IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 08.02.2017

PRONOUNCED ON:02..3..2017

CORAM

THE HON`BLE MR.JUSTICE N.SATHISH KUMAR

Application No.2608 of 2012

in TOS.No.23 of 2003

1. M.Vijayalakshmi

2. G.Bakyalakshmi .. Applicants /third party

vs.

1. Sadhu A.N.Sircar Foundation
   Rep.by its Board of Trustees
   Mr.E.Nandakumar
   S/o. Mr.Elumalai
   No.246, Rajarathinam Nagar
   2nd Street, Kodungaiyur
   Chennai -600 118
2. Abraham Samarendiranath Sircar
   S/o. A.N.Sircar
   1st West Main Road,
   Katpadi Township, Gandhi Nagar,

Vellore. .. Respondents

Application filed under Order XIV Rule 8 of CPC read with Order 25 Rule 62 of Original Side Rules read with 263 of Indian Succession Act 1925 to revoke or recall and annul the grant of Letters of Administration granted to the 1st respondent in TOS.No.23 of 2003 dated 29.08.2008.

For applicant : Mr.R.Thiyagarajan
Senior Counsel
For respondent : Mr.R.Thiyagarajan

O R D E R

The captioned application has been filed by the third party to revoke or recall and annul the grant of Letters of Administration dated 29.8.2008 granted to the 1st respondent in T.O.S.No.23 of 2003.

2. Originally, the testamentary Suit was filed by 1st

respondent herein for issuance of Letters of Administration with certified copy of the Will of the deceased Sadhu A.N.Sircar executed in his favour as the legatee of the said deceased. This Court, vide judgment dated 27.08.2007 disposed of the said suit by recording the Memorandum of Compromise dated 16.07.2007, which was entered into between the said Sadhu A.N.Sarcar Foundation and Abraham Samarendrianath Sircar, the respondents herein under Order XXIII Rule -3 & 3 (b) of C.P.C. Pursuant to the said judgment, Letters of Administration was granted to the 1st respondent herein on 29.8.2007. Aggrieved against the said judgment, the applicants/third parties, have come forward with the instant application for revocation of the said Letters of Administration granted to the 1st respondent on the ground that the first item of the property in the Will of the deceased A.N.Sircar was the subject matter of sale in their favour and also their deceased brother Venkatesan.

3. It is the case of the applicants that the property in

question, was sold by the deceased A.N.Sircar himself during his life time by way of registered Sale Deeds separately in their favour and also in favour of their brother Venkatesan dated 14.2.2001 conveying 1/3rd undivided share each for them and the same has been admitted by the 1st respondent in the testamentary petition and contrary to the same, the respondents had entered into the Memorandum of Compromise. According to the applicants, the deceased A.N.Sircar, after executing the Will, had sold the property, which was mentioned as item No.1 of the schedule properties in his Will dated 30.6.2000 under three sale deeds in favour of the petitioners and one Venkatesan dated 14.12.2001. It is stated that the deceased A.N.Sarcar also mentioned the reasons for sale of the property the Sale deed and he had also declared that he is the absolute owner of the suit property and obtained it out of his self acquisition. The deceased also admitted and acknowledged the receipt of sale consideration from the applicants While so, the respondents have colluded and represented to this Court, as if the Will dated 30.6.2000 is the

last Will and testament and obtained probate of the said Will. Hence, the applicants prayed for revocation of Letters of Administration granted to the 1st respondent herein.

4. The learned Senior counsel for the applicants submitted that the applicants are the owner of the subject matter of the property in TOS.No. 23 of 2003. The learned Senior counsel for the applicants further submitted that Letters of Administration was obtained by the 1st respondent by concealing the material facts. It is submitted by the learned Senior counsel that the testator after executing the Will, had sold the house property situate in Vellore for which, Letters of Administration was granted in favour of the 1st respondent herein. Originally the application for Probate was filed against the son of the testator. Subsequently, in view of the caveat, the same has been converted into Testamentary Suit. Based on the compromise, which was entered into between the respondents herein, the Letters of Administration was granted including the property,

which was sold to the applicant by the testator during his life time. Hence, it is the contention of the learned counsel that Letters of Administration was obtained by concealing the materials facts. Therefore, the learned counsel for the applicants prayed for revocation of the Letters of Administration granted in favour of the 1st respondent herein. In support of his contention, the learned counsel has placed reliance on the Judgments reported in ***Sisir Kumar Chandra and another v. Sm.Monorama Chandra and Others*** *(AIR 1972 CAL. 283 V-59 C 50);* ***Illachi Devi (DEAD) by Lrs. and Others v. Jain Society, Protection of Orphans India and Others*** *(2003) 8 SCC 413);* ***Dr.R.A.Venkatesan v. D.Jenbagalakshmi and Others*** *(2011- 4- L.W. 916) and* ***K.Karthik and Another v. Jayanthi Iyengar and others*** *(2015 (2) CTC 425).*

5. Countering the arguments, the learned counsel appearing for the respondents submitted that question of title cannot be gone into by way of this application as the applicants herein, who

are third parties had no caveat interest in the property. The learned Counsel further submitted that though, originally, objection was raised by the son of the testator, subsequently, he has withdrawn the same. Therefore, the Will has been proved in the manner known to law and hence, there is no need for revocation of the Letters of Administration granted on the basis of the Joint Memo of Compromise.

6. According to the learned counsel, the present applicants, who are claiming independent title over the property cannot agitate the same by way of this application. It is the further contention of the learned counsel that the so called purchase made by the applicants and others, is only sham and there is no consideration passed and the testator was 90 years old at the relevant time. Therefore he submitted that the sale itself is null and void in the eye of law. Further, the applicants have obtained the Letters of Administration in the year 2003 itself. Now this application is filed with a delay and the same has not been properly explained. Hence, the learned counsel prayed for

dismissal of the application.

7. In support of his contention, the learned counsel for the applicant relied upon the judgment of this Court reported in AIR 1975 Mad.330 (In Re: N.Narasimhan and another); (1992) 1 L.W 185 (R.Krishnamoorthy v. Chandrashekaran); (1993) 2 SCC 507 (Chiranjilal Shrilal Goenka v. Jasjit Singh and Others); (1997) 2 L.W. 726 (A.C.Bopanna v. Dr.K.T.Achaya and Others); 2001 (2) CTC 713 (R.Ramachandran v. G.Hariharan); (2005) 12 SCC 154 (Manibhai Amaidas Patel and Another v. Dayabhai Amaidas); (2005) 12 SCC 503 (Baibir Singh Wasu v. Lakhnir Singh and Others) and 2008 (1) CTC 698 (Basanti Devi V. Raviprakash Ramprasad Jaiswal). The learned counsel also relied upon the unreported judgments in V.Mohanan and another v. Estate of E.Narayanan (OSA.No.78 of 2008); K.Sreeranjini v. Surendra and others (A.No.4513 of 2011); Surendra v. K.Sreeranjiani (OSA.No.50 of 2012); Amarnath Prabahar Ramsait alias Prabaharan and Ors. v. TPSH Sokkalal Ramsait) and Pramod Kumar and Others v. Amar Krishna Basu and Ors. (Test Case

No.7 of 1993).

8. In the light of the above submissions, now it has to be analsysed whether the Letters of Administration granted by this Court in Tos.No.23 of 2003 is liable to be revoked?

9. Before going into the legal issues, the sequence of events leading to the filing of this application is briefed hereunder.

10. It appears from the records that OP.No.94 of 2003 was originally filed by 1st respondent herein for the grant of Letters of Administration on the basis of the Will dated 30.6.2000 said to have been executed by Mr.A.N.Sircar. In the above original Petition, son of the testator, namely, Abraham Amarendiranath Sircar, alone was made as respondent. In the said petition, in paragraph 11, the petitioner therein i.e. the 1st respondent herein, it is pleaded as follows:

"11. The petitioner states that one of the Will

mentioned in item Viz., item No: (1) "Swasti Nilayam" bearing door No.103 of Katpadi Co-operative Township Limited is sold by the testator during his lifetime and hence not included in the affidavit of assets and liabilities filed along with this petition but claiming unpaid consideration for the same from the respective purchasers. .. .. .. "

11. In view of the objection given by the son of the testator, the 2nd respondent herein, namely, Abraham Samarendrianath Sircar, the aforementioned Original Petition was converted as Testamentary Suit being TOS.No.23 of 2003. The 2nd respondent herein/defendant in the above suit filed a written statement, wherein he denied the execution of the Will dated 30.6.2000. It is also pleaded by the 2nd respondent/ defendant in the above suit, that the alleged Will dated 30.6.2000 was a forged one. Further, he had pleaded that the above Will, i.e 30.6.2000, is not a last

testament of his father, whereas his father had executed a last Will dated 09.3.2002 in favour of his son.

12. From the written statement in the above TOS, it could be seen that the son of the testator had not only pleaded about the forgery of the signature of his father in the Will dated 30.6.2000 but also pleaded about the execution of another Will dated 09.3.2002, which is said to have been executed by his father during his life time. When the matter stood thus, the plaintiff and the defendant in TOS No.23 of 2003 have entered in to a compromise not only in respect of the property mentioned in the so called Will dated 30.6.2000 but also in respect of the other properties already sold to the applicants herein and others. The Joint Memorandum of Compromise also formed part of the judgment and decree passed by this Court.

13. On a careful perusal of the said Joint Memorandum of Compromise, it is seen that, in one of the terms set out in clause

3 (d), the 2nd respondent/defendant therein agreed to associate with the 1st respondent/plaintiff therein in all pending and proposed cases in respect of the property situated at Gandhi Nagar, Katpadi. As per clause 3 (f) of the very same Joint Memo of Compromise, the 2nd respondent/defendant therein also has given consent for grant of Letters of Administration to the plaintiff trust/1st respondent herein in respect of Plot No.103, in 40 Feet 1st West Cross Road, Gandhi Nagar, Katpadi, to the extent as agreed between the parties thereon.

14. It appears from the Joint Memo of Compromise that son of the testator, namely, Abraham Samarendiranath Sircar, had already initiated Original Petition in OP 305 of 2006 on the file of the Vellore District Court which was subsequently transferred to this Court and numbered as TOS.No.36 of 2006 for grant of Letters of Administration on the basis of the subsequent Will said to have been executed by his father. Further, in the Compromise memo filed by the parties, they agreed that there is no necessary

to pass any orders on merits in the above TOS.No.36 of 2006. Based on the compromise Memo, this Court had passed decree granting Letters of Administration.

15. It is to be noted that in the Original Petition filed by the 1st respondent herein for grant of letters of Letters of Administration, in paragraph 11, as already stated above, it has been categorically stated that since item No.1 of the suit property was already sold by the testator, the same has not been included in the affidavit of assets and liabilities.

16. Having pleaded so, 1st respondent herein entered into the so called compromise with the son of the testator, i.e. 2nd respondent herein during the pendency of the suit and obtained Letters of Administration based on the said compromise behind the back of the original purchasers, which is not sustainable and the same itself is a clear case of suppression of material facts and playing fraud on the Court to obtain grant in respect of the

property which belongs to somebody. The Will of the testator, namely, S.N.Sircasr, which was the subject matter of the suit being TOS No.23 of 2003, has not been proved in the manner known to law.

17. It is well settled that execution, attestation and the testamentary capacity of the testator has to be proved in the manner known to law. In the absence of the same, this Court cannot grant probate or Letters of Administration merely on the basis of the Compromise entered into between the parties particularly, when one of the property was already sold by the testator during his life time to third party. The defendant in the suit, i.e., 2nd respondent herein, assailed the very Will on the ground of forgery and claimed the right on the basis of the subsequent Will. Whereas in the Compromise Memo, he has given up the subsequent Will and straight away agreed for grant of Letters of Administration in respect of the property, which was not even included in the affidavit of assets and liabilities filed in

the petition for Letters of Administration originally. The above conduct of the parties clearly indicates that they entered into the compromise only in order to defeat the rights of the applicants herein.

18. From the typed set of papers filed in the captioned application, it is seen that originally, the property was purchased by the deceased A.N.Sircar on 23.07.1962. Though the Will dated 30.8.2000 was executed by the testator, A.N.Sircar subsequently, on 14.12.2001, he has sold item No.1 of the suit property, morefully described in the said Will, to Vijayalakshmi, Bakyalakshmi and Venkatesan. When the sale deed dated 14.12.2001 appended at pages 63 – 79 is perused, it is seen that the vendor, A.N.Sircar, has sold the property to the purchaser as stated above. In the sale deed, the vendor, namely, the testator, A.N.Sricar, has specifically mentioned that since his son, frequently demands money from him and wanted to transfer the property in his name and since he failed to take care of him at his

old age and tried to murder him and also tried to drive him away from the property, he left his house and hadgone to Kanyakumari and staying along with his friend and therefore, he decided to dispose the property to discharge his debts thereby selling property for a sum of Rs.5,40,000/- each.

19. Having executed the Will, he had sold the property subsequently, which is a clear case of ademption since the property, which is the subject matter of the sale deed dated 14.12.2001, sold in favour of the applicants herein and one Venkatesan did not belong to the testator at the time of his death. Therefore, the legacy could not take effect in respect of 1st item of the Will.

20. The second argument canvassed before the Court is that the 2nd respondent herein has filed the original suit in O.S.No.180 of 2002 for permanent injunction restraining the applicants herein from in any way interfering with his possession.

In the said suit, he has admitted the sale of the suit properties in favour of the petitioner and subsequently, the said suit was withdrawn on 21.12.2009 by the 2nd respondent. Though there is no document filed before this Court to substantiate the same, this fact is not disputed by the other side counsel during the arguments. It is also admitted that suit in O.S.No.133 of 2008 was filed by the respondents herein before the District Court, Vellore to set aside the sale executed in favour of the applicants was also dismissed and a copy of the judgment is filed before this Court. The above facts clearly indicate that the respondents are, in one way or other, making some attempts to retrieve the property which was already sold by the testator A.N.Sircar during his life time. Subsequent to the Letters of Administration granted by this Court, the first respondent herein has also executed registered Power of Attorney dated 03.8.2009 in favour of one Wilson, wherein, it was pleaded about the Letters of Administration and the full power given to the said Wilson to continue the suit filed by them in O.S.No.128 of 2008 and also

for eviction and deal with the property. On the same day, i.e. on 03.8.2009, the said Power of Attorney has entered into the sale agreement for sale of the property which was already sold to the applicants herein. Thereafter, on 31.8.2009, the 1st respondent has executed a Deed of simple Mortgage through his Power of Agent in favour of one Sasikala for a sum of Rs.10,00,000/- All these facts clarly show that the respondents 1 and 2, having known that the first item of the property covered under the Will has already been sold to third parties i.e. the applicants herein, have obtained Letters of Administration without making them as parties. That itself clearly shows that they concealed the material facts and obtained Letters of Administration fraudulently.

21. In this context, it is useful to refer Section 263 of the Indian Succession Act 1925, which reads as follows:

> *"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."

22. In this case, the grant was obtained without arraying the parties, who are interested in the properties and that itself is

one of the grounds to revoke or annul the Letters of Administration granted by the Court.

23. It is also useful to refer Section 223 of the Indian Succession Act, 1925 which reads as follows:

> *223. Persons to whom probate cannot be granted.- Probate cannot be granted to any person who is a minor or is of unsound mind [nor to any association of individuals unless it is a company which satisfies the conditions prescribed by rules to be made [, by notification in the Official Gazette] by the [State Government] in this behalf.]"*

24. In the judgment reported in 2003 8 SCC 413 (ILLACHI DEVI V. JAIN SOCIETY), the Hon`ble Supreme Court has observed as follows:

> *".. .. ..The view taken by the High Court cannot be countenanced. The mere fact of*

registration of a society under the Societies Registration Act will not make the said society distinct from an association of persons. Sections 223 and 236 of the Act in very categorical terms provide that association of persons; be it a society, a partnership or other forms of associations, a Letter of Administration can be granted only to a company fulfilling the conditions laid down under the Rules. The rules have been framed by the Governor-General-in Council, which, after the enforcement of the Constitution of India, became a law within the meaning of Article 372. Sections 223 and 236 of the Act would be interpreted in the light of the Rules framed in terms thereof. Thus, in terms of Sections 223 and 236, a "company" must be a "company"registered under the Companies Act. Neither the Act nor the Rules framed thereunder contemplate that the societies registered under the Societies Registration Act would qualify to be considered as a company for the purpose of Sections 223 and 236.

A society registered under the Societies Registration Act is not a body corporate as is the case in respect of a company registered under the Companies Act. Therefore, such a society is not a juristic person. The law for the purpose of grant of a probate or Letter of Administration recognises only a juristic person and not a mere conglomeration of persons or a body which does not have any statutory recognition as a juristic person. Moreover, a society whether registered or unregistered neither can be prosecuted in a criminal court nor is it capable of ownership of any property or of suing or being sued in its own name.

Inasmuch as a company enjoys an identity distinct from its original shareholders, wheareas the society is indistinguishable, in some aspects, from its own members, that would qualify as a material distinction, which

prevents societies from obtaining Letter of Administration.

The provisions in the Acts of various States show that a society registered under the Societies Registration Act as contra distinguished from a company registered under the Companies Act cannot sue in its own name. It is to be sued in the name of the President, Chairman, or Principal Secretary or trustees as shall be determined by the rules and regulations of the society or in the name of such person as shall be appointed by the governing body for the occasion in default of such determination."

In the case on hand, there is no materials placed before the Court that somebody has authorised either in terms of the statute or by resolution to get the Letters of Administration in favour of the 1st respondent.

25. In a judgment reported in 2011 (4) L.W. 916, the Hon`ble Division Bench of this Court has held as follows:

> *"22. .... When the property was already said to have been disposed of by way of Settlement Deed in favour of Dhanapal and subsequently sold, the Respondents definitely have interest in the property to oppose the Letters of Administration. More so, when the Letters of Administration was sought for nearly 30 years after the death of Perundevi Ammal... "*

26. From the above judgment, it is very clear that the persons, who have caveatable interest in the property should have been cited as parties. In this case, the applicants are not made as parties in the suit. That itself is also one of the ground to annul the grant of Letters of Administration.

27. Similarly, in the judgment reported in ***K.KARTHIK AND ANOTHER V. JAYANTHI IYENGAR AND OTHERS*** *(2015 (2) CTC 425,* this Court has held as follows:

> *".. ..Under section 263 of the Indian Succession Act, the grant of Probate or Letters of Administration can be revoked or annulled for just cause. As per sub-clause (b) to Section 263 of the Act, if the grant of Probate or Letters of Administration was obtained fraudulently by making a false suggestion or by concealing from the Court Something material to the case, the same can be revoked. In the instant case, though the 1st Respondent was aware of the Will dated 12.11.1977 executed by the Testator in favour of the mother of the Applicants as well as the Settlement Deeds*

executed in favour of the Applicants, the 1st Respondent has suppressed the same in the Original Petition proceedings for grant of Letters of Administration. As per sub-clause to Section 263 of the Indian Succession Act, if the grant of Letters of Administration has become useless and inoperative through circumstances, the same can be revoked. In the instant case, according to the First Respondent, Will was executed by the Testator-P.D. Rajagopalan on 26.6.2000 in her favour; but subsequent to 26.6.2000 two Gift Settlement Deeds were executed on 24.8.2000 and 25.8.2000 in favour of the Applicants. Therefore, according to the learned Counsel for the Applicants, even if the said Will dated 26.6.2000 is taken as genuine Will, since

subsequently the Testator-P.D. Rajagopalan has executed two Settlement Deeds on 24.8.2000 and 25.8.2000 in favour of the Applicants, the grant of Letters of Administration has become useless and inoperative. Therefore, under sub-clause to Section 263 of the Indian Succession Act, the Applicants are entitled to revocation of the Letters of Administration granted in favour of the 1st Respondent. I find some force in the Submission made by the learned Counsel for the Applicants. Hence, the Applicants are entitled for the prayers sought for in the present Applications."

28. In ***SISIR KUMAR CHANDRA AND ANOTHER V. SM. MONORAMA CHANDRA AND OTHERS [A***IR 1972 CALCULUTTA 283 (V-59 C 50)], the High Court of Calcutta has held thus :

"16.....A Court of probate is said to be a court of conscience which is not to be influenced by private arrangements of the parties Either it grants probate to a will or it rejects such grant. For such a Court. It is said, there is no middle path for a happy compromise. The rule of law is stated to be that there can be no probate by consent. Either it is a grant or refusal. The Court has to be satisfied in each case whether the Will proposed is truly the will of a capable testator or not. It is not concerned with any other arrangement. It has been said over and over again that there is no such thing as conditional probate or an amended probate. It is either all or nothing. That seems to be sensible enough law.

21.....The agreement arrived at between the parties is a different matter altogether. This agreement can be kept in

the records of Court and the parties can take such steps as they think best by independent proceedings on the agreement. But in the instant case there was a decree in terms of the settlement filed in Court and grant of probate by consent.

22.....The whole question is whether this can be done? It seems to me that the attention of the court was not drawn to the case reported in (1943) 48 cal WN 294 (jagadish Chakravarty v. Upendra chandra Chakravarty) when the consent decree dated September 7, 1948 was passed. It was held by this court in (1943) 48 Cal WN 294 at p.299 as follows:

"That a Court exercising probate jurisdiction cannot grant or refuse probate of a will consent and without taking evidence is settled law. When a

Will is actually put before such a Court, the parties to the proceedings cannot say to the Court, that the probate be granted without proof of the due execution of the Will or probate refused without any evidence being led. This principle is well established and has for its basis the fact that a probate or an order refusing probate operates as a judgement in rem. Monmohini Guha v. Banga Chandra Das, (1904) ILR31 Cal 357 and Sarada Kanta Das v. Gobinda mohan Das, (1910) 12 cal LJ 91. When a will is put before the probate Court for proof the parties before the court can, however, enter into an agreement which changes the terms of the Will and say that probate be granted. The effect of such an agreement will be the withdrawal of the objections to the proof of the will in consideration of the division of the estate in the manner agreed upon. In such a case the probate Court will have

to take evidence about the Will and if it comes to the conclusion that the Will is valid must grant probate of the Will, as it stands and unmodified by the terms of the agreement but should make the agreement arrived at between the parties an annexure to the decree"

29. In (2015) 8 SCC 615 ***(JAGDISH CHAND SHARMA V. NARAIN SIGNH SAINI),*** the Hon`ble Supreme Court has held as follows:

"46.This Court in H. Venkatachala Iyengar[AIR 1959 SC 443] while dilating on the statutory requisites of valid execution of a will, observed that unlike other documents this testamentary instrument speaks from the death of the testator and by the time when it is produced before a court, the testator had departed from his temporal state and is not available to own or disown the same. It was thus emphasised that this does introduce an element of solemnity in the decision on the

question as to whether the document propounded is proved to be the last will and testament of the departed testator. In this context, it was emphasised that the propounder would be required to prove by satisfactory evidence that (i) the will was signed by the testator, (ii) he at the relevant time was in a sound and disposing state of mind, (iii) he understood the nature and effect of the dispositions, and that (iv) he put his signature to the document of his own free will. It was observed that ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, the court would be justified in making a finding in favour of the propounder signifying that he/she had been able to discharge his/her onus to prove the essential facts. The necessity of removal of the suspicious circumstances attendant on the

execution of the will, however, was underlined as well. That no hard-and-fast or inflexible rule can be laid down for the appreciation of the evidence to this effect was acknowledged.

47.That a propounder has to demonstrate that the will was signed by the testator and that he was at the relevant time in a sound disposing state of mind and that he understood the nature and effect of the disposition and further that he had put his signature to the testament on his own free will and that he had signed it in the presence of the two witnesses who had attested it in his presence and in the presence of each other, in order to discharge his onus to prove due execution of the said document was reiterated by this Court amongst others in Surendra Pal[(1974) 2 SCC 600] . It was held as well that though on the proof of the above facts, the onus of the propounder gets discharged, there could be situations where the execution of a will may

be shrouded by suspicious circumstances such as doubtful signature, feeble mind of the testator, overawed state induced by powerful and interested quarters, prominent role of the propounder, unnatural, improbable and unfair bequests indicative of lack of testator's free will and mind, etc. In all such eventualities, the conscience of the Court has to be satisfied and thus the nature and quality of proof must be commensurate to such essentiality so much so to remove any suspicion which may be entertained by any reasonable and prudent man in the prevailing circumstances. It was propounded further that where the caveator alleges undue influence, fraud and coercion, the onus, however, would be on him to prove the same, and on his failure, probate of the will must necessarily be granted if it is established that the testator had full testamentary capacity and had in fact executed it validly with a free will and mind.

52. While dwelling on the respective prescripts of Section 63 of the Act and Sections 68 and 71 of the 1872 Act vis-à-vis a document required by law to be compulsorily attested, it was held in Janki Narayan Bhoir case [(2003) 2 SCC 91] that if an attesting witness is alive and is capable of giving evidence and is subject to the process of the court, he/she has to be necessarily examined before such document can be used in evidence. It was expounded that on a combined reading of Section 63 of the Act and Section 68 of the 1872 Act, it was apparent that mere proof of signature of the testator on the will was not sufficient and that attestation thereof was also to be proved as required by Section 63(c) of the Act. It was, however, emphasised that though Section 68 of the 1872 Act permits proof of a document compulsorily required to be attested by one attesting witness, he/she should be in a position to prove the execution thereof and if it is a will, in terms of Section 63(c) of the Act

viz. attestation by two attesting witnesses in the manner as contemplated therein. It was exposited that if the attesting witness examined besides his attestation does not prove the requirement of the attestation of the will by the other witness, his testimony would fall short of attestation of the will by at least two witnesses for the simple reason that the execution of the will does not merely mean signing of it by the testator but connotes fulfilling the proof of all formalities required under Section 63 of the Act. It was held that where the attesting witness examined to prove the will under Section 68 of the 1872 Act fails to prove the due execution of the will, then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects."

30. From the above judgments, it is well settled that the Will has to be proved in the manner known to law and the probate or Letters of Administration cannot be granted by way of

private arrangement between the parties. In this case also having omitted to state the property in the assets of the affidavit filed in the original petition, subsequently, the respondents have made compromise between themselves and obtained the Letters of Administration on the basis of the above compromise in respect of the property which was already sold in favour of the applicants herein.

31. The learned counsel for the respondents have placed reliance on the judgments to contend that the applicants have no caveatable interest. The judgments reported in Re N.Narasmihan and Another cited supra are carefully read, it is clear that when the person disputing title of the testator or testatrix to the whole or any part of the property which is the subject matter of disposition is entirely and necessarily outside the scope of probate proceedings, that question will have to be settled by a regular trial. But in this case, the applicants are not questioning the title of the testator, but claiming interest in the property on

the basis of the purchase made by them. Therefore, this Court is of the view that the judgments cited supra by the learned counsel for the respondents are not applicable to the facts of the present case. The judgment cited by the learned counsel for the respondents in R.Krishnamoorthy v. Chandrashekaran cited supra is also in similar line. In the case of Chiranjilal Shrilal Goenka v. Jasjit Singh and Ors., the Hon`ble Supreme Court has held that Probate Court does not decide any question of title or of the existence of the property itself. The only issue in the Probate proceedings relates to the genuineness and due execution of the Will and the Court itself is under duty to determine. The said judgments clearly show that in the Probate proceedings, the Will has to be proved in the manner known to law. In Ishwardeo Narain Singh v. Smt. Kamta Devi, the Apex Court has held that the Court of Probate is only concerned with the question as to whether the document put forward as the last Will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution

the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the probate Court.

32. In A.C. Bopanna v. Dr.K.T.Achaya and Others cited supra, it has been held that revocation must be made within reasonable time even though there is no limitation period. In R.Ramachandran v. G.Hariharan, the petition filed under Section 263 has been dismissed on the ground that he has already admitted the validity of the Will.

33. In the unreported judgment of this Court in A.No.4513 of 2011, this Court held that having questioned the title and authority of the testator to bequeath the property, he cannot maintain the Caveat in the Testamentary Suit or proceedings. Similarly in the unreported judgment in OSA.No.50 of 2012, the Division Bench of this Court has held that disputed question of title would be outside the purview of the probate proceedings. In

the unreported judgment in A.No.3568 and 3569 of 2012, this Court has held that without the presence of the applicant, the probate has been granted and the applicant is only an outsider to the probate proceedings.

34. The above judgments are not applicable to the facts of the present case. From the above judgments and the settled position of law, it could be seen that the Will has to be proved in the manner known to law in the testamentary proceedings. Similarly, the applicants have not come to Court to deny the title of the testator. They have come before this Court claiming interest in the property on the basis of the purchase made by them. Therefore, it cannot be stated that they have no caveatable interest and that they cannot attack Letters of Administration granted.

35. It is to be noted that when the 1st respondent, had omitted to include the affidavit of assets with regard to the

property in question in the petition, and that the 2nd respondent had taken a defence of forgery about the subject matter of the Will in the suit, the compromise entered into between the 1st respondent and the 2nd respondent for grant of Letters of Administration, which is on the basis of some private arrangements, that too, behind the back of the applicants, is unsustainable in law. The nature of the documents executed by them subsequent to the grant of Letters of Administration on the same day, as discussed earlier, indicate that the respondents are some how or other tried to defeat the rights of the applicant herein and they obtained the Probate suppressing the material facts and without making them as a party to the proceedings. That itself is clear case of fraudulent act and concealment of material facts. Therefore, this Court hold that it is a fit case that the Letters of Administration granted is liable to be revoked. The mere fact that the applicants have approached the Court with some delay itself cannot be a ground to allow the fraud played on the Court to continue for ever. Every fraudulent act vitiates all

solemn act. Hence, this Court, having regard to the manner in which the Letters of Administration was obtained by entering into compromise without testing the Will, is of the view that it is a fit case to revoke Letters of Administration.

The captioned application is, accordingly, allowed. The Judgment and decree dated 29.08.2008 is revoked.

ga 02..03..2017

Index: Yes/No
Internet : Yes/No

N.SATHISH KUMAR, J

ga

Pre-Delivery order in
A.NO.2608 of 2012 in
TOS.NO.23 OF 2003

02.03..2017

http://www.judis.nic.in