
(2015) 04 BOM CK 0086

In the Bombay High Court

Case No : Chamber Summons No. 708 of 2014 in Suit No. 2363 of 2012

Sonali Nimish Arora and Others

APPELLANT

Vs

Sandeep Gopal Raheja and Others

RESPONDENT

Date of Decision : 30-04-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 22, Order 22 Rule 9, 2(11)
Limitation Act, 1963 — Section 5
Succession Act, 1925 — Section 211, 213, 229, 229 up, 230

Citation : (2015) 5 BomCR 358

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

Bench : Single Bench

Advocate : Rohit Kapadia, Pradeep Sancheti, Senior Advocates, Chirag Mody, Aditya Mehta, Terressa Daulat, Meghna Talwar, Divya Shah and Saket Bhatad i/b Divya Shah and Associates, for the Appellant; D.J. Khambata, Senior Advocate and Zubin Behramkamdin instructed by

Judgement

G.S. Patel, J.—There is before me a Chamber Summons filed by the original Defendant No. 6, Sonali Arora ("Sonali"), in Suit No. 2363 of 2012 filed by her late father, Gopal L. Raheja. The prayers in this Chamber Summons are firstly to condone a delay of 32 days in filing this Chamber Summons; secondly, to set aside the abatement, if any, of the suit itself; and thirdly, to allow the transposition of Defendant No. 6 as the Plaintiff in place of the original Plaintiff who has passed away.

2. There are actually a very large number of suits and applications that are interlinked, although I am at this stage concerned in this judgment only with this Chamber Summons. In order to better understand the spectrum of disputes, before dealing with the rival contentions in this Chamber Summons, it is perhaps useful to outline at the broadest level these competing actions. The disputes are all within the Raheja family. This is a prominent presence in India's construction and real estate sector. The patriarch of this group was Gopal Raheja. He died on 18th March 2014 after a very long and difficult illness. Gopal Raheja was

survived by his three children: Sandeep, his son, and his two daughters Sonali Arora and Sabita Narang. In the main suits, Gopal Raheja, Sonali and Sabita are among those arrayed against Sandeep. To cut a very long story short, Gopal Raheja first brought Suit No. 2363 of 2012 claiming that substantial assets were actually placed in Sandeep's name only for convenience, and that Gopal Raheja continued to be their beneficial owner. He claimed that there was a family arrangement that give him plenary control over the disposition of these assets, and that he had in fact made a distribution on 1st June 2012, of which he sought enforcement. Sandeep has himself filed no suit. In response to Gopal Raheja's suit, he claimed that there was no arrangement of the kind or at the time Gopal Raheja suggested but instead that there was a wholly different family arrangement by which these assets were transferred to Sandeep absolutely. The real opposition to that suit was from Sandeep.

3. While Sabita does oppose Sandeep's case, she does not entirely support her father's. Instead, she claimed that there was at some earlier point in time, around 1995-1996, a separation amongst the members of the previous generation of the Raheja family, i.e., between Gopal Raheja and his own siblings; and on that separation Gopal Raheja and his three children each took an equal undivided 1/4th share in the assets and property that are the subject matter of Gopal Raheja's 2012 suit.

4. Gopal Raheja filed a Notice of Motion for interim reliefs. At the time of that Notice of Motion an application was made for framing issues under Section 9A of the Code of Civil Procedure, 1908. These are pending determination. Gopal Raheja died on 18th March 2014, just a few days before his cross-examination on those issues was scheduled to start. Sandeep now claims that the cause of action in Gopal Raheja's suit was personal to him and did not survive his death. He says that Gopal Raheja's suit has abated.

5. In the meantime, Sonali has filed Suit No. 103 of 2015 in her own name. Sabita too has filed her own suit, Suit No. 777 of 2014. In both sisters' suits, there are pending Notices of Motion. There is also one pending perjury Notice of Motion filed by Sandeep, and in each of the two sisters' suits preliminary issues have been framed under Section 9A of the CPC and are pending. Thus, there are three suits, several Notices of Motion and in each of the three suits, preliminary issues under Section 9A of the Code of Civil Procedure, 1908 still awaiting determination.

6. The present Chamber Summons did not at first have a prayer for setting aside the abatement. An objection was taken. Sonali filed Chamber Summons No. 394 of 2015 in the present Chamber Summons seeking to amend this Chamber Summons to include a prayer for setting aside the abatement. I allowed that Chamber Summons for amendment of the present Chamber Summons on 6th April 2015.

7. I have heard Mr. Kapadia, learned Senior Counsel for Sonali, Mr. Khambata,

learned Senior Counsel for Sandeep, Mr. Kamdar, learned Senior Counsel for Sandeep's family members and Ms. Iyer, learned Senior Counsel for Sabita at some length on the now amended Chamber Summons. I have considered their submissions.

8. Mr. Kapadia's case in opening is straightforward. He points out that this is an application under Order XXII of the Code of Civil Procedure, 1908 ("CPC"). No rights are being determined at this stage. On a fair reading of the plaint in Gopal Raheja's suit, Mr. Kapadia says, it is not possible to unequivocally hold that his right to sue was only personal and did not survive his passing. Sonali is, after all, one of Gopal Raheja's heirs and legal representatives; and she is entitled, in that capacity, to continue the suit he had brought, in addition to her own suit. He does not deny that Sonali's own Suit No. 103 of 2015 hinges on Gopal Raheja's suit. The interests of Sonali and Gopal Raheja were never divergent, and what Sonali claims to be entitled to do is to prosecute her father's suit and, thereafter, her own. The matter, Mr. Kapadia says, is no more complicated than that. Whatever defences were available to Sandeep against his father's suit will continue to be available when Sonali continues that suit. In addition, Sandeep may well have other defences now available to him. But none of these are being determined at the state of Chamber Summons. There is no reason, Mr. Kapadia submits, why Gopal Raheja's suit and Sonali's subsequent suit should be brought to be a premature end only on account of Gopal Raheja's death.

9. Mr. Khambata, however, submits that the Chamber Summons is not maintainable as a matter of law. He says that Gopal Raheja left a Will 12th January 2012 with two Codicils (dated 8th August 2012 and 11th February 2014; the latter was registered) in which he appointed both his daughters Sonali and Sabita as joint executors. He is at some pains to point out that this appointment was not of Sonali and Sabita in their joint and several capacities but only as joint executors. According to Mr. Khambata, consequently, the law and, in particular, Section 211 of the Indian Succession Act, require that Sonali and Sabita act together or not at all. It is not permissible, he says, for them, having been appointed as joint executors, to take separate or divergent paths as Gopal Raheja's legal representatives. This submission is, of course, distinct from Mr. Khambata's submission that the cause of action in Gopal Raheja's suit was entirely personal to him.

10. Mr. Khambata says that while Sonali has filed Testamentary Petition No. 1140 of 2014 seeking probate to Gopal Raheja's Will and two Codicils, Sabita, although a joint executor, has not joined in that application. In paragraph 5 of that Petition, Sonali does not say that Sabita had renounced her executorship or that she is not joining in the Probate Application. The terms of the Will, Exhibit "B-2" to the Probate Petition, make it clear that the appointment is of Sonali and Sabita jointly and not jointly and severally. Sonali's Administration Suit seeks an administration of Gopal Raheja's estate in terms of his testamentary disposition. Mr. Khambata attempts a submission that in her own suit Sonali too has claimed

an interest adverse to Gopal Raheja's estate. He submits that in paragraph 8 of the plaint in that suit, Sonali has said that during the separation between Gopal Raheja and his brothers Suresh, Kishor and Chandru, a set of properties and rights vested in the Gopal Raheja Group, and consequently, that this is an admission by Sonali that all four members of Gopal Raheja's family took an equal share in the properties that came to the Gopal Raheja Group. I do not think that any such interpretation of this averment is possible. Mr. Khambata sets too exacting a standard of draughtsmanship, one possibly beyond the reach or ken of most of us. Sonali has throughout claimed administration of Gopal Raheja's estate only in terms of his testamentary writings and this is clear, *inter alia*, from both a reading of the Testamentary Petition and Sonali's Administration Suit No. 103 of 2015.

11. The point Mr. Khambata attempts to make however is slightly different. He says that Gopal Raheja's estate vests in Sonali and Sabita together by virtue of their appointment as joint executors. Sonali has accepted this. Sabita has not. Her stand throughout has been that on the separation between Gopal Raheja and his brothers, every member of Gopal Raheja's family took an equal 1/4th share in the assets that came to Gopal Raheja Group. Sabita has, Mr. Khambata says, thus claimed an interest adverse Gopal Raheja's estate. This is, consequently, not just adverse to her duties as a named executor but is actually hostile to the discharge of those duties. If the estate vests in Sabita and Sonali jointly, then Sabita and Sonali are required to act jointly, and it is impermissible in law for one of them to take a stand that is not just inconsistent but actually destructive of the stand taken by Gopal Raheja. It is equally impermissible for an executor to make a personal claim that is adverse to the estate vested in her as an executor. Gopal Raheja made two assertions fundamental to his suit. The first was, of course, that it was he, Gopal Raheja, who was the beneficial owner of the properties in question, and that he alone was entitled to decide of their division and distribution in his absolute discretion. He claimed that any holdings in other persons' names, including especially Sandeep's, were so placed only for convenience. The second essential averment in Gopal Raheja's suit is that on 1st June 2012 he actually made a division. In the suit he now seeks to enforce that division. Without getting into that merits of the case, I will proceed for the present on the basis that Gopal Raheja's testamentary dispositions accord with the 2012 distribution that he claimed to have made. Sonali's case is consistent with this and she does not claim differently. Sabita takes a diametrically opposite view. Sabita claims that on 1st June 2012 there was indeed a family arrangement with her getting a defined percentage, and, she says, Gopal Raheja gave her an oral assurance in regard to her share. The essence of Sabita's case both in reply to Sonali's administration suit as also in Sabita's own suit for partition is that Gopal Raheja and his three children each have a 25% share in these various properties from 1995-96 onward.

12. Mr. Khambata says that these two cases are so antipodal that they cannot co-exist; if Sabita succeeds, Sonali's suit (and by necessary implication Gopal

Raheja's suit) fails, and vice-versa. Therefore, he submits, putting all these various elements together, it is clear that there is no question of Sonali being allowed to continue with Gopal Raheja's suit on an application brought by her alone.

13. Mr. Kamdar, learned senior counsel on behalf of Sandeep's family adopts Mr. Khambata's submissions and further submits that Sonali has not come to Court with clean hands. There is, according to him, an inadequate explanation for the delay. In her affidavit in support of the Chamber Summons she attempts to explain this by saying that there was a period of settlement talks. This is not correct, Mr. Kamdar says. Those talks failed much earlier and the fact of the matter is that Sonali spent some time abroad on a holiday, a matter she does not disclose in her affidavit in support. The question, Mr. Kamdar says, is whether the right to sue survives to Sonali. If she wishes to be transposed as a Plaintiff in Gopal Raheja's suit she must espouse his cause, not hers. Once she has filed her own suit claiming her own rights, she can never be transposed. No such question arises because she is then asserting her own rights. In Suit No. 103 of 2015, she seeks administration of Gopal Raheja's estate. What is that estate? Is it the estate she claims in the suit, or the fraction of it that Sabita claims, or what Gopal Raheja claimed in his suit. Sonali's Administration Suit is not based on the 1st June 2012 family arrangement at all. There is, therefore, according to Mr. Kamdar, no question of Sonali being allowed to prosecute Gopal Raheja's suit. Even if that suit abates, Sonali's rights and contentions as pleaded in her own suit are undisturbed.

14. I have some difficulty accepting these propositions from Mr. Khambata and Mr. Kamdar. Their arguments seem to me proceed on the assumption that everybody, Sandeep included, has accepted Gopal Raheja's Will and Codicils. When Sandeep complains of Sabita and Sonali not acting jointly as executors and says that the estate as Gopal Raheja's estate "vested" jointly in them as such executors, he seems necessarily to imply his own acceptance of these testamentary dispositions. In fact, he opposes the grant of probate and disputes these testamentary dispositions. There is, however, another perspective, one that seems to me to be the one that will govern. Whether or not Sonali will succeed in obtaining probate of Gopal Raheja's testamentary writings is as yet unknown. Gopal Raheja's Will and Codicils may well be held not to be proved in their solemn form or may otherwise be invalidated. Should that happen, no question on executorship joint, several or sole would survive. What does survive throughout is that Gopal Raheja's three children are all his heirs and legal representatives. This question of being an heir and legal representative is not necessarily and in all cases tied to executorship. Mr. Kapadia is correct in my view in his submission that Order XXII of the CPC only requires an application by a legal representative. A person may in making a Will appoint anybody as his executor. The person so named has a duty to act as an executor or must renounce executorship. No executor can make a claim adverse to the estate of the executor. This much is clear. If, therefore, on Mr. Khambata's demonstration

of it, Sabita has taken an interest hostile to Gopal Raheja's estate, there can be no question of her acting as an executor, irrespective of anything that Gopal Raheja's Will might or might not say. She has by her statements and conduct disqualified herself and disentitled herself from executorship. Mr. Kapadia's submission that the requirement of law for executors to act jointly applies to those who have accepted, or, at any rate, to those who have not, explicitly or by necessary implication, renounced executorship appears to me to be the correct, logical and equitable approach in such matters.

15. On this basis, as Mr. Kapadia says, the submission by Mr. Khambata and Mr. Kamdar puts Sonali to an election because of the stand Sabita has chosen to take: the two must, according to Mr. Khambata's formulation, act jointly and only jointly. If Sabita has disclosed an intention hostile to Gopal Raheja's estate, she cannot join Sonali. Therefore, if Sonali is to be allowed to continue, Sabita's suit must, at this stage, fail. If this cannot happen, then Sonali's Chamber Summons for transposition must fail. Either way, the two sisters' respective cases must be defenestrated now, and Sandeep must stand freed of the burden of proving his own case in opposition.

16. The clue to this lies perhaps in assessing the future trajectory of Sonali's probate petition. In that petition, Sabita is not a Petitioner. She must, as a named executor, be served with a citation. She must then either accept or renounce executorship. There are consequences to each. If she accepts executorship, she cannot maintain her separate claim adverse to the estate of Gopal Raheja. If she renounces executorship, Sonali is the sole executor and she would be entitled to take all actions, including on Mr. Khambata's and Mr. Kamdar's own showing, to maintain the present application. To suggest, therefore, that this Chamber Summons is not presently maintainable but might become maintainable a few weeks from now upon an order being made on the Testamentary Petition seems to me to be nothing more than the sheerest casuistry. If Sonali can maintain this Chamber Summons after an order on the Testamentary Petition on facts that will not change between now and then, she can certainly maintain it now. Also, by necessary and logical extension, Mr. Khambata's submission means that the probate petition could not have been filed by either Sonali or Sabita singly; because they would, as he puts it, be required to act "jointly". This is simply unsustainable as a proposition and, in fairness, Mr. Khambata does not go quite this far even if this is, inescapably, the destination to which his argument leads us.

17. Mr. Kapadia refutes these submissions in their entirety. They are, he says, a self-serving attempt to short-circuit the challenge to Sandeep's claim to being the lawful owner of the assets and properties in question. Mr. Kapadia says that nothing in Order XXII of the CPC supports the case advanced against him.

18. The present action by Gopal Raheja, Mr. Kapadia says, is very like a partition suit, one where every party is a plaintiff and a defendant. There is, therefore, no question of such a suit abating. It can always be continued at the instance of any

of the parties to the litigation. If one of them--in our case Sonali--is willing to step into the shoes of the original Plaintiff, then that should be allowed as a matter of course. Order XXII has elaborate provisions for a situation where a suit does abate. For instance, Rule 4A deals with a situation where there is no legal representative at all. Here, an effort must be made for one who can don the deceased plaintiff's mantle. If there be such a person, a Court need look no further. Once a suit has abated or been dismissed as such under Order XXII, then, under Rule 9, no fresh suit can be brought on the same cause of action. Now if Sonali's cause of action is the same as that in Gopal Raheja's suit, then, Mr. Kapadia says, her own suit is thrown into jeopardy by the concatenation of these three factors: Gopal Raheja's passing; a finding that his suit abated; and a refusal to allow Sonali's transposition application. The consequence is that the challenge to Sandeep's conduct and actions fails automatically only because of the father's passing. This is entirely inequitable and can never be the intended purpose of this Order. I believe Mr. Kapadia is justified in this submission and in saying too that the entire attempt seems to be to obstruct the course of justice and turn procedure on its head. Sandeep is in no way prejudiced by the continuance of Gopal Raheja's suit. Nor is the course of justice diverted or disrupted by Sonali's application. His defences are left intact and untouched. No creditor is defeated or left without valid discharge. I believe there is a common thread that runs through the whole of Order XXII and it is simply this: the application can be brought by any person claiming to be the legal representative of the deceased plaintiff. These are the very words of Rule 9(2); and Rule 4A(2), operating in the situation where there is no legal representative, requires notice to be given to any person who has an interest in the estate of the deceased person. Interestingly, Rule 4A(2)(b) excludes any person who claims any interest adverse to the estate of the deceased person. Plainly, this would exclude both Sabita and Sandeep. That leaves only Sonali. Rule 9(2) also speaks of "sufficient cause". But correctly read, that is a requirement demanded of the plaintiff or the person claiming to be the legal representative in the second suit, for that plaintiff or person must show "sufficient cause" why he was prevented from continuing the previous abated or dismissed suit. The reference to the plaintiff who is required to "show cause" can never be a reference to the plaintiff in the first suit, because that suit has abated or been dismissed. Where such cause is shown, the abatement or dismissal is to be set aside. That requirement of showing sufficient cause can, therefore, never be against someone who does apply to be allowed to continue the previous suit. That is one way of seeing it. Another, perhaps, is the one suggested by Mr. Kapadia, viz., that the requirement of showing sufficient cause is to be read to be limited to the assignee or the receiver and never to the plaintiff, for the deceased plaintiff's legal representative can never be expected to show "sufficient cause". It is only the official assignee or receiver who must; because the "dismissal" referred to in Rule 9 is the one contemplated in Rule 8(2), where the assignee fails to continue the suit or give security. Seen thus, Mr. Khambata's reliance on the Supreme Court decision in *Union of India (UOI) Vs. Ram Charan and Others*, AIR 1964 SC

215 : (1964) 3 SCR 467 does not actually lend itself to the present case.

19. In any case, in *Lanka Venkateswarlu (D) by L.Rs. Vs. State of A.P. and Others*, AIR 2011 SC 1199 : (2011) 112 CLT 152 : (2011) 2 RCR(Civil) 880 : (2011) 2 SCALE 703 : (2011) 4 SCC 363 : (2011) 3 SCR 217 : (2011) AIRSCW 1459 : (2011) 2 Supreme 174 the Supreme Court inter alia said that Courts in India adopt a liberal approach in considering applications for condonation of delay on the ground of sufficient cause. The Supreme Court relied on its earlier decision in *Mithailal Dalsangar Singh and Others Vs. Annabai Devram Kini and Others*, AIR 2003 SC 4244 : (2004) 97 CLT 257 : (2003) 1 JT 262 Supp : (2003) 7 SCALE 610 : (2003) 10 SCC 691 : (2003) 3 SCR 822 Supp : (2004) 1 UJ 105 : (2003) AIRSCW 4878 : (2003) 6 Supreme 796 It seems to me that the decision in *Lanka Venkateswarlu* was something of an extreme case. The Supreme Court had before it an order of the High Court condoning delay after holding that this application for condonation was unjustified. It was in this context that the *Lanka Venkateswarlu* Court said that words such as "liberal approach", "just oriented approach" and "substantial justice", are no substitute for the substantive Law of Limitation. I do not think that *Lanka Venkateswarlu* can be fairly read to mean that Courts of equity should not do equity. The paragraph that Mr. Khambata relies upon (paragraph 28) is, I think, the result of the peculiar facts of the case that the Supreme Court had before it. In that very decision, in previous paragraphs (from 17 to 23), the *Lanka Venkateswarlu* Court in fact reiterated the well-settled principles regarding the correct approach to be adopted by the Court. This was also the view of the Supreme Court in *Ram Nath Sao @ Ram Nath Sahu and Others Vs. Gobardhan Sao and Others*, (2002) 2 JT 349 : (2002) 2 SCALE 334 : (2002) 3 SCC 195 : (2002) 2 SCR 77 : (2002) AIRSCW 978 : (2002) 2 Supreme 143 where the Supreme Court emphasized that the liberal interpretation of the phrase "sufficient cause" is necessary to ensure that substantial justice is done. In paragraph 12 of *Ram Nath Sao*, the Supreme Court said that the expression "sufficient cause" within the meaning of Section 5 of the Limitation Act or Order XXII Rule 9 of the Code of Civil Procedure, 1908 or any other similar provision must receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fides is imputable to a party. Whether or not an explanation is satisfactory is necessarily dependent on the facts of each case.

20. Rules (3)(1) and (3)(2) of Order XXII contemplate an application for impleadment by a "legal representative". This expression defined in Section 2(11) of the CPC to mean a person who in law represents the deceased's estate. It includes even an intermeddler. It also includes the person on whom the estate devolves.¹ This, Mr. Kapadia says, only supports his case that the application is to be one who claims to be a legal representative. To say, therefore, that Sonali and Sabita are required to act jointly and that neither of them can "claim to represent the estate of" Gopal Raheja seems to me to be simply incorrect.

21. As to the provisions of the Indian Succession Act, Mr. Kapadia submits that

Mr. Khambata's argument necessarily means that no executor appointed under a will can ever renounce executorship. That is patently incorrect. Where an executor does so, there is no "vesting" in him or her of any part of the estate. Mr. Khambata's argument is based, Mr. Kapadia says, and I think correctly, on an a priori assumption that Sabita has in fact accepted executorship and it is, of necessity, an invitation to hold that Sonali is not one of Gopal Raheja's legal representatives. Being previously committed to the law, that is an invitation I must, without the least regret or hesitation, decline.

22. I find Mr. Khambata's reliance on the decision in *In Re: James Noel Anthony Hobbs and Another*, AIR 1957 Mad 613 : (1957) ILR (Mad) 510 to be of little avail to him. In that case, there seemed to be no indication that the other executors appointed jointly had declined to act. Indeed, *Motilal Pal Chowdhry and Others Vs. Satya Prashad Pal Chowdhry and Another*, (1900) ILR (Cal) 683 , a decision cited by Mr. Kapadia, was also cited before the learned single Judge of the Madras High Court in *James Noel Anthony Hobbs*, and that precedent clearly indicates that where one of several executors jointly appointed acted, the other surviving executors "if they had formally renounced, must be taken practically to have refused office."

23. Similarly, when Mr. Khambata relies on the decision of a learned single Judge in *In Re: Last will and Testament of Eunice Annette Johnson*, (1969) ILR (Kar) 620 and draws attention to paragraph 5 of that decision,² he overlooks a critical qualifying phrase used there:

5. There is, apart from the effect of the language of the sections, a much higher principle which requires that grant should be made in favour of all executors appointed under the will and willing to act, and that is that executors are persons selected by the testator as deserving the trust he reposes in them; because those are persons trusted by the testator, no security is taken from them for the execution of the will. When a testator appoints several executors, the normal inferences should be that he expects all of them to act together the opinion of the testator implicit in the appointment being that he expects that his will be fully and properly executed when all the executors appointed by him act together. Of course, because the position is one of trust and appointment need not have been made after consultation it is open to anyone of the executors to decline to act or having started to act, renounce the executorships if circumstances are such that law would permit him to do so.

(Emphasis supplied)

Sabita is not "willing to act" as an executor. She has made that plain. I do not think there is the slightest ambiguity about it. I do not see how this decision assists Mr. Khambata. Indeed, even paragraph 7 of this decision specifically contemplates a situation where one or more executors appointed "jointly" may renounce and "stand out", refraining from acting as executors. Sabita has done not the smallest thing to indicate that she is "acting as an executor."

24. Similarly, I think Mr. Khambata's emphasis on the Supreme Court decision in *K. Leelavathy Bai and Others Vs. P.V. Gangadharan and Others*, AIR 1999 SC 1267 : (1999) 2 JT 244 : (1999) 2 SCALE 87 : (1999) 3 SCC 548 : (1999) 1 SCR 1197 : (1999) AIRSCW 951 : (1999) 3 Supreme 89 is somewhat misdirected. No issue arose there of either of the joint executors renouncing executorship. The submission was that the other executor's assent would have to be inferred from certain circumstances and conduct. That, the Supreme Court held, cannot be done. I do not think this decision can possibly be read to mean that even an executor who renounces executorship, or, as the learned single Judge of the Madras High Court said, has "practically refused office", must nonetheless be held to be bound to the very executorship he disclaims; or, to continue this, that an executor who by his conduct takes a stand adverse to the interest of the estate can yet be held to be bound to administer it. Implicit in *Leelavathy Bai* is the requirement that an executor must be willing to act as such. It could never have been the intention of the Supreme Court in *Leelavathy Bai* to suggest to the contrary, for that would undoubtedly yield irreconcilable results. In fact, paragraph 10 of the decision makes this clear: it speaks of a particular document and interprets it not to mean an assent to executorship. The question therefore before the Supreme Court was of deemed or implied assent, not necessary renunciation by express conduct and by taking a stand hostile to the deceased's estate. Similarly paragraph 5 of the decision proceeds on the basis of an acceptance of executorship; and I do not think the decision applies to a case where the second joint executor has renounced. For the same reasons, *Govind Rao and Another Vs. Mahadev*, AIR 1977 SC 627 : (1976) 4 SCC 508 also does not take us further.

25. In *FGP Ltd. Vs. Saleh Hooseini Doctor and Another*, (2009) 12 JT 210 : (2009) 12 SCALE 516 : (2009) 10 SCC 223 : (2009) 14 SCR 995 : (2009) 9 UJ 4445 the Supreme Court in terms held in paragraph 47 that the vesting to property in an executor is under Section 211 and not under Section 213 of the Indian Succession Act. Probate confers no title on the executor. It just makes his title certain. Mr. Khambata's submission is that if this be so, then the title to Gopal Raheja's estate has "vested" in both Sonali and Sabita jointly, and that neither of them can act singly. But this assumes that all concerned have accepted the factum of this vesting and that Sabita has accepted executorship. Neither is correct. Sandeep's case is, in fact, that none of the properties in question are comprised in Gopal Raheja's estate; and Sabita has taken a stand adverse to that estate. Sandeep cannot benefit from this sort of a Catch-22. He cannot at once say that the estate has vested in both his sisters and simultaneously say that none of the assets in question belong to that estate and that none of those assets have vested in them. He also cannot demand that his sisters be held to any part of Gopal Raheja's testamentary dispositions while at the same time challenging those dispositions in their entirety. If he does so today, it is for one simple, plain reason: he seeks only to scuttle all challenges to his own actions vis-a-vis the properties and assets in question.

26. Ms. Iyer, learned Senior Counsel on behalf of Sabita made it clear that Sabita had taken a contrary and independent stand, but submitted that this cannot be used as leverage by Sandeep to get read of Gopal Raheja's suit and, consequently, Sonali's suit. Sabita's acceptance or non-acceptance of executorship is, Ms. Iyer says, irrelevant. It is of no consequence whatever to the application for transposition.

27. On an overall assessment of the matter, I do not believe that either justice or equity favour the 1st Defendant, Sandeep. As I have noted, none of his contentions or rights are being adjudicated. His defences are entirely open. Equally, it cannot be that the death of siblings' father should result in so considerable an advantage to Sandeep, especially given the challenge to Sandeep's claim to these various assets and properties. Sections 229 to 231 of the Indian Succession Act provide for matters of renunciation of named executors. These require that a renunciation must be made at the time of application for probate before a Court. There is at least one authority for the proposition that the renunciation must be in a prescribed manner.³ While that may be correct, there is also established authority for the proposition that no person can be forced to act as an executor against his Will. In *Re: Manchershah Pestonji Danania*, (1928) 30 BOMLR 1566 : (1929) ILR (Bom) 172 : 113 Ind. Cas. 402 Mr. Justice Rangnekar of this Court said:

"8. Now there is no section in the Act which in terms lays down as to when and why an executor or administrator can renounce, and obviously for the simple reason that the act of renunciation is one which depends on the will of a person. No one is bound to act as an administrator or executor against his will. Section 229 up to 231 are sections which lay down and deal with the procedure to be followed when a person renounces or fails to accept the office to which he is entitled."

28. I do not think it is correct to suggest that Sabita, by virtue of her being named as a joint executor, cannot either renounce that position, or be taken to have practically done so; or that she is hamstrung in abiding by that nomination against her wishes. Yet, this is precisely what Sandeep invites me to hold. I cannot.

29. As to the maintainability of the application, Mr. Kapadia correctly submits that it is now settled law that an application for substitution is effectively an application to set aside an abatement.⁴

30. Articles 120 and 121 of the Limitation Act, 1963 provide for a period of 90 days from the date of death of the party in question for an application to be made to have the legal representative brought on record, and for a period of 60 days from the date of abatement to have it set aside. Gopal Raheja died on 18th March 2014. The 90 day period expired on 18th June 2014. This Chamber Summons was filed on 18th July 2014. The delay therefore is, Mr. Kapadia says, of about 30 days. As we have seen, Sonali says that the delay was because

settlement talks were going on. In the reply, it is pointed out that in fact Sonali was abroad for several weeks. In rejoinder, Sonali says that this is indeed so, but that she went to see her son, whom she had not met for a long time since she was looking after her ailing father. Whatever be the circumstances, I do not believe that this delay is so inexplicable that it cannot be condoned.

31. Where lies the equity in this case? Taken at its broadest, the situation is this: Gopal Raheja filed a suit in 2012 in respect of various assets and properties. He claimed these to be his own. His son denied this, and laid claim to them all. One of Gopal Raheja's daughters, Sonali, supported his cause. The other, Sabita, took a different line and while she, too, said these did not belong to her brother, she also made a claim not in line with Gopal Raheja's. In 2014, Gopal Raheja died. Should his claim be allowed to end with his passing? Should not Sonali, who has since filed her own suit based in large measure on her father's suit, be allowed to continue it? Should Sandeep, merely by virtue of his father's passing, be allowed to get away without having to substantiate his defence, and be permitted to defeat his sisters' claims? This is just what Sandeep claims and it is hard to conceive of a more unjust and inequitable approach. After all, Sandeep's defences are untouched by Sonali's application for substitution. He will no doubt pursue those most vigorously. Gopal Raheja's story has shades of the tragedy of King Lear: Know that we have divided in three our kingdom: and 'tis our fast intent to shake all cares and business from our age; Conferring them on younger strengths, while we unburthen'd crawl toward death. But there is no reason to bring down the curtain on the Raheja saga without affording Sonali the opportunity to pursue both her own cause and the one initiated by her father. There is also no reason to hold at this stage, given the rival submissions, that Sonali is not one of Gopal Raheja's legal representatives. All three of his children are, and any one of them can and I think should be permitted to espouse his cause as their own. Sandeep evidently cannot, and, given her stand, nor can Sabita; and that leaves Sonali, the present applicant. I do not believe that there is any valid reason to deny this application.

32. The Chamber Summons is made absolute in terms of prayer clauses (a) and (b), and, though I do not think it necessary, by way of abundant caution, in terms of prayer (aa) as well. Amendment to be carried out on or after 10th June 2015 and on or before 26th June 2015. Learned counsel for all parties undertake not to make any application in relation to this Chamber Summons or this order before the Learned Vacation Judges. In view of this, there is no question of stay of this order.

1 Chiranjilal Shrilal Goenka (Deceased) through Lrs. Vs. Jasjit Singh and Others, (1993) 2 JT 341 : (1993) 2 SCALE 146 : (1993) 2 SCC 507 : (1993) 2 SCR 454 ; Also: Jaladi Suguna (deceased) through LR's. Vs. Satya Sai Central Trust and Others, AIR 2008 SC 2866 : (2008) 8 SCALE 709 : (2008) 8 SCC 521 : (2008) AIRSCW 4733 2In Re: Last will and Testament of Eunice Annette Johnson, (1969) ILR (Kar) 620 3 In re B. Lakhshmi Shanker and Anr., AIR 1941 Oudh 293

(FB) 4 Mithailal Dalsangar Singh and Others Vs. Annabai Devram Kini and Others, AIR 2003 SC 4244 : (2004) 97 CLT 257 : (2003) 1 JT 262 Supp : (2003) 7 SCALE 610 : (2003) 10 SCC 691 : (2003) 3 SCR 822 Supp : (2004) 1 UJ 105 : (2003) AIRSCW 4878 : (2003) 6 Supreme 796