
(1999) 12 BOM CK 0045

In the Bombay High Court

Case No : Misc. Petition No. 50 of 1999 in Petition No. 598 of 1990 and Notice of Motion No. 2566 of 1999 in Petition No. 598 of 1990 and Administrator's Report dated 8-3-1999 of Mr. Justice M.L. Dudhat (Retd.)

Darius Jehangir

APPELLANT

Vs

Lyla Minoo Ghaswala and others

RESPONDENT

Date of Decision : 22-12-1999

Acts Referred:

Guardians and Wards Act, 1890 — Section 29
Succession Act, 1925 — Section 119, 120, 131, 132, 74

Citation : AIR 2000 Bom 372 : (2000) 2 ALLMR 32 : (2000) 3 BomCR 447 : (2000) 2 BOMLR 108

Hon'ble Judges : S.S. Nijjar, J

Bench : Single Bench

Advocate : C.S. Kapadia and Ms. Lata Bachani, instructed by I.R. Joshi and Co, for the Appellant; Pravin Diwan, Ms. Sidhwa instructed by Geeta Menon, A.Y. Bookwala, V.J. Shah instructed by Chetan Mehta, M.P. Rao instructed by L.C. Tolat and Co., J.B. Chinoy and J. Jain instructed by Lalit Jain, for the Respondent

Judgement

S.S. Nijjar, J.—This order will dispose of the report of the Administrator (Justice M.L. Dudhat (Retd.,) dated 8th March, 1999 and Notice of Motion No. 2566 of 1999 in T. & I.J. Petition No. 598 of 1990 and the preliminary objections raised by respondent Nos. 1 and 3 to the maintainability of Misc. Petition No. 50 of 1999 in T. & I.J. Petition No. 598 of 1990.

2. The facts as emerging from the pleadings of the parties may be noticed in order to crystalise the various controversies raised by the parties.

3. Late Mrs. Piloo Ghaswala (hereinafter referred to as "the deceased") who was the maternal grand mother of minor Zenia and the mother of Mrs. Lyla Darius Jehangir, hereinafter referred to as "respondent No. 1", died leaving her last Will & Testament dated 21st April, 1989. Mr. Justice B. Lentin, Mrs. Roshan Chopra and Mr. Mohan Jaykar were appointed as Executors in the Will. They have

obtained probate of the Will in T. & I.J. Petition No. 598 of 1990 by order of this Court dated 28th October, 1994. Darius Jehangir, hereinafter referred to as "the applicant", was married to respondent No. 1. The marriage was dissolved by a decree of divorce granted on 12th July, 1989. The custody of Zenia was given to respondent No. 1. On 7th October, 1989 the testator died. Decree dated 12th July, 1989 was modified on 12th December, 1990 in terms of the Consent Terms. Two relevant Clauses of the Consent Terms were as under :

"1. Ordered that the order dated 12th July, 1989, according custody of the minor, Zenia, to the respondent be varied and the custody of the minor, Zenia, be and is hereby accorded to the petitioner and respondent jointly.

2. Ordered that all the major decisions with regard to the minor, Zenia, be taken by the petitioner and respondent jointly and in the event of there being any disagreement between the parties hereto, through orders of this Hon"ble Court."

For the decision of this controversy, Clauses 6, 7, 8, 9, 10, 11, 13, 14 and 40 of the Will are relevant and are reproduced hereunder:

"6. I have two daughters viz. Mrs. Lyla Darius Jehangir and Miss Anita Ghaswala. (I have called my daughter Anita Ghaswala by her maiden name as she has already filed a petition for divorce in respect of her marriage to Mr. Dalla Toddywalla). My elder daughter Mrs. Lyla Darius Jehangir is an extravagant and irresponsible girl and is subject to fits of depression and it is for this reason that I direct my trustees by this my will under the trust created hereunder to hold all properties bequeathed and devised by me to her for the benefit of her daughter Zenia and the said property bequeathed to Lyla shall be held upon trust for the benefit of her daughter Zenia and upon Zenia completing the age of 21 years, my trustees shall hand over all such property to Zenia absolutely.

7. As stated above in view of my daughter Lyla being an extravagant and irresponsible girl and being subject to fits of depression in the matter of sale and dispose off the flat on the 2nd floor of Gazdar House at 45, Warden Road, Bombay 400 026, as mentioned in Clause 15 herein, the decision of my trustees shall be binding on her and the bequest to her shall therefore be subject to the decision of my trustees.

8. I have shares in the following companies belonging to me but standing in the joint names of my daughter Lyla and myself, I direct my trustees that the said shares shall be held upon trust for the benefit of my grand daughter Zenia to be given to her on her attaining the age of 21 years as stated hereinabove.

Larsen and Toubro 3091

Larsen and Toubro (Debentures) 66

Associated Cement 11

South India Viscose 45

Cochin Malabar 840

9. I have shares in the following companies belonging to me but standing in the joint names of myself, my daughter Lyla and Mr. Darius Jehangir. I direct my trustees that the said shares shall be held upon trust for the benefit of my grand-daughter Zenia to be given to her on her attaining the age of 21 years as stated hereinabove.

Larsen and Toubro 2374

South India Viscose 323

Cochin Malabar 3085

Bombay Denying 17

Hindustan Alloy 100

10. I have several fixed deposits in Limited companies in the joint names of my daughter Lyla and myself, I direct my trustees that the said shares shall be held upon trust for the benefit of my grand-daughter Zenia to be given to her on her attaining the age of 21 years as stated hereinabove. My trustees in this connection will have the absolute direction to reinvest the amounts lying in the Fixed Deposits for such period and on such terms as they may decide during the period that the same is held in trust for my grand daughter Zenia.

11. I have a Locker in the Union Bank of India, Forbes Building, Home Street, bearing No. 5063 in the joint names of myself and my daughter Lyla. I direct my trustees that the contents of the said locker shall belong to Lyla but shall be held upon trust by my trustees to be handed over to my grand-daughter Zenia on her attaining the age of 21 years. The password for the said locker is "Lulubelle" and the keys of the said locker are kept in my Godrej safe, I direct that none of the contents of the said locker can be sold.

13. I have certain jewellery in two boxes at my house being indicated by the name of each of my two daughters Lyla and Anita. I give bequeath and devise the contents of the box bearing the name of my daughter Anita to my daughter Anita absolutely. I however direct that none of the articles in these boxes are to be sold and that if my daughter Anita so desires, the designs of the articles of jewellery may be changed to other desired designs. As far as the box bearing the name of my daughter Lyla is concerned, the contents thereof shall belong to her but shall be held upon trust by my trustees for my grand daughter Zenia and the contents thereof shall be handed over by my trustees to my grand daughter Zenia on her attaining the age of 21 years. I, however, direct that one of the contents of the said box are to be sold and if, however, any of the rings do not fit Lyla, then the designs can be changed but in no way will there be a sale of the said jewellery.

40. I have a one third share in the trust of Gazdar House at 45, Warden Road, Bombay-400 026, the other shares belonging to my cousin Jehangir Gazdar

staying at Palisimo, Warden Road, and Jimmy Gazdar staying at Fair-Lawns, Juhu. My said 1/3rd share shall be equally distributed between my daughter Lyla and my daughter Anita, The share of my daughter Lyla shall be kept in trust by my trustees to be handed over to my grand-daughter Zenia on her attaining the age of 21 years."

I give bequeath and devise my daughter Anita's share in 1/3rd share in the trust of Gazdar House to my daughter Anita absolutely.

Gazdar House was sold by the trustees on 18th December, 1994 for a price of Rs. 15 crores. A sum of Rs. 2,35,00,000/- was paid to the executors of the deceased. Out of the aforesaid amount, an amount of Rs. 75 lakhs was disbursed by the then executors to respondent No. 1 at her request in order to enable her to purchase 5 fully paid up shares of Rs. 50/- each of the Florina Estates Sahakari Rachana Sanstha Limited, Pune bearing distinctive Nos. 16 to 20 and the property bearing plot No. 10 admeasuring about 5800 sq.ft. along with the bungalow standing thereon bearing Municipal Survey No. 142/ 10 and situate at S.D. Dhole Patil Path Off. Boat Club Road, Opp. Max Muller Bhavan, Pune 411 008, hereinafter referred to as "the Pune Property". The amount was paid directly to the vendor Mrs. Anita Shah. An agreement for sale of the property was entered into between Mrs. Anita Shah as the vendor and Zenia acting through her mother and natural guardian, respondent No. 1 and respondent No. 1 in her individual capacity as purchasers. Thus the property seems to have been purchased in the joint names of Zenia and respondent No. 1. Misc. Petition No. 13 of 1995 was filed by the executors for discharge. This petition was made absolute by this Court's order dated 8th July, 1998, in terms of the prayers made therein. The applicant had taken out a draft Notice of Motion in Misc. Petition No. 13 of 1995 seeking to be appointed as guardian ad litem of Zenia. On 30th July, 1997 the following order was passed.

"Under the circumstances with a view to protect the interest of minor, since both the applicant as well as respondent No. 1 are claiming that they are taking best care of the minor, I feel that the applicant though not party to the proceedings should be served with all applications and pleadings in future if filed by any of the parties."

On 22nd June, 1998 a lease deed was executed by respondent No. 1 in favour of Mukesh Dhingra, respondent No. 3 to Misc. Petition No. 50 of 1999, hereinafter referred to as "Dhingra". The lease deed was lodged for registration on 22nd June, 1998. Pursuant to the lease deed, possession of the bungalow was handed over to Dhingra. The lease is for 99 years on refundable interest free deposit of Rs. 2 lakhs and monthly rent of Rs. 2,000/-. Under the lease Dhingra also has the right to transfer or assign his leasehold interest or to give the property on sub-lease without the consent of the lessee. On 10th July, 1998 the applicant took out Notice of Motion No. 2002 of 1998 for an order of injunction restraining the first respondent from selling, alienating or parting with possession of the Pune property. An ex parte ad-interim order was passed on 10th July, 1998 in

terms of prayer Clause (b) of the Notice of Motion. On 22nd January, 1999 when the Notice of Motion came up for hearing, Counsel appearing for respondent No. 1 submitted to the orders of the Court, Hence Notice of Motion was made absolute in terms of prayer Clause (b). On 7th October, 1998 Administrator General, State of Maharashtra, was appointed as the administrator of the estate of the deceased. The Administrator General was directed to take charge of the estate of the deceased forthwith. This order was modified by order dated 23rd December, 1998 in Notice of Motion No. 3828 of 1998 in Misc. Petition No. 13 of 1998 in Petition No. 598 of 1990. This Notice of Motion was taken out by respondent No. 1 seeking appointment of Justice M.L. Dudhat (Retd.) as Administrator. It was the case of respondent No. 1 that Justice Dudhat had agreed to be appointed as Administrator. The Notice of Motion was disposed of in terms of the Minutes of the order attached with the Notice of Motion. Thus the charge of the estate was handed over to Justice M.L. Dudhat (Retd.) after complying with the requirements as per the rules. The applicant filed Contempt Petition No. 44 of 1999. The same is pending. In this contempt petition, the applicant has prayed for appointment of Receiver and injunction. Since no relief had been granted in the contempt petition, the applicant has filed Misc. Petition No. 50 of 1999.

4. On 8th March, 1999 the administrator submitted a report to this Court seeking approval of the prayers made therein. The report mentions that the Administrator General, State of Maharashtra handed over the charge of the estate on 5th February, 1999. On 15th February, 1999, respondent No. 1 wrote to the administrator making a number of demands. In paragraph 4 of the report it is stated that F.D.R. of Rs. 1,27,92,363/- has been further renewed with the State Bank of Mysore upto 23rd February, 1999. The amount of Rs. 59,34,225/- received from the Administrator General, State of Maharashtra was deposited in Savings Bank Account No. 022-152346-006 with Hong Kong Bank, Mumbai Main Branch, M.G. Road, Mumbai 400 023. Out of the aforesaid amount of Rs. 59,34,225/- a sum of Rs. 55,00,000 representing interest at 11.5% were transferred in the fixed deposit upto 29th October, 2003, the date on which the minor Zenia is attaining 21 years. On 23rd February, 1999 the amount of Rs. 1,27,92,363/- being the fixed deposit amount together with interest of Rs. 4,76,927/- was received from the State Bank of Mysore. Thus the moneys were deposited in Savings Bank Account No. 10328 with Bank of Baroda, Bhulabhai Desai Road Branch, Mumbai 400 026. The amount of Rs. 1,27,92,363/- has been invested in fixed deposit at 12% p.a. upto 29th October, 2003. The report thereafter states that as per provisions of the Will, directions have been given to Hong Kong Bank and to Bank of Baroda to pay the interest at quarterly rest accrued on the two fixed deposit of Rs. 55 lakhs, and Rs. 1,27,92,363/- to respondent No. 1 in her Saving Bank Account. In paragraph 7 the report mentions that out of the balance of Rs. 4,34,225/- and Rs. 4,76,927/- deposited to the credit of the aforesaid Savings Bank Account of Rs. 4,30,000/- and Rs. 4,70,000/- has been paid on account of professional fees to M/s. L.C.T. Olat &

Co. including for assisting the administrator. In paragraph 8 the report states that as per the earlier statement of accounts filed by the ex-Executor, Rs. 2.20 crore had been received on account of 1/6th share of Lyla to be paid to Zenia on attaining 21 years i.e. 29th October, 2003. A sum of Rs. 60 lakhs had been paid for Pune property and the balance was invested in fixed deposit. A sum of Rs. 15,47,411/- was received as interest upto 6th August, 1996. A sum of Rs. 1,11,04,861/- on investment and re-investment has grown to Rs. 1,27,92,363/- . Similarly the sum of Rs. 55 lakhs invested in the Savings Bank Account with Corporation Bank has grown to Rs. 59,34,225/-. Thus the total interest realised from the investments of the amounts in the fixed deposit comes to Rs. 41,46,065/- which includes the aforesaid amount of Rs. 9,11,152/- deposited in the Savings Account of Hong Kong Bank and Bank of Baroda. Out of the present fixed deposit of Rs. 1,27,92,363/- and Rs. 55 lakhs, the interest received is Rs. 32,34,913/-. Thereafter in paragraph 10 an opinion has been expressed by the Administrator to the effect that under the provisions of Will the share of Lyla in Estate of Piloo Ghaswala including jewellery is to be handed over to Zenia on her attaining 21 years on 29th October, 2003 and till then Lyla is entitled to make use of it. It is therefore, proposed to pay Rs. 41,46,065/- to respondent No. 1 who is entitled to receive the same under the Will. The report also notices that pursuant to the order dated 24th April, 1997 passed in Notice of Motion No. 281 of 1997 the Court Receiver, High Court, Bombay, was appointed in respect of articles of jewellery lying in Locker No. 5063 Union Bank of India, Forbes Street, and also in the Godrej Safe and Godrej cupboard lying on 2nd floor of Gazdar House. The Receiver was directed to take inventory of the jewellery and also value the same and thereafter the Receiver was to keep it in a locker to be operated as per the order that may be passed. Thereafter the jewellery which comes to the share of Anita Malhotra, sister of respondent No. 1, has been handed over to her except the jewellery lying in pouch. The balance jewellery including the pouch is lying in the custody of the Court Receiver. Therefore, it is stated that it is necessary that the contents of the pouch be divided between respondent No. 1 and Anita Malhotra and balance jewellery be handed over to the Administrator. The report notices that the said jewellery was handed over by respondent No. 1 to the Court Receiver pursuant to the orders of this Court dated 3rd September, 1998. Advocates for respondent No. 1 and the Administrator by their letter dated 26th February, 1999 requested the Court Receiver to hand over the jewellery to the administrator. The Court Receiver has not taken any steps. Thus the direction is sought to the Court Receiver, to hand over the jewellery to the Administrator. In paragraph 14 of the report the Administrator proposes to hand over the articles of jewellery coming to the share of respondent No. 1 to her to be used by her till 29th October, 2003 subject to her giving an undertaking to the Court not to sell, dispose of, alter, modify or create third party rights or encumbrance on the jewellery and to hand over the same to Zenia on 29th October, 2003. Thus a direction is sought to the Court Receiver to open the locker and hand over jewellery lying in it to the Administrator or the person authorised by the Administrator. It is further

proposed by the Administrator to hire a locker with Bank of Baroda, Bhulabhai Desai Road, Bombay 400 026 for a period of 5 years and to keep the original records of the estate including the share certificates and fixed deposit receipts. It is also proposed to appoint M/s. L.C. Tolat and Co. to authorise and to perform such duties and execute such work as may be entrusted by the Administrator and to fix and pay the professional fees and out of pocket expenses. In view of the above, the administrator seeks the following reliefs:

"(a) That the Administrator of the estate of late Piloo Ghaswala be authorised to pay to Ms. Lyla Ghaswala Rs. 41,46,065/- being the accrued interest till date inclusive of the balance of Rs. 9,11,152/- lying in the Savings Bank Account of the administrator with Hong Kong Bank and Bank of Baroda by premature withdrawal of Rs. 55,00,000/- invested in Fixed Deposit A/c. No. 002-152346-017 with Hong Kong Bank and to reinvest the balance or such part thereof as the Administrator may deem fit and proper.

(b) That the action taken by the administrator of estate of late Piloo Ghaswala including payments made and investment of the amounts and directions for payment of interest accrued thereon be confirmed by this Hon''ble Court.

(c) That the Court Receiver, High Court, Bombay be directed by this Hon''ble Court to hand over to the administrator of the estate of late Piloo Ghaswala the articles of jewellery mentioned in the letter dated 26th February, 1999 part of Exhibit-E (Colly) hereto and also referred to in Notice of Motion No. 281 of 1997 being part of Exhibit-F (Colly) to the Report within such time as this Hon''ble Court may deem fit and proper and upon receipt of the said jewellery to hand over the same for personal use of Ms. Lyla Ghaswala on her giving an undertaking to this Hon''ble Court to hand over all the said jewellery to Zenia on 29th October, 2003 and till then in the meantime not to create encumbrances or alteration in the said jewellery in any manner as stated in paragraph 13 of the Report.

(d) That the administrator of the estate of late Piloo Ghaswala be authorised to appoint M/s. L.C. Tolat and Co., Advocates or any other person to discharge such duties and execute such work as administrator may direct and authorise administrator to fix and pay their remuneration out of the future income of interest or dividend".

5. On 1st April, 1999 this Court made the report absolute in terms of prayers (a), (b) and (c), prayer Clause (d) had already been allowed. On 5th May, 1999 prayer Clauses (b) and (c) of the Misc. Petition (Lodg) No. 464 of 1999 were granted. This petition was subsequently numbered as Misc. Petition No. 50 of 1999. By order dated 5th May, 1999, the Court Receiver, High Court, Bombay, was appointed as Receiver of the shares of the Pune Property, The first respondent and Dhingra were also restrained from creating any third party rights in the Pune property. On 14th May, 1999 this Court stayed the order earlier passed on 1st April, 1999 on the report of the administrator. Order dated 1st

April 1999 had been brought to the notice of the applicant by the Receiver in his letter dated 10th May, 1999. The applicant, therefore, made an application on 13th May, 1999 for orders directing the first respondent to give inspection of the application which was filed before this Court on which the order dated 1st April, 1999 was passed. On 14th May, 1999, Gokhale, J., stayed his earlier order dated 1st April, 1999 and also directed the Prothonotary and Sr. Master, High Court, Bombay, to furnish to the applicant copy of the report of the Administrator. The aforesaid order is to continue until the Misc. Petition No. 50 of 1999 is heard and disposed of. On 11th August, 1999 the applicant took out Notice of Motion No. 2655 of 1999 and moved for ad-interim order. In this Notice of Motion, inter alia, a prayer is made for bringing back a total sum of Rs. 1,05,57,217/- . At the ad-interim stage the respondents were directed to deposit in this Court an amount of Rs. 41,46,065/-. The respondent No. 3 was directed to bring back a sum of Rs. 9,11,152/- handed over to them by respondent No. 1 and a sum of Rs. 7,50,000/- given for the purpose of making provisions for future costs. The order was to be complied with within a fortnight. This order has not been complied with till today by respondent No. 1. Subsequently the order was clarified on 2nd September, 1999 to the effect that respondent No. 2 i.e. Administrator has not been directed to deposit the amount. The directions were given only to respondent Nos. 1, and 3. Prayer for extension of time to deposit was not granted.

6. I have heard the learned Counsel for the parties at length. Since the fate of Misc. Petition No. 50 of 1999 will depend on the decision on the Administrator's report, it would be better to first give a decision on the administrator's report.

7. Mr. Kapadia appearing for the applicant has vehemently argued that respondent No. 1 is acting adverse to the interest of the minor for her own benefit. In view of her conduct, he submitted that the property of the minor ought to be protected till she reaches the age of 21. He submitted that respondent Nos. 1 and 3 cannot be permitted to argue that the applicant does not have any locus standi to file the Misc. Petition No. 50 of 1999 and the Notice of Motion No. 2655 of 1999 in view of the fact that the applicant is the father and the natural guardian of Zenia. The father is not interested in any of the estate of the deceased except to protect the legacy of Zenia. He submitted that the jurisdiction of the Probate Court continues even after the probate is granted. The learned Counsel has submitted that the administrator's report cannot be accepted as it is virtually verbatim copy of the letter written by Lyla on 15-2-999. In this letter Lyla had demanded the payment of the accrued interest of Rs. 55,00,000/- and Rs. 1,27,92,363/- as per the provisions of the Will. She had stated that directions have been given to Hong Kong Bank and to Bank of Baroda to pay the interest at quarterly rest on the aforesaid two fixed deposits to her in her Savings Bank account with the aforesaid Banks. She has stated that under the provisions of the Will the principal amount and jewellery is to be handed over to Zenia on her attaining 21 years on 29th October, 2003 and till then she alone is entitled to make use of it which includes the interest and dividends and other

income. Learned Counsel then pointed out to letter dated 26-2-1999 written to the Court Receiver by the Advocates of respondent No. 1. In this letter it is stated that the jewellery is part of the estate and the Court Receiver is requested to hand over the jewellery to respondent No. 1 at the earliest. On the basis of this letter, respondent No. 2 addressed a letter to the Court Receiver on 26-2-1999. The Court Receiver was requested to hand over the jewellery referred to in the letter dated 26-2-1999 to the Administrator, respondent No. 2. According to the learned Counsel, the jewellery would have been taken away but for the timely orders passed by this Court. The jewellery at present is with the Court Receiver. The report submitted by respondent No. 2 was made absolute by Gokhale, J., on 1st April, 1999. Subsequently, however, when the matter was brought to the notice of Justice Gokhale by application dated 13th May, 1999, the operation of the order dated 1st April, 1999 was stayed by Gokhale, J., on 14th May, 1999. This order was passed when it was brought to the notice of Gokhale, J., that by an order dated 30th July, 1997 Datar, J., had directed the parties to give notice to the applicant for all future applications. He submits that even if respondent No. 2 was not aware of the order of Datar, J., respondent No. 1 was certainly aware of the same. In fact, respondent No. 1 only informed that the order dated 1st April, 1999 has been passed on the Administrator's report. This information was given when an application was made by the applicant to disclose the details of the application on the basis of which the order dated 1st April, 1999 was passed. The learned Counsel has reiterated that respondent No. 1 has been virtually disinherited if the different provisions of the Will are properly construed. He has thereafter referred to various Clauses of the Will. He submitted that there is no justification for accepting the report of the Administrator as respondent No. 1 has no right to the properties and money's mentioned in the Administrator's report.

8. Mr. Bookwala, appearing for respondent No. 1 submitted that a perusal of and a proper construction of the provisions of different Clauses of the Will would show that only in some Clauses an absolute bequest has been made to Zenia. In some cases only conditional bequest has been made to her. On the other hand in some Clauses, an absolute bequest has been made to respondent No. 1 and conditional in some of the others. Mr. Bookwala had relied upon sections 74, 75, 82, 88, 119, 120, 131 and 132 of the Indian Succession Act, 1925. Mr. Bookwala has relied on the decisions in the cases of (i) *Re. Rowland & another* 1963 CD 1, (ii) *Boyes v. Cook* 1880 14 CD 53 and (iii) *Thakur Lalta Bakhsh Singh and others v. Lala Phool Chand and others* AIR 1945 PC 113. He submits that Clauses 8, 9 and 10 which are identical give an absolute estate to Zenia. However, Clause Nos. 11, 13 and 40 are distinguishable from these three Clauses. Therefore, the report submitted by respondent No. 2 deserves to be accepted. He also submitted that even the earlier trustees understood the provisions of the Will in the same manner as understood by respondent No. 2. He submitted that there is no false statement made either by respondent No. 1 or by respondent No. 2 with regard to the non-disclosure of the order passed by Datar, J., on 30th July, 1997.

The order was passed by Gokhale, J., on 1st April, 1999. Learned Counsel had pointed out that Tolat & Co. the Advocates did not come on the record for respondent No. 1 till November, 1998 and for respondent No. 2 till March, 1999. However, this controversy need not be gone into as at the request of the Court, Mr. Kapadia has unconditionally withdrawn all allegations made against respondent No. 2. So far as the Advocates for respondent No. 1 are concerned, they were not on the record till November, 1998 and, therefore, it is possible that they did not know about the order passed by Datar, J., on 30th July, 1997. Therefore, nothing further needs to be stated on this aspect of the matter. But in my view it reflects adversely on the conduct of respondent No. 1. It was her bounden duty to inform respondent No. 2 of the order passed by Datar, J., on 30th July, 1997. Then it would have been for respondent No. 2 to decide whether or not to give notice to the applicant. A perusal of the allegations which have been made against respondent No. 2 who is a retired Judge of this High Court would show that the applicant has made the allegations without giving any particulars as to how respondent No. 2 was to gain from wrongly construing the Clauses of the Will. Merely because one individual construes the provisions/Clauses of a Will differently from another cannot lead to a conclusion that the construction is necessarily made for extraneous considerations. Mr. Kapadia has correctly adopted the attitude of unconditionally withdrawing the allegations made against respondent No. 2. This, however, does not mean that the applicant is not required to be at least cautioned against such behaviour in the future. During the course of the hearing of these proceedings, Counsel for respondent No. 2 have made it known to the Court that respondent No. 2 would wish to be discharged as administrator even if the allegations are withdrawn.

9. Sections 74, 75, 82 and 88 form part of Chapter VI of the Indian Succession Act entitled Construction of Wills. These sections lay down certain guidelines for construing the Clauses in a Will. Section 74 provides that it is not necessary to use any technical words or terms of art in the Will. The only requirement is that the wording be such that the intentions of the testator are clear. Section 75 requires the Court to enquire into every material fact relating to the person who claim to be interested under the Will and the property which is said to be the subject of disposition. The Court shall also enquire into the circumstances of the testator and his family and into every fact a knowledge of which may conduct to the right application of the words which the testator has used. Section 83 provides that the Court can give either a restricted or a wider sense to the words used depending on how the testator meant to use the words. Section 88 provides that where two Clauses or gifts in a will are irreconcilable, the last shall prevail. Sections 119 and 120 are contained in Chapter VIII which deal with vesting of legacies. Section 119 provides that where the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall become vested in the legatee on the testator's death. Such a bequest passes to the legatee's representative if he dies before the time and without having received the legacy. In contrast to this, section 120 provides that a legacy

bequeathed in case a specified uncertain event shall happen does not vest until that event happens. Mr. Bookwala had submitted that Clauses 8, 9 and 10 would be covered u/s 119. Clause 40 would be covered u/s 120. This till Zenia attains the age of 21, the legacy vests in Lyla. He has also submitted that since Clause 40 is inconsistent with Clause 6, then Clause 40 shall prevail. I am unable to agree with the submissions made by the learned Counsel, In the case of re Rowland (supra) it has been observed on page 10 of the report by Lord Denning that the whole object of construing a Will is to find out the testator's intention so as to see that his properties are disposed of in the way he wished. It was observed as follows.

"True it is that you must discover his intention from the words he used: but you must put upon his words the meaning which they bore to him. If his words are capable of more than one meaning, or of a wide meaning and a narrow meaning, as they often are, then you must put upon them the meaning which he intended them to convey, and not the meaning which a philologist would put upon them. And in order to discover the meaning which he intended, you will not get much help by going to a dictionary. It is very unlikely that he used a dictionary, and even less likely that he used the same one as you. What you should do is to place yourself as far as possible in his position, taking note of the facts and circumstances known to him at the time: and then say what he meant by his words."

A perusal of the aforesaid would show that these are the very considerations which have been enumerated in sections 74, 75, 82 and 88. In the case of Boyes (supra) James, L.J., has observed:

"In re Ruding's Settlement (1) the Vice-Chancellor held that the surrounding circumstances could be looked at in construing the Will. But when it is said that surrounding circumstances may be looked at, that only means that the circumstances existing at the time when the testator made his Will may be looked at. You may place yourself, so to speak in his armchair, and consider the circumstances by which he was surrounded when he made his Will to assist you in arriving at his intention.."

The aforesaid extract also states that all the surrounding circumstances may be looked at which existed at the time when the testator made the will to discover the intention of the testator. In the case of Thakur Lalta (supra) the Privy Council held as follows:-

"In construing a Will the primary duty of a Court is to ascertain from the language of the testator what were his intentions and in doing so they are entitled and bound to bear in mind other matters than merely the words used. It is justified in refusing to allow defects in expression in these matters to prevent the carrying out of the testator's true intentions. These intentions must be ascertained by the proper construction of the words he uses and once ascertained they must not be departed from."

Thus it becomes apparent that the provisions of the Indian Succession Act quoted above and the judicial pronouncements make it clear that the primary duty of the Court is to ascertain the intention of the testator at the time when the instrument was created.

10. Keeping the aforesaid principles in view, the various Clauses of the Will are now to be construed. It becomes quite apparent from Clause 6 that the intention of the testator was to put all the properties which would normally come to the share of Lyla in trust for the benefit of Zenia. In this Clause the testator had quite clearly stated that under the trust created under the Will the trustees are to hold all properties bequeathed and devised by her to Lyla for the benefit of Zenia absolutely. She did not say that Lyla would hold her share in trust for Zenia. She said all such properties are to be handed over to Zenia by the trustees on her attaining the age of 21 years. Thus the intention is clear that the trustees are to hold the properties which are left for the ultimate benefit of Zenia. This omnibus Clause, in my view, would have to be kept at the forefront whilst examining the various other clauses of the Will. In Clause No. 6 the deceased had unequivocally declared that Lyla is an extravagant and irresponsible girl and is subject to fits of depression and it is for this reason that the properties falling to her share shall be held in trust for the benefit of her daughter Zenia absolutely, Clauses 8 and 9 deal with certain shares which provide that the same shall be held in trust for the benefit of Zenia. Clause 10 deals with the fixed deposits in Limited Companies which are in the joint names of Lyla and the deceased. These fixed deposits even though in the joint names of Lyla and deceased are directed to be held in trust for Zenia and to be handed over to her on her attaining the age of 21. All the properties coming to the share of Anita, the other daughter, have been left absolutely to her in various clauses of the Will. Clause No. 11 directs that the contents of the locker shall belong to Lyla but shall be held in trust by the trustees to be handed over to Zenia at the age of 21. It is directed that the contents of the locker cannot be sold. Clause No. 13 deals with jewellery which is kept in two boxes in the house in which the deceased was living. The box bearing the name Anita has been given absolutely to her. The contents of the box bearing the name of Lyla are to belong to her but are to be held in trust by the trustees for Zenia. Both the daughters are not entitled to sell the jewellery. They are only permitted to use the jewellery. They are permitted to change the design. Thus, it becomes evident that so far nothing has been left for the benefit of Lyla absolutely. Then in Clause 16 it is provided that the amounts standing to the credit of the Savings Account of the deceased mentioned therein shall be paid over to Lyla who shall then hold it absolutely. Similarly Clause 17 bequeaths the amount in another Savings Bank Account to Anita absolutely. Clause 40 is what is really to be construed as it is on the basis of this clause that the property in Pune has been purchased and the amounts of interest are sought to be paid to Lyla. Clause 40 of the Will has been reproduced earlier. Comparing the Clause with Clauses 8 and 9 and 10, Mr. Bookwala has submitted that the share of Lyla has been directed to be kept in trust by the trustees until Zenia reaches the age

of 21. Thereafter Zenia is to keep the share of Lyla in trust for her mother. The reasoning given for this is that deceased has treated Lyla as the "prodigal daughter". The deceased, therefore, wanted to protect Lyla from her own extravagant and irresponsible behaviour. He submitted that this clause is substantially different from Clauses 8, 9 and 10 where only the date of receiving the legacy has been postponed. He submitted that in Clauses 8, 9 and 10 it is categorically stated that the properties mentioned therein shall be held in trust for the benefit of the grand daughter. These words are missing from Clauses 11, 13 and 40. I am unable to accept the submission made by the learned Counsel. Clause 40 is perfectly in tune with the intention expressed by the deceased in Clause 6. In that Clause the deceased had made it clear that all the properties which fall to the share of Lyla shall be held in trust for the benefit of Zenia. Clause 40 provides that 1/3rd share of the deceased shall be equally distributed between her daughter Lyla and her daughter Anita. Thereafter it is categorically stated that the share of her daughter Lyla shall be kept in trust by the trustees to be handed over to Zenia on her attaining the age of 21 years. If the deceased had wanted to give the benefit of the use of the estate to Lyla till Zenia reaches the age of 21, then similar provision would have been made as has been made with regard to jewellery where it is quite categorically stated that Lyla is entitled to use jewellery until Zenia reaches the age of 21. There is also an embargo placed on Lyla on the sale of jewellery. No such provision is found in Clause 40. In my view, if the submission of the learned Counsel is accepted, it would amount to adding to the words which have been deliberately used by the deceased in Clause 40. In fact Lyla herself never accepted this interpretation which is sought to be urged on her behalf by the learned Counsel. A perusal of the letter dated 15-2-99 which she wrote to respondent No. 2 would quite clearly show that in paragraph 9 thereof Lyla had accepted that under the provisions of the Will the principal amount and jewellery is to be handed over to Zenia on her attaining the age of 21 years on 29th October, 2003. She thereafter claims that till then she alone is entitled to make use of it which include the interest and dividends and other income. This has been accepted by the Administrator without giving any reasons for the recommendations made in the report. Clause 40 cannot be confused with Clause 13. This position is accepted by Lyla, otherwise there was no need to purchase the Pune property in the joint names with Zenia. Clause 40, in my opinion, does not vest any right in Lyla with regard to Rs. 2,35,00,000/- which are half of the sale proceeds of 1/3rd share of the deceased in the trust of Gazdar House. The accrued interest on the fixed deposit belongs exclusively to Zenia. In my view, respondent No. 2 has misconstrued Clause 40 of the Will.

11. For the aforesaid reasons it would not be possible to accept the recommendations made by the Administrator in the report in paragraph 17(a) and (b). With regard to paragraph 17(c) of the report, I am of the opinion that the jewellery should remain in the custody of the Receiver only which has been handed over to him by Lyla pursuant to the order passed on 2nd September,

1998. The jewellery was actually handed over on 3rd September, 1998. In my view the conduct of Lyla is such that the Court as well as the Court Receiver will have to act with caution, if and when any application is made by Lyla for use of the jewellery. The jewellery should therefore be handed over to Lyla for her personal use only on particular occasions on the specific orders of the Court. It may be that Lyla would protest at the added restrictions on her use of the jewellery. For this she has only herself to thank. With regard to prayer 17(d), Mr. Rao had stated that in view of the unfounded allegations made against his clients, they have already disassociated themselves from respondent No. 1 and respondent No. 2. The Administrator's report is disposed of as aforesaid.

12. Notice of Motion No. 2566 of 1999 has been taken out by the applicant with a prayer to the respondents to bring back the money which has been paid to respondent No. 1, who has further disbursed some of the money to Total & Co., Solicitors. Having held that Lyla had no right to receive the interest, the moneys, therefore, have to be brought back to the Court to be kept in trust for Zenia till she reaches the age of 21. At the ad-interim stage on 11th August, 1999 the respondents were directed to bring back the money. By a subsequent order dated 2nd September, 1999 it was clarified that the directions were given to respondent Nos. 1 and 3 only. Mr. Rao has stated that in view of the order passed on 11th August, 1999 the sum of Rs. 7,50,000/- has already been deposited in Court on 27th August, 1999. Learned Counsel states that the remaining amount of Rs. 9,11,152/- shall be deposited in Court within a period of six weeks. The learned Counsel has made it clear and it is accepted by the Court that the amount had been received from respondent No. 1. This is without prejudice to the right of the Solicitors to claim the legitimate fees on account of the work done from respondent No. 1. So far as the amount released to respondent No. 1 are concerned, none has been brought back to Court till today. In view of the above, Notice of Motion is made absolute in terms of prayer Clause (a) with the clarification that respondent No. 1 is directed to bring back to Court any of the amounts which have been disbursed to her on the basis of the order of this Court dated 1st April, 1999. The respondent No. 1 is directed to deposit the money in Court within a period of six weeks from today.

13. A perusal of the facts narrated above would clearly show that respondent No. 1 has been all along trying to defeat the legacy of her own daughter. In fact, the prophecy of the deceased in Clause 6 of the Will to the effect that Lyla is an extravagant and irresponsible person has been proven to be correct by subsequent conduct of Lyla. Thus in future the Court would have to extremely cautious while dealing with any claims that Lyla (respondent No. 1) may make in the future. Legacy of Zenia has to be kept intact till she reaches the age of 21 years on 29th October, 2003.

14. Misc. Petition No. 50 of 1999 has been filed by the father again to protect the interest of Zenia in the Pune property. I have already come to the conclusion that by virtue of Clause 40 of the Will, Lyla does not get any interest in the 1/3rd

share of the deceased. The money was disbursed to Lyla in order to purchase the property for the benefit of Zenia. Instead of purchasing the property for the benefit of Zenia, she purchased it in the joint names of herself and Zenia. After purchasing the property in the joint names which she was not permitted to do, she proceeded further to virtually dispose of the property of Zenia by creating a 99 year lease in favour of Dhingra for a petty amount of Rs. 2 lakhs. Dhingra has been given rights under the lease to create further lease and sub-leases. In effect, the property has been virtually disposed of. Having purchased the property Lyla was bound to act only as a trustee for the beneficial owner Zenia. On 12th December, 1990 joint custody of Zenia was given to the applicant and respondent No. 1. The order further provides that all decisions with regard to Zenia shall be taken jointly by the applicant and respondent No. 1. In spite of this the applicant was kept totally in the dark about the whole transaction, which vitally affected the future welfare of Zenia. Not being satisfied with acquiring the property in joint names, Lyla proceeded to dispose off the same for a paltry sum of Rs. 2 lacs and a yearly ground rent of Rs. 24,000/- per annum. This conduct of Lyla is again in consonance with the expressed prophecy of her mother the deceased in Clause 6 of the Will. On behalf of respondent No. 3, Mr. Chinoy had submitted that the petition cannot be accepted. He has submitted that since probate of the Will has already been granted the present Misc. Petition cannot be entertained by this Court. I am not in agreement with the submission made by Mr. Chinoy. Even if it is assumed that Lyla had some interest in 1/3rd share of the property of the deceased till Zenia became the age of 21, she would still hold the beneficial interest of Zenia in trust. She would have absolutely no right whatsoever to virtually dispose of the legacy of Zenia which will rightly pass on to her at the age of 21. u/s 29 of the Guardians and Wards Act, 1890, the Guardian has the power to create lease hold interest in the property of the minor for a term not exceeding 5 years. Taking the allegations made in the petition at face value, prima facie, it cannot be held that the petition does not disclose a cause of action. Therefore, at this stage it would not be possible to hold that the petition is not maintainable. In any event the petition raises substantial questions of law and, therefore, it cannot be dismissed at this stage. In view of the above, the following order.

(a) The Administrator's report is not approved.

(b) Notice of Motion No. 2566 of 1999 is made absolute with a direction to respondent No. 1 to bring back the moneys disbursed to her by respondent No. 2 on the basis of the order dated 1st April, 1999. The money to be deposited in Court within a period of six weeks from today. The Solicitors, L.C. Total & Co. to deposit a sum of Rs. 9,11,152/- in Court within a period of six weeks from today. On the amount being deposited, the Prothonotary and Sr. Master to invest the amount in fixed deposit with a Nationalised Bank for a period at the discretion of the Prothonotary and Sr. Master. This deposit is without prejudice to the rights of the Solicitors to recover the same from respondent No. 1.

(c) Misc. Petition is accepted. Returnable after eight weeks. Respondent No. 3 waives service.

(d) Respondent No. 2 is discharged as Administrator. Administrator General, State of Maharashtra is hereby appointed Administrator of the Estate of the deceased Piloo Ghaswala. The Administrator General to take charge from respondent No. 2 on a day which is mutually convenient to the parties.

(e) Ad-interim, order dated 5th May, 1999 to continue during the pendency of the petition.

Parties to act on an ordinary copy of this order duly authenticated by the associate of this Court.

15. Order accordingly.