IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 126 OF 2023
IN
INTERIM APPLICATION (L.) NO. 8532 OF 2020
IN
SUIT (L.) NO. 1011 OF 2014
WITH
INTERIM APPLICATION (L.) NO. 10139 OF 2023
IN
APPEAL NO. 126 OF 2023

Mujibur Rehman Haji Israr Alam Siddiqui ... Appellant/Ori. Defendant No. 4

Versus

1. Noorjahan Begum Haji Israr Alam Siddiqui
2. Dr. Nazia Shad Siddiqui
3. Mohd. Shad Haji Israr Alam Siddiqui
4. Mohd. Aslam Haji Israr Alam Siddiqui
5. Haji Salauddin Haji Israr Alam Siddiqui
6. Islahuddin Haji Israr Alam Siddiqui
7. Shah Alam Haji Israr Alam Siddiqui
8. M/s. Hilton Infrastructure,
   A Partnership Firm
9. Dukh Singh D/o. Dharam Singhji Chouhan
10. Shamsuddin Alli Hussain Khan
11. ICICI Bank, ICICI Bank Limited
12. Khushnuda Begum
13. Afsana Begum
14. Kadia Begum

... Respondents/ Proposed Defendants

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Mr. B.P. Pandey *a/w. Ms. Ridhima Mangaonkar, Shyam K. Tripathi i/b Vivek Pandey, for Appellant.*

Mr. D. A. Barot, *for Respondent No. 1 in IAL/10139/2023.*

Mr. Anshul Anjarlekar *i/b Raval Shah & Co., for Respondent Nos. 2 & 3.*

Mr. Y. E. Mooman, *for Respondent No. 6.*

Ms. Dhamini Nagpal *i/b Manilal Kher Ambalal & Co., for Respondent No. 11 (ICICI Bank Ltd.).*

CORAM: G. S. KULKARNI &
SOMASEKHAR SUNDARESAN, JJ.

Reserved on : July 8, 2024
Pronounced on : August 26, 2024.

Oral Judgement (Per, Somasekhar Sundaresan J):

1. This Appeal is directed against an order dated 13th March, 2023 ("***Impugned Order***"), by which a Learned Single Judge of this Court allowed the replacement of the deceased original Plaintiff in Suit No. 1011 of 2014, with certain individuals who purport to claim through a Will, as the legal heirs of the deceased original Plaintiff.

2. The Impugned Order is one of the many strands in a web of litigation among the parties. It would be fruitful to examine the background to the litigation among the parties.

Background and Context:

3. The Appellant, Mr. Mujibur Rehman Haji Israr Alam Siddiqui is the son of Late Mr. Haji Israr Alam Mohd Nazir Siddiqui ("***Late Mr. Alam***"). The Late Mr. Alam's widow is Ms. Noorjahan Begum Haji Israr Alam Siddiqui ("***Mother***"). Nine siblings who are the offspring of the Late Mr. Alam, the Mother, and eight tenants of various properties, are parties to various suit proceedings in this Court.

4. According to the Appellant, an oral partition and division pursuant to a Family Settlement took place, initially on 11th July, 2000, and thereafter on 18th June, 2004 (collectively, "***Family Settlement***"). Various family members are said to have acted upon such Family Settlement, even creating third-party rights over the properties they were entitled to under the Family Settlement. The Appellant has alleged that the Late Mr. Alam had illegally and unilaterally revoked the Family Settlement by a revocation notice dated 5th March, 2014. According to him, the Late Mr. Alam also reneged on the Family Settlement by alienating various properties.

5. These allegations were countered by the Late Mr. Alam. Other parties who are said to have initially supported the Appellant are said to have switched sides subsequently, opposing the Appellant and seeking the Late Mr. Alam's forgiveness. The upshot of these developments is the institution

and pendency of three Suits in this Court, namely:-

a) Suit No. 865 of 2014 ("***Suit 865***"), filed by the Appellant challenging the revocation of the Family Settlement by the Late Mr. Alam, and the allegedly violative alienation of properties covered by the Family Settlement;

b) Suit No. 1011 of 2014 ("***Suit 1011***"), filed by the Late Mr. Alam, seeking declaratory reliefs relating to ownership of suit properties and appointment of a Court Receiver in respect of properties in the possession of the Appellant; and

c) Suit (Lodging) No. 27343 of 2021 ("***Suit 27343***"), filed by Dr. Nazia Shad Siddiqui ("***Dr. Nazia Shad***"), the daughter-in-law of the Late Mr. Alam (sister-in-law of the Appellant), based on the assertion that she is an executor of a purported Will dated 11th November, 2019 that had been made by the Late Mr. Alam.

6. Both, the Late Mr. Alam and Dr. Nazia Shad have alleged that the Appellant has created bogus and fraudulent Family Settlements. In Suit 1011 (the suit instituted by the Late Mr. Alam), a Learned Single Judge of this Court had passed an order dated 24th July, 2014, directing the parties to

maintain *status quo* in respect of the properties listed in Exhibit C of the Plaint in Suit 865 ("***Status Quo Order***"). The Appellant had claimed that his father had committed perjury by filing contradictory assertions on oath in the aforesaid litigation. The Late Mr. Alam had taken out Chamber Summons No. 217 of 2017 in Suit 1011 seeking to bring on record the fact that third party interests exist on the properties. The Late Mr. Alam had gifted properties to the Appellant's siblings. The Late Mr. Alam had also formed a trust and transferred rights to certain properties to the trustees. The Appellant filed Contempt Petition No. 72 of 2017 against Late Mr. Alam for the alleged violation of the Status Quo Order.

7. On 20th October, 2020, Dr. Nazia Shad wrote to the Appellant, calling upon him to implead her in Suit 865, in place and stead of the Late Mr. Alam, who had passed away on 13th May, 2020. The request was on the premise that she was the beneficiary of the assets forming part of the suit properties pursuant to a Will dated 11th November, 2019. Dr. Nazia Shad moved Interim Application No. 566 of 2021 in Suit 865 praying for being joined as a Defendant in place of the Late Dr. Alam.

8. In Suit 1011, Dr. Nazia Shad, her husband Mr. Mohd Shad Haji Israr Alam Siddiqui ("***Mr. Mohd Shad***", a sibling of the Appellant) and the Mother filed Interim Application No. 8532 of 2020 ("***IA 8532***") to be made parties,

in the capacity of Plaintiffs in place and stead of the Late Mr. Alam, the Original Plaintiff, in the Suit and in all the motions and application relating to the Suit. Dr. Nazia Shad claimed to now be the absolute owner (pursuant to the Will) of certain properties that the Late Mr. Alam had sued for in Suit 1011.

9. It is IA 8532 in Suit 1011 that has been decided by the Learned Single Judge *vide* the Impugned Order, allowing the replacement of the Late Mr. Alam, the Original Plaintiff with the Mother, Dr. Nazia Shad and Mr. Mohd Shad, as Plaintiff 1(a), Plaintiff 1(b) and Plaintiff 1(c) respectively in the Suit and connected applications and motions. This Appeal (126 of 2023) is directed against such replacement being permitted. Interim Application (Lodging) No. 10139 of 2023 has also been filed by the Appellant in this Appeal, seeking a stay of the Impugned Order.

Contentions of the Parties :

10. Mr. Pandey, learned counsel for the appellant submitted that the Learned Single Judge failed to appreciate that while permitting the impleadment of Respondent Nos. 1 and 2 (in this Appeal) to be added as Plaintiff Nos. 1(a) and 1(b) in place of the deceased original Plaintiff and by transposing the original Defendant No.6 as Plaintiff No. 1(c), the very nature of the Suit underwent a significant change. According to him, the very

nature of the cause of action and thereby, the nature of the Suit would stand transformed by reason of the Impugned Order. The original Plaintiff had made several allegations against the original Defendant No.6, who would now himself become Plaintiff 1(c). The serious allegations originally levelled by the deceased Plaintiff cannot be extinguished in this manner. The deceased original Plaintiff had sought a declaration in Suit 1101, that among other Defendants, Defendant No.6 would have no right, title or interest of any nature whatsoever in respect of the suit properties. Mr. Pandey would urge us to hold that by permitting such a Defendant to himself become a Plaintiff, the very nature of the Suit would stand undermined.

11. As far as the other two newly incorporated Plaintiffs, i.e., Plaintiff 1(a) and Plaintiff 1(b) are concerned, Mr. Pandey would submit that their impleadment is based on the purported Will dated 11 November, 2019, despite the validity of the very Will being under challenge in Suit 27343. By bringing the Will on record in Suit 1101, a simple declaratory suit instituted by the Late Mr. Alam for declaration of his title as the exclusive owner of the properties, and consequential possession, would stand transformed into a testamentary suit. Since these newly incorporated Plaintiffs would administer and intermeddle with the suit properties, a declaratory suit is being transformed into an administrative suit. Drawing our attention to the newly inserted paragraphs 7A and 46A in the amended plaint in Suit 1101,

Learned Counsel would submit that these Plaintiffs would take possession of the suit properties, although the deceased original Plaintiff never amended the Plaint to include such changes before passing away on 13 May, 2020. The Late Mr. Alam had indeed filed a rejoinder dated 22 October, 2018 about having resolved his grievances against Mr. Mohd Shad, without incorporating the contents of such rejoinder in the Plaint. The Late Mr. Alam did not incorporate such contents of the rejoinder in the purported Will dated 11 November, 2019. This is one more ground cited by Mr. Pandey to argue that such changes would be symptomatic of the nature of the Suit undergoing a change.

12. By drawing our attention to paragraph 46B, Mr. Pandey would submit that by permitting the introduction of two new Plaintiffs and the transposition of Defendant No. 6 as a fellow Plaintiff, the effect of the purported Will, which was not in existence when the Suit was instituted, is being given effected to, which is yet another pointer to a change in the nature of the Suit.

13. Mr. Pandey also submits that the Mother was never joined in the Suit originally and is now being brought in purportedly just to give moral support to the other two Plaintiffs, which is nothing but an academic exercise. A person without a claim to any interest to a suit property, cannot

be a Plaintiff in the Suit. The Mother had entered into Consent Terms with the Appellants in Suit 865 which has been brought on record by the Mother in her affidavit in reply dated 6 January, 2024 filed in the present Appeal. This reply would show that she had refused to prosecute Suit 1101 and that it had been filed without her knowledge and consent. For all these reasons, it was submitted that the Mother simply cannot be added as a Plaintiff.

14. As regards Dr. Nazia Shad and Mr. Mohd Shad, Mr. Pandey would submit that the Learned Single Judge had acknowledged that the outcome of Suit 1101 may have a direct bearing on Suit 27343. The purported Will covers 60 properties and only 12 were bequeathed to Dr. Nazia Shad and as such, her entitlement would be restricted only to the extent of the 12 properties. Consequently, it would not be feasible to permit her to prosecute the entire Suit. There being no capacity to prosecute a suit in part, the Impugned Order is indefensible in allowing Dr. Nazia Shad to be joined as Plaintiff in Suit 1101. Mr. Pandey would also submit that the affidavit in rejoinder filed by the deceased original Plaintiff is being looked at selectively. A full reading of the said affidavit in rejoinder would show that the Late Mr. Alam had formed a trust and appointed Dr. Nazia Shad and Mr. Mohd Shad as trustees of the said trust, only to cancel the said trust later, pursuant to which, their rights as trustees also got cancelled. Neither of these two individuals can claim to be unaware of the cancellation of the trust

since they were signatories to the cancellation, along with the deceased original Plaintiff.

15. Mr. Pandey would also submit that the exercise of discretion by the Learned Single Judge to allow the amendment with the modification was not correct to the entire Suit 1101 being rendered a futile exercise since it would now seek a declaration in the name of a dead person. Assuming a decree came to be passed in favour of the deceased, it was unclear as to who would execute the said decree. However, by permitting the amendment, the Learned Single Judge has wrongly expanded the scope for fresh litigation and thereby increased the multiplicity of proceedings. Mr. Pandey would also emphasize that the purported Will itself has been assailed as an instrument in contempt of the Status Quo Order. On such Contempt Petition, *vide* an order dated 17 April, 2023, a notice had been issued by this Court, therefore, it is inappropriate, Mr. Pandey would argue, to permit the amendment to the Plaint based on the contents of the contemptuous instrument like the purported Will.

16. Mr. Pandey would cite *Asian Hotels (North) Limited Vs. Alok Kumar Lodha & Ors.* ("***Asian Hotels***")[1] to submit that when the cause of action undergoes a change, the court must not routinely allow amendments. In

[1] (*2022) 8 SCC 145*

that case, the Delhi High Court, had, in reliance on Order I Rule 10 of the CPC, allowed applications permitting the original Plaintiff to amend the suit and ordered impleadment of Banks who were mortgagees. In a challenge against such ruling, the Supreme Court found that the entire cause of action underwent a change by the amendment and consequently, ruled that it would not be permissible to allow such an amendment.

17. Mr. Anshul Anjarlekar, Learned Counsel on behalf of Respondent Nos. 2 and 3, i.e., the new Plaintiff Nos.1(b) and 1(c) submitted that where a testator has filed a suit seeking declaratory reliefs, but dies during the pendency of such Suit, the executor or legatee under the Will can come on record as a legal representative of the deceased Plaintiff. Such executor and legatee can also institute suit for their own rights under the Will in question, and all disputes in connection with the Will that need to be tried, would be dealt with as part of the trial in the suit. In support of such proposition, reliance was placed on *Binapani Kar Chowdhury Vs. Sri Satyabrata Basu & Anr.*[2] ("***Binapani Kar***"), *Geeta Patel D'Souza Vs. Girnar Apartments Co-operative Housing Society Ltd., Mumbai & Ors.*[3] ("***Geeta Patel***") and *Suresh Singh and Anr. Vs. Dr. Raja Ram Singh & Ors.*[4]("***Suresh Singh***").

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[2] *(2006) 10 SCC 442*

[3] *2019(3) Mh.L.J. 745*

[4] *1998 SCC OnLine Pat 127*

18. Likewise, Mr. Anjarlekar would submit that the provisions enabling adding or striking of parties would also include transposing of parties in terms of Order I Rule 10(2) of the Code of Civil Procedure, 1908 ("***CPC***"). The transposition of a Defendant as a Plaintiff may be made only when the Defendant has some interest in common in that of the deceased Plaintiff and a person whose interest is totally adverse to the Plaintiff cannot be permitted to be transposed as the Plaintiff. On facts, he would submit that in the instant case, the adverse relations between the deceased original Plaintiff and the original Defendant No.6 have been resolved and such resolution also forms part of the record in terms of the contents in the affidavit in rejoinder filed by the deceased original Plaintiff. Towards this end, Learned Counsel would rely upon the judgments rendered in *Sarat Chandra Barik and Anr. Vs. Manoranjan Barik and Ors.* [5] and *Piyush Hasmukhlal Desai Vs. International Society for Krishna Consciousness (ISKON)* [6]

Findings and Analysis :

19. We have carefully considered the Impugned Order in the light of the submission made by Learned Counsel for the parties. The Learned Single Judge dealt with an assertion on behalf of the Appellant that the Mother is neither a necessary party nor a proper party to Suit 1101, and therefore must

[5] *2015 SCC OnLine Ori. 354*

[6] *2015 SCC OnLine Ori. 3*

not be joined. The Learned Single Judge, in our opinion, rightly, ruled that being the widow of the Late Mr. Alam, the Mother would, at the least, be a proper party, even if not a necessary party. Besides, she was purportedly the legal heir and therefore, there was no impediment to permitting her to be Plaintiff 1(a) in place and stead of the Late Mr. Alam. Needless to say, such permission is not at all an expression of any opinion on any right of the Mother to any property, which too has been explicitly set out in the Impugned Order. It merely places her in a position of a Plaintiff in Suit 1101, to which she was hitherto not a party.

20. As regards Dr. Nazia Shad, the Appellant alleged that she could at best prosecute the Suit 27343 to the extent of the properties mentioned in the Will. In our opinion, the Learned Single Judge has rightly held that to what extent Dr. Nazia Shad is entitled to any property is a matter of merits, while IA 8532 in Suit 1101 was merely an application for effecting amendments in view of the *ex facie* contents of the Will. It was noted that under the Will, Dr. Nazia Shad had been empowered to prosecute Suit 1101. As an executor of the purported Will, she was entitled to prosecute proceedings and defend proceedings filed by or against the Late Mr Alam.

21. As regards, Mr. Mohd Shad (husband of Dr. Nazia Shad), it had been pointed out on behalf of the Appellant that the Late Mr. Alam had levelled

serious allegations against this son, and in that light, it would not be possible to routinely permit him to be made a Plaintiff in place of the Late Dr. Alam. Upon a review of the plaint in Suit 1101, the Learned Single Judge noted and ruled that in Paragraphs 44 and 45 of the Plaint, the Late Mr. Alam had categorically stated that Mr. Mohd Shad had profusely expressed regret for having joined hands with the Appellant and had sought forgiveness of the Late Mr. Alam and the Mother, and that the Late Mr. Alam had decided to forgive him. The Plaint also disclosed that the Late Mr. Alam had affirmed that Mr. Mohd Shad had given true and correct accounts of whatever business they had done on behalf of the Late Mr. Alam, and had also furnished the documents pertaining to the Late Mr. Alam's properties and the case papers of various litigation. In this view of the matter, the Learned Single Judge ruled that there was no impediment in permitting Mr. Mohd Shad to be joined as Plaintiff No. 1(c). Needless to say, such permission is not at all an expression of any opinion on the merits of Mr. Mohd Shad's claims to any property. It merely places him in a position of a Plaintiff in Suit 1101.

22. Other amendments to the Plaint that were merely consequential to such permission to bring the Mother, Dr. Nazia Shad and Mr. Mohd Shad as plaintiffs, were naturally allowed in the Impugned Order. We do not see as to why a different view needs to be take from what has been decided by the

Learned Single Judge, and therefore see no reason to interdict the Impugned Order.

23. We note that the Learned Single Judge has also categorically ruled that the prayer to routinely replace the word "Plaintiff" with the word "Plaintiffs", in all the prayer clauses of the Plaint and various Notices of Motion and Chamber Summons in Suit 1011, is not acceptable. On this count, the Learned Single Judge agreed with the Appellant and has ruled that the substituted plaintiffs cannot seek a declaration of absolute title over the suit properties in their favour in the garb of being plaintiffs. It is evident from the Impugned Order that the new plaintiffs fairly conceded that in these prayer clauses, the expression "Plaintiff" may instead be replaced by the words "Original Deceased Plaintiff". Therefore, Suit 1011 would only lead to determination of whether the suit properties would form part of the estate of the Late Mr. Alam and not automatically entitle the three new Plaintiffs to the properties. In this view of the matter, the Impugned Order truly does not change the character of Suit 1011 and there is also no change to the cause of action being pursued. Truly, the introduction of the legal heirs cannot change Suit 1011 into a testamentary suit or an administrative suit. It remains a declaratory suit and the outcome would declare what the estate of the Late Mr. Alam would consist of.

24. We are unable to agree that ***Asian Hotels*** is of any assistance to the Appellant. In ***Asian Hotels***, the Delhi High Court had originally been presented with a suit by licensees under a leave and license agreement to declare that the revocation of the license granted to them by the licensor-defendant was illegal since the licenses were claimed to be irrevocable and perpetual. The High Court had allowed the plaintiff therein to amend the suit to include reliefs being sought against banks to whom the properties had been mortgaged by the licensor. The licensor had responded in the High Court that the disputes were exclusively referable to arbitration and consequently, also filed an application under Section 8 of the Arbitration and Conciliation Act, 1996. While these proceedings were pending, the licensees sought to amend the plaint to challenge mortgages created by the licensor in favour of banks to whom the properties had been mortgaged and sought a declaration that the mortgages should be regarded as illegal. It is in this context that it was held by the Supreme Court that the original plaintiff who was not a party to the mortgage could have had no right to seek declaratory relief against the mortgagees and that such an amendment would constitute a fundamental change in the nature of the suit.

25. It was also found that the license agreements themselves recognised existing encumbrances and the freedom to create further encumbrances. Taking all these factors into account, Supreme Court ruled that when the

mortgage had been created, the licensees were not even in the picture. Therefore, it was a totally different and new cause of action that was sought to be introduced in the garb of an amendment, in ***Asian Hotels***. The factual matrix in the matter at hand, is totally different. There is no new cause of action that was not originally contained in the Plaint that is being introduced. The Plaintiff who had instituted the suit has passed away and the legal heirs found in the Will are being allowed to continue the proceedings. The Learned Single Judge, in the Impugned Order has made it abundantly clear that the original prayers would not be allowed to be amended whereby the new Plaintiffs steal a march over the trial of whether the Will is valid. Towards this end, the Impugned Order makes it clear that the prayers would remain with regard to the rights and entitlement of the deceased original Plaintiff. Consequently, the outcome of suit 1011 would only determine the status of the estate of the Late Mr. Alam, and would not automatically lead to a decree in favour of the new Plaintiffs in their personal capacity. The Impugned Order merely enables the new Plaintiffs to pursue the interests of the estate of the Late Mr. Alam, and nothing more. It may be the Appellant's argument that such legal heirs are not truly entitled as a matter of fact and that the Will is illegal but that is an assertion that is subject matter of trial in other proceedings that form part of web of litigation among the parties. Suit 1011 would merely result of determination of the composition of late Mr. Alam's estate. The other litigation would determine

who is entitled to which portion of the estate. Therefore, we have no hesitation in rejecting the submission made in reliance of ***Asian Hotels.***

26. On the other hand, the observations in ***Binapani Kar*** are worthy of reproduction and the same are extracted below :

> *4. Section 213 of the Succession Act ("the Act" for short) provides as to when the right of the executor or legatee is established. Sub-section (1) thereof provides that no right as executor or legatee can be established in any court unless a court of competent jurisdiction in India has granted probate of the Will under which the right is claimed (or has granted letters of administration with the Will or with a copy of the Will annexed). It is not in dispute that the said section applies in the case of Wills made by a Hindu who is a resident of Calcutta. The trial court and the High Court have proceeded on the basis that having regard to Section 213 of the Act, the suit cannot be decided unless the executor of the Will produces the probate. Section 213 clearly creates a bar to the establishment of any right under a Will by the executor or legatee unless probate or letters of administration of the Will have been obtained. This Court in Hem Nolini Judah v. Isolyne Sarojbashini Bose [1962 Supp (3) SCR 294 : AIR 1962 SC 1471] held as follows: (SCR p. 303)*
>
> > *"The words of Section 213 are not restricted only to those cases where the claim is made by a person directly claiming as legatee. The section does not say that no person can claim as a legatee or as an executor unless he obtains probate or letters of administration of the Will under which he claims. What it says is that no right as an executor or legatee can be established in any court of justice, unless probate or letters of administration have been obtained of the Will under which the right is claimed, and therefore it is immaterial who wishes to establish the right as a legatee or an executor. Whosoever wishes to establish that right, whether it be a legatee or an executor himself or somebody else who might find it necessary in order to establish his right to establish the right of some*

legatee or executor from whom he might have derived title, he cannot do so unless the Will under which the right as a legatee or executor is claimed has resulted in the grant of a probate or letters of administration."

5. *Therefore, where the right of either an executor or a legatee under a Will is in issue, such right can be established only where probate (where an executor has been appointed under the Will), or letters of administration (where no executor is appointed under a Will), have been granted by a competent court.* ***Section 213 does not come in the way of a suit or action being instituted or presented by the executor or the legatee claiming under a Will. Section 213, however, bars a decree or final order being made in such suit or action which involves a claim as an executor or a legatee, in the absence of a probate or letters of administration in regard to such a Will.*** *Where the testator had himself filed a suit (seeking a declaration and consequential reliefs), and he dies during the pendency of the suit, the executor or legatee under his Will, can come on record as the legal representative of the deceased plaintiff under Order 22 Rule 3 CPC and prosecute the suit.* ***Section 213 does not come in the way of an executor or legatee being so substituted in place of the deceased plaintiff, even though at the stage of such substitution, probate or letters of administration have not been granted by a competent court****.*

6. *However, there appears to be some divergence in views on the question* ***whether a decree can be passed in the absence of probate (or letters of administration), where the suit or action has been initiated by the testator himself (and not by anyone claiming a right as the executor or legatee under a Will), and the executor/legatee subsequently comes on record as the legal representative on the death of the testator****. One view is that after the death of the testator, when an executor or a legatee comes on record and proceeds with the suit, he is trying to enforce his right under a Will and, therefore, Section 213 would come into play and the probate or letters of administration will have to be obtained before the judgment is delivered (see Arijit Mullickv. Corpn. of Calcutta [(1979) 2 Cal LJ 426]).* ***The other view is that Section 213 will not apply as the suit was not filed to establish any right of an executor of legatee under a Will, and that as the testator himself having filed the suit, the issue in the suit is only about the right claimed by the plaintiff testator and not about the right claimed by the executor/legatee under the Will (see Gobinda Ballav Chakraborty v. Biswanath Mustafi [AIR 1980 Cal 143 : (1979) 2 Cal LJ 325])****. We do not propose to examine this question in this appeal,*

as the respondent is unrepresented, and this appeal can be disposed of on the special facts and circumstances of this case.

[Emphasis Supplied]

27. Likewise, the observations of a Division Bench of Patna High Court in ***Suresh Singh*** are instructive. The following extracts are noteworthy :

> ***4.*** *The sole point which falls for consideration in this revision application is as to* ***whether a legatee under unprobated Will can be impleaded as party upon the death of testator or not, who was a party to the suit and section 213 of the Act debars a court from recognising and impleading a legatee under unprobated Will unless and until a probate or letters of administration has been obtained in respect of the Will under which he claims.*** *For deciding this question, it would be necessary to refer to the provisions of sections 211 and 213 of the Act, relevant portions of which are quoted hereunder:*
>
> > *"211. Character and property of executor or administrator as such—.(1) The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such.'*
> >
> > *"213. Right as executor or legatee when established.— (1) No right as executor or legatee can be established in any Court of Justice unless a Court of competent jurisdiction in India was granted probate of the will under which the right is claimed, or has granted letters of administration with the will or with a copy of an authenticated copy of the will annexed."*
> >
> > *(Emphasis added)*
>
> ***5.*** *It has to be seen* ***whether the expression 'right' as used in section 213 is wide enough to include a right to prosecute a suit or proceeding or is the expression 'right' confined to the right to enforce a claim for which a suit or legal proceeding is brought.*** *The language of section 213(1) is very clear and it says no right can be established in a court.* ***Institution of a case is something different than establishment of a right.*** *Section 213, in my view, does not preclude a person from instituting a case or setting up a defence on the basis of unprobated*

Will, but it only debars a person from enforcing the right claimed on the basis of unprobated Will unless and until a probate or letters of administration is obtained. According to section 211, an executor or administrator of a deceased person is his legal representative for all purposes and all the properties of the deceased vest in him as such. ***This question was considered by the Privy Council in the case of Meyappa Chetty v. Soona Navena Subramnaian Chetty (A.I.R. 1916 Privy Council, 202). In that case, letters of administration pendente lite was granted in favour of an Administrator in the year 1910 and thereafter he filed a suit in the year 1911 and during the pendency of the suit probate was granted in the year 1912. In those circumstances, a question had arisen whether before grant of probate a suit could have been filed to enforce the right claimed on the basis of a Will, and it was held that such a suit could have been instituted under law but no decree could be passed unless a probate is granted.*** *It was laid down by their Lordships of the Judicial Committee as follows:—*

> *"**It is quite clear that an executor derives his title and authority from the will of his testator and not from any grant of probate. The personal property of the testator, including all rights of action, vests in him upon the testator's death, and the consequence is that he can institute an action in the character of executor before he proves the will**. He cannot, it is true, obtain a decree before probate, but this is not because his title depends on probate, but because the production of probate is the only way in which, by the rules of the Court, he is allowed to prove his title. An administrator, on the other hand, derives title solely under his grant and cannot, therefore, institute an action as administrator before he gets his grant."*
>
> *"It would seem, therefore, that an executor is not only the legal representative of his testator, but capable of instituting an action…"*

***

13. In view of the foregoing discussions, ***I hold that a legatee or executor of an unprobated Will making a claim on the basis of the same can institute a suit or take a defence in a suit on the basis of such a***

> ***Will, but his claim cannot be established in a court of law unless and until a probate or letters of administration is granted meaning thereby that neither any decree can be passed in favour of a plaintiff nor defence can be accepted in such a suit unless pr obate or letters of administration is obtained before its disposal.*** *I also hold that if such a legatee or executor can institute a suit or set up a claim by way of defence, he can be allowed to be substituted in place of the testator or added as a party if he makes a claim on the basis of an Unprobated Will.* ***Therefore, it is held that the court below has committed error of jurisdiction in refusing the prayer made on behalf of the petitioners, and thereby refusing to exercise jurisdiction vested in it under law. I am of the view that if the impugned order is allowed to stand, there will be failure of justice and irreparable injury would be caused to the petitioners if they are not permitted to be impleaded as party the suit is allowed to be disposed of in terms of the compromise and they would be required to challenge the decree by filing another suit leading to multiplicity of the suit****.*
>
> ***[Emphasis Supplied]***

28. At the risk of repetition, we note that it is apparent that the permission granted to permit the new Plaintiffs to be brought on board is not in any manner an expression of an opinion on the merits of the claims by these parties. No injury would be occasioned by replacing the Late Mr. Alam with the three new Plaintiffs. It would be truly inconvenient to adjudicate Suit 1011 with the sole Plaintiff being dead and the purported legal heirs not being allowed to prosecute the proceedings. The Mother is the widow of the Late Mr. Alam; Dr. Nazia Shad is the purported executor of the purported Will; and Mr. Mohd Shad, the husband of Dr. Nazia Shad, stands in the same position, and indeed, *prima facie*, the Late Mr. Alam appears to have

buried the hatchet with Mr. Mohd Shad.

29. We do not think it necessary or appropriate to burden this judgement any further with prolix analysis of the long list of case law cited at the bar, in particular, case law on the law of succession and personal law.

30. We make it clear that nothing in this judgement is an expression of an opinion on the merits of the case or the relative strength of the parties' respective positions in the multiple legal proceedings they are engaged in. We have limited ourselves to the scope of appellate review of a decision to permit legal heirs to be brought on record, even while taking care to ensure that in doing so, the claim made by the deceased original Plaintiff against a legal heir is not lost sight of.

31. Consequently, we see no merit in the Appeal, which stands dismissed. As a result, pending Interim Application in the Appeal, too stands dismissed. There shall be no order as to costs.

(SOMASEKHAR SUNDARESAN, J.) **(G. S. KULKARNI , J.)**

Shraddha Talekar PS