SUPREME COURT OF INDIA

Uma Devi Nambiar

Vs.

T.C. Sidhan

Special Leave Petition (civil) 9026 of 2002

(Doraiswamy Raju and Arijit Pasayat JJ.)

11.12.2003

JUDGMENT

ARIJIT PASAYAT, J.

Leave granted.

When crave for materialistic possessions outweighs personal love and affection, the inevitable result is passing long times in the corridors of Courts and the case at hand is no exception. In a proceeding initiated under Sections 192 to 195 of the Indian Succession Act 1925 (for short the 'Act') validity and genuineness of a Will was decided by the District Court, Kozhikode and the Kerala High Court refused to interfere under Section 115 of the Code of Civil Procedure 1908 (for short the 'Code'), negativing appellants' plea that such adjudication was not permissible in the said proceeding.

The background in which the litigation has reached this Court is essentially as follows:

The petitioner No.1 had initiated proceedings under Sections 192 to 195 of the Act, aggrieved by the action of the respondent in allegedly taking illegal possession of the petitioner's palatial ancestral home situate in the heart of the city of Calicut on U.K. Sankunni Road (a road named after the petitioner's father Late Shri U.K. Sankunni). The said proceedings being under Part VII of the Act were summary in nature, confined only to the issue of possession of the ancestral family home and the two garages. It has been judicially recognized that in such proceedings where the issue is one of possession, the question of title cannot be gone into in detail.

According to her, the respondent (Dr. T.C. Sidhan) propounded a forged Will in the said proceedings and sought adjudication of the same, to which the petitioner no.1, objected to. In fact, petitioner no. 1 had filed a separate application (I.A. No. 2976 of 2000) objecting to the adjudication of the alleged Will since the District Court exercising summary powers had no jurisdiction to do so. The petitioner no.1 reiterated her objections even at the time when the witnesses were produced by the respondent (Dr. T.C. Sidhan). Notwithstanding all these, the District Court proceeded to adjudicate on the genuineness of the Will and solely on that ground gave possession of the property to the respondent. The District Court justified this assumption of jurisdiction by citing consent of parties. This was, according to petitioners clearly incorrect and on the contrary the petitioner no.1 had objected to the said course of action. Original respondent Dr. T.C. Sidhan has died in the meantime, his legal representatives have been impleaded.

The petitioner no.1, therefore, filed a revision before the High Court raising again the fundamental issue of lack of jurisdiction on the part of the District Judge, adverting to the specific objections raised in respect of the lack of jurisdiction of the District Court to consider title. The High Court, agreed with the contention that the claim of the respondent had to be decided in appropriate proceedings before the appropriate forum. The High Court adverting to the submissions on the question of jurisdiction, held as follows:

"In this case, the revision petitioner has no contention that the lower court had no jurisdiction to pass the impugned order. The only contention is that the order passed by the lower court is illegal as it had exercised jurisdiction which is no vested in the court, in so far as considering the genuineness, legality and validity of the Will propounded by the 1st Respondent in the above summary proceedings, wherein the jurisdiction of the lower court was invoked only for the settlement of the dispute regarding actual possession." The schedule property is the residential house and compound which belonged to deceased Sankunni. Sankunni had two daughters, the petitioner no.1 and her elder sister Rani Sidhan, wife of the original respondent Dr. T.C. Sidhan. After the death of Sankunni, the property devolved upon the petitioner no.1 and the wife of respondent Dr. T.C. Sidhan on equal rights. Petitioner no.1 was married to Dr. Rajan, the younger brother of respondent Dr. T.C. Sidhan and they were living together in England. Mrs. Rani Sidhan, the sister of the petitioner no.1 died issueless. Therefore, the petitioner no.1 contended that she is the legal heir of her sister Mrs. Rani Sidhan under Section 15(2)(a) of the Hindu Succession Act, 1956 (in short the 'Succession Act'). She alleged that the respondent Dr. T.C. Sidhan, who has absolutely no right in

the schedule property, taking advantage of the position that he was the husband of Mrs. Rani Sidhan, illegally occupied the property, and that he was likely to commit waste and cause damage to the property. As per the ex parte order in IA No. 363/1996 filed by the petitioner no.1 seeking appointment of a Curator, the lower court appointed a Curator on 20.2.1996 and directed him to take immediate possession of the property.

Accordingly, he took possession of the property from the respondent Dr. T.C. Sidhan. Though the order appointing the Curator by the lower court was challenged before the High Court in C.M.A. No. 111/96, the said Court did not interfere with the order as the Curator had already taken possession of the property and directed the lower court to conduct an enquiry under Section 194 of the Act.

The case of the respondent Dr. T.C. Sidhan was that as per the joint Will executed by him and his wife Mrs. Rani Sidhan, he is the sole heir of all her assets and her share in the schedule property devolved upon him and accordingly he is entitled to be in possession of the schedule property as the person who is entitled to half share in the properties.

The District Court, Kozhikode in Succession O.P. No. 38 of 96 by judgment dated 30.3.2001 came to hold that the alleged Will was proved, directing further the discharge of the Curator and to audit all accounts and property and directed to handover possession to respondent Dr. T.C. Sidhan. As the High Court did not interfere with said order, this appeal has been filed.

According to Mr. K.K. Venugopal, learned Senior Counsel the judgments of the District Court, Kozhikode and the High Court suffer from irreparable infirmities. In the proceeding under Section 192 of the Act, there was no scope for adjudicating the genuineness of the Will, on the face of several orders passed by various courts including High Court of Kerala and this Court. The proceedings are summary in nature. It is to be noted that the so-called attesting witnesses did not in anyway prove execution of the Will. Earlier an application was filed for examining one of the attesting witnesses on commission and the same was rejected by the District Judge. The genuineness of the Will has to be established by filing of suit and a proceeding under Section 192 of the Act is no substitute. Though these aspects were highlighted before the High Court, which proceeded on erroneous impression that as the party had consented for adjudication of the issue, there was no error. The conclusion was clearly erroneous in view of the stand taken by the appellants at various stages and acceptance thereof by various courts including this Court that the issue whether the Will was genuine has to be adjudicated in an appropriate proceeding. The learned District Judge, himself has held so only a few months before. Even in the grounds before the High Court, it is specifically stated so. But the High Court overlooked all these salient features and rejected the revision application by holding that the jurisdiction was discretionary.

There is no reason indicated to justify the conclusion as to why in a case of this nature, where

substantial questions of law were involved interference was not warranted. After having observed that consent cannot confer jurisdiction, the High Court completely overlooked the various orders passed which had clearly directed that the genuineness of the Will was to be established in an appropriate proceeding. It was submitted that the fallacy in the conclusions of the District Judge as well as the High Court are apparent because the whole house was directed to be handed over to respondent Dr. T.C. Sidhan when admittedly even according to the respondent half share therein belongs to the appellant no.1. It was submitted that till an appropriate adjudication is made, the property can be handed over to the appellant no.1 on condition that she will deposit mesne profits in Court; otherwise there is likelihood of the property being passed on to strangers and the same being an ancestral house, it would be not only be improper, but inequitable, to keep out direct descendant in preference to distant relative or total third party outsiders.

In response, learned counsel for the respondents submitted that while making adjudication under Section 192 of the Act which appears in part VII of the Act relating to protection of property of deceased, there has to be finding recorded as regards the rival claims and a prima facie view on the question of lawful title has to be rendered and that is what has been done; the appellant having consented in an adjudication by the District Court cannot turn around and say that there was no consent. When the Court has recorded such a finding it is not open to be questioned before the higher court. The decision is not one on title but on the question of possession. Section 209 deals with the fate of such decision. Strong reliance was placed on Clarence Pais and Ors. v. Union of India (2001 (4) SCC 325); more particularly, para 6 where it has been observed that Will can be looked into for some purposes. As there was a direction for disposal of the matter by the District Court within a particular time, it was but necessary to record the decision on the question of prima facie title and the judgments of the Trial Court and the High Court need no interference.

Will is a translation of the Latin word "voluntas", which was a term used in the text of Roman Law to express the intention of a testator. It is of significance that the abstract term has come to mean that document in which the intention is contained. The same has been the case with several other English law terms, the concrete has superseded the abstract-obligation, bond, contract, are examples (Williams' Wills and Intestate Succession, page 5). The word 'testament' is derived from "testatio menties', it testifies the determination of the mind. A Will is thus defined by Ulpians's "Testamentum est mentis nostraejusta contestatio in id sollemniter facta to post martem nostrum valeat." Modastinus defines it by means of volantas. It is "voluntatis nostrae just sententia de co quod quis post mortem suam fietei vult (or velit)"; the word "justa" implying in each, that, in order to be valid, the testament must be made in compliance with the forms of law.

It means, "the legal declaration of a man's intentions, which will be performed after his death". A last Will and testament is defined to be "the just sentence of our Will, touching what we would have done after our death". Every testament is consummated by death, and until he dies, the Will of a testator is ambulatory. Nam omne testamentum morte consummatum est; et voluntae testamentoric est embulatoria usque od mortem. (For, where a testament is, there must also of necessity be death of testator. For, a testament is of force after men are dead;

otherwise it is of no strength at all while the testator liveth). A "Will", says Jarman, "is an instrument by which a person makes a disposition of his property to take effect after his decease, and which is in its own nature ambulatory and revocable during his life".

(Jarman, on Wills, Ist Edn., p.11). This ambulatory character of a Will has been often pointed out as its prominent characteristic, distinguishing it, in fact, from ordinary disposition by a living person's deed, which might, indeed postpone the beneficial possession or even a vesting until the death of the disposer and yet would produce such postponement only by its express terms under an irrevocable instrument and a statement that a Will is final does not import an agreement not to change it. (Schouler's Law of Wills, S. 326). A Will is the aggregate of man's testamentary intentions so far as they are manifested in writing, duly executed according to the Statute. (Per Lord Penzance in Leimage v. Goodbhan, L.R. 1 P. & D. 57, cited by Fry. J., in Green v. Tribe, (1878) 9 Ch D 231). In N.D. Bani's Law of Succession (Sixth Edition) also about position has been delineated. From various decisions of the this Court e.g. Ram Gopal v. Nand Lal (AIR 1951 SC 139), Gnambal Ammal v. Raju Ayyar (AIR 1951 SC 103), Raj Bajrang Bhadaur Singh v. Thakurain Bakhtraj Kher (1953 SC 7), Pearey Lal v. Rameshwar Das (AIR 1963 SC 1703), Ramchandra v. Hilda Brite, (AIR 1964 SC 1323) and Navneet Lal v. Gokul (AIR 1976 SC 794), the following principles are well established:

(1) In construing a document whether in English or in vernacular the fundamental rule is to ascertain the intention from the words used; the surrounding circumstances are to be considered; but that is only for the purpose of finding out the intended meaning of the words which have actually been employed.

(2) In construing the language of the Will the Court is entitled to put itself into the testator's armchair and is bound to bear in mind also other matters than merely the words used. It must consider the surrounding circumstances, the position of the testator, his family relationship the probability that he would use words in a particular sense. But all this is solely as an aid to arriving at a right construction of the Will and to ascertain the meaning of its language when used by that particular testator in that document.

(3) The true intention of the testator has to be gathered not by attaching importance in isolated expressions but by reading the Will as a whole with all its provisions and ignoring none of them as redundant or contradictory.

(4) The Court must accept, if possible such construction as would give to every expression some effect rather than that which would render any of the expressions inoperative. The Court will look at the circumstances under which the testator makes his Will, such as the state of his property of his

family and the like. Where apparently conflicting dispositions can be reconciled by giving full effect to every word used in a document, such a construction should be accepted instead of a construction which would have the effect of cutting down the clear meaning of the words used by the testator. Further where one of the two reasonable constructions would lead to intestacy, that should be discarded in favour of a construction which does not create any such hiatus.

(5) To the extent that it is legally possible, effect should be given to every disposition contained in the Will unless the law prevents effect being given to it. Of course, if there are two repugnant provisions conferring successive interests, if the first interest created is valid the subsequent interest cannot take effect but a Court of construction will proceed to the farthest extent to avoid repugnancy so that effect could be given as far as possible to every testamentary intention contained in the Will.

In Kalvelikkal Ambunhi v. H. Ganesh Bhandary (AIR 1995 SC 2491), it was observed that a Will may contain several clauses and the latter clause may be inconsistent with the earlier clause. In such a situation, the last intention of the testator is given effect to and it is on this basis that the latter clause is held to prevail over the earlier clause. As observed in Hammond v. Treharne, (1938 (3) All ER 308), if in a Will there are two inconsistent provisions, latter shall prevail over the earlier clause. This is regulated by the well-known maxim "cum duo inter se pugantia reperiuntur in testamenta ultimum ratum est". This principle is also contained in Section 88 of the Act which together with its illustrations, provides as under:

"88. The last of two inconsistent clauses prevails.

- Where two clauses of gifts in a Will are irreconcilable, so that they cannot possibly stand together, the last shall prevail.

Illustrations (i) the testator by the first clause of his Will leaves his estate of Ramnagar to "A", and by the last clause of his Will leaves it to "B" and not to A". B will have it.

(ii) if a man, at the commencement of his Will gives his house to A and at the close of it directs that his house shall be sold and the proceeds invested for the benefit of B, the latter disposition will prevail.

This rule of interpretation can be invoked if different clauses cannot be reconciled. (See Rameshwar v. Balraj, AIR 1935 PC 187). It is to be noted that rules of interpretation of Will are different from rules which govern interpretation of other documents like sale deed, or a gift deed, or a mortgage

deed or, for that matter, any other instrument by which interest in immovable property is created. While in these documents, if there is any inconsistency between the earlier or the subsequent part or specific clauses, inter se contained therein, the earlier part will prevail over the latter as against the rule of interpretation applicable to a Will under which the subsequent part, clause or portion prevails over the earlier part on the principle that in the matter of Will the testator can always change his mind and create another interest in place of the bequest already made in the earlier part or on an earlier occasion. Undoubtedly, it is the last Will which prevails.

What is the intention of the testator has to be found out on a reading of the Will and there cannot be any hard and fast rule of uniform application to find out as to whether the grant was absolute or it was subject to any condition or stipulation. The true intention of the testator has to be gathered not only by attaching importance to isolated expressions but by reading the Will as a whole with all the provisions and ignoring none of them as redundant or contradictory. As observed in Navneet Lal's case (Supra), although there is no binding rule that the Court should avoid intestacy at any cost, yet the Court would be justified in preferring that construction of the Will which avoids intestacy. Where the words are ambiguous attempt should be made to avoid that construction which leads to intestacy.

It is seldom profitable to compare the words of one Will with those of another or to attempt to find out to which of the Wills, upon which decisions have been given in reported cases, the Will before the Court approximates closely. Cases are helpful only in so far as the purport to lay down certain general principles of construction and at the present these principles seem to be fairy well settled. The cardinal maxim to be observed by Courts in construing a Will is to endeavour to ascertain the intention of the testator. This intention has to be gathered primarily from the language of the document which is to be read as whole without indulging in any conjecture or speculation as to what the testator would have done if he had been better informed or better advised (See Gnanmbal's case (supra). In construing the Will the Court must consider the surrounding circumstances. The testator's position, his family relationship, the probability that he would use his words in a particular sense and many other things summed up in the picturesque phrase. The Court should put itself in the testator's armchair (See Veerattalingam v. Rameth AIR 1990 SC 2201).

Section 63 of the Act deals with execution of unprivileged Wills.

It lays down that the testator shall sign or shall affix his mark to the Will or it shall be signed by some other person in his presence and by his direction. It further lays down that the Will shall be attested by two or more witnesses, each of whom has seen the testator signing or affixing his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator and each of the witnesses shall sign the Will in the presence of the testator.

Section 68 of the Indian Evidence Act, 1872 (in short the 'Evidence Act') mandates examination of

one attesting witness in proof of a Will, whether registered or not. The law relating to the manner and onus of proof and also the duty cast upon the Court while dealing with a case based upon a Will has been examined in considerable detail in several decisions of this Court [See H. Venkatachala Iyengar v. B.N. Thimmajamma and Ors. (AIR 1959 SC 443), Rani Purnima Debi and Anr. v. Kumar Khagendra Narayan Deb and Anr. (AIR 1962 SC 567) and Shashi Kumar Banerjee and Ors. v. Subodh Kumar Banerjee and Ors. (AIR 1964 SC 529)].

A Constitution Bench of this Court in Shashi Kumar Banerjee's case (supra) succinctly indicated the focal position in law as follows:

"The mode of proving a Will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a Will by Section 63, Succession Act. The onus of proving the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the Will as genuine. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the Will being unnatural, improbable or unfair in the light of relevant circumstances or there might be other indications in the Will to show that the testator's mind was not free. In such a case the court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last Will of the testator. If the propounder himself takes part in the execution of the Will which confers a substantial benefit on him that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the court would grant probate, even if the Will might be unnatural and might cut off wholly or in part near relations." A Will is executed to alter the ordinary mode of succession and by the very nature of things it is bound to result in either reducing or depriving the share of natural heir. If a person intends his property to pass to his natural heirs, there is no necessity at all of executing a Will. It is true that a propounder of the Will has to remove all suspicious circumstances. Suspicion means doubt, conjecture or mistrust.

But the fact that natural heirs have either been excluded or a lesser share has been given to them, by itself without anything more, cannot be held to be a suspicious circumstance especially in a case where the bequest has been made in favour of an offspring. As held in PPK Gopalan Nambiar v. PPK Balakrishnan Nambiar and Ors. (AIR 1995 SC 1852) it is the duty of the propounder of the Will to remove all the suspected features, but there must be real, germane and valid suspicious features and not fantasy of the doubting mind. It has been held that if the propounder succeeds in removing the suspicious circumstance, the Court has to give effect to the Will, even if the Will might be unnatural in the sense that it has cut off wholly or in part near relations (See Puspavati and Ors. v. Chandraja Kadamba and Ors. (AIR 1972 SC 2492). In Rabindra Nath Mukherjee and Anr. v.

Panchanan Banerjee (dead) by LRs. and Ors. (1995 (4) SCC 459), it was observed that the circumstance of deprivation of natural heirs should not raise any suspicion because the whole idea behind execution of the Will is to interfere with the normal line of succession and so, natural heirs would be debarred in every case of Will. Of course, it may be that in some cases they are fully debarred and in some cases partly.

Now, we shall deal with the scope of Section 208. The object of Part VII of the Act is to protect the property appertaining to large estates in case of a dispute as to succession. This Part in some respect stands in a similar position to Section 145 of the Code of Criminal Procedure, 1973 (in short the 'Code') with respect to certain specified properties, where its scope is large in as much as it embraces all properties movable and immovable and once for all it settles the right to hold possession of the property summarily directing the order disputants to seek their remedy in proper Court. (See Biso Ram v. Emperor (66 Ind. Cases 76). A person aggrieved by an order passed in a summary proceeding under Part VII, should seek remedy by a suit and not by an application for revision. This remedy is preserved by this Section. (See Gouri Shankar v. Debi Prasad (AIR 1929 Nag. 317). The suit should be a suit for possession by establishment of title (See Bhoba Tarani v. Profulla (140 Ind. Cas.379). Therefore, it should necessarily be by the person who need to establish his title to claim any such possession on the basis of title.

By analogy to Order XXI, Rule 63, it can be said that where an adverse order has been passed against the plaintiff, under Section 194 of the Act, the onus lies heavily on the plaintiff to show that he has a right which has been demised by the decision under Section 194 [See Dhirendra v. Indra Chandra (AIR 1939 Calcutta 571); Mahammad Ali v. Bismilla Begam (AIR 1930 P.C. 255); Sahadi v. Usman Ali (184 Ind.Cas. 113); Ahmad v. Partap (AIR 1939 Lahore 438); Md. Ismail v. Hanuman (AIR 1939 P.C. 290); Bavamma v. Papanna (AIR 1936 Madras 971). Coming to the scope and ambit of Sections 192, 193, 194 and 195 it is to be noted that they form a part of Chapter XIII dealing with the modalities to be adopted for protection of properties of the deceased being covered by Part VII. These proceedings are essentially interlocutory in character and necessarily summary depending upon the filing of an application for relief seeking the Court to determine who has a right to possession pending the final determination of the rights of the parties in a regular suit.

Section 192, inter alia, provides that a person who claims right by succession can make an application in respect of a property, movable or immovable, left behind a person who has died. Section 193 provides for an enquiry by the District Judge to whom such an application is made and Section 194 deals with the procedure to be adopted when an application is made under Section 192.

The Court before taking any steps in the matter under Section 194 is required to be satisfied of the existence of such strong ground of belief on both points i.e. the person in possession has no lawful title and that the person applying is likely to be materially prejudiced if left to the ordinary remedy of a regular suit. An order under Section 194 is in nature of summary decision and can only be passed if the conditions embodied in Section 193 are fulfilled. The expression "subject to a suit"

means subject to a suit contemplated under Section 208 i.e. a regular suit to establish title and obtain possession.

The effect of a summary decision even in an extreme case is not a bar to a regular suit. The underlying object of Section 208 and Part VII is particularly to protect the property appertaining to large estates in case of a dispute as to succession. As noted above, it has a great similarity to a proceeding under Section 145 of the Code with respect to certain specified properties where its scope is large in as much as it embraces all properties movable and immovable and once for all it settles the right to hold possession of the property summarily directing the other disputants to seek their remedy in proper Court by appropriate proceedings. A person aggrieved by an order passed by a summary proceeding under Part VII is required to seek remedy by a suit and not by an application for revision. This remedy is preserved by Section 208.

Section 209 makes the position further clear. It provides that the decision of a District Judge in a summary proceeding under Part VII shall have no other effect than that of settling the actual possession, but for this purpose it shall be final and shall not be subject to any appeal or review. But where instead of a summary disposal, there is in depth analysis of the evidence and conclusive conclusions/decisions arrived at it cannot be said that there has been a proper exercise of the power conferred while dealing with an application under Section 192 of the Act.

In the case at hand by several orders/judgments on earlier occasions/stages it has been specifically held that the genuiness of the Will has to be established in a regular suit. While dealing with an application under Section 192 of the Act, obviously there has to be some consideration of the genuineness of the Will. But it cannot be in a conclusive and detailed manner as has been done in this case. Further, when admittedly half of the share in the property indisputably belonged to appellant No.1, the District Judge while dealing with an application under Section 192 could not have either ventured to undertake even a summary decision of a disputed title of the respondent or even delivered possession of the whole property to original respondent no.1 in preference to the person whose title and claims are beyond controversy at least in respect of her half share. This itself shows that the consideration was not proper and the entire exercise wholly impermissible. The High Court dismissing the revision petition holding that the jurisdiction was discretionary, is to put it even in mild terms, a serious error and misdirection virtually placing a premium on grave illegality committed resulting in miscarriage of justice.

Discretion, in general, is the discernment of what is right and proper. It denotes knowledge and prudence, that discernment which enables a person to judge critically of what is correct and proper united with caution; nice discernment, and judgment directed by circumspection; deliberate judgment; soundness of judgment; a science or understanding to discern between falsity and truth, between wrong and right, between shadow and substance, between equity and colorable glosses and pretences, and not to do according to the will and private affections of persons. When it is said that something is to be done within the discretion of the authorities, that something is to be done

according to the rules of reason and justice, not according to private opinion; according to law and not humour. It is to be not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man, competent to the discharge of his office ought to confine himself (Per Lord Halsbury, L.C., in Sharp v. Wakefield, (1891) Appeal Cases 173). Also (See S.G. Jaisinghani v. Union of India and Ors. (AIR 1967 SC 1427).

The word "discretion" standing single and unsupported by circumstances signifies exercise of judgment, skill or wisdom as distinguished from folly, unthinking or haste; evidently therefore a discretion cannot be arbitrary but must be a result of judicial thinking. The word in itself implies vigilant circumspection and care;

therefore where the legislature concedes discretion it also imposes a heavy responsibility.

"The discretion of a Judge is the law of tyrants; it is always unknown. It is different in different men. It is casual, and depends upon constitution, temper, passion. In the best it is often times caprice; in the worst it is every vice, folly, and passion to which human nature is liable," said (Lord Camden, L.C.J., in Hindson and Kersey (1680) 8 How, St. Tr.57.) If a certain latitude or liberty accorded by statute or rules to a judge as distinguished from a ministerial or administrative official, in adjudicating on matters brought before him, it is judicial discretion.

It limits and regulates the exercise of the discretion, and prevents it from being wholly absolute, capricious, or exempt from review.

Such discretion is usually given on matters of procedure or punishment, or costs of administration rather than with reference to vested substantive rights. The matters which should regulate the exercise of discretion have been stated by eminent judges in somewhat different forms of words but with substantial identity. When a statute gives a judge a discretion, what is meant is a judicial discretion, regulated according to the known rules of law, and not the mere whim or caprice of the person to whom it is given on the assumption that he is discreet (Per Willes J. in Lee v Budge Railway Co., (1871) LR 6 CP 576, and in Morgan v. Morgan, 1869, LR 1 P & M 644).

The principles relating to exercise of discretion judicially do not appear to have been kept in view by the High Court in this case. The inevitable result, therefore, is that the order of the High Court refusing to interfere with the order of the District Judge needs to be vacated. The Curator should have been directed to deliver possession only to the appellants whose rights to half share is indisputable and beyond controversy, rather than keep out of possession such sharer.

While setting aside the orders of the Courts below, we direct the possession to be delivered forthwith to the appellants. We also find substance in the plea of the appellants that this being an ancestral property with lot of sentiments attached to it, if the possession is given to the appellants with clear conditions stipulated, that the mesne profits the claim relating to which is yet to be decided shall be deposited in Court awaiting final adjudication in the matter. It shall be for the respondents to establish the genuiness of the Will in the manner recognized by law in the appropriate proceeding, and thereafter seek for possession including the claim for any mesne profits in such proceedings. It shall not be construed that our interference in the matter is on the basis of any expression of opinion about merits of the original dispute i.e. relating to genuiness of the Will but made only for the limited purpose of setting aside the illegal orders of the Courts below as to right to possession. As and when, an appropriate suit is filed the competent Court shall be at liberty to determine the question of title to the disputed half share of the respondents on its own merits, on the basis of materials and evidence that may be let in during trial, uninfluenced by the observations made on such claims in the orders set aside, as well as those made in this order. The appeal is allowed in the aforesaid terms. Parties to bear their respective costs.