
(2015) 03 BOM CK 0160

In the Bombay High Court

Case No : Testamentary Suit No. 2 of 1986 in Testamentary Petition No. 824 of 1981

Rujuta Pradeep Mhatre and Others

APPELLANT

Vs

Smita Harihar Parelkar and Others

RESPONDENT

Date of Decision : 30-03-2015

Acts Referred:

Hindu Succession Act, 1956 — Section 15, 15(1)(b), 8, 9
Succession Act, 1925 — Section 218, 254

Citation : (2015) 3 ABR 514 : AIR 2015 Bom 183

Hon'ble Judges : G.S. Patel, J.

Bench : Single Bench

Advocate : H.C. Mehta i/b Mehta and Co., for the Appellant; Sanjay Jain instructed by Johair and Co., Advocates for the Respondent

Final Decision : Disposed off

Judgement

G.S. Patel, J.—This is a petition for Letters of Administration to the estate, property and credits of one Shankarrao H. Parelkar ("Shankarrao"), who died on 8th November 1979. Shankarrao was survived by his widow Sitabai; his sons Manohar, Yeshwant and Harihar; and a daughter, Sarojini Bhatte. Shankarrao died intestate; none have propounded any Will or testamentary writing. His estate would, therefore, devolve as on intestacy, with a 1/5th or 20% share in his estate going to his widow and four children respectively. This is not disputed.

2. At the time of his death, Shankarrao was a 50% partner in a firm known as M/s. Parelkar and Dallas. This was a firm of architects of some considerable repute and standing among architects and in the construction industry in Mumbai. It had considerable business, revenue and goodwill. The firm continues today, though, as we shall see, in considerably changed circumstances. The firm was first established on 19th October 1948 and has been in practice since then. Vinay Manohar Parelkar, Shankarrao's grandson (Manohar's son) claims that he entered into partnership with the other 50% partner Mr. Dallas with effect from

the date of Shankarrao's death. He claims to have been inducted into this partnership, but does not show that he paid any consideration for this either to Shankarrao's estate or to Mr. Dallas.

3. On 20th October 1981, Manohar, Shankarrao's eldest son, filed the present Petition No. 825 of 1981 for Letters of Administration to Shankarrao's estate, property and credits. The petition includes a schedule of assets. Of the very many assets listed, there are also certain immovable properties, one of which is a land with building known as Sita Sadan at Plot No. 75, Keluskar Road, Shivaji Park, Dadar. There are other immovable properties too and there is also his interest in the partnership firm of Parelkar and Dallas. The petition, however, as originally brought showed Shankarrao's interest in this firm as being of the value of only Rs. 3167.10.1

4. Following the filing of this Petition many of the lineal descendants of Shankarrao and their own heirs passed away. The petition has been amended several times to reflect these changes. For convenience a family tree showing the relations between the parties is appended to this judgment.

5. On 14th December 1981, Shankarrao's second son Yeshwant passed away. He was survived by his widow, Sandhya; the couple had no children.

6. Even at this time, the petition for Letters of Administration, though pending, had not been contested.

7. Sometime in 1984, Harihar, Shankarrao's younger son, filed Suit No. 8009 of 1984 in the Bombay City Civil Court at Bombay seeking reliefs in relation to the firm of M/s. Parelkar and Dallas in his capacity as one of Shankarrao's heirs. To this suit, Manohar's son Vinay (Harihar's nephew) was joined as Defendant No. 2(b). Shankarrao's other heirs were also party Defendants, as was Mr. Dallas, the remaining 50% partner in the firm. Subsequently, Vinay's wife, Neelam, was also joined as Defendant No. 6 to this partnership suit. Many of the heirs joined to this suit supported Vinay.

8. On 21st December 1985, Harihar (Shankarrao's third son and the Plaintiff in the Bombay City Civil Court partnership action) filed a Caveat and an Affidavit in Support in the present petition for Letters of Administration. The petition was then renumbered as Suit No. 2 of 1986.

9. About two years later, on 10th November 1987, Harihar executed a Release Deed in respect of one of the properties included in Shankarrao's estate. Harihar reserved his rights in other properties and the remaining estate of Shankarrao and then agreed, in that Release Deed, one to which I will turn presently, to withdraw his Caveat. Harihar later claimed that he did not in fact ever withdraw that Caveat since the commitments made to him were not fulfilled. In any case, the fact remains that Manohar, the Plaintiff in the testamentary action, made no application for discharge of the Caveat on the basis of this Release Deed or for enforcement of Harihar's obligations under it.

10. On 20th April 1988, Shankarrao's widow, Sitabai, passed away. She was survived by her two sons Manohar and Harihar, her daughter Sarojini and her second son, Yeshwant's, widow, Sandhya.

11. On 27th June 1989, Neelam Parelkar, Vinay's wife and the daughter-in-law of Manohar, Shankarrao's elder son, claimed that she had been inducted as partner of M/s. Parelkar and Dallas. She also claimed that Mr. Dallas had retired. She, too, did not claim to have paid any consideration whatsoever into Shankarrao's estate.

12. On 10th January 1992, Manohar, Shankarrao's elder son, passed away. He was survived by his wife, Shalini, son Vinay and his daughter Padmaja Goregaonkar. Shalini, Vinay and Padmaja were later added as party Plaintiffs to the present action.

13. After Manohar passed away, Harihar, who had filed a Caveat and was the original Defendant in the suit filed Chamber Summons No. 608 of 1992 seeking that he be transposed as a Plaintiff. This application was opposed by the other heirs who filed a counter Chamber Summons No. 736 of 1992. The affidavit in support of that second Chamber Summons was affirmed by Vinay, Manohar's son. On 11th September 1992, Chamber Summons No. 736 of 1992 was allowed. The Court held that the other heirs (i.e., the Applicants in the Chamber Summons) had a higher and superior right in Shankarrao's estate as compared with Harihar, the original Defendant. Thus, those heirs were joined as party Plaintiffs and Harihar continued as a Defendant. The plaint was amended thus: Shankarrao's only daughter Sarojini Bhatte was joined as Petitioner No. 1; Yeshwant's widow (Shankarrao's daughter-in-law, the widow of his second son) was joined as Petitioner No. 2; Shalini, Manohar's widow was joined as Petitioner No. 3; Vinay, Manohar's son was joined as Petitioner No. 4; and Padmaja Goregaonkar, Manohar and Shalini's daughter was joined as Petitioner No. 5.

14. On 8th November 1992, Harihar filed an additional affidavit in support of the Caveat. The Plaintiffs' case was conducted till this time by Vinay, Manohar's son, Plaintiff No. 4.

15. On 6th August 2001, Harihar's partnership suit was decreed. At that time, Harihar had a 25% share in Shankarrao's estate. Vinay and his wife Neelam were ordered to pay Harihar 25% of Shankarrao's 50% share in the profits of the firm from the date of Shankarrao's death (8th November 1979) till payment. This judgment and decree was carried in Appeal by Vinay in First Appeal No. 94 of 2003. This is pending and there appears to be no stay of the decree. It has not been satisfied either.

16. On 22nd August 2003, Sarojini Bhatte, Shankarrao and Sitabai's only daughter, passed away. She was survived by her three daughters, Rujuta Mhatre, Neeta Madgulkar and Preeta Bhatte, who are now joined as Plaintiffs Nos. 1(a) to 1(c).

17. On 28th July 2002 Harihar Parelkar passed away. His heirs are Defendants Nos. 1 to 3, his wife, son and daughter respectively.

18. On 8th February 2008, Shalini, the original Plaintiff No. 3 (Manohar Parelkar's widow) passed away. She was survived by Plaintiffs Nos. 4 and 5 viz. Vinay Parelkar and Padmaja Goregaonkar.

19. On 11th December 2010, the 2nd Petitioner Sandhya, viz., the widow of Shankarrao's second son Yeshwant, passed away. She left no heirs. However Neelam Parelkar, Petitioner No. 2(a), the wife of Petitioner No. 4 Vinay, claimed to be an Executor of an alleged Will said to be have been left by Sandhya. Neelam is thus on record also as the Executor of that Will. It does not appear that any Application for Probate of that Will was ever made.

20. Sometime in 2010, Vinay Parelkar filed Suit No. 2807 of 2010 in the Bombay City Civil Court at Bombay, in respect of a room on the second floor of "Sita Sadan". Vinay alleged that these premises had been gifted to him by Sandhya Parelkar, the deceased original Plaintiff No. 2 and the widow of Shankarrao's second son Yeshwant. Vinay sought a restraint against the Defendants from entering upon this property. The City Civil Court granted interim relief. The matter was carried in appeal in A.O. No. 230 of 2011. Vinay also filed a Cross Appeal No. 94 of 2011. On 30th August 2011, the Defendants' Appeal was allowed and Vinay's Appeal was rejected. The impugned interim order of the City Civil Court was set aside and the Notice of Motion filed by Vinay was dismissed.

21. It seems that the present suit was in the meantime dismissed for default but came to be restored shortly thereafter. Vinay filed an evidence Affidavit in these proceedings. However he passed away on 21st October 2011 before his cross examination could commence. He was survived by his widow, Neelam, Petitioner No. 2(a); his son Pranil, Petitioner No. 4(a) and his daughter, Avanti, Petitioner No. 4(b).

22. In February 2012 Neelam, Petitioner No. 2(a), filed her Affidavit in lieu of Examination-in-Chief. The Defendants sought to have portions of this evidence Affidavit struck off as being hearsay. That application was by way of Chamber Summons No. 47 of 2012, and this came to be disposed of on 15th April 2012 with an observation that at that stage it was not possible to say what portion of Neelam's Affidavit was hearsay and what portion to her personal knowledge. A Commissioner was directed to record evidence. The cross-examination of the Plaintiff's only witness, Neelam, Plaintiff No. 2(a) was ultimately conducted in Court on 17th June 2014 (R.D. Dhanuka, J) and 25th June 2014 (S.J. Kathawalla, J). The Defendants led no oral evidence. They did however tender certain documents in evidence being in the nature of orders of the Court and proceedings in and arising from proceedings in the City Civil Court.

23. On 25th November 2008, issues had been framed (R.Y. Ganoo, J). These are set out below with my findings against each.

24. Issues Nos. 1 and 2 are only ones for determination. They are both conveniently dealt with together. I have heard Mr. Mehta, learned Counsel for the Plaintiff and Mr. Jain, learned Counsel for the Defendant and, with their assistance, have considered the documents and evidence on record as also the pleadings of the parties.

25. Before I consider the rival submissions, it must be noted that Shankarrao was first survived by five heirs including his widow. Today, there are only three contesting branches of Shankarrao's family. The reason is that during the pendency of this litigation, Sitabai, Shankarrao's widow, too passed away as did Yeshwant (Shankarrao and Sitabai's second son) and Yeshwant's widow Sandhya. Yeshwant and Sandhya had no heirs. The consequence is that there are only three contesting branches. The Plaintiffs are two of these three branches, viz., those of Manohar, Shankarrao's elder son; and Sarojini Bhatte, Shankarrao's daughter. Within each of those branches, the surviving heirs are Plaintiffs. The action is opposed by the third surviving branch, that of Harihar (Shankarrao's third son) and his heirs. The consequence is that on intestacy, and this cannot be disputed, Shankarrao's estate is now divisible between these three branches. The question before me is who amongst these surviving lineal descendants is best suited to be appointed an Administrator of Shankarrao's estate. A subsidiary question is also whether an appointment should be made of one or more persons from the Plaintiffs and Defendants jointly. This is Issue No. 2. I have heard both the learned Counsel on both these issues.

26. In her cross-examination conducted on 17th June 2014 Neelam, PW. 1, claimed that she had a 60% share in Shankarrao's estate². How she arrived at this is not precisely stated. She claimed that Harihar's branch was only entitled to 20% and that Manohar's branch was entitled to another 20% share. Mr. Mehta was unable to explain how this 60% claim could have been arrived at. I believe that Mr. Jain is correct in his submission that this computation of claim by Neelam is entirely erroneous, and that the three contesting branches would, no matter how one looks at it, be entitled to a 33.33% share each in Shankarrao's estate.

27. The reason for this suggests itself. When Shankarrao passed away he was survived by five heirs, each of whom therefore took a 20% share, right, title and interest in his estate. Shankarrao's second son Yeshwant, passed away on 14th December 1981. His heirs were his widow Sandhya, original Defendant No. 2, and his mother Sitabai. Yeshwant's 20% share in Shankarrao's estate would thus, have devolved on Sandhya and Sitabai equally, each of whom would have thus received an additional 10% share in Shankarrao's estate. Sitabai passed away in 1988 and was survived by her two sons Manohar and Harihar, her daughter Sarojini, and Sandhya, the widow of her predeceased son. Sitabai's 30% share (her original 20% plus the 10% she inherited from Yeshwant, her predeceased son) would have thus devolved in four shares on Manohar, Sandhya, Harihar and Sarojini each of whom would have thus got an additional 7.5% share

in Shankarrao's estate. Now Sandhya too passed away in 2010. She and Yeshwant had no children of their own. In view of the provisions of Section 15 of the Hindu Succession Act read with Sections 8, 9 and the Schedule to that Act, Sandhya would have been survived by her husband's heirs, as specified in Section 15(1)(b). Now Yeshwant's heirs at that time would have been those in Class 2, Entry 4 of the Schedule to the Act, i.e., the children of Manohar, Harihar and Sarojini. Thus, Sandhya's 17.5% share (her original 10% share inherited from Yeshwant and the 7.5% share inherited from Sitabai) would have devolved in three equal shares, i.e., 5.83% each, on Manohar's branch, Harihar's branch and Sarojini's branch. The consequence would be that each of these three branches would have its original 20% share, plus the 7.5% share inherited from Sitabai and additionally the 5.833% share inherited from Sandhya. Thus, each of these three branches would have taken exactly a 1/3rd share each in Shankarrao's estate. Consequently, Neelam's statement in her cross-examination that she has a 60% share in the estate of Shankarrao is incorrect and without any basis.

28. Neelam's claim seems to be based on the alleged Wills left behind by Shankarrao's widow Sitabai and Yeshwant's widow Sandhya. Neither of these Wills are admitted. Neither of these Wills have been proved. A Petition for probate or Letters of Administration with Will annexed to Sitabai's Will apparently abated. Mr. Jain is correct in his submission that a person appointed to administer the estate of a person who died intestate must necessarily do so in accordance with law. Such a person is appointed in a fiduciary capacity. He or she cannot make a claim that is adverse to the interests of the other heirs in accordance with law. Neelam's claim to 60% of Shankarrao's estate is entirely without established or proved basis. As we have seen, each of the three surviving branches has a 33.33% share in that estate. It is not possible to accept the claim by Mr. Mehta that this evidence by Neelam is one that must be accepted. Merely asserting a larger interest is not proof of entitlement to that share.

29. But this is not all. There are other aspects in respect of which Neelam also makes a claim that is controverted. Mr. Jain submits that her claim as made is adverse to that of the estate. She has claimed in her cross-examination³ as also in her Affidavit in lieu of Examination-in-Chief that she is a tenant of the first floor of Sita Sadan. Her deposition in this respect is set out in paragraph 12 of the evidence affidavit. In her cross-examination on 17th June 2014 Neelam says:⁴

"Witness Volunteers: In so far as 1st floor premises is concerned, I am claiming to be tenant thereof independently."

It is not in dispute that Shankarrao was the owner of these premises. There is nothing to show how and when Neelam acquired an "independent" tenancy in respect of these premises.

30. Further, Neelam has also claimed to be a tenant of the entire third floor of Sita Sadan and, along with her children Pranil and Avanti, also claimed ownership of part of the second floor of Sita Sadan. The averments in this respect are set out in paragraph 12 of Neelam's evidence affidavit. Neelam claims that she has been residing since marriage with Vinay (original Plaintiff No. 1) in Sita Sadan and that Shankarrao at some point in time, which remains unspecified, created a tenancy of the third floor and part of the terrace in favour of Neelam's father-in-law, Manohar. Despite this, she says that Manohar and other members of his family stayed on the second floor. She then makes various statements about marriages within the family and allegations against the Defendants. Nothing, however, is brought on record to establish the tenancy that Neelam claims was granted to Manohar. What is not in doubt again is that the third floor premises were part of the estate of Shankarrao.

31. In cross-examination, Neelam was asked whether she had any rent receipts in respect of the first floor and third floor.⁵ She admitted that she has no such rent receipts; that these were never executed in her favour by Shankarrao in his life time; that she had no documents to support her claim of tenancy for the first floor; and that her claim to a share in the partnership firm was not based on a testamentary writing or any gift deed. Neelam was specifically asked on the first date of her cross-examination to produce the relevant rent receipts.⁶ On the next occasion, on 25th June 2014⁷ she was asked whether she could produce these rent receipts. She said she could not.

32. As regards the second floor of Sita Sadan, Neelam claims ownership of a part of this floor and says that her husband Vinay (original Plaintiff No. 1) filed Suit No. 2807 of 2010 in respect of these premises. I have already noted the events relating to the ad-interim injunction in respect of these premises and the fact that the 4th Plaintiff's motion was dismissed in Appeal, a fact that Neelam is careful not to mention anywhere in her evidence affidavit.

33. Thus, in respect of various portions of valuable immovable properties, Neelam, representing the other Plaintiffs, all of whom have supported her, has made claims that are clearly adverse to the interests of Shankarrao's estate.

34. Neelam and her fellow Plaintiffs, including her husband (Plaintiff No. 1, Vinay) have also laid claim to Shankarrao's 50% share in the partnership firm of M/s. Parelkar and Dallas. The value of Shankarrao's share in that firm has been shown as only Rs. 3,176/- in the schedule annexed to the Petition. This is clearly not tenable. This claim has been rejected by the Bombay City Civil Court in Suit No. 8009 of 1984, to which I have earlier referred, and which was decreed in favour of Harihar, a decree that has as yet not been satisfied nor stayed. This firm has huge goodwill and tenanted premises. All of this is recorded in the decree of the Bombay City Civil Court. Neelam and Vinay were decreed to pay profits year on year from the date of Shankarrao's death. These are even now unpaid. In the Suit, Vinay and Neelam have even alleged that the estate's claim is barred by limitation. This clearly shows that the claim made is adverse to the

estate of the deceased.

35. The consequence of all of this is that there is absolutely nothing to substantiate Neelam's claim to tenancy of any premises, ownership of any premises or to a larger share in Shankarrao's estate. She seems simply to have grabbed it for herself without any justifiable legal basis. In her evidence affidavit Neelam makes much of the Deed of Release dated 10th November 1987 between Harihar and Manohar. Harihar did not deny having signed this⁸ or the accompanying declaration.⁹ Later deeds of 28th March 1989 between Sandhya and Narayani Developers and between Ratnakar and Narayani Developers¹⁰ are also not disputed. In his evidence affidavit, however, Harihar has said that the Deed of Release was not acted on because the obligations to him were not fulfilled. But let us ignore Harihar's testimony for the moment. The Deed of Release, Exhibit "A" is not unconditional. By this document, Harihar relinquished his share in the Sita Sadan property in favour of Manohar in consideration of payment of an amount of Rs. 4 lakhs as compensation. In any event, no further action seems to have been taken on the basis of this Deed of Relinquishment to convey any larger share to Manohar's branch or by that branch to assert its title to the properties in question. In my view, this was necessary since contested testamentary matters, it is well established, do not decide questions of title.

36. Mr. Jain says that there is what he calls a "fail safe" in this Release Deed. It is not absolute. Harihar reserved some of his rights. The Release Deed is dated 10th November 1987. At that time, the Petitioner in the present matter was Manohar. The consent granted in the Release Deed was vis-a-vis Manohar alone. By that time, Vinay had already sequestered to himself Shankarrao's partnership and Shankarrao's share in that partnership. Some time after the Release Deed, a declaration was executed and Manohar died immediately after. It was only thereafter that Neelam and Vinay were made Petitioners and made a claim to a larger share in Shankarrao's estate. Now, even assuming that Harihar had actually relinquished his share, it would have been only vis-a-vis Manohar and was also dependent on the performance by Manohar of all obligations mentioned in the Release Deed. This would have to be shown. It is not. It is difficult, therefore, to conclude that, on this basis, Neelam today has proved that she is entitled to a larger share in Shankarrao's estate.

37. It is also significant that Neelam has made no allegations of any kind against the Defendants. Defendant No. 1 is the mother of Defendants Nos. 2 and 3. Defendant No. 3 is a teacher and Defendant No. 2 is a practising architect. In my view, Mr. Jain is not in error in pointing out that Issue No. 2 can possibly be answered in the affirmative by granting joint Letters of Administration to the representatives of all three branches, each of which is entitled to a one-third share, right and interest in Shankarrao's estate. It cannot be disputed that where there is more than one person entitled to the grant, the Court enjoys discretion.¹¹ Such a grant operates in rem and recognises and confers a right to represent the estate and these functions are in the nature of a trust; they carry

the same responsibilities. A Court's discretion must thus be guided by assessment of the claims made. Where it is found that the claims made are adverse to the estate, either expressly or by necessary implication, the claimant must be held to be disentitled to such a grant.¹²

38. An Administrator duly appointed has a duty to collect and distribute the estate amongst the heirs of the deceased. This distribution must necessarily be based not on rival claims, and certainly not on claims only asserted but not proved, but in the manner required by law.¹³ In that case, a Division Bench of the Calcutta High Court held:

"Administration, in its proper sense, consists in the legal proceedings necessary to satisfy the claims of creditors, next of kin, legatees, or whatever other parties may have any claim to the property of the deceased person; until all such claims, whether of creditors or heirs or legatees, are satisfied administration is not complete. Executors and administrators are the functionaries appointed by law to accomplish this purpose, and are invested with the legal ownership of the property of the testator until it is accomplished. Stripped of extraneous elements and considerations, this is the office of administration and the scope of power of executors and administrators is commensurate therewith. Two principles follow from this view, which are inconsistent with the original Common Law rule just referred to, namely, first, that the conversion of property from the form in which the deceased left it into some other form, for example, changing it into money by a sale, does not exhaust the authority of the executor or administrator over it in its changed form, but it still remains to be administered; and secondly, upon the death, removal or resignation of the administrator before the administration has been fully completed, all the authority vested in him must pass to an administrator de bonis non, so that the purpose of the law demanding administration may be accomplished. This necessarily includes the power to call the former administrator or his representatives to account for any balance of money, bonds, notes, etc, belonging to the estate, which he had in possession at the time of his removal or death, because this is unadministered property and may be lawfully administered only by the successor in administration. It must with the same necessity include the power to call the predecessor to account and respond in damages for any devastavit, mismanagement or breach of duty, whereby any property of the deceased was diverted from a due course of administration, because the wrongful acts of administrator, not being within the scope of his lawful authority, render him liable, as for trespass and it is the duty of the lawful representative of the estate to recover whatever may be due to it. On these principles, the inference is irresistible that upon the death, removal or resignation of an administrator or executor, the successor may sue for and recover against him, his sureties and representatives, all property, of whatever nature of the deceased in his hands, and demand an account of any property converted or squandered, whether the debts have been paid or not, so long as any duty remains to be performed by an administrator."

(Emphasis supplied)

39. Section 218 of the Indian Succession Act, 1925 must be read with Section 254. These two Sections read thus:

218: To whom administration may be granted, where deceased is a Hindu, Muhammadan, Buddhist, Sikh, Jaina or exempted person.-(1) If the deceased has died intestate and was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, administration of his estate may be granted to any person who according to the rules for the distribution of the estate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate.

(2) When several such persons apply for such administration, it shall be in the discretion of the Court to grant it to any one or more of them.

(3) When no such person applies, it may be granted to a creditor of the deceased.

254. Appointment, as administrator, of person other than one who, in ordinary circumstances, would be entitled to administration.-(1) When a person has died intestate, or leaving a Will of which there is no executor willing and competent to act or where the executor is, at the time of the death of such person, resident out of the State, and it appears to the Court to be necessary or convenient to appoint some person to administer the estate or any part thereof, other than the person who, in ordinary circumstances, would be entitled to a grant of administration, the Court may, in its discretion, having regard to consanguinity, amount of interest, the safety of the estate and probability that it will be properly administered, appoint such person as it thinks fit to be administrator.

(2) In every such case letters of administration may be limited or not as the Court thinks fit.

40. It is clear from a conjoint reading of these two Sections that no grant can be made in favour of a person who makes a claim adverse to that of the estate. This was the view of a learned Single Judge of the Calcutta High Court in *Gopi Debi Memani v. Chunilal Kothari*¹⁴ and I am in most respectful agreement with that view.

41. Further in *Sivdas Mookerjee vs. Surendra Nath Chatterjee*,¹⁵ a learned Single Judge of the Calcutta High Court held:

6. It will be observed that one of the elements to be taken into consideration is consanguinity; judged by this test, a claim by either of the sons of the testator is entitled to preference over that of the grandson by daughter. There are, however, other elements which must be taken into consideration, such as safety of the estate and the probability that it will be properly administered. The principle which underlies this statutory provision was formulated by Sir John Nicholl in the case of *Earl of Warwick v. Greville* (1809) 1 Phill. 123. "The selection rests with the discretion of the Court. That discretion, however, is not to be arbitrary or

capriciously exercised, but it is a legal discretion governed by principle and sanctioned by practice; in exercising it, the Court is not to be guided by the wishes or feelings of parties, but is to look to the benefit of the estate and to that of all the persons interested in the distribution of the property. The first duty of the Court then is to place it in the hands of that person who is likely best to convert it to the advantage of those who have claims, either in paying the creditors, or in making distribution: the primary object; is the interest of the property."

(Emphasis supplied)

42. On this reading of the matter, I do not think that it is at all possible to hold in favour of the Plaintiffs. The first issue must, therefore, be answered in the negative.

43. The question then is whether there should be a joint grant in favour of the Plaintiffs and the Defendant. Mr. Jain relied on the decision of *Dinbai Behramji Gonda vs. Motibai Burjorji Chhor*.¹⁶ There, the Appellant and Respondent, two daughters, stood in equal degree of kinship to the deceased and it was argued that the Appellant was entitled to a joint grant. The Court held that it was not bound to grant joint Letters of Administration and that the Court should in fact lean against any such joint grant. The view of the Court was that it was never desirable to grant joint administration to parties who are quarrelling and who, because of their internal disputes, have managed to evade a distribution of the estate. In *Dinbai's* case, the estate had remained without distribution for twenty years. In another decision of another learned Single Judge of this Court in *Re Yeshwantibai Eknath Vijayhkar*¹⁷ it was held that the rule is that as far as possible joint grants should not be made and that this is a sound rule that has been acted upon by the Courts for centuries even though a Court undoubtedly has discretion in the matter. *Rangnekar, J.* held that a departure from this rule would introduce laxity, and that might lead to dangerous consequences. He went so far as to say that the Court at all times prefers a sole administrator to a joint administrator, and it is only when the circumstances are sufficiently strong that a joint grant should be made.

44. I do not believe that there is any other way to view the present matter. *Neelam's* evidence in support of her claim is scanty at best. She claims tenancies but has nothing to show them. She claims possessory rights but has not succeeded in establishing those. She claims to be entitled to *Shankarrao's* share in his architectural consultancy firm, but cannot establish the basis for this and, indeed, has an outstanding decree against her in that very behalf. It is not in any way possible to see *Neelam* or those who support her, i.e., the remaining Plaintiffs, as suitable persons to whom Letters of Administration should be granted. Does this mean that the Suit itself should be dismissed and the Defendants should be driven to filing their own action and another wait of several decades for the administration of the estate? The answer is self-evident and is in the negative. The Court after all does have a discretion. The estate cannot be left

pending administration and distribution for several decades to come.

45. In the result, Issues Nos. 1 and 2 must both be answered in negative. The Plaintiffs are not entitled to the Letters of Administration to the estate of Shankarrao Parelkar, either on their own or jointly with the Defendants. The Plaintiffs cannot be permitted any role in the administration of Shankarrao's estate. Letters of Administration must be granted jointly and severally to Defendants Nos. 2 and 3 alone. They along with Defendant No. 1 are jointly and severally entitled to this grant. I have excluded Defendant No. 1 in her own interest as she is of advanced years and it is unlikely that she will be able to discharge this responsibility effectively. There is no reason to burden her at her age with this additional responsibility.

46. The suit is thus decreed in favour of Defendants Nos. 2 and 3 to whom Letters of Administration are to be granted to the estate, property and credits of Shankarrao Parelkar. The Suit is disposed of in these terms with no order as to costs.

47. After Judgment is pronounced, Mr. Jain points out that the schedule to the Petition does not necessarily reflect the correct value of the estate, especially in regard to the value of Shankarrao's share in M/s. Parelkar and Dallas. It is clarified that in the course of administration, Defendants No. 2 and 3 will be jointly and severally entitled to apply for an amendment to that schedule to correctly reflect the value of Shankarrao's share in that firm. It must also be noted that the share shown by the Plaintiffs in the Schedule is contrary to the decree in Harihar's partnership suit, and to which I have referred earlier.

48. At the request of Mr. Mehta, the operation of this order is stayed for a period of three weeks from today.

1Item 7 of the schedule of the estates to the Petition. 2Page 139 of the paper-book 3Page 139 4Paragraph 4 at page 139 5Paragraphs 5 and 7 of the cross-examination at page 140. 6Paragraph 7 at page 147. 7Question 1, page 141. 8Exhibit A to Evidence Affidavit. 9Exhibit D to Evidence Affidavit. 10Executors of Sitabai's Will. 11Section 218 of the Indian Succession Act. 12 Judgment dated 11th October 2013 in Miscellaneous Petition No. 66 of 2013, Mukesh Ramanlal Gokal and Anr. v. Ashok Jagjivan Gokal and Ors. 13 Baroda Prosad Banerji and Others Vs. Gajendra Nath Banerji and Others--> . 14 Gopi Debi Memani Vs. Chunilal Kothari, 15AIR 1995 Cal. 178 16 In Re: Yeshvantibai Eknath Vijaykar, (Per Beaumont, C.J.) 1747 Bom. LR 770 (Per Beaumont C.J.)