati Debi**, AIR 1931 Calcutta 470, it is held that the petitioner therein who was related to the deceased through a common ancestor, can be said to have interest in opposing the application for probate. In **Shanti Devi Aggarwalla V. Kusum Kumari Sarkar & Ors.**, AIR 1972 Orissa 178, Justice Ranganath Misra, as he then was, held that the vendor legatee is entitled to enter caveat and the purchaser having stepped into the shoes of vendor is also entitled to enter the caveat. In **Narayan Sah V. Smt.Davaki**, AIR 1978 Patna 220, considering the locus standi of a person to oppose grant, it is held that any interest, however, slight and even a bare possibility of an interest is sufficient to entitle a person to enter caveat in a probate proceeding.

6. XXXXX

7. XXXXX

8. XXXXX

9. The learned counsel, however, lastly submitted that the petitioner inspite of having substantial interest in the estate is losing her right, to prove that the alleged will by Miss Zoe Enid Browne is not a genuine one and that it is a fictitious one. We must point out that by granting a probate, the court is not deciding the disputes to the title. Even with regard to a probate granted, it can be revoked as provided under Section 263 of the Act in any one of the cases

mentioned therein. But the learned counsel for the petitioner submits that the findings of the Sub Court and the High Court regarding the caveatable interest will come in the petitioner's way in seeking revocation of the grant of probate. It is needless to say that the findings regarding the caveatable interest of the petitioner have a limited effect and are relevant only to the extent of granting of probate. But they cannot deprive his right, if he has any, to invoke Section 263 of the Act and it is upto the petitioner to satisfy the Court."

(emphasis is ours)

17.3. The concept of caveatable interest was explained by the Supreme Court in the recent judgement passed in the matter of : **Krishna Kumar Birla V. Rajendra Singh Lodha and Others, (2008) 4 SCC 300**. The Court drew, once again, sought to distinguish "caveatable interest", from other interest by observing that the former would enure to a person, who would have otherwise succeeded to the estate of the testator, but for the Will. According to the Court, any other person, who seeks revocation, must show some interest. In this regard, the Court referred, by way of example, to a creditor of the deceased, as in the case of : **Sarala Sundari Dassya V. Dinabandhu Roy Brajaraf Saha (Firm), AIR 1944 PC 11**. In this behalf, the following observations made in paragraphs 94 to 97, 100 to 103 and 109, in Krishna Kumar Birla's case, being apposite, are extracted

hereinbelow, for appreciating what would constitute a "caveatable interest" :

“..... 94. A Will is executed when the owner of a property forms an opinion that his/her estate should not devolve upon the existing heirs according to the law governing intestate succession. **When, thus, a person who would have otherwise succeeded to the estate of the testator, would ordinarily have a caveatable interest, any other person must ordinarily show a special interest in the estate.**

95. Such a special interest may be a creditor of the deceased as was the case in **Sarala Sundari Dassya V. Dinabandhu roy Brajaraf Saha (Firm)**, AIR 1944 PC 11. But, in our opinion, the same would not mean that even if the estate of the deceased is being represented by the legal heirs, caveat can be entertained at the instance of a person who has no real interest therein or in other words would merely have a contingent interest.

96. A transferee pendente lite without the leave of the court would not have a caveatable interest and as such cannot be impleaded as a party. A person cannot also be impleaded as a party even on an apprehension that those who have a caveatable interest and to whom citations have been made would not take any interest in the litigation.

97. A tenant occupying the premises belonging to a testator was held not to have any caveatable interest in the property of the testator. (See **Jagadish Chander V. State & Anr.**, 1988 RLR 678.

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100. We are not oblivious of the fact that a judgment rendered in a probate proceeding is a judgment in rem. But, its application is limited. A judgment rendered in a probate proceeding would not be determinative of the question of title. If a probate has been obtained by fraud or suppression of material fact, the same can be the subject matter of revocation of the grant in terms of Section 263 of the 1925 Act. (See **Elizabeth Antony V. Michel Charles John Chown Lengera, (1990) 3 SCC 333**). In **Basanti Devi V. Ravi Prakash Ram Prasad Jaiswal, (2008) 1 SCC 267**, it was held :

"24[23]. It is now well settled that an application for grant of probate is a proceeding in rem. A probate when granted not only binds all the parties before the Court but also binds all other persons in all proceedings arising out of the Will or claims under or connected therewith. Being a judgment in rem, a person, who is aggrieved thereby and having had no knowledge about the proceedings and proper citations having not been made, is entitled to file an application for revocation of probate on such grounds as may be available to him. We are, therefore, of the opinion that the application for revocation of the grant of probate should have been entertained."

[See also **Sunil Gupta V. Kiran Girhotra, (2007) 8 SCC 506**].

101. These decisions relied upon by Mr. Jethmalani relating to revocation of grant, as for example **Brindaban Chandra Shah V. Sureswar Shaha Paramanick, (1909) 10 Cal**

L.J. 268, are, thus, not applicable to the facts of the present case.

102. We may notice that in **Jagdish Prasad Tulshian V. Yasheen Jain, AIR 2007 Calcutta 218**, the Calcutta High Court held:

"20. In the case of **Elizabeth Antony V. Michel Charles Crown Lenger, 1990 (3) SCC 333**, the Supreme Court was dealing with an application for revocation of grant of a Probate and in the said case a party sought to establish a caveatable interest on the basis of a Will though the said Will or the copy thereof was not filed before the Court. In such a case, the Supreme Court was of the view that it was not expedient to reopen the matter. In the said case, the Supreme Court, however, held that for the purpose of revocation of a grant within the scope of Section 263 of the Indian Succession Act, the absence of caveatable interest does not stand in the way. In the case before us, we are not concerned with a case of revocation of grant. Therefore, the principle laid down in the said decision, cannot have any application to the case before us. Moreover, in that case, even the copy of the purported Will was not produced."

103. What would be the cavetable interest would, thus, depend upon the fact situation obtaining in each case. No hard and fast rule, as such, can be laid down. We have merely made attempts to lay down certain broad legal principles.

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109. It is in that backdrop the question which is

required to be posed is: Did the Calcutta High Court or the other High Court opine that even a busy body or an interloper having no legitimate concern in the outcome of the probate proceedings would be entitled to lodge a caveat and oppose the probate? The answer thereto, in our opinion, must be rendered in the negative. If anybody and everybody including a busy body or an interloper is found to be entitled to enter a caveat and oppose, grant of a probate, then Sections 283(1)(c) and 284 of the 1925 Act would have been differently worded. Such an interpretation would lead to an anomalous situation. It is, therefore, not possible for us to accede to the submission of the learned counsel that caveatable interest should be construed very widely.”

(emphasis is ours)

17.4. In **G.Gopal V. C.Baskar, 2008 (10) SCC 489**, the Supreme Court reiterated that any person, who had even slightest interest in the estate of the deceased testator, was entitled to file a caveat and contest the grant of probate.

17.5. The Supreme Court, however, seems to have noticed in **Jagjit Singh and others V. Pamela Manmohan Singh, 2010 (5) SCC 157**, a conflict between what is stated in **Krishna Kumar Birla's case** with regard to caveatable interest, and that, which is stated in **Gopal's case**. Accordingly, the issue has been referred to a Larger Bench.

17.6. A Division Bench of this Court in the matter of : **S.Bhaskaran V. R.Loganathan, 2007 (5) CTC 821**, was called upon to consider the scope and ambit of "caveatable interest". The facts of the case are similar to the one arising in the instant case. This was a case, where, one, Purushothaman, who owned property on his own, died, leaving behind his wife as his only legal heir. The property was sold by the wife of Purushothaman to the appellants vide two sale deeds. By virtue of the sale, the appellants, i.e., the vendees, were in possession and enjoyment of the property. The brother of Purushothaman, though, filed a civil suit to assail the sale deeds. In the suit, Purushothaman's wife and the vendees, i.e., the appellants, had been arrayed as defendants. Pending the suit, Purushothaman's brother also filed a petition for grant of letters of administration in respect of the Will, which was, evidently, executed by Purushothaman. In the probate petition, Purushothaman's wife was impleaded as a respondent. However, before the petition came up for hearing, Purushothaman's wife died. Consequently, her name was struck off from the array of parties and the letters of administration were granted to Purushothaman's brother. The vendees, i.e., the appellants, thereafter, filed applications for revocation of letters of administration and for stay of further proceedings on the ground that they had

caveatable interest in the property.

17.7. Purushothaman's brother contested the application for revocation on the ground that he had followed the prescribed procedure, in its entirety, to the satisfaction of the Court prior to grant of letters of administration. The case set up was, since, no fact had been suppressed, in the first instance, and the vendees had been impleaded as defendants, the letters of administration granted could not be interfered with. A learned Single Judge of this Court held that the vendees had no caveatable interest.

17.8. This is how the matter has travelled to the Division Bench of this Court.

17.9. Hon'ble Ms. Justice R. Banumathi, (as she then was), speaking for the Division Bench, in sum, held that the person, who buys a property from the legatee would have *locus standi* to file a caveat. In this behalf, (the Court cited with approval), the following observations made in *Lalit Mohan Bhattacharjee Vs. Navadip Chandra Kaparia*, 1901 ILR Cal 587 in paragraphs 14 and 16 of the judgement, these being relevant, are extract hereinbelow:

“.... 14. Observing that a purchaser of properties from heirs of a deceased person has a *locus standi* to apply for revocation of Letters of Administration of a Will said to have

been executed by the deceased, in **Lalit Mohan Bhattacharjee V. Navadip Chandra Kaparia, 1901 ILR Cal 587**, the Court has held thus :

“[T]he only question submitted for our decision is, whether the applicant had any *locus standi* to apply for revocation of these Letters of Administration. I think he had. He stood virtually in the shoes of the two sons, who claimed to be the heirs, and who had dealt with the property, as the sole owners of it. The applicant was the purchaser from the heirs, and, if the heirs could have applied for revocation of the Letters of Administration, I do not see why the purchaser could not do so, he being in the same position as they were. He was not in a position of an ordinary creditor, but he was the purchaser from the heirs. I think, therefore, that, if the heirs were entitled to sue for revocation of the Letters of Administration, the purchaser from them had a *locus standi* to make a similar application. This view seems to me to be consistent with certain decisions of this Court, namely, the case of **Komol Lochun Dutt V. Nil Ruttun Mundle, 1878 ILR (4) Cal. 360**, and also the very recent case of **Muddun Mohun Sircar V. Kali Churn Dey, 1892 ILR 20 Cal. 37.**”

15. XXXXX

16. Referring to various decisions, in **Shanti Devi Agarwalla V. Kusum Kumari Sarkar, AIR 1972 Orissa 178**, the learned Single Judge has held that even bare possibility of a interest is sufficient to entitle a person to oppose testamentary instrument. In the said case, part of property was purchased from one of the Legatees relying on second Will. That purchaser would be affected if probate is granted through first Will. The learned Single Judge has held that vendor legatee is entitled to enter caveat in respect of first Will, the purchaser having stepped into the shoes of the vendor is also entitled to enter caveat.”

(emphasis is ours)

18. We may also note that there was another point, which came up for consideration, which was that, could the appellants/vendees challenge the grant of letters of administration, after the same had granted, given the fact that a public notice was taken out before the grant and they had failed to participate in the proceeding. The Court answered the question by observing that since the appellants/vendees (defendants), had, purchased the interest of the legatee in the property, they were necessary parties to the probate proceedings. Thus, according to the Court, neither their knowledge nor their acquiescence or even lapse of time would bar them from moving an application to seek revocation of the letters of administration. The

relevant observations made, in this behalf, are adverted to in paragraph 24 of the judgement, which, for the sake of convenience, are extracted hereafter :

“..... 24. Next point for consideration is whether the appellants should fail as they have filed application seeking revocation of Letters of Administration at a belated stage after the Letters of Administration was granted. The learned Counsel for the respondent has submitted that the paper publication was effected and the appellants did have notice of probate proceedings and even then they have not taken steps to enter caveat to contest the Will. If a person who is a necessary party to probate proceedings is not made a party/respondents, in our view, neither his knowledge nor his acquiescence nor lapse of time Will be a bar. Illustration (ii) to the Explanation of 'just cause' in Section 263 makes it clear that if the grant is made without citing parties who ought to have been cited, it Will amount to a cause which is just to revoke or annul the Letters of Administration Pritam Das v. Nand Ram 1966 Punj. 88. A purchase of a share of the estate of the deceased is a 'person interested' and a probate issued without citation to him is liable to be set aside S.D.Ponnusamy Mudaliar V. S.K.Somasundaram, 1992 (1) MLW 77; Sivagnanam V. Sadananda Mudaliar, 1978 (1) MLJ 164.”

(emphasis is ours)

18.1. We may also note that the Division Bench, cited with approval, the view taken in **Gita's case (cited supra)**, wherein, it was held that the circumstances referred to in Explanation (a) to (e) were not exhaustive. The Court, finally, came to the conclusion that the letters of administration had to be revoked.

18.2. Given the view taken in the aforesaid judgment, what is come to fore, is that, the Court can revoke the grant of probate or letters of administration under Section 263 of the 1925 Act in circumstances, which would necessarily not fall within the ambit and scope of clause (a) to (e) of the explanation appended to the said Section. As a matter of fact, as indicated hereinabove by us, in **Moonga Devi's case**, the Supreme Court went beyond the circumstances set out in clause (a) to (e) of the explanation appended to Section 263 of the 1925 Act. This view stands confirmed, by at least, two Division Benches of this Court, that is, in **Gita's case** as well as in **S.Bhaskaran's case**.

18.3. A perusal of the provisions of the 1925 Act, would show that the expression "caveatable interest" is not defined therein. The Courts have, however, held "caveatable interest" would enure in a person, who would otherwise have succeeded to the estate in issue, but for the execution of the Will by the testator. However, the Courts,

having said so, in certain cases, as noted above, conferred caveatable interest even upon those who purchased or acquired interest in the estate of the testator via his/her legatees. The Division Bench of this Court in **S.Bhaskaran's case** has categorically held such an interest to be a caveatable interest, likewise, the Supreme Court in **Krishna Kumar Birla's case**, described such an interest as caveatable interest.

18.4. Similarly, the Supreme Court in **Gopal's case and Elizabeth Antony's case** has held that a slightest interest in the estate of the testator would entitle a person to file a caveat and contest the grant of probate. The only limitation, which, the Court has put, is that the person moving the application under Section 263 of the 1925 Act, cannot question the existence of title in respect of the estate or, the capacity of the testator to dispose of the property by way of a Will. Furthermore, the person moving the application under Section 263 of the 1925 Act would have to show some interest in the estate of the testator. Busybodies or interlopers can neither enter caveat nor oppose grant of probate. (See **Krishna Kumar Birla's case**).

18.5. In the instant case, respondent No.2 and 3, have demonstrated that they had some interest in the estate of the testator, and therefore, were necessary parties to the probate. As indicated

above, the testator died on 11.08.1986. Respondent No.1 entered into a lease deed dated 05.01.2001, with respondent No.3 and, one, Subbiah, and thereafter, entered into a JDA dated 08.02.2006, with the very same persons. This was followed by a cancellation deed dated 04.02.2009, whereupon, two sale deeds of even date, i.e., 06.02.2009, were executed between respondent No.1 on one side, respondent No.2 and 3 on the other. Therefore, right from 2001, respondent No.2 and 3 continued to have some interest in the estate of the deceased testator. The fact that respondent No.1 has stated in her testimony, that the sale deeds were executed, based on the misrepresentation and that the documents in issue related to development of the subject property, does not dislodge the fact that the sale deeds were executed. As to whether the sale deeds would survive the scrutiny of law, if and when challenged, is not the issue with which, we are confronted in the present proceedings. Respondent No.1, in her testimony, has accepted she had received a sum of Rs.50,000/- per month over a period of two years spanning between March 2009 and April 2012. Respondent No.1 has also accepted that some part of the consideration has been received by her. Respondent No.1, in a sense, conceded that some part of consideration has been received by her, though under a misimpression that the money was

given towards maintenance and rent.

18.6. The fact that respondent No.2 and 3 have not paid the entire sale consideration would not, in these proceedings, dislodge the fact that they have some interest in the estate of the deceased. The clause referred to, on behalf of respondent No.1, by Mr.Thangavelu, in the sale deed, does indicate that consideration under the two sale deeds had been paid/arranged. As to what would be the scope and ambit of such expression would not be for us to gauge in the instant proceedings. The fact that the entire sale consideration has not been paid would not prevent the passing of title in an immovable property. The payment of sale consideration is not a condition precedent for completion of sale, if the intention of parties was that title would pass on the execution and registration of the sale deed. In such eventuality, the only remedy available to a vendor for unpaid price is to sue the vendee for balance price. The sale, in such circumstances, cannot be avoided. The vendee is, however, entitled to a charge on the property for the unpaid price, where, ownership in the property has passed prior to payment of entire price. This principle, however, is subject to intention of the parties, as discernible from the terms of the sale deed and, if the terms are ambiguous, the intention has gauged from the

surrounding circumstances, subject to provisions of Section 92 of the Indian Evidence Act. If the terms of the sale deed and the circumstances suggest that payment of the entire sale consideration is a condition precedent, then, title in the immovable property will pass only upon such condition being fulfilled, otherwise, the execution of the sale deed and its registration would result in transfer of title. (see **Kaliaperumal V. Rajagopal, 2009 (4) SCC 193**; and **Bishundeo Narain Rai (Dead) by Lrs v. Anmol Devi and Others, 1998 (7) SCC 498**).

18.7. The judgment of the Supreme Court, cited on behalf of respondent No.1, in the matter of : **Janak Dulari Devi and Another V. Kapildeo Rai and Another, 2011 (6) SCC 555**, does not state anything contrary to the principle laid down in the judgements referred to above. As a matter of fact, Hon'ble Mr. Justice R.V. Raveendran (as he then was), who has authored the judgement in **Janak Dulari Devi's case**, is also the member of the other Bench, which delivered the judgement in **Kaliaperumal's case**.

18.8. As indicated above, the fact as to whether or not title passed on to respondent No.2 and 3, pursuant to the sale deeds dated 06.02.2009, cannot be the subject matter of enquiry in the present proceedings. Suffice it to say that the totality of facts do show that

respondent No.2 and 3, as indicated above, had some interest, (at least, as is demonstratable, at this juncture), in the estate of the testator, notwithstanding the purported failure on their part to pay and / or arrange the entire sale consideration, as alleged by respondent No.1. Therefore, the argument advanced by Mr.Raja Kalifulla that respondent No.2 and 3 had changed their position from projecting that they had a caveatable interest, to a lesser position, if you like, which is, that they have some interest in the estate of the testator, to our minds, is a submission which does not help the cause of the appellant, given the state of the law. Either way, respondent No.2 and 3 would be entitled to sustain an application under Section 263 of the 1925 Act. In our opinion, respondent No.2 and 3, would have a *locus standi* to move an application to seek revocation of grant of probate of the purported July, 1986 Will.

19. This bring us to the other question as to whether probate of the purported July, 1986 Will (Ex.P.1), ought to have been revoked, in the facts and circumstances arising in the instant case ?

19.1. Respondent No.2 and 3, in our view, has demonstrated that the proceedings to obtain probate were defective in substance and/or involved concealment of material facts from the Court. As

noticed above, substantial defects arose, mainly, on account of the appellant seeking probate of a certified photocopy of the purported July, 1986 Will (Ex.P.1), without advertng to the fact that as per the very same document, one counterpart of the original was in his custody. Though, this fact is admitted by the appellant before us, it is sought to be explained by stating that it was handed over to respondent No.1. This explanation, to our minds, is an afterthought, which does not emerge from the evidence placed before the probate Court. As a matter of fact, respondent No.1, in her counter affidavit to the application (A.No.6053 of 2007), clearly, took the stand that the original of July, 1986 Will (Ex.P.1), was not in her custody. The appellant took recourse, it appears, to this strategy to explain the delay of nearly 21 years in approaching the Court for grant of probate. The appellant in order to counter the arguments advanced on behalf of respondent No.2 and 3 that the probate should have been sought, by taking recourse to Sections 237 and 239 of the 1925 Act, it appears, has advanced this plea, which is, that the original was handed over to respondent No.1, and therefore, the said provisions were not applicable in the instant case.

19.2. In our view, if, this was the position, such an averment ought to have been made in the petition, while, seeking grant of

probate based on a certified photocopy of the purported July, 1986 Will (Ex.P.1). This is especially so, as a perusal of the testimony of respondent No.1, would, clearly, demonstrate that while, she does not appear to be aggrieved by the grant of probate, she continues to maintain that the purported July, 1986 Will (Ex.P.1), was destroyed, at the say so of the deceased testator/Parasmal Jain, and thereafter, the unregistered August, 1986 Will was drawn up. The fact that neither the original of July, 1986 Will nor that of August, 1986 Will has seen the light of the day, does not help the cause of the appellant.

20. Apart from what is indicated above, we are of the view that the instant case does present other circumstances as well, for the Court to invoke the "just cause" doctrine engrafted in Section 263 of the 1925 Act and therefore, to order re-examination of the issue as to whether probate ought to be granted in this case. The reason we say so is : that there is no clear evidence as to whether the written statement placed on record, pursuant to order dated 18.10.2016, is a reconstructed written statement.

20.1. We may only note, in this behalf, that while, a perusal of paragraph 3 of the judgement and order dated 30.04.2014, does show that there was a written statement on record prior to passing of the

said judgement and order, what we are not able to conclude with certainty as to whether the written statement dated 24.06.2016, which has been placed on record, pursuant to order dated 18.10.2016, is a reconstructed written statement that is, a written statement reconstructed based on the stand taken in the original written statement filed by respondent No.1. The reason for this is that the Registry appears to have reported that respondent No.1 had not filed a written statement, and that, both the appellant as well as respondent No.2 and 3, were not able to produce a copy of the original written statement even though in all probability, they would have been served with same before it was filed.

20.2. Having said so, in the order dated 18.10.2016, it is also noticed that respondent No.2 and 3 had adverted to the fact that the Court had referred to the written statement filed, while granting probate vide judgement and order dated 30.04.2014. In other words, respondent No.2 and 3 had objected to respondent No.1 seeking permission to file a second written statement. It is for this reason, respondent No.2 and 3 had objected to condonation of delay in filing the written statement and having the same placed on record. Notwithstanding the said objection, the Court vide order dated 18.10.2016, not only condoned the delay, but also permitted

respondent No.1 to place the written statement dated 24.06.2016 on record.

21. What is, even more disconcerting, is the difference in the name of the second attesting witness as reflected in the July, 1986 Will (Ex.P.1) and in the recorded testimony of P.W.2. The July, 1986 Will (Ex.P.1) shows, one, Ratan Lal as the first attesting witness and, one, Kishan Jain as the second attesting witness. Admittedly, Ratan Lal has expired. The July, 1986 Will (Ex.P.1) was sought to be proved by the appellant by having, one, Kishore Jain (P.W.2) depose before the Court. Kishore Jain (P.W.2) claims to be second attesting witness while the July, 1986 Will (Ex.P.1) shows Kishan Jain as the second attesting witness. A perusal of the judgement and order dated 30.04.2014, shows that this aspect of the matter was not brought to fore before the Court. There is a serious doubt as to whether Kishore Jain was actually the second attesting witness to the purported July, 1986 Will (Ex.P.1).

22. For all these reasons, the Single Judge, in our opinion, was justified in passing the impugned judgement and order, and thus, recall the grant of probate qua the July, 1986 Will (Ex.P.1).

22.1. In these circumstances, in our view, no interference is

called for with the impugned judgement and order.

23. The necessary consequence would be that the appeal would have to be dismissed. It is ordered accordingly. Resultantly, pending application shall stand closed. There shall, however, be no order as to costs.

Speaking Order/
Non-speaking order

(R.S.A., J.) (A.Q., J.)
13.09.2017

Index : Yes/No
Internet : Yes
gg/kk



WEB COPY

RAJIV SHAKDHER,J.
AND
ABDUL QUDDHOSE,J.

gg/kk



Pre-Delivery Judgement
in O.S.A.No.47 of 2017

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13.09.2017