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A.No.6076 of 2016
in T.O.S.No.36 of 2011

Reserved on : 21.11.2022

Pronounced On : 30.11.2022

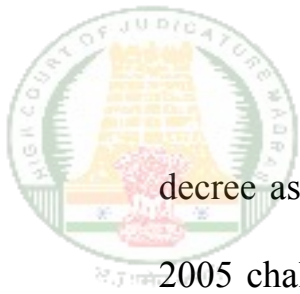
G. CHANDRASEKHARAN, J.

A.No.6076 of 2016 is filed to reject the plaint in T.O.S.No.36 of 2011.

2.The learned counsel for the applicants submitted that the respondents 1 to 6 filed O.P.No.841 of 2005 for the grant of Letters of Administration of the Will dated 05.10.1970 alleged to have been executed by Dharmanjulu Naidu. The testator purported to have bequeathed the property, being house and ground bearing Old No.5/10-A,B,C,D, Vedagiri Maistry Street, Chintadripet, Chennai – 2, vesting the property absolutely in favour of his son C.D.Sadagopan after the extinguishment of life estate granted in favour of his wife Savithriammal. The testator died on 19.12.1973. On a caveat lodged by the applicants, the Original Petition came to be converted as T.O.S.No.36 of 2011. Dharmanjulu Naidu owned and possessed properties. He died on 19.12.1973 leaving behind his wife Savithriammal, daughters Lalitha, Vasantha, Krishnaveni and son C.D.Sadagopan. Savithriammal died on 18.10.1982. Vasantha Sekaran, instituted a suit in O.S.No.8303 of 1984 on the file of the City Civil Court against her brother C.D.Sadagopan and sisters



Krishnaveni and Lalitha for partition of properties described as 'A', 'B' & 'C' schedule properties therein, left by their father into four equal shares and allot 1/4th share to her. C.D.Sadagopan filed a written statement claiming exclusive ownership and title to the properties on the basis of the Will dated 05.10.1970. A specific issue was framed with regard to the Will dated 05.10.1970. The trial Court found that C.D.Sadagopan failed to prove the validity of the Will and passed a preliminary decree for partition on 22.09.1986 in respect of 'B' schedule property and rejected the other reliefs asked in the suit. The second respondent Krishnaveni preferred A.S.No.87 of 1989 and third defendant Lalitha preferred A.S.No.114 of 1989 against this judgment and decree. The learned II Additional Judge, City Civil Court, Chennai, by a common judgment and decree dated 27.10.1989, confirmed the judgment of the trial Court. They preferred S.A.Nos.62 of 1992 and 175 of 1991. During the pendency of the Second Appeal, C.D.Sadagopan died and Appeals were dismissed on 11.07.2002. Third defendant Lalitha filed I.A.No.7742 of 2003 for passing final decree. Advocate Commissioner was appointed and he filed report suggesting the mode of division. Respondents 1 to 6 objected the report and stated that they have filed petition for grant of Letters of Administration. Respondents 1 to 6 have not filed any Appeal against the preliminary decree passed in O.S.No.8303 of 1984. Therefore, they are precluded from challenging the findings recorded in preliminary



decree as per Section 97 of C.P.C. Respondents 1 to 6 filed A.S.No.690 of 2005 challenging the final decree and judgment dated 24.01.2005. That was dismissed on 30.12.2009. Against the judgment, Second Appeal in S.A.No.86 of 2012 was filed and it is pending. The legatee C.D.Sadagopan had not taken any steps to probate the Will during his lifetime after the death of executrix of the Will on 19.12.1973. Therefore, the respondents 1 to 6 are not entitled to maintain T.O.S.No.36 of 2011. It is barred by law, especially under Section 141 of Indian Succession Act.

3.The learned counsel for the applicants relied on the following judgments

i)It is observed in ***1951 SCC Online Pat 160 : AIR 1953 Pat 97 [Sri Thakurji and another Vs. Dhulan Ahir and others,*** that

9.When the present defendant 3 lost title suit No. 130 of 1932 up to the appellate stage and when the names of the plaintiffs were mutated in Register D he filed Suit No. 362 of 1944 for realization of half the income of some of the properties devised by the aforesaid will dated 24-12-1918. That suit was contested by the present plaintiffs who put forward the plea that by virtue of the provisions of Section 141, [Indian Succession Act](#) the plaintiff of that suit had debarred himself from claiming any interest in the properties so devised. [Section 141, Indian Succession](#)



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Act runs as follows:

"If a legacy is bequeathed to a person who is named an executor of the will, he shall not take the legacy, unless he proves the will or otherwise manifests an intention to act as executor."

10. The defence of the present plaintiffs in that suit succeeded and it was held that "According to the provision of Section 141 an executor to whom a legacy has been bequeathed shall not take the legacy unless he proves the will or otherwise manifests an intention to act as an executor. There were three persons named in the will who were authorised to act as executors. They were No. 1 Ganesh Pd; No. 2 Harihar Charan, No. 3 Bhawani Charan alias Bhola. Out of these three persons none of the executors applied for probate before the District Judge. Exhibit A is the judgment passed by the learned District Judge which shows that this Bhawani Pd. hotly contested in that proceeding and tried his level best to nullify the will itself. The plaintiff of this suit went so far as to say that the will was a forged one and the executant of the will was of an unsound mind & as such was incapable of executing any valid will. He further contended that the idol named Shree Thakurjee was not in existence at all. The learned District Judge found all those objections of the present plaintiff to be unfounded and frivolous. He overruled his objection & granted letters of administration to the applicant. This Bhawani Lal thereupon brought a title suit No. 130/1932 to set aside that will. The learned Munsif dismissed the suit



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and held the will to be valid one. Thereupon this plaintiff preferred an appeal against that decision. The judgment of T. A. No. 159/1934 which is Ex. A1 to this suit shows that the learned appellate Court confirmed the decision of the lower Court and the said will was held to be genuine, valid and operative. The mischief of the plaintiff does not end here. The judgment of R. S. 1655/1943 Ex. A2 shows that Shree Thakurjee brought a Rent Suit against Dhulan Ahir and another and he appears to have raised a hostile claim. Thus from the beginning to the end I find his conduct highly mischievous. His whole effort was from the very beginning to set at naught the will executed by Rameshwar Dayal. He tried his utmost to make the said will null and void and inoperative. Under such a circumstance according to the provision laid down under [Section 141, Indian Succession Act](#) of 1925 he is not entitled to take the legacy as he neither proved the will nor manifested his intention to act as an executor."

ii) It is observed in **AIR 2004 Cal 217 [Himungsu Kumar Basu Vs.**

Sudhangsu Kumar Basu], that,

7. Such section clearly indicates that there is a specific bar against a legatee to get legacy unless and until he fulfils the terms and conditions under [Section 141](#) of the Act, The words '.....shall not take,.....' is comparable with the words 'shall not be able to take' when it is conditional with the other parts of the section. Admittedly plaintiff did not discharge such functions. It is



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just like a reciprocal promise. Unless you cultivate land you cannot get the crops. When a person died after creating a Will it would be sincere desire of the Court of law to give respect to his/her intention and to protect his/her interest because such person is no more in this world to fight for any cause. Therefore, the named executors are obliged to discharge their duties as representatives of the testator. If one fails to discharge such duties then such person cannot claim any equity. Therefore, if the law is not read in such manner then [Section 141](#) of the Indian Succession Act, 1925 will have redundant face value. Yet the appellant/plaintiff is not interested to refuse from giving legacy but subject to completion of the administration. But the respondent/plaintiff is not only impatient but also forgetful that unless administration is complete title cannot pass. Therefore, if the legacy is directed to be passed on the strength of this so-called administrative suit keeping the administration under the Will pending, it will be obviously hit by the principles of Order 7 Rule 11(d) substantially.

8. In AIR 1973 SC 2583 [Mst. Bhagwani Kuer(dead) and Ors. v. [Tapeswari Kuer](#) (dead) and Ors.] it was categorically held that to manifest an intention to act as executor, the executor must do things which he was directed to do in the Will by the testator. Where the testator in his Will desired that the executor should perform his Shradh ceremony and it was found that the executor had taken part in cremation of the testator but



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had not performed his Shradh ceremony, it would be held that the cremation ceremony being different from Shradh could not be said that the executor had manifested his intention to act as executor. This judgment speaks what type of strictness will have to be followed by the Court in such circumstances. Position of this case is much worse than that one yet the respondent/plaintiff is inclined to get the legacy before completion of administration. Therefore, now the question is whether the civil suit is absolute bar at this stage or not. According to me, sometimes a suit can be said to be absolute bar not by application of law but by implication of law. Such implication arises from the interpretation of law. Therefore, either expressly or impliedly a civil suit can be said to be hit by the principle of demurrer.

iii) It is observed in 2016 SCC Online Cal 6523 [Soumitra Dhar Vs.

Ashim Kumar Nandi], that,

23. It is relevant to quote the provisions of [Section 141](#) of the Indian Succession Act, which is as follows:

"141. Legatee named as executor cannot take unless he shows intention to act as executor. If a legacy is bequeathed to a person who is named an executor of the Will, he shall not take the legacy, unless he proves the Will or otherwise manifests an intention to act as executor."

24. The question for consideration of the Court is whether the defendant who did not express his intention to act as executor in spite of having notice of the Will dated January



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28, 1995, is entitled to the legacy under the said Will. In *"Mst Bhagwani Kuer V. Smt. Tapeswari Kuer"* reported in AIR 1973 SC 2583, the Supreme Court dealt with the issue whether by taking part in cremation ceremony of the testator and by helping two daughter-in-law to manage properties, the executor manifests his intention to act as an executor and is, therefore, entitled to claim his legacy. It is held by the Supreme Court that the executor did not manifest his intention to act as an executor of the Will by performing cremation ceremony of the testator, as the testator desired in the Will that his executor would perform Shradh Ceremony and thereby the executor cannot take the legacy of the Will as laid down in *Section 141* of the Indian Succession Act. In *"Siddamurthy Jayarami Reddy V. Godi Jayarami Reddy"* reported in (2011) 5 SCC 65 the Supreme Court held that the legacy bequeathed to the executor by the testator did not vest in the executor as he did not discharge his obligation under the Will as an executor and as he was instrumental in frustrating the adoption of son by testator's daughter, and thereby the executor is not entitled to any interest in the estate of the testator. In *"Himangshu Kumar Basu V. Sudhangshu Kumar Basu"* reported in AIR 2004 Cal 217 both the plaintiff and the defendant were appointed as joint executors under the Will and the plaintiff did not join hands as executor to obtain the probate of the Will, but the defendant obtain the probate of the Will. Subsequently, the plaintiff brought a civil suit against the defendant for delay in administration of the estate under the



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Will and claimed allotment of property in spite of pendency of the administration by executors. The trial court dismissed the suit on the basis of preliminary issue that the suit is not maintainable in law. By reversing the order of the first appellate court Learned Single Judge of our High Court restored the order of the trial court on the ground that the suit is barred under [Section 141](#) of the Indian Succession Act.

25. In the present case the defendant did not join the plaintiff to act as joint executors for obtaining grant of probate of the Will dated January 28, 1995, and did not manifest his intention to act as executor of the said Will. On the contrary the defendant contested the probate proceeding by filing an affidavit in support of the caveat and thereby the defendant did not express his intention to act as an executor of the Will. By following the decision of the Supreme Court in "[Mst. Bhagwani Kuer V. Smt. Tapeswari Kuer](#)" (supra) and "[Siddamurthy Jayarami Reddy V. Godi Jayarami Reddy](#)" (supra) and the dictum of the provisions of [Section 141](#) of the Indian Succession Act, I can safely hold that the defendant is not entitled to the legacy bequeathed by the testator - Shyam Sunder Nandy under the Will dated January 28, 1995 (Exhibit-D).

4. In response, the learned counsel for the second respondent submitted that applicants have filed written statement and they cannot seek to reject the
plaint at this point of time. The earlier suits had been decided and it was found



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that C.D.Sadagopan failed to prove the probate of the Will. However, the genuineness of the Will had not been decided. There is no bar under Section 137 of the Limitation Act to file the present testamentary suit. There is also no question of estoppel, acquiescence and waiver for the reason that there were several proceedings pending between the parties. He further submitted that the Will refers the property in door No.5/10-A,B,C,D, Vedagiri Maistry Street, Chintadripet, Chennai – 2. However, the suit in O.S.No.8303 of 1984 was not filed in respect of door No.5/10-A,B,C,D, Vedagiri Maistry Street, Chintadripet, Chennai – 2, but was filed only for No.5/10-B. It is seen from the judgment that there were steps taken by C.D.Sadagopan for probating the Will. In view of the fact that the properties in door No.5/10-'A', 'C' & 'D' are not shown as suit properties in O.S.No.8303 of 1984, respondents 1 to 6 can maintain this T.O.S for seeking Letters of Administration in respect of property in 5/10-'A', 'C' & 'D'. Even when the property in door No.5/10-'A', 'C' & 'D' are not shown as properties in O.S.No.8303 of 1984, the Advocate Commissioner had included the properties in door No.5/10-'A', 'C' & 'D' in the report for division. It is totally illegal. Commissioner acted beyond the scope of the commission warrant. The Will was marked in the suit and therefore it could not be probated immediately.

5. The learned counsel for the first respondent further submitted that



even in T.O.S.No.36 of 2011 there is no schedule given. No written statement was filed in O.S.No.8303 of 1984 claiming that 'A', 'C' & 'D' properties are not the suit properties in O.S.No.8303 of 1984. Respondents 1 to 6 participated in the final decree proceedings. Therefore, the learned counsel for the first respondent supported the case of the applicant for rejecting the plaint in T.O.S.No.36 of 2011.

6.From the copy of the Will executed by Dharmanjulu Naidu, it is seen that he claimed that he was 67 years old at the time of execution of will. He claimed that he possessed immovable properties namely No.5/10, 'A', 'B', 'C' & 'D', Vedagiri Maistry Street, Chindadripet, Madras – 2, and it is recited that the properties should be enjoyed by his wife during her lifetime. His wife has no right of alienation during her lifetime. After her lifetime, the properties shall be taken absolutely by his son C.D.Sadagopan. A direction was given to son C.D.Sadagopan that he has to do all Seervarisai to his daughters. Thus, this Will covers the immovable property of Dharmanjulu Naidu in No.5/10 'A', 'B', 'C' & 'D', Vedagiri Maistry Street, Chindadripet, Madras – 2.

7.The plaint filed in O.S.No.8303 of 1984 shows that there were three schedule of properties. 'A' and 'C' schedule properties are different and not connected with the property bearing door No.5/10. 'B' schedule relates to the



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property bearing No.5/10 'B'. Therefore, so far as the property in door No.5/10 is concerned, the plaintiffs in O.S.No.8303 of 1984 had filed the suit only in respect of door No.5/10 'B' and not in respect of door No.5/10 'A', 'C' & 'D'. The suit in O.S.No.8303 of 1984 was decreed only in respect of 'B' schedule property alone. The relief claimed in respect of other properties was negated. The appeal filed in Appeal Nos.87 and 114 of 1989 against the judgment passed in O.S.No.8303 of 1984 came to be dismissed by a common judgment on 27.10.1989. The trial Court negated the claim made by C.D.Sadagopan on the basis of the Will on the ground that C.D.Sadagopan failed to prove the Will dated 05.10.1970. The Second Appeals in S.A.Nos.62 of 1992 and 175 of 1991 were also dismissed. In I.A.No.7742 of 2003 final decree was passed allotting specified portions in 'B' schedule property. The commissioner's plan shows that the property in door No.5/10 was shown as 4 plots and allotted. It is submitted by the learned counsel for the respondents 1 to 6 that without including 'A', 'C' & 'D' in door No.5/10, the property in 5/10 'A', 'B', 'C' & 'D' was subjected for partition. The records produced in this case also confirms this statement. Mainly because the defendants had not taken any plea with regard to non inclusion of 'A', 'C', & 'D' in door No.5/10, the plaintiff in O.S.No.8303 of 1984 cannot claim partition in these properties. Plaintiff showed only 5/10-'B' as the suit property. Therefore, this Court finds that T.O.S.No.36 of 2011 can be maintained in respect of the property in 'A',



'C' & 'D' in door No.5/10.

8.It is the submission of the learned counsel for the applicant that there is huge delay and that the legatee C.D.Sadagopan had not initiated any proceedings for probating the Will by seeking Letters of Administration.

Section 141 of Indian Succession Act, 1925 reads as follows:-

“Legatee named as executor cannot take unless he shows intention to act as executor- If a legacy is bequeathed to a person who is named an executor of the Will, he shall not take the legacy, unless he proves the Will or otherwise manifests an intention to act as executor. Illustration: A legacy is given to A, who is named an executor. A orders the funeral according to the directions contained in the Will, and dies a few days after the testator, without having proved the Will. A has manifested an intention to act as executor”.

9.We can understand from this Section that if the legatee, is named as executor of the Will failed to prove the Will or manifest his intention to act as an executor, he cannot take the legacy. In the case before hand, the Will was executed on 05.10.1970 and the testator Dharmanjulu Naidu died on 19.12.1973. The legatee C.D.Sadagopan died on 20.03.2000. Meanwhile the suit in O.S.No.8303 of 1984 was filed for partition. In the written statement filed by C.D.Sadagopan, he claimed exclusive right on the basis of the Will.



The trial Court found that C.D.Sadagopan failed to prove the probate of the Will that he had taken steps for probating the will.

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10.The learned counsel for the respondents 2 to 6 produced the following judgment in support of his case that there is no limitation prescribed for seeking probate or Letters of Administration for the reason that the right is a continuous right.

i)It is observed in ***2019 SCC ONLINE SC 630 [Sameer Kapoor and Another Vs. State through Sub-Division, Magistrate South, New Delhi and others]***, that

36. Therefore, considering the law laid down by this Court in the case of Kunvarjeet Singh Khandpur (supra), it can be said that in a proceeding, or in other words, in an application filed for grant of probate or letters of administration, no right is asserted or claimed by the applicant. The applicant only seeks recognition of the court to perform a duty. Probate or letters of administration issued by a competent court is conclusive proof of the legal character throughout the world. That the proceedings filed for grant of probate or letters of administration is not an action in law but it is an action in

rem. As held by this Court in the case of Kunvarjeet Singh



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Khandpur (supra), an application for grant of probate or letters of administration is for the court's permission to perform a legal duty created by a will or for recognition as a testamentary trustee and is a continuous right which can be exercised any time after the death of the deceased, as long as the right to do so survives and the object of the trust exists or any part of the trust, if created, remains to be executed.

37. Therefore, even if the will is probated by any court mentioned in [Section 228](#) of the Act, right to get the letters of administration is a continuous right which can be exercised any time, as long as the right to do so survives and the object of the trust exists or any part of the trust, if created, remains to be executed.

38. Applying the law laid down by this Court in the aforesaid decision and the observations made hereinabove, the submission on behalf of the appellants that Probate Case No. 15/2001 filed by respondent no.2 for letters of administration under [Section 228](#) of the Act, read with [Section 276](#) of the Act is barred by law of limitation, cannot be accepted. At this stage, it is required to be noted that even in the plaint, it is specifically pleaded that after passing away of the father of the parties in the year 2000, the appellants started intermeddling with properties bequeathed to respondent no.2, which were situated in Delhi and, therefore, left with no option, he was compelled to apply for letters of administration. Therefore, even as per the pleadings in



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the application, the cause of action started from the date on which the appellants started intermeddling with the properties bequeathed to respondent no.2, after passing away of the father of the parties in the year 2000. Therefore, in the facts and circumstances of the case, both the learned Single Judge and the Division Bench have rightly refused to reject the application in exercise of powers under Order VII Rule 11 of the CPC. In the facts and circumstances of the case and as observed hereinabove, it cannot be said that the application for letters of administration was clearly barred by the law of limitation which was required to be rejected in exercise of powers under Order VII rule 11(d) of the CPC. We are in complete agreement with the view taken by the High Court.

39. In view of the above and for the reasons stated above, the present appeal fails and the same deserves to be dismissed and is accordingly dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

ii)It is observed in 1990 1 LW 85, 86 [Smt.Jayalakshmi-S.Krishnaswamy], that,

20.We have now, as per our preceding discussion, settled the question and we hold that Art.137 of the Limitation Act would not apply to proceedings filed for grant of probate or letters of administration with or without the Will annexed. Before concluding, we must



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point out that though the proceedings filed for grant of probate or letters of administration may not come within the mischief of Art.137 of the Limitation Act, 1963, yet the delay aspect is relevant to test the genuineness of the Will propounded. Delay in taking steps gives rise to suspicion and the longer the delay the stronger the suspicion. This is an aspect for consideration of the Court while dealing with the request. We can only leave this aspect at that. Now we have answered the references, the matters will have to go before the learned single Judge, who could deal with them on merits.

iii)It is observed in **2016 (1) CTC 257 [S.Vatsala Vs. K.S.Mohan and ors]**, that,

36.It is also worthwhile to mention that no period is prescribed for filing petition for probate or letters of administration or Succession Certificate in the Original Side Rules. As extracted above, Rule 9 specifically provides for delay in applying for Probate or Letters of Administration to be explained which is mandatory in nature. Depending upon facts and circumstances of each case, the right to apply for probate or letters of administration made become necessary even beyond three years from the date of death of the testator. One such instance may be when a



party came to know of the Will long after the testator's death. Whenever there is delay, it has to explained. More over, if the execution of the Will is proved, the delay in taking steps to probate the Will, will not loom large, since Order XXV, Rule 9 of Madras High Court Original Side Rules has not prescribed any period of limitation and probably, it aims to give explanation alone. Though delay may cause suspicion about the Will, it cannot be held that the application is barred by limitation under Article 137 as it may not be possible to find out as to when the right to apply accrued. Delay in taking steps may be one of the circumstances to be considered while determining the genuineness of the Will.

11.From the judgments relied by the learned counsel for the respondents 1 to 6, it is clear that there is no question of limitation in initiating the probate proceedings or for the grant of Letters of Administration.

12.When the property is in 'A', 'C' & 'D' in door No.5/10 are not the suit properties in O.S.No.8303 of 1984, this Court is of the considered view that the T.O.S.No.36 of 2011 has to be decided on the merits on the disputed claim of the parties. There is no legal bar for filing this suit and proceed with the trial of the suit, for it to reach its logical conclusion. Therefore, prayer for



rejection of plaint cannot be entertained. In this view of the matter A.No.6076

of 2016 is dismissed.

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Speaking Order: Yes/No

G. CHANDRASEKHARAN, J.

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