
(2013) 10 BOM CK 0040

In the Bombay High Court

Case No : Misc. Petition No. 86 of 2013 in Petition No. 851 of 1979

Lydia Agnes Rodriques Nee D"Cunha and Others

APPELLANT

Vs

Joseph Anthony D"Cunha and Others

RESPONDENT

Date of Decision : 14-10-2013

Acts Referred:

Citation : (2013) 6 ABR 1268 : (2014) 2 ALLMR 873 : (2014) 1 BomCR 811 : (2014) 3 MhLj 508

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : Denzil D"Mello, for the Appellant; Owen Menezes, for the Respondent

Final Decision : Dismissed

Judgement

R.D. Dhanuka, J.—By this petition, petitioners seek revocation of probate granted by this Court on 3rd July 1980 in favour of Mr. Joseph Anthony D"Cunha in respect of the Will and testament of Mr. Andrew Satiro D"Cunha (herein after referred to as the said deceased). Petitioner Nos. 1 and 2 are the aunts of petitioner Nos. 3 to 6 and the respondents. Petitioner No. 7 is the widow of Mr. Patrik Edwin Anthony D"souza, the deceased nephew of petitioner Nos. 1 & 2. The said deceased expired on 20th August 1977 leaving behind three daughters and two sons namely petitioner Nos. 1 & 2 and their siblings Mrs. Annie D"souza, Mr. Joseph D"Cunha & Mr. Edwin D"Cunha as his heirs under the Indian Succession Act 1925 by which he was governed. Mrs. Annie D"Souza expired on 5th July 1993 and is survived by petitioner Nos. 3 to 6. Petitioner No. 7 is the widow of Mr. Patrik Edwin Anthony D"Souza, one of the sons of Mrs. Annie D"Souza. Mr. Joseph D"Cunha expired on 17th April 2004 and is survived by his children who are respondents to this petition. Mr. Edwin D"Cunha widower expired intestate and issueless at Goa on 7th November 2002.

2. There is no dispute that the deceased had left a Will dated 20th February 1971 bequeathing his house "Villa Bemvinda" to his son Joseph. Petitioners were admittedly aware of the said Will left by the said deceased which is probated. It

is the case of the petitioners that the petitioners came to know about public notice dated 14th December 2012 appearing in Free Press Journal dated 22nd December 2012 stating that the respondents had agreed with some undisclosed developers to jointly develop the property of the said deceased situated at Bandra. The petitioners through their Advocate, sent reply to the said public notice on 2nd January 2013 as heirs of the said deceased and claimed undivided 4/5th share in the said property and objected to the respondents dealing with the said property without prior consent of the petitioners. Petitioners called upon advocate of the respondents to disclose the identity of his clients and instruct them not to deal with the said property through the respondents. By letter dated 18th January 2013, the respondents and the proposed developers replied to the letter dated 2nd January 2013 and informed the petitioners that the said deceased had left a Will dated 20th February 1971 and had bequeathed the said property to the respondents absolutely. The petitioners were also informed that this Court had granted probate of the said Will in Petition No. 851 of 1979 on 3rd July 1980. The respondents denied the allegations made by the petitioners.

3. The petitioners vide their Advocate's letter dated 12th February 2013 informed the Advocate of the respondents that the petitioners were aware that the said deceased had left a Will dated 20th February 1971 bequeathing the house "Villa Bemvinda" to his son Joseph in the manner more particularly set out therein with a condition that in the event of the house being sold, the sale proceeds after deducting the expenses, should be divided into six shares, two of which should go to Joseph and the other children one share each. Petitioners alleged that they had grave doubts about the authenticity of the said Will and the circumstances under which the same was obtained however, had no occasion to place on record their objections to the same as no citation of any testamentary petition was served on them nor were they informed of any petition being filed. It was alleged that the said Will dated 20th February 1971 was never acted upon and no citation of any petition for probate was served upon the petitioners thereafter and therefore the petitioners had presumed that their brother/uncle, Joseph D'Cunha had disregarded the said Will.

4. It is the case of the petitioners that petitioners thereafter took inspection of papers and proceedings in the testamentary department of this Court and came across an affidavit dated 1st September 1979 purported to be signed by late Mrs. Annie D'Souza and petitioner Nos. 1 and 2 giving their free and full consent to the probate of the said deceased in favour of the petitioner Mr. Joseph D'Cunha without service of any citations upon them. It is the case of petitioner No. 1 that she had not attended this Court on 1st September 1979 or any other date nor appeared before the associate of this Court on the said date or any other date and did not sign any such consent affidavit. It is alleged that the signature appearing on pages 1 & 2 of the said alleged consent affidavit are forged. It is alleged that petitioner No. 1 did not know Mr. Karande, retired Superintendent, High Court Bombay who has alleged to have identified signature of petitioner No. 1. It is the case of petitioner No. 2 that she also did not attend the Court on 1st

September 1979 or any other date and did not sign any such consent affidavit. It is alleged by her that even her signature appearing on the alleged consent affidavit is forged. It is alleged that she also did not know Mr. Karande, retired superintendent of this Court who had alleged to have identified her signature. It is alleged that someone has impersonated her and has played a fraud upon this Court. Daughters of Mrs. Annie Josephine D'Souza who are petitioners also disputed that their mother had attended the Court on 1st September 1979 or any other date for signing such consent affidavit and have alleged forgery of her signature. Petitioner No. 6 also has made similar allegations.

5. Mr. D'Mello, learned counsel appearing for the petitioner invited my attention to Rules 374, 397 and 434 of the Bombay High Court (Original Side) Rules and Form 101. Learned counsel invited my attention to some of the documents annexed to the rejoinder and in particular photocopy of passport of petitioner No. 1, Bank form, passport of petitioner No. 2, nomination form etc. and would submit that signature of petitioner Nos. 1 to 3 on these documents if compared with the disputed signatures on the consent affidavit would indicate that the signature of petitioner Nos. 1, 2 and 3 on the alleged consent affidavit are forged. It is submitted that this Court should compare the signature on the documents annexed to the rejoinder with the alleged signature on consent affidavit. Learned counsel submits that though notice to next-of-kin is mandatory under the provisions of Indian Succession Act and High Court Rules, no such notice came to be issued to the petitioners. No citation has been served upon the petitioners. Petitioners did not sign any such consent affidavits as produced by the executor who had filed probate petition in this Court. It is submitted that Will is surrounded by suspicious circumstances. Learned counsel submits that if the said deceased petitioner would have served citation upon the petitioners or would have contacted the petitioners for filing consent affidavits, petitioners would have raised objections about such Will. Learned counsel submits that since no steps of any nature whatsoever was taken by the executor of the said Will in last 33 years, there was no occasion for the petitioners to file any objection about the alleged Will. It is submitted that petitioners were all throughout under impression that the executor of the Will has given up the said Will and would not act upon the same. It is submitted that if any such notice which was published in the year 2012 would have been published earlier, petitioner would have raised such objection earlier. Learned counsel submits that since fraud is committed by the said executor by relying upon forged consent affidavits and alleged signatures of the petitioners identified by third party who was not an advocate, entire proceedings initiated by the executor were fraudulent and thus probate obtained by the executor is vitiated and is a nullity.

6. Mr. D'Mello, learned counsel submits that the limitation for filing petition for revocation of probate would commence only from the date of knowledge of the petitioners of fraud committed by respondents or their predecessor and not prior thereto which in this case when a public notice came to be issued in the newspaper on 22nd December 2012. This petition has been filed within three

years from the date of such knowledge of fraud committed by the respondents and/or their predecessor and is thus within time. Learned counsel submits that u/s 263 of the Indian Succession Act, grant of probate can be revoked if the just cause described therein exists. Section 263 of the Indian Succession Act 1925 reads thus:

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.

7. Mr. D'Mello Learned counsel submits that since in this case, the proceedings filed by the executor to obtain grant itself is defective in substance, i.e. without effecting service of citation upon the legal heirs of the said deceased, grant was obtained fraudulently by filing forged consent affidavits, in view of the executor in whose favour grant was made by this Court had wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of the Indian Succession Act, 1925, such grant of probate issued by this Court in favour of the executor is liable to be revoked.

8. Mr. D'Mello learned counsel placed reliance of following Judgments in support of his submission that period of limitation u/s 17 of the Limitation Act shall not begin to run until the petitioners would have discovered the fraud. Judgments are also relied upon in support of the proposition that the fraud committed by the executor/respondents vitiates the grant obtained by the executor.

1. Pallav Sheth Vs. Custodian and Others,
2. Bhaurao Dagdu Paralkar Vs. State of Maharashtra and Others,
3. 2002 (1) ALT 48 (SC)
4. S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, .

9. Mr. D'Mello also placed reliance on the Judgment of this Court in case of Dr. Dinshah Dhunjishah Gagrath Vs. Viloo Byramji Plumber and Another, . Mr. D'Mello placed reliance on the Judgment of Supreme Court in case of Basanti Devi Vs. Raviprakash Ramprasad Jaiswal, and in particular paragraph 22 in support of his submission that the petitioners being aggrieved by the probate obtained by the executor and having no knowledge about the proceedings and proper citations, are entitled to file an application for revocation of probate. Mr. D'Mello placed reliance on the Judgment of Supreme Court in case of Anil Behari Ghosh Vs. Smt. Latika Bala Dassi and Others, in support of his submission that in view of the executor not submitting accounts of the estate u/s 263 wilfully and without reasonable cause, grant is liable to be revoked. Reliance is placed on paragraph 21 of the said Judgment.

10. Mr. Owen Menezes, learned counsel appearing on behalf of the respondents on the other hand opposed this petition on the ground of limitation and other grounds. It is submitted that it is not in dispute that the petitioners were fully aware of the Will dated 20th February 1971 made by the said deceased as admitted by the petitioners themselves not only in the correspondence exchanged in the year 2012-13 but also in the petition. Learned counsel submits that the said deceased had appointed his son Mr. Anthony D'Cunha as executor under the said Will. One of the witness to the said Will is an Advocate, Mr. L.R.D. Coelho and the other witness was one Mr. A. D'souza who was staying opposite to the respondents. The said deceased expired on 20th August 1977. The executor applied for probate of the said Will in the year 1979 (851 of 1979). Learned counsel submits that the petition was filed by the executor in person without engaging the services of an advocate. The executor however, availed of the services of retired Superintendent of this Court who assisted the executor to file the said probate petition. Mr. A. D'souza who was one of the attesting witnesses had sworn an affidavit. Signature of the executor was identified by the said retired superintendent Mr. Karande. On 1st September 1979, mother of the petitioner Nos. 3 to 6 and mother in law of petitioner No. 7, petitioner Nos. 1 and 2 filed their affidavit of consent. Signature on the said affidavit had been identified by the said retired superintendent, Mr. Karande. One of the heirs Mr. Edwin D'Cunha who was residing in Goa also filed his consent affidavit on 3rd September 1979.

11. It is submitted that since consent affidavits by all the legal heirs were filed in this court in accordance with the procedure prescribed, service of citation was not required. It is submitted that only after all such prescribed procedure under High Court (Original Side) Rules was followed by the executor and duly verified by the office of this Court, probate came to be issued on 3rd July 1980 in favour of the executor. Mr. Menezes submits that under such Will duly probated, executor was directed to give sum of Rs. 5,000/- to each of the heirs of the said deceased after grant of probate. The executor accordingly made the said distribution to each of the legal heirs of the said deceased who acknowledged the payment of receipt of Rs. 5000/- each and executed receipt of acknowledgment

of Rs. 5000/- each. Learned counsel invited my attention to such receipts which are annexed to the affidavit in reply filed by the respondents and also tendered coloured photocopies thereof. It is submitted that all the petitioners have thus acted upon and accepted the Will of the said deceased and rightly did not challenge the said Will for last 33 years.

12. Mr. Menezes submits that the petitioners are also admittedly residing at Bandra where the said deceased was staying. The property left by the said deceased is also situated at Bandra. In last 33 years, petitioners did not address any letter to the respondents or to the said executor during his life time calling upon him to distribute after receipt of Rs. 5,000/-. It is submitted that if according to petitioners, the said Will was surrounded by suspicious circumstances, petitioners could also have filed petition for administration of estate of the said deceased. It is submitted that if according to petitioners, petitioners were entitled to any share in immovable property, petitioners ought to have come forward to share the expenses of such immovable property in last more than three decades which the petitioners failed. It is submitted that since the rates of the said immovable property have now arisen in last three decades, petitioners have made their fraudulent claim in the said property. Mr. Menezes submits that the said Will makes an absolute bequest of the said immovable property in favour of the said executor, late father of the respondents and none of the petitioners have any right of any nature whatsoever in the said property. Learned counsel submits that petitioners did not admittedly contribute any amount towards municipal taxes, maintenance, estate duty etc. of the said property and were solely borne by the said executor and the respondents. The said property has been solely looked after by the said executor after the demise of the said testator on 20th August 1977. Mr. Menezes invited my attention to the coloured photocopy of acknowledgement receipt of Rs. 5,000/- signed by the petitioners and Mr. Edwin D'Cunha in September-October 1980 and would submit that signature appearing on these receipts if compared with the signatures on the consent affidavits would indicate that signatures on both these documents are of the same person and there was no forgery.

13. Mr. Menezes placed reliance on following Judgments on the issue of limitation:

1. Hari Narain and Others Vs. Subhash Chander and Others,
2. Ramesh Nivrutti Bhagwat Vs. Dr. Surendra Manohar Parakhe, .
3. Nina Agarwalla Vs. Ashok Gupta and Others, .

14. In support of his submission that if a fact which can be discovered by due diligence by the plaintiff, he would be deemed to have necessary knowledge, learned counsel placed reliance on the Judgment of Supreme Court in case of Smt. Dilboo (Dead) by Lrs. and Others Vs. Smt. Dhanraji (Dead) and Others, and Judgment of Madras High Court in case of The Ramanathapuram Market Committee Vs. East India Corporation Ltd., .

15. Mr. Menezes placed reliance on following Judgment in support of his submission that in testamentary suit, this Court cannot grant any interim reliefs and the same can be granted only by civil court. Rupali Mehta Vs. Smt. Tina Narinder Sain Mehta, and Judgment in case of Ramchandra Ganpatrao Hande alias Handege Vs. Vithalrao Hande and Others, .

Reasons & Conclusions:

16. Mr. Menezes also distinguished the Judgments relied upon by the Mr. D'Mello on the issue of limitation and other Judgments on the ground that petitioners have not made out any case of alleged fraud or that in spite of due diligence, petitioners could not recover the fraud alleged to have been committed by the respondents.

17. It is not in dispute that the deceased had left a Will on 20th February 1971 and the petitioners were aware of such Will. It is the case of the petitioners that since no steps were taken by the executor for obtaining probate of the said Will in last 30 years, petitioners were under impression that the said Will was abandoned and not acted upon. The petitioners, therefore, did not think it necessary to take any steps to file any proceedings for administration of estate of the said deceased and simultaneously there was no occasion to file any objection for want of service of citation upon them by the executor. It is submitted by Mr. D'Mello during the course of argument that since the respondents were also family members and there was no development on the suit property and the status quo in respect of the possession of the said property continued for more than three decades as was prevailing on the date of death of the said deceased, petitioners did not think it necessary to make any contribution for payment of taxes and/or maintenance etc. in respect of the property.

18. The questions that arise for consideration of this Court are (i) whether petitioners have made out a case of fraud against the respondents and/or the said executor in obtaining probate of the Will of the said deceased upon the petitioners or their predecessors; (ii) whether inspite of due diligence, petitioners could come to know about such alleged fraud for the first time only in the month of December 2012; (iii) petition for revocation of probate is barred by law of limitation and (iv) whether grant can be revoked on any other ground.

19. It is not in dispute that petitioners as well as the said deceased were residing at Bandra. It is not in dispute that there was not a single letter addressed by the petitioners to the executor or any of the respondents after the demise of the said deceased pertaining to the administration of estate of the said deceased in last more than thirty three years. Petitioners have not contributed any amount towards maintenance and/or taxes in respect of the said immovable property which has been bequeathed in favour of the said executor by the said deceased and the said property was exclusively maintained by the said executor during his life time and thereafter by the respondents. I am not inclined to accept the submission of Mr. D'Mello learned counsel appearing for the petitioners that it

was not necessary to contribute any amount towards taxes or maintenance or to address any letter in last thirty three years to assert the rights by the petitioners in the estate of the said deceased, since there was no development on the suit property or otherwise. Since the petitioners were fully aware of the said Will, even if according to the petitioners, the same was surrounded by suspicious circumstances, petitioners could have filed a separate proceedings for administration of estate of the said deceased or would have called upon the executor to take appropriate steps for administration of estate of the said deceased. Admittedly no such proceedings have been filed by the petitioners. In my view, no legal heir who would claim share in the property of the deceased testator on intestacy, would be a mute spectator for thirty three years and would take no steps to seek redressal of his claims before any court of law.

20. On perusal of the annexures to affidavit in reply filed by the respondents, it is clear that the consent affidavits of the legal heirs were filed along with petition and signatures of such legal heirs were identified by Mr. Karande, retired superintendent of this Court. Signatures on the said affidavit were attested by the Associate of this Court. In view of such consent affidavits, service of citation was not required. Only after compliance of such procedure by the executor and duly verified by the office of this Court, grant was issued in favour of the executor. I am not inclined to accept submission of Mr. D'Mello that since signature of the executor who filed petition in person or parties on the consent affidavit was not identified by an advocate it would amount to forgery. It is not mandatory that any proceeding has to be filed only through an advocate. Parties are allowed to file proceedings in person and services/assistance of any person who is familiar with the procedure can be taken by such party appearing in person for filing any proceedings in the Court. It is not in dispute that out of signatures of four parties on consent affidavits, petitioners are not disputing the signature of the son of the deceased which was on the same affidavit and whose signature was also identified by Mr. Karande, retired superintendent of this Court.

21. On comparison of the signature on the coloured photocopies of the receipt produced by Mr. Menezes for perusal of this Court, signature on the documents relied upon by Mr. D'Mello with the signature on the consent affidavit, it is revealed that the signature on the documents referred to and relied upon by the parties and the consent affidavits are of the same persons. In my view, no case of forgery is made out by the petitioners against the said executor or any party as alleged in the petition. No steps were taken by the petitioners at any point of time to find out about the proceedings if any filed by the respondents or by the executor for obtaining probate or any proceedings relating the administration of the estate of the said deceased.

22. I shall now deal with some of the Judgments which are relied upon by both the parties on the issue of limitation. Since several Judgments are relied upon in support of the same proposition on the issue of limitation, to avoid multiplicity, I refer to few Judgments on the issue.

23. Supreme Court in case of Pallav Sheth (supra) in paragraph 47 of has held thus:

47. Section 17 of the Limitation Act, inter alia, provides that where, in the case of any suit or application for which a period of limitation is prescribed by the Act, the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of the defendant or his agent (Section 17(1)(b)) or where any document necessary to establish the right of the Plaintiff or Applicant has been fraudulently concealed from him (Section 17(1)(d)), the period of limitation shall not begin to run until the Plaintiff or Applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it; or in the case of a concealed document, until the Plaintiff or the Applicant first had the means of producing the concealed document or compelling its production. These provisions embody fundamental principles of justice and equity, viz, that a party should not be penalised for failing to adopt legal proceedings when the facts or material necessary for him to do so have been wilfully concealed from him and also that a party who has acted fraudulently should not gain the benefit of limitation running in his favour by virtue of such fraud.

In paragraph 41 of the said Judgment, it is held by the Supreme Court that one of the principles underlying the law of limitation is that a litigant must act diligently and not sleep over its rights.

24. In case of Bhaurao Dagdu Paralkar (supra), Supreme Court has held that "Fraud" and collusion vitiate even most solemn proceedings in any civilized system of jurisprudence. Similar view has been taken by the Supreme Court in case of S.P. Chengalvaraya Naidu (supra). Paragraph 7 & 8 of said Judgment in case of S.P. Chengalvaraya read thus:

7. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean-hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.

8. The facts of the present case leave no manner of doubt that Jagannath

obtained the preliminary decree by playing fraud on the court. A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. Jagannath was working as a clerk with Chunilal Sowcar. He purchased the property in the court auction on behalf of Chunilal Sowcar. He had, on his own volition, executed the registered release deed (Exhibit B-15) in favour of Chunilal Sowcar regarding the property in dispute. He knew that the appellants had paid the total decretal amount to his master Chunilal Sowcar. Without disclosing all these facts, he filed the suit for the partition of the property on the ground that he had purchased the property on his own behalf and not on behalf of Chunilal Sowcar. Non-production and even non-mentioning of the release deed at the trial tantamounts to playing fraud on the court. We do not agree with the observations of the High Court that the appellants-defendants could have easily produced the certified registered copy of Exhibit B-15 and non-suited the plaintiff. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party.

25. In case of *Dilboo vs. Dhanraji* (supra) relied upon Mr. Menezes, learned counsel for respondents and in particular paragraph 20, it has been held by the Supreme Court that whenever a document is registered, the date of registration becomes the date of deemed knowledge and in other cases where a fact could be discovered by due diligence then deemed knowledge would be attributed to the plaintiff because a party cannot be allowed to extend the period of limitation by merely claiming that he had no knowledge. Paragraph 20 of the said Judgment reads thus:

20. This Suit was governed by the Limitation Act of 1948. Arts, 134 and 148 reads as follows:

Description of suit

Period of limitation

Time from which period begins to run

134. To recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration

Twelve years

When the transfer becomes known to the plaintiff.

148. Against a mortgagee to redeem or to recover possession of possession immovable property mortgaged.

Sixty years

When the right to redeem or to recover possession accrues.

Thus a Suit for redemption of mortgage could be filed within 60 years. But if the mortgagee had created an interest in excess of the right enjoyed by him then to recover possession against the third party the Suit had to be filed within 12 years of the transfer becoming known to the Plaintiff. The rational in cutting down the period of 60 years to 12 years is clear. The 60 years period is granted as a mortgagee always remains a mortgagee and thus the rights remain the same. However when an interest in excess of the interest of the mortgagee is created then the third party is not claiming under the mortgagee. The position of such a person could not be worse than that of a rank trespasser who was in open and hostile possession. As the title of the rank trespasser would get perfected by adverse possession on expiry of 12 years so also the title of such transferee would get perfected after 12 years. The period of 12 years has to run from the date of knowledge by the Plaintiff of such transfer. It is always for the party who files the Suit to show that the Suit is within time. Thus in cases where the suit is filed beyond the period of 12 years, the Plaintiff would have to aver and then prove that the Suit is within 12 years of his/her knowledge. In the absence of any averment or proof, to show that the suit is within time, it is the Plaintiff who would fail. Whenever a document is registered the date of registration becomes the date of deemed knowledge. In other cases where a fact could be discovered by due diligence then deemed knowledge would be attributed to the Plaintiff because a party cannot be allowed to extend period of limitation by merely claiming that he had no knowledge.

26. Madras High Court in case of The Ramanathapuram Market Committee (supra) and in particular paragraph 14 has held that in a case where the defendant challenges the allegation of the plaintiff as to the date of knowledge, it is for the plaintiff to establish that he could not have discovered the mistake with reasonable diligence on a date earlier than that on which the plaintiff bases his cause of action. Paragraph 14 of the said Judgment reads thus:

14. The difference in the context and the language adopted by the old and the new Acts is rather significant. In the old Act, stress is laid on the knowledge of the per SOD, who wants to take advantage of the enlarged period of limitation. In the new Act, emphasis is on the date when the plaintiff has discovered the fraud or mistake or could, with reasonable diligence, have discovered it. By the "use of the phrase "with reasonable diligence " in Section 17 of the Act, the Legislature has given scope to the defendant to contend that the date of knowledge or discovery pleaded is not the sure date of such discovery of mistake or fraud. It is open to the defendant to establish that "with reasonable diligence" the plaintiff could have discovered the fraud or the mistake earlier. The plaintiff, therefore, is not mechanically permitted to adduce a plea over the matter in issue as a step in aid to maintain the action. Where the legality of some proceeding is the matter in dispute between the two parties, he, who maintains its legality and seeks to take advantage of it, cannot rely upon the proceeding

itself as a bar to the adverse party. To do so, would involve the logical fallacy of "petition principi and would in many cases preclude redress to the aggrieved party. If the plaintiff's allegation as to the date of the knowledge of mistake is adapted and accepted as a matter of course, then he would automatically" be licensed to prejudice his adversary." A fortiori in a case where the defendant challenges the allegation, it is for the plaintiff to establish that he could not have discovered the mistake, "with reasonable diligence" on a date earlier than that on which the plaintiff bases his cause of action. As is said, it would be unreasonable to expect an exact definition of the word "reasonable". Reason varies according to times and circumstances in which the individual thinks. Thus, the word "reasonable " has always been understood in law as *prim a facie* meaning, reasonably in regard to those circumstances of which the actor called on to act reasonably, knows or ought to know. It is also a fundamental maxim, of things relating to each other, one being known, the other is also known ". In the instant case, when the plaintiff knew about the cancellation of the earlier notification by a later notification then it is normally and reasonably expected that it knew or with reasonable diligence ought to have discovered that the payments made by it under the earlier cancelled notification were irregular and improper and the payments were made under a mistake of law or of fact. The cancellation of the earlier order is intimately connected with the mistake in the payments made by the plaintiff pursuant to the first withdrawn order. As" it knew or ought to have known and with reasonable diligence should have discovered that the earlier notification has become inoperative by its cancellation under the second notification, then that being known, then the other," namely, that it should seek for the refund of the said amounts on such discovery within the prescribed period of limitation, could have been known also. Such, a discovery is possible because of the impact of one event as against the other.

27. On perusal of paragraph 47 of the Judgment of Supreme Court in case of *Pallav Sheth v. Custodian & Ors.* (supra), it is clear that u/s 7(1)(d) of the Limitation Act, the period of limitation shall not begin to run until the plaintiff or applicant had discovered the fraud or the mistake or due diligence had discovered it. Question that arises for consideration is whether petitioner in this case could have without reasonable diligence discovered alleged fraud played by the executor in respect of the Will of the said deceased in last thirty three years. It is not in dispute that petitioners were fully aware of the Will of the said deceased. All parties to this proceedings including the executor and the said deceased were residing at Bandra at the relevant time. It is not the case of the petitioners that in spite of reasonable/due diligence, petitioners could not ascertain about the proceedings if any filed by the executor for obtaining probate or for administration of the estate of the said deceased. Petitioners never bothered to make any inquiry by addressing any single letter to the executor to ascertain about the proceedings if any filed by him in respect of the said Will. It is not the case of the petitioners that any inquiry was made by the petitioners in this Court to ascertain the status of any proceedings till recently. In my view, if

the petitioners would have taken reasonable steps and would have acted with reasonable and due diligence in last thirty three years, petitioners could have come to know about filing of the probate petition by the executor and issuance of grant in his favour by this Court as far back as in the year 1980.

28. Testamentary proceedings are proceedings in rem. Issuance of grant by this Court would also be a deemed notice. Supreme Court in case of Dilboo (supra) has held that where a fact could be discovered by due diligence by the plaintiff, then deemed knowledge would be attributed to the plaintiff because a party cannot be allowed to extend the period of limitation by merely claiming that he had no knowledge. In my view, the petitioners cannot just simply take an excuse of lack of knowledge of the alleged fraud without taking any reasonable steps or acting with reasonable diligence to ascertain such facts. In my view, the petitioners would have deemed knowledge of filing of such petition by the executor and issuance of grant by this Court. Limitation in this case thus would commence on the date of issuance of grant by this Court which was in the year 1980 and would not commence in the year 2012 when public notice was issued by the respondents in the newspaper.

29. Next submission of Mr. Owen Menezes, learned counsel for the respondents is that Article 137 of Schedule-I to the Limitation Act would be attracted for filing petition for revocation of probate. Reference to Article 137 and some of the Judgments relied upon by Mr. Menezes would be relevant. Article 137 of schedule-I of Limitation Act reads thus:

Description of application

Period of limitation

Time from which period begins to run

Art. 137

Any other application for which no period of limitation is provided elsewhere in this division.

Three years

When the right to apply accrues

30. Learned single Judge of this Court in case of Ramesh Nivrutti Bhagwat (supra) has held that Article 137 of the Limitation Act would be attracted to the petition for revocation of Letters of Administration. Paragraph 9 of the said Judgment reads thus:

9. The Letters of Administration were granted in ancillary proceedings by this Court on 25.11.1994. The present petition for revocation of the said grant has been filed on 21.7.1999. In the above referred judgment of the Division Bench of this Court, it is also held that the application for revocation of grant is covered by Article of the Limitation Act, 1963, which requires the application to be filed

within 3 years from the date when right to apply accrues. The period spent the notice of motion from 29.3.1997 to 1.4.1998 even if excluded from consideration, the present petition is filed beyond the period of three years from 25.11.1994 as three years period expired on 24.11.1997 and the present petition is filed on 21.7.1999. The period of seven months and two days spent in pursuing the remedy of notice of motion even if excluded, the petition is hopelessly barred by time.

31. The division bench of this Court in case of Nina Agarwalla (supra) and in particular paragraph 13 has held that Article 137 of the Limitation Act would apply to the proceedings for revocation of probate filed u/s 263 of Indian Succession Act 1925. Paragraph 13 of the said Judgment reads thus:

13. The Appellant has not been able to show any evidence to establish that the citation was not served upon her. We find it difficult to accept on her mere statement that the citation was not served upon her, particularly in view of the records of the testamentary department of the Court and the fact that probate was granted more than 38 years ago. So far as the decisions of the Supreme Court in the matter of Kunvarjeet Singh (supra) is concerned, the same dealt with the issue of grant of probate and not with revocation of probate. In any case, in the facts of the present case in the absence of the Appellant being able to show that citations were not served upon her and she was kept in dark about the Will dated 28 March, 1964, the provision of Section 263 of Indian Succession Act, 1925 is not satisfied. Moreover, one must keep in mind that a grant of probate by a Competent Court operates as a judgment in Rem and once the probate to the Will is granted, then the said probated Will is good not only in respect of the parties to the proceedings, but against the whole world. Therefore, if the probate is granted, the same operates in Rem and time runs from the date of the grant of the probate for purposes of limitation under Article of the Limitation Act in proceedings for revocation of probate.

32. I am bound by the Judgment of division bench of this Court in case of Nina Agarwalla (supra) in which it has been held that Article 137 would be attracted to the proceedings filed u/s 263 of the Indian Succession Act. In my view, Article 137 would be applicable to this proceedings which provides for three years limitation and time commences when the right to sue accrues. In this case petitioners were granted probate in the year 1980. Time to file petition for revocation u/s 263 thus would commence in the year 1980 i.e. the date on which probate was granted by this Court. Petition for revocation of probate has been filed by the petitioners on 22nd July 2013. The petition is thus, on the face of it barred by limitation.

33. As far as submission of Mr. D'Mello, learned counsel for petitioner that the grant issued by this Court is liable to be revoked on the ground that the executor has not submitted accounts/inventory of the estate of the deceased is concerned, reference to paragraph 21 of the Judgment of Supreme Court in case of Anil Bihari Ghosh (supra) would be relevant which reads thus:

21. It remains to consider the last point, viz., whether the case is within clause (e) of the explanation to section 263. In this connection ground (f) in paragraph 23 of the petition quoted above is the only allegation. The omission to submit accounts is not always synonymous with "wilfully and without reasonable cause" omitting to exhibit accounts. In certain circumstances omission to submit accounts may bring the case within the purview of clause (e) aforesaid because the circumstances may tend to show that the omission was willful and without reasonable cause. We have therefore to consider whether in the circumstances of this case the omission to file accounts has the effect of entitling the appellant to an order of revocation. Under the will the testator intended that Anil Nath Basu should function as the managing executor during his lifetime, as will appear from the relevant portion of paragraph 17 of the will which is as follows:

I direct that my executor Babu Anil Nath Basu shall act alone without interference of my other executors in drawing money from or depositing money to any bank, courts or any other place or places and also in drawing interest of Government Promissory Note, debentures, etc. and in collecting rents of the houses and also in defending and instituting all suits relating to my estate and for the purpose above to sign cheques, rent bills and all papers relating to any suit in connection with my estate.

It would thus appear that Anil Nath Basu was not only the most competent man being a trained lawyer to administer the estate but had also been in terms vested with the power to handle the cash and the accounts by himself without interference by the other executors. He must therefore have handled the incomings and the outgoings and been responsible for keeping true and proper accounts. Whether or not he did so we do not know, because Girish, as already indicated, never made any attempt to question the will or the grant or to call him to account. We have already made reference to Debi Prosad Mitter's correspondence with Anil Nath Basu, the managing executor, bearing on the question of accounts. There is nothing on the record to show what happened on that demand for accounts by Debi Prosad Mitter. The managing executor was alive up till July 1948 and unfortunately for the appellant, he initiated the revocation proceedings more than a year after his death. If these proceedings had been started in Anil Nath Basu's lifetime, he would have been the best person to inform the court as to how matters stood with reference to the accounts. The fact remains that no accounts appear from the record of this case to have been submitted by the executors. An application was made before us to take notice of the fact that accounts had been submitted up to date by the 1st respondent who is in charge of the testator's estate. But whether or not the respondent has filed accounts during the pendency of this appeal is wholly irrelevant. We have to determine whether the omission to submit accounts in the circumstances of this case entitles the appellant to have an order of revocation. In the first place, no proper pleading had been made on this part of the case. It has not been alleged that there has been a wilful default without any reasonable cause. Hence no proper foundation was laid in the pleadings for

reception of evidence either way. On that ground alone, in our opinion, the appellant must fail on this part of the case. It may also be pointed out that in all the circumstances of this case referred to above, particularly in view of the fact that it was never suggested that the will in question was not genuine or had not been validity executed, it must be held that the proceedings leadings up to this appeal have been misconceived. If the appellant has any locus standi, his remedy lay not against the will or against the grant of probate, but under the will. But it is not for this court to advise what the appellant should have done.

34. On perusal of the Judgment of Supreme Court in case of Anil Bihari Ghosh (supra), it is clear that if no proper pleadings had been made on the issue of inventory or that accounts were not submitted by the executor, on that ground grant cannot be revoked. On perusal of paragraph 25 of the petition, it is clear that the only ground raised on this issue is that the said executor had without any reasonable cause failed to exhibit an inventory or account in accordance with the provisions of chapter VII of the Indian Succession Act 1925. No foundation is laid by the petitioners in the petition. It is the case of the respondents that as per the directions in the Will, executor was required to pay Rs. 5,000/- to each of the legal heirs which was duly paid by the executor and acknowledged by the legal heirs and receipts in support thereof are already produced on record. In my view, no case is made out for revocation of grant on this ground also. In my view, petitioners have neither able to make out any case that the said executor or the respondents have committed any fraud or forgery as alleged in obtaining probate nor have proved that the petitioners in spite of reasonable and due diligence could not find out the fraud alleged to have been committed by the executor or by any other party. In my view, the petition is thus barred by law of limitation. Petitioners have not made out any just cause prescribed in Section 263 of Indian Succession Act 1925. Petition is devoid of merits. I, therefore pass the following order.

(a) Misc. petition is dismissed. No order as to costs.

(b) In view of dismissal of petition, notice of motion does not survive and is disposed of accordingly.