A CHANDRABHAI K. BHOIR & ORS.

v.

KRISHNA ARJUN BHOIR & ORS.

(Civil Appeal No. 6575 of 2008)

NOVEMBER 07, 2008

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[S.B. SINHA AND CYRIAC JOSEPH, JJ.]

Succession Act, 1925 – s.302 – Applicability of – Jurisdiction of testamentary Court – Agreement between C *parties by which terms of Will changed/altered – Enforcing of – Held: The terms of the Will cannot be changed or altered in terms of an agreement – A probate when granted binds the whole world – It is a judgment in rem – Executor, therefore, has to administer the estate of the testator in terms of the* D *Will and not on the basis of the settlement arrived at by and between the parties – In case of any conflict between the terms of the Will and the settlement, the former would prevail – The effect of termination of such agreement entered into by and between the parties is required to be gone into in an* E *independent suit and not in a proceeding under s.302 of the Act – Testamentary court in exercise of its jurisdiction under s.302 cannot enforce a contract qua contract, only because the Executor is a party thereto – It can enforce only the terms of the Will and not the terms of the agreement.*

F *Doctrine of* **res judicata** *– Applicability of, to an order passed without jurisdiction – Held: Such an order would be a nullity – It will be a coram non judice and non est in the eye of law – Principles of* **res judicata** *would not apply to such cases.*

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The respondents were legatees under a Will. On the death of testator, respondents filed application for grant of probate in respect of said Will. Appellants filed a caveat thereto, pursuant whereto a suit was directed to be

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registered. In the said suit, compromise was entered into between the parties by which, the terms of Will were changed. Thereafter the caveat was withdrawn.

In 1992, an agreement by way of family arrangement was also entered into between the parties, wherein appellants agreed to sell their share to the respondents for Rs.19 lacs and allowed respondents to develop entire property including share of appellants. The entire amount was not paid. Appellants cancelled the said agreement by notice dated 26.11.1998. Respondent no.1 who was the executor of the said Will took out chamber summons. Single Judge of High Court exercising testamentary jurisdiction allowed the chamber summons. Division Bench of High court upheld the same. Hence the instant appeal.

It was contended for the appellants that s. 302 of the Succession Act, 1925 was not applicable in the instant case inasmuch as the rights and obligations of the parties were governed by the terms of agreement having regard to the fact that by reason of the order of the court on the terms of settlement or otherwise, the Will remained unaltered; and that the development agreement which was a contract between the parties could not be specifically enforced by the High Court, while exercising its testamentary jurisdiction.

Allowing the appeal, the Court

HELD: 1.1. A probate is granted in respect of a Will. An Executor is appointed to administer the estate of the testator in terms of Will. The Will ordinarily should be administered having regard to the last wishes of the testator himself. Appellant No. 1 was a caveator. He withdrew his caveat which was noticed by the court in terms of the order dated 11.02.1993. The probate was granted unconditionally. However, Clause 1 of the

A consent terms was vague. The terms of the Will cannot be changed or altered in terms of the agreement. Both would be contradictory to or inconsistent with each other. [Paras 15 and 16] [664-F, G, H; 665-A]

1.2. A probate when granted binds the whole world. B It is a judgment in *rem.* The Executor, therefore, has to administer the estate of the testator in terms of the Will and not on the basis of the settlement arrived at by and between the parties which would be inconsistent with the terms of the Will. In case of any conflict between the C terms of the Will and the settlement, the former will prevail. The court, thus, in exercise of its jurisdiction under s.302 of the Succession Act, 1925 can enforce only the terms of the Will and not the terms of the agreement. [Para 17] [665-A, B]

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1.3. The agreement although formed part of the terms of settlement, but it may only be held to be a collateral document. A purported agreement of family arrangement which in effect and substance is a development agreement cannot form the part of a decree granting E probate. Admittedly, a sum of Rs. 19,00,000/- was to be paid in consideration of the appellants' allowing the Executor to purchase his share in the property for the aforementioned sum. The terms of payment had also been settled thereby. There is a dispute between the F parties as regards the actual amount to be paid by the Executor to the appellant. [Para 18] [665-C, D, E]

1.4. The effect of non-payment, according to the respondents, is governed by Clause 5 of the agreement in terms whereof interest at the rate of 18% on the unpaid G amount could be levied from the due date till date of payment of the unpaid amount along with the accrued interest, which would constitute a charge over the property. The said agreement is not registered. Whether by reason of such a provision, a valid charge can be H created would be separate question. But the fact remains

that rightly or wrongly the said agreement stood terminated. The effect of termination of such agreement entered into by and between the parties is required to be gone into in an independent suit and not in a proceeding under s.302 of the Act. The testamentary court in exercise of its jurisdiction under s.302 of the Act cannot enforce a contract qua contract; only because the Executor is a party thereto. From the prayers made in the notice of motion, it would appear that the Executor had sought for direction against himself. Such a prayer was whether maintainable in terms of s.302 of the Act had not been adverted to by the courts below. [Para 19] [665-F, G, H; 666-A, B]

2. Submission that the decision of the Division Bench of the High Court dated 22.11.2005 constituted *res judicata* cannot be accepted. It is one thing to say that an application under s.302 of the Act would be maintainable but it is another thing to say that as to whether by reason of the Chamber Summons, the respondent No. 1 would have discharged as sole Executor, was dependant upon the facts and circumstances of the case. Thus, the said issue, did not attain finality. In any view of the matter, an order passed without jurisdiction would be a nullity. It will be a coram non judice. It is non est in the eye of law. Principles of res judicata would not apply to such cases. Thus, if s.302 of the Act was not attracted in the facts and circumstances of this case, the principles of res judicata would also not apply. If the agreement was not a part of the Will, s.302 will have no application. [Paras 20, 21 and 22] [666-C, D; E, F, G]

Chief Justice of Andhra Pradesh and Others v. L.V.A. Dixitulu, **(1979)2 SCC 34;** *Union of India v. Pramod Gupta,* **(2005) 12 SCC 1 and** *National Institute of Technology and Ors. v. Niraj Kumar Singh,* **[2007] 2 SCC 481, relied on.**

3. There is distinction between the two functions of

A **the respondent No. 1; one as an Executor of the Will and the other as a developer. Whereas his action as an Executor is subject to the direction of the testamentary court, his action as a developer is not. An Executor or a Trustee would not put him in such a position in which his**
B **personal interest and his duties under the Will come in conflict with each other. The testamentary court must give effect to the Will and not an agreement by and between the Executor and the third party, which would be contrary to the wishes of the testator. [Para 23] [666-H; 667-A, B]**

C **Case Law Reference:**

(1979) 2 SCC 34	**relied on**	**Para 21**
(2005) 12 SCC 1	**relied on**	**Para 21**
D **(2007) 2 SCC 481**	**relied on**	**Para 21**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6575 of 2008.

From the final Judgment and Order dated 5.2.2007 of the
E High Court of Judicature at Bombay at Aurangabad in TS No. 33 of 1986 & CS No. 54 of 2006, TP No. 613 of 1986 & FO No. 889 of 2006.

Shekhar Naphade, S.R. Mishra, Vimal Chandra S. Dave,
F S.N. Singh and Neelam Kalsi for the Appellants.

Ranjit Kumar, Santosh Paul, Aanchal Jain, Arvind Gupta, M.J. Paul, Yashwardhan Divekar and K. Rajeev for the Respondents.

G The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted.

2. Application of Section 302 of the Indian Succession Act, 1925 (for short "the Act") is in question in this appeal which
H arises out of a judgment and order dated 5.02.2007 passed

by a Division Bench of the High Court of Judicature at Bombay in Appeal No. 889 of 2006.

3. The basic fact of the matter is not in dispute.

One Kanha Barik Mhatre executed a Will on or about 8.09.1963; the legatees whereunder are the respondents herein. He expired on 6.08.1974.

An application for grant of probate in respect of the said Will was filed by the respondents. Appellants filed a caveat thereto, pursuant whereto a suit was directed to be registered. In the said suit, a compromise was entered into by and between the parties; the terms whereof inter alia are:

> "1. The parties have settled their disputes as per agreement executed today...
>
> 2. The parties agree that even though the Probate will be granted to the Petitioner unconditionally the terms of the Will stand changed and/ or altered on terms of agreement Annexure 'A' hereto.
>
> 3. The parties agree that they have no objection if the probate is granted unmodified by the terms of the agreement Ex. 'A'. However, the parties agree and undertake to this Hon'ble Court that their rights and obligations would be regulated by the terms of Agreement Ex. 'A' hereto and that an order should be sought on the said terms.
>
> 4. In view of the above agreements and terms the Caveators/ Caveatorics withdraw their caveat."

However, an agreement by way of family arrangement was also entered into by and between the parties on or about 2.12.1992; Clauses 2, 3 and 5 whereof are relevant for our purpose, which read as under:

A "2. The parties of the First Part has agreed to allow the party of the second part to develop the entire property including the share of the party of the First Part and also further agree to sell their share to the party of the second part for Rs. 19,00,000/-.

B 3. The said amount is to be paid in the manner stated hereinafter:

(a) Rs. 6,00,000/- (Rupees Six Lakhs only) shall be paid by the Developer on the execution of these presents.

C (b) Rs. 3,00,000/- (Rupees three lakhs only) within a period of six months from the date of the execution of these presents.

(c) Rs. 3,00,000/- (Rupees three lakhs only) within a period
D of 12 months from the date of the execution of these presents.

(d) Rs. 3,00,000/- (Rupees three lakhs only) within a period of 18 months from the date of the execution of these
E presents.

(e) Rs. 4,00,000/- (Rupees four lakh only) within a period of 24 months from the date of the execution of these presents."

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5. The party of the other part hereby agrees to pay the said amount as stated above to the party of the first part and further agrees to pay interest at the rate of 18% per annum
G on such amount which not paid on due date from the due date till payment thereof and till that date the said unpaid amount along with accrued interest shall constitute a charge over the property mentioned herein."

Clause 6 contained in the recital part of the said agreement
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reads as under:

> "6. The party of the second part agrees to accept the share of the parties of the 1st part in the property at Dahisar more particularly described in the schedule hereto and further agree that aggregate share of all the parties of the first part is by consent valued at Rs. 19,00,000/- and the parties of the first part have agreed to allow party of the second part to develop the entire land including the share of the parties of the first part which they have agreed to sell to the party of the second part or his nominees at the agreed price of Rs. 19,00,000/-."

4. Indisputably, the entire amount of Rs. 19,00,000/- was not paid. Appellants cancelled the said agreement by service of a legal notice dated 26.11.1998.

5. Respondent No. 1 herein was the Executor of the said Will. He took out a Chamber Summons purported to be in terms of Section 302 of the Act praying inter alia for the following reliefs:

> "(a) That the Plaintiff be directed to deposit in this Hon'ble Court the sum of Rs. 13,78,422/- towards the share of the Defendant Nos. 2 to 4 and the Respondent Nos. 1 to 5 and 7 to 12 in the estate of the deceased Kanha Barik Mhatre;
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> (b) That it may be declared that on such deposit being made the plaintiff be discharged of his obligation as Executor of the Will of the deceased Kanha Barik Mhatre and that the Defendant Nos. 2 to 4 and the Respondent Nos. 1 to 12 have no right, title and interest in the estate of the deceased and particularly in respect of the immovable property more particularly described in the Schedule annexed hereto and marked Exhibit 'A';
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> (c) ad-interim order in terms of prayer clauses (a) and (b)

A above."

6. The said Chamber Summons was dismissed by an order dated 11.08.2005. An intra-court appeal was preferred thereagainst, which was marked as Appeal No. 897 of 2005. By a judgment and order dated 22.11.2005, the Division Bench held:

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"10. It was not disputed before us that probate to the Will of the deceased Kanha Barik Mhatre has been granted by this Court in Testamentary and intestate jurisdiction on 9th July, 1998. In the probate granted by this Court on 9th July, 1998, the present Appellant has been appointed as a sole Executor as to the Will executed by Kanha Barik Mhatre, Section 302 of the Indian Succession Act, 1925 empowers the Testamentary Court to give to the Executor any general or special directions with regard to the estate of the deceased Testator. The Probate having already been granted, the issue whether the sole Executor could be discharged of his obligation on deposit of the amount as set out in the Chamber Summons was surely within the exclusive jurisdiction of the Testamentary Court. The question is not whether in the facts and circumstances set out in the affidavit in support of Chamber Summons, the Appellant at all could have been discharged as sole executor that would be seen by the learned Chamber Judge at the time of hearing of Chamber Summons. However, that was not seen and the learned Chamber Judge dismissed the Chamber Summons on the ground that the Chamber Summons was beyond the jurisdiction of the Testamentary Court. The approach of the learned Chamber Judge cannot be countenanced. It was for the learned Chamber Judge to decide whether the sole Executor of the Will of the deceased Kanha Barik Mhatre could at all be discharged of his obligations as the Executor of the Will as this could only be decided in the Testamentary jurisdiction."

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7. On the said premise, the appeal was allowed. The order dated 11.08.2005 was set aside and the matter was remitted to the Court of learned Chamber Judge for hearing of the Chamber Summons afresh.

8. By an order dated 23.06.2006, the learned Single Judge allowed the respondents to withdraw the said Chamber Summons.

9. However, a fresh Chamber Summons bearing No. 54 of 2006 was taken out on 13.07.2006. In the said notice of motion, the Constituted Attorney of the Defendant Nos. 2 and 3, in an affidavit affirmed on 28.08.2006, stated as under:

> "...I say that as against the total consideration of Rs. 19 lakhs, the sum of Rs. 13.5 lakhs was paid and balance amount was not paid. I say that the amount was to be paid within 24 hours from the date of the Agreement. I say that the full consideration was not paid within 24 hours from the date of the Agreement i.e. on 2/3/1993. I say that the amount was to be paid by 1/3/1995. I say that in the said circumstances the Original Defendants terminated the said Agreement for sale by Advocate's notice dated 26/11/1998 and the Plaintiff also replied said notice dated 21/12/1998..."

10. The learned Single Judge exercising testamentary jurisdiction, by reason of a judgment and order dated 28.09.2006, held as under:

> "Thus, the probate of the Will granted by this Court without modifying the Will. But the terms agreed between the parties for withdrawal of caveat were made part of the order of the Court. Perusal of the agreement entered into between the parties which is mentioned in the consent terms shows that the amounts to be paid by the Petitioner to the parties who are mentioned in the agreement. The time when these amounts were to be paid is also

A mentioned in the agreement. Clause (5) of this agreement deals with the event of parties who are obligated to pay amount commits default in making payment..."

The said Chamber Summons was allowed issuing various directions, which are as under:

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"(i) The Petitioner to deposit the amount mentioned in prayer clause (a) of the chamber summons with the Prothonotary and Senior Master of this Court within a period of two weeks from today with due notice to the C respondents.

(ii) In case the respondents apply before the Prothonotary & Senior Master of this Court for withdrawal of the amount within a period of six months from the date of deposit, the D Prothonotary and Senior Master of this Court shall permit them to withdraw the amount.

(iii) On deposit being made immediately the amount shall be invested in fixed deposit in a nationalised bank. In case respondents apply for withdrawal, the amount be paid to E them with accruals, if any.

(iv) In case the respondents institute proceedings in appropriate court within a period of six months and secure appropriate orders, the disposal of the amount shall be F governed by the order that may be passed by the competent court.

(v) In case neither the respondents apply for withdrawal of the amount nor Prothonotary and Senior Master of this Court receives any order from the competent Court in G relation to the disposal of the amount, the Prothonotary and Senior Master of this Court shall permit the petitioner to withdraw the amount, with accruals."

11. The Prothonotary & Senior Master of the court

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accepted the security furnished by the respondents herein. A

An appeal preferred against the order dated 28.09.2006 before the High Court has been dismissed by reason of the impugned judgment.

Appellants are, thus, before us. B

12. Mr. Shekhar Naphade, learned senior counsel appearing on behalf of the appellants, would submit:

(i) Section 302 of the Act cannot have any application in the instant case inasmuch as the rights and obligations of the parties are governed by the terms of agreement having regard to the fact that by reason of the order of the court on the terms of settlement or otherwise, the Will remained unaltered. C D

(ii) The development agreement which was a contract between the parties could not have been specifically enforced by the High Court, while exercising its testamentary jurisdiction. E

13. Mr. Ranjit Kumar, learned senior counsel appearing on behalf of the respondents, on the other hand, would contend that the consent terms formed part of the decree passed in the suit and as in terms thereof the Executor was required to administer the Will, Section 302 of the Act would be applicable. F

Drawing our attention to the well-settled legal principle that the probate is granted against the whole world, it was argued that the consequences of non-payment of the amount under the contract having been stipulated therein itself, viz., payment of interest, the application under Section 302 of the Act was maintainable. G

It was submitted that the property in question being subject to the Will and as by reason of clause 5 of the agreement, a H

A charge has been created on the property, in absence of any proceeding initiated by the appellants to revoke the grant of probate or to reopen the decree and/ or to enforce the charge, a direction by the court in that behalf was imperative.

B Our attention was furthermore drawn to the fact that the purported termination of the contract was made in 1998, i.e., after five years of the passing of the decree and in view of the fact that now the entire amount together with interest has been paid, the impugned judgment should not be interfered with.

C It was contended that in the earlier round of litigation, the judgment of the Division Bench upholding the maintainability of the proceedings under Section 302 of the Act having been upheld and the same having attained finality, the said question cannot now be gone into once over again.

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14. Section 302 of the Act reads as under:

"302 - Directions to executor or administrator

Where probate or letters of administration in respect of any
E estate has or have been granted under this Act, the High Court may, on application made to it, give to the executor or administrator any general or special directions in regard to the estate or in regard to the administration thereof."

F 15. A probate is granted in respect of a Will. An Executor is appointed to administer the estate of the testator in terms thereof. The Will ordinarily should be administered having regard to the last wishes of the testator himself.

16. Appellant No. 1 herein was a caveator. He withdrew
G his caveat which was noticed by the court in terms of the order dated 11.02.1993. The probate was granted unconditionally.

However, Clause 1 of the consent terms appears to be vague. How the terms of the Will can be changed or altered in
H terms of the agreement defies all comprehension. Both would

be contradictory to or inconsistent with each other. A

17. A probate when granted binds the whole world. It is a judgment in rem. The Executor, therefore, has to administer the estate of the testator in terms of the Will and not on the basis of the settlement arrived at by and between the parties which would be inconsistent with the terms of the Will. In case of any conflict between the terms of the Will and the settlement, the former will prevail. The court, thus, in exercise of its jurisdiction under Section 302 of the Act can enforce only the terms of the Will and not the terms of the agreement. B C

18. The agreement although formed part of the terms of settlement, but it may only be held to be a collateral document. A purported agreement of family arrangement which in effect and substance is a development agreement cannot form the part of a decree granting probate. D

Admittedly, a sum of Rs. 19,00,000/- was to be paid in consideration of the appellants' allowing the Executor to purchase his share in the property for the aforementioned sum. The terms of payment had also been settled thereby. There is a dispute between the parties as regards the actual amount to be paid by the Executor to the appellant. E

19. The effect of non-payment, according to the respondents, is governed by Clause 5 of the agreement in terms whereof interest at the rate of 18% on the unpaid amount could be levied from the due date till date of payment of the unpaid amount along with the accrued interest, which would constitute a charge over the property. The said agreement is not registered. Whether by reason of such a provision, a valid charge can be created would be separate question. But the fact remains that rightly or wrongly the said agreement stood terminated. The effect of termination of such agreement entered into by and between the parties is required to be gone into in an independent suit and not in a proceeding under F G H

A Section 302 of the Act. The testamentary court in exercise of its jurisdiction under Section 302 of the Act cannot enforce a contract qua contract; only because the Executor is a party thereto. From the prayers made in the notice of motion, it would appear that the Executor had sought for direction against himself. Such a prayer was whether maintainable in terms of Section 302 of the Act had not been adverted to by the courts below.

20. Submission of Mr. Ranjit Kumar that the decision of the Division Bench of the High Court dated 22.11.2005 constitutes res judicata cannot be accepted. It is one thing to say that an application under Section 302 of the Act would be maintainable but it is another thing to say that as to whether by reason of the Chamber Summons, the respondent No. 1 would have discharged as sole Executor was dependant upon the facts and circumstances of the case.

21. Thus, the said issue, in our opinion, did not attain finality. In any view of the matter, an order passed without jurisdiction would be a nullity. It will be a *coram non judice*. It is non est in the eye of law. Principles of *res judicata* would not apply to such cases. [See *Chief Justice of Andhra Pradesh and Others v. L.V.A. Dixitulu,* (1979) 2 SCC 34, *Union of India v. Pramod Gupta* (2005) 12 SCC 1 and *National Institute of Technology and Ors. v. Niraj Kumar Singh,* (2007) 2 SCC 481]

22. Thus, if Section 302 of the Act was not attracted in the facts and circumstances of this case, the principles of res judicata would also not apply.

If the agreement was not a part of the Will, in our opinion, Section 302 will have no application.

23. It is not necessary for us also to go into the question in regard to the effect of delay in termination of the agreement. We must, however, make a distinction between the two

functions of the respondent No. 1; one as an Executor of the Will and the other as a developer. Whereas his action as an Executor is subject to the direction of the testamentary court, his action as a developer is not. An Executor or a Trustee would not put him in such a position in which his personal interest and his duties under the Will come in conflict with each other. The testamentary court must give effect to the Will and not an agreement by and between the Executor and the third party, which would be contrary to the wishes of the testator.

24. For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly. The appeal is allowed. No costs.

D.G. Appeal allowed.