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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
MISC. PETITION NO.150 OF 2023
IN
TESTAMENTARY PETITION NO.1893 OF 2015**

1. Kalpana Nambiar,
aged about 64 years, Indian Inhabitant
Occu – Business, residing at
Kabra Mangalkripa, Flat No.401,
Near Venus Garden, Goregaon (W),
Mumbai – 400 104.
2. Krishnakumar Rajagopal Menon,
Aged about 58 years, Indian Inhabitant,
Occu – Professor, residing at B9-S,
2nd Floor, Delhi Police Society Apartments,
Mayur Vihar Phase – I, Delhi – 110 091.
3. Asha Sudarsh Menon,
Aged about 62 years, Indian Inhabitant,
Occu – Housewife, residing at 102,
Manu Apartments, Mayur Vihar – 1,
New Delhi – 110 091. ... Petitioners

versus

Dr. Jayashree Balchandran Kurup,
Aged about 66 years, Occu – Advocate,
residing at 204, Raval Tower, Sundarvan Complex,
Off Lokhandwala Road, Andheri (W),
Mumbai – 400 053. ... Respondent

Mr. Denzil D'Mello with Ms. Geeta Sonawane Rahate, for Petitioners.
Ms. Jayashree B. Kurup, Respondent in person.

CORAM: N.J.JAMADAR, J.

DATE : 16 JANUARY 2025

JUDGMENT :

1. This Petition is filed, inter alia, to remove the Respondent who has been appointed as an executrix, under the Will and last testament dated 21 April 2012, of Puthenveetil Rajagopal Menon (deceased), and allow the Petitioner Nos.1 and 3 to administer the property and credits of the deceased and also to direct the Respondent – executrix to produce proof of payments, give inspection and furnish copies of the documents, receipts and vouchers, referred to in the affidavit to file inventory and accounts, to deposit the original documents of title and also direct the Respondent – executrix to join the Petitioners in the sale of the property situated at Peramangalam Village, Thrissur District, Kerala (Ambadi House property) and restrain the Respondent, acting as executrix, from unilaterally selling, transferring, alienating or otherwise creating any third party rights in the said Ambadi House property.

2. The Petition arises in the backdrop of the following facts :

2.1 The deceased passed away on 29 July 2012. The deceased left behind the last Will and Testament dated 21 April 2012. The Respondent and Sudarsh Menon, husband of Petitioner No.3, were named as the executors in the said Will. Under the said Will, Ambadi House property has been bequeathed to all four children i.e. Petitioner Nos.1 to 3 and the Respondent. In Testamentary Petition No.1893 of 2015, filed by the Respondent as

executrix, this Court granted Probate on 13 April 2016.

3. The Petitioners assert, post grant of Probate, the Respondent has abused her position as executrix and committed various acts of commission and omission detrimental to the estate of the deceased and interest of the beneficiaries under the Will.

3.1 It is, inter alia, asserted that, after the grant of Probate, the money which was standing to the credit of the account of the deceased, being Account No.34832 maintained with Canara Bank, Fort Branch, Mumbai, was appropriated by the Respondent towards the fees and expenses in connection with the Probate proceedings. The Petitioners / beneficiaries were kept in the dark. The Respondent has claimed inflated expenses and appropriated the amount.

3.2 As regards the Ambadi House property, the Petitioners alleged, the Respondent has not furnished accounts of the proceeds of sale of the trees, which were cut, and the fruits, obtained from the trees standing in the said property.

3.3 All the four co-owners decided to sell Ambadi House property as none of them was in a position to purchase the share of the rest three. On 12 August 2016, a Memorandum of Understanding (MOU) was executed with Mr. Jose Konikkara to sell Ambadi House property for a consideration of Rs.10.02 Crores. A part consideration of Rs.3 Crores was paid by Mr. Jose Konikkara,

which has been distributed amongst the Petitioners and Respondent. Mr. Jose Konikkara, however, committed default in payment of the balance consideration, and, therefore, in accordance with the terms of the contract, as the time was essence, the agreement stood cancelled and part consideration stood forfeited.

3.4 Mr. Jose Konikkara addressed a legal notice on 1 November 2017, adverting to the fact that the Respondent had demanded a sum of Rs.1 Crore for herself, over and above the sale consideration, and Mr. Jose Konikkara was compelled to pay a sum of Rs.25 Lakhs as an advance towards the said additional Rs.1 Crore. Out of the said amount, a sum of Rs.8 Lakhs was paid to the husband of the Respondent and Rs.4 Lakhs was paid to the daughter of the Respondent. This fraudulent act of the Respondent renders her unfit to continue to act as an executrix. The Respondent has, thus, committed breach of trust and confidence, reposed in her by the executrix, and acted in violation of the terms and conditions of the Will, subject to which the Probate has been granted to her.

3.5 The Petitioners further assert that they also learnt that the Respondent and Mr. Jose Konikkara had entered into a separate MOU on 9 July 2017 for the sale of 83.5 cents of the said property, keeping the Petitioners totally in the dark. This act on the part of the Respondent in entering into MOU with Mr. Jose Konikkara in a clandestine manner is also an instance of fraud and

abuse of the position of the executor by the Respondent.

3.6 The Petitioners have referred to the proceedings initiated by Mr. Jose Konikkara for recovery of the part consideration and the stand taken by the Petitioners and Respondent therein. The actions of the executrix, according to the Petitioners, have put the other beneficiaries to severe monetary loss, mental trauma and jeopardised their rights in the property.

3.7 With reference to the inventory of accounts dated 18 May 2018 filed by the Respondent, the Petitioners have asserted that the said inventory of accounts is inconsistent with and materially different from the accounts given by the Respondent to the Petitioners. Reference is made to the entries under the head – Probate Expenses, wherein a sum of Rs.95,000/- has allegedly been expended by way of tips to expedite the process for issue of grant of Probate. That again, according to the Petitioners, shows the illegal manner in which the executrix has proceeded with the Probate proceedings and execution of the Will. The Respondent has submitted fictitious and inflated bills as the executor's alleged expenses. Affidavit of Inventory and accounts, filed by the Respondent, is false and fabricated.

3.8 On these, amongst other, grounds, the Petitioners assert, the Respondent is liable to be removed as the executrix. In addition, the Petitioners have sought allied reliefs, adverted to above.

4. The Respondent has resisted the Petition by filing an affidavit in reply.

At the outset, the Respondent contends that the Petition for her removal as the executrix is barred by law of limitation, and is, otherwise, not maintainable. The Petitioner No.3 in connivance with her husband Sudarsh Menon, the other executor, who had renounced the executorship, has filed this Petition with an oblique motive. The Petitioner No.2 is suffering from mental ailments and is under the control of Petitioner Nos.1 and 3.

4.1 On the merits of the matter, the substance of the resistance put forth by the Respondent is that, the Petitioners had put hindrances in obtaining the Probate. The deceased had full trust and confidence in the Respondent. The Respondent has diligently discharged her duties as the executrix. There was no corpus fund left with the Respondent for the administration of Ambadi House property, and, even for filing the Probate Petition. The Respondent has diligently administered the assets set out in the Will and Ambadi House property from August 2012 itself, from her own personal income as the Petitioners high handedly refused to contribute towards the expenses of the management of Ambadi House property.

4.2 The Respondent contends, all the assets of the deceased were proportionally distributed amongst the beneficiaries, except Ambadi House property. The Respondent has categorically denied the allegations of wrongful appropriation of the estate of the deceased and breach of trust. Despite the Petitioners refusing to contribute towards the expenses for

obtaining the Probate and administration of the estate of the deceased, the Respondent has utilized her professional fees and family income to administer the property and the said fact is reflected in the affidavit of inventory and accounts filed by the Respondent on 18 May 2018.

4.3 With regard to the allegations in the matter of sale of Ambadi House property, the Respondent contends that the latter had distributed the consideration parted with by Mr. Jose Konikkara in the year 2016 itself. The transaction failed as Mr. Konikkara could not pay the balance consideration. The Petitioners have withheld the amount of part consideration, which was forfeited in accordance with the terms of the MOU dated 12 August 2016. The Respondent had categorically informed the Petitioners about the expenses incurred by the Respondent in managing Ambadi House Property and the recovery of the said expenses from the sale proceeds of Ambadi House property. The Petitioners, however, refused to share the expenses even after the receipt of Rs.75 Lakhs each from Mr. Konikkara under the MOU dated 12 August 2016. The Respondent refers to the steps taken by her to manage Ambadi House property and the expenses incurred by her for the same. Even the funds of the family members of the Respondent were utilized for the said purpose.

4.4 As regards the payment of a sum of Rs.25 Lakhs by Mr. Konikkara, the Respondent categorically denied that the said amount was towards the

advance for a sum of Rs.1 Crore, which was allegedly demanded by the Respondent over and above the agreed consideration. It is the claim of the Respondent that after the Respondent apprised Mr. Konikkara about the expenses by her for the management of Ambadi House property and the Petitioner's refusal to contribute to the said expenses, Mr. Konikkara had voluntarily deposited with the Respondent a sum of Rs.25 lakhs on 14 September 2016 towards the expenses incurred by her and to be incurred in future till the final sale and transfer of the property from the balance consideration under the MOU dated 12 August 2016. Out of the said amount, the Respondent claimed, a sum of Rs.12 Lakhs was refunded to Mr. Konikkara and the balance amount of Rs.13 Lakhs was expended for the preservation and maintenance of Ambadi House property.

4.5 As regards the execution of MOU dated 9 July 2017 for the sale of 83.5 cents property to Mr. Konikkara, the Respondent contends that, in fact, the Petitioners played fraud on her by prevailing upon her to execute the said MOU as the Petitioners did not want to refund the advance amount of Rs.3.13 Crores received under the MOU dated 12 August 2016.

4.6 The Respondent has also denied the allegations of furnishing false and fabricated accounts. Hand-written accounts on which the Petitioners are placing reliance, according to the Respondent, were an own accord hurried overall compilation of expenses for the estate as well as for preparing the

Grant. The Respondent had never represented that the said hand-written accounts would be filed in Court. To take an undue advantage, the Petitioners have produced the same before the Court.

4.7 The Respondent contends, there is no cause for the instant Petition. The Petition has been filed with intent to usurp Ambadi House property and sell it by entering into a benami transaction.

5. An affidavit in rejoinder and sur-rejoinder thereto, followed.

6. I have heard Mr. D'Mello, learned Counsel for the Petitioners, and the Respondent in person, who is also a practicing Advocate, at some length. With their assistance, I have perused the material on record, including the documents which have been relied upon by them in support of their rival submissions.

SUBMISSIONS

7. Mr. D'Mello, learned Counsel for the Petitioners, would urge that the Respondent – Executrix has committed gross misconduct which dis-entitles her to continue to act as an Executrix. By her acts and conducts, the Respondent has jeopardised the estate of the deceased and interest of the beneficiaries therein. The surreptitious manner in which the Respondent attempted to unjustly enrich herself would have gone unnoticed but for the legal notice issued by Mr. Jose Konikkara to the Petitioners and Respondent. What further accentuates the situation is the receipt of payment in the name

of the husband and daughter of the Respondent. When the fraud came to light, the Respondent returned a sum of Rs.12,00,000/-. That, however, does not dilute the gravity of the fraudulent act, urged Mr. D'Mello.

8. As a second limb of the submission with regard to the transaction in respect of Ambadi house property, Mr. D'Mello submitted that the Respondent entered into another agreement with Mr. Jose Konikkara on 9 July, 2017 to sell 83.5 cents of land purportedly forming part of the Ambadi House property, behind the back of the Petitioners, for a consideration of Rs.3,51,00,000/-. This again shows the fraudulent manner in which the Respondent professed to discharge her duties as an Executrix. Mr. D'Mello urged that the explanation sought to be offered by the Respondent in respect of the aforesaid fraudulent acts, is unworthy of acceptance.

9. Mr. D'Mello made an endeavour to take the Court through the hand-written accounts furnished by the Respondent to the Petitioners, particularly the entries, wherein a substantial amount is shown to have been paid by way of tips to the officials of the Testamentary Department to obtain the Probate. Mr. D'Mello urged that the Respondent, instead of showing any remorse, has tried to justify the said act. The affidavit of inventory and accounts, submitted by the Respondent, according to Mr. D'Mello, is bereft of any sanctity as no documents, receipts and vouchers were annexed thereto, to substantiate the huge expenses. There is a clear breach of the mandate contained in Section

317 of the Indian Succession Act, submitted Mr. D'Mello.

10. Lastly, it was urged that for over 12 years since the demise of the testator, the beneficiaries under the Will are deprived of the benefits thereunder, due to the wrongful acts and conduct of the Respondent. Therefore, it is imperative that the Respondent is removed as an executrix and a fit and proper person is appointed to administer the estate left behind by the deceased.

11. A very strong reliance was placed by Mr. D'Mello on the judgment of this Court in the case of Mukesh Ramanlal Gokal and ors. vs. Ashok Jagjivan Gokal¹ and the decision of Madras High Court in the case of P. B. Srinivasan and another vs. T. P. S. Varadhan².

12. Per contra, Dr. Jayashree Kurup, the Respondent, would urge that, first and foremost, the instant petition is barred by law of limitation. The Petitioners, on their own showing, became aware of the alleged acts on the part of the Respondent in the year 2017 – 2018. However, the Petition came to be filed on 18 November, 2022. The petition is thus *ex facie* barred by limitation. Reliance was placed by Dr. Kurup on A decision of this Court in the cases of Adil Phiroz Makhania vs. Dilip Gordhandas Gondalia and anr.³ and a decision of Punjab and Haryana High Court in the case of Hari Narayan

1 Misc. Petition No.66/2013 dated 11 Oct. 2013.

2 1981 The Madras Law Journal Reports 158.

3 2014(5) Bom.C.R. 384.

(deceased) by L.Rs. vs. Subhash Chander and others⁴. In these cases, it was enunciated that Article 137 of the Limitation Act applies for a petition to revoke the Probate and such petition has to be filed within three years from the date of accrual of the right to seek revocation.

13. Secondly, Dr. Kurup would urge, there are bald allegations of fraud, misconduct and mismanagement. Especially the allegations of fraud are as vague as they could be. Nor there is any material to substantiate the allegations of fraud. In the absence of specific pleadings on the point of fraud, no enquiry is warranted. To buttress this submission, Dr. Kurup placed a very strong reliance on a Three-Judge Bench decision of the Supreme Court in the case of Svenska Handelsbanken vs. M/s. Indian Charge Chrome and others⁵ wherein the necessity of specific pleading was emphasized. It was further enunciated that a finding as to fraud cannot be based on suspicion and conjectures. Reliance was also placed on a decision of the Delhi High Court in the case of Padma Bewa vs. Krupasindhu Biswal and others⁶ wherein referring to the provisions contained in Order VI Rule 4 of the Code, it was ruled that a plea of fraud is to be raised in the pleadings by giving the particulars thereof as required under the said rule.

14. Thirdly, Dr. Kurup strenuously submitted that the wishes of the testator

4 AIR 1985 Punjab and Haryana 211.

5 (1994) 1 Supreme Court Cases 502.

6 AIR 1986 Orissa 97.

and the trust and confidence reposed by the testator in the executor, cannot be disregarded on the basis of bald and unsubstantiated allegations. Very strong grounds are required to divest the named executor of his authority to execute the Will. In the absence of convincing proof of malfeasance and misfeasance, a named executor cannot be removed from the office of executorship, for the mere asking.

15. To lend support to the aforesaid submission Dr. Kurup placed reliance on a decision of Delhi High Court in the case of Swapnil Gupta and anr. vs. Govt. of NCT of Delhi and ors.⁷, the judgments of this Court in the cases of Dr. Shubhada Mithilesh and another vs. Prabhakar Deolankar and others⁸ and Marteen Borchert and another vs. Arzan Khambatta and another⁹.

16. On the merits of the matter, the thrust of the submission of Dr. Kurup was that the Respondent has been administering the estate of the deceased since the demise of the deceased, even in the absence of any corpus fund. The Ambadi House property has been maintained by the Respondent by incurring expenses from her personal income and that of her family. The Petitioners have flatly refused to contribute to the expenses, despite having received a sum of Rs.75,00,000/- each, from Mr. Jose Konikkara. Therefore, the petition does not deserve to be entertained.

7 297 (2023) Delhi Law Times 770.

8 2018(2) Mh.L.J. 211.

9 2011(5) Mh.L.J. 682.

17. Refuting the allegations that the Respondent had surreptitiously demanded the sum of Rs.1 Crore for herself, over and above the agreed consideration, Dr. Kurup submitted that the amount of Rs.25,00,000/- paid by Mr. Jose Konikkara was part of the balance consideration and was voluntarily paid by Mr. Jose Konikkara to cover the personal expenses for the preservation and sale of the Ambadi House property, incurred by the respondent and her family members. There was no dishonest intention on the part of the Respondent. An explanation was also sought to be offered regarding the circumstances in which the Respondent had signed the purported MOU with Mr. Jose Konikkara on 9 July, 2017 in respect of 83.5 cents of land. The entire exercise, according to Dr. Kurup, was to advance the cause of benefit to the estate of the deceased. The aforesaid acts, according to Dr. Kurup, have no element of fraud and misapplication as alleged by the petitioners.

18. Dr. Kurup also made an earnest effort to persuade the Court to hold that the affidavit of inventory and accounts filed by the Respondent represents true and correct state of expenses, incurred by the Respondent, for administration of the estate for the years together. With an oblique motive the Petitioners are trying to take undue advantage of the hand-written notes of accounts, which were neither final nor complete and were hurriedly prepared and tendered to the petitioners. Therefore, the Respondent who has toiled for

over 10 years to protect the estate of the deceased at a huge physical and financial cost, cannot be removed on the basis of the baseless and motivated allegations.

CONSIDERATION :

19. The preliminary challenges to the Petition on the count of bar of limitation and absence of pleading on the allegation of fraud need not detain the Court. Reliance on the decisions in the cases of Adil Phiroz Makhania (supra), and Hari Narayan (supra), does not advance the cause of the submission on behalf of the Respondent as those decisions were rendered in the Petition for revocation of the Probate under Section 267 of the Indian Succession Act, 1925. The said principle cannot apply with equal force to an application for removal of the executor under Section 301 of the Indian Succession Act, as the testamentary Court, being the court of conscience cannot permit the executor to continue to act to the detriment of the estate and the beneficiaries, if such a case is made out, on the ground of bar of limitation. It would amount to putting a premium on disingenuity and mal-administration of the estate.

20. Indeed, there are allegations in the Petition that the acts and conduct attributed to the Respondent amount to fraud on the part of the Respondent. Articulation of the alleged misconduct or categorization thereof as fraud, may be questioned. However, it cannot be said that there are no specific

pleadings. In addition to the pleadings, the Petitioners have placed on record the documents from which the allegations stem. Thus, the reliance on the judgments in the cases of Svenska Handelsbanken (supra) and Padma Bewa (supra) does not seem to be well founded.

21. This propels me to the moot question of exercise of the power under Section 301 of the Indian Succession Act, 1925. It may be appropriate to appreciate the core controversy in the light of the statutory prescription. Section 301 of the Act, 1925 reads as under :

“Sec. 301 : Removal of executor or administrator and provision for successor

The High Court may, on application made to it, suspend, remove or discharge any private executor or administrator and provide for the succession of another person to the office of any' such executor or administrator who may cease to hold office, and the vesting in such successor of any property belonging to the estate.

22. Evidently, the power to remove a named Executor is discretionary in nature. Normally, where the Executor is named by the testator, the Court would be loath to remove him and appoint an Administrator *pendente lite*, or post grant of Probate, unless there is gross misconduct or mismanagement or waste of assets on the part of the Executor. The reason is not far to seek. In the very appointment of the Executor by the testator is the implicit confidence that the testator has reposed in the Executor. Strong grounds are, therefore, required to remove the named Executor and appoint an Administrator *pendente lite*. In the very nature of the things, the question of

removal of an Executor is rooted in thicket of facts. Where, in the facts of the given case, the Court upon consideration of all the relevant circumstances comes to the conclusion that the continuation of the Executor, named by the testator, is detrimental to either the estate of the testator, or the beneficiaries under the Will, on account of gross misconduct, mismanagement or usurpation of the estate by the Executor or gross mis-application of the estate, the Court may be justified in removing an Executor. It is trite that a Testamentary Court is a Court of conscience.

23. At this juncture, a reference may be made to the decision of this Court in Mukesh Gokal (Supra), on which a very strong reliance was placed by Mr. D'Mello. In the said case, the Court was confronted with the question, as to whether the Executors, who had set up rival claims in respect of the properties, which were described as ownership properties of the testator by those Executors themselves, can be allowed to continue to act as Executors and Trustees of the Will and Codicil of the testator. After an elaborate analysis and referring to the judicial pronouncements, the learned single Judge held that the Executors have to act in the interest, benefit and welfare of the beneficiaries/legatees under the Will and Codicil and cannot be permitted to have conflicting interest in the estate. Since no part of the estate was bequeathed in favour of the Executors by the deceased therein, the Executors have to comply with their duties and distribute the legacies amongst the

beneficiaries/legatees under the said Will and Codicil and cannot be permitted to set up a title adverse to the title of the deceased while carrying out their duties as Executors or Trustees. If the Court comes to the conclusion that actions of the Executor and Trustees would prevent the estate from being properly executed, the Executors and Trustees can be removed.

24. The following observations, in paragraph 41 to 44, deserve to be extracted. They read as under:

“41. Punjab & Haryana High Court, in the case of Tarachand Sharma Vs. Uma Aggarwal, has held that the court cannot shut its eyes to the conduct of the executor and allow executor to continue irrespective of his working detriment to the property bequeathed merely because complainant's conduct was not aboveboard. It is held that if the executor instead of discharging his duty as per the Will was abusing his position to divert the property of the testator for his personal benefit, such executor has to be removed by court. Even in that matter, the executor/trustee was pleading his own tenancy in the property bequeathed and was considered as sufficient ground for justifying the removal of such executor acting in dual capacity as executor and trustee. I am in agreement with the view taken by Punjab & Haryana High Court in the case of Tarachand Sharma (supra). Even in this case, it is found that respondent no. 1 and 2 are claiming rights in the property which is subject matter of dispute.

42. In my view, an executor who is not a beneficiary cannot be permitted to continue to act as executor and trustees under the Will and codicil and as per the provisions of the Indian Succession Act and when such executor and trustee himself claims some right in the property which is stated to be forming part of the estate

adverse to the title of the deceased and claim of the beneficiaries as is apparent from the schedule amended by respondent no.1 himself.

43. In my view, if beneficiaries have lost confidence in the executors, such executors or trustees cannot be allowed to foist themselves upon the beneficiaries/legatees to act on their behalf as executors and trustees. Respondent Nos. 1 and 2 are facing serious allegations made by the beneficiaries/legatees including allegations of fraud and adverse claim having been put up by the executors against the estate of the deceased. In my view, in this case there is clear conflict of duty and obligation of executors towards beneficiaries and rival claims put up by them against the beneficiaries in respect of the properties stated to be forming part of the estate. Punjab & Haryana High Court in the case of Smt. Shantidevi (supra), has held that the conduct of the executor must be for the welfare of the beneficiaries and to advance the aims and objects of the trust and if the conduct of the executor is not conducive to the welfare of the beneficiaries, then the power of removal must be exercised. I am in complete agreement with the principles laid down above by the Punjab & Haryana High Court in the said judgment. Punjab & Haryana High Court has considered the judgment in the case of Shrinivasan in which it was held that if the executor put forth right which is absolutely untenable and is in conflict with the rights of the beneficiaries, it is sufficient for the High Court to exercise powers vested in it under section 301 of the Indian Succession Act.

44. In my view, this court cannot go into the issue of title of the deceased in respect of any property which is stated to be forming part of the estate of the said deceased in testamentary proceedings. However, this court is entitled to ascertain whether such claim put up by the executor and trustee would be in conflict with the interest of the beneficiaries and legates and if so, whether

such executors and trustees can be allowed to act as executors and trustees. In my view, in such a situation, the executors have to first step down from their position as executors and trustees and then can make their rival claims against the beneficiary in respect of the property stated to be forming part of the estate. A person cannot be allowed to act as executor and trustee for the benefit of beneficiaries and at the same time to set up his own title which may be adverse to the title of the said deceased which would be in conflict with the welfare and interest of the beneficiaries at the same time."

25. In the case of Tara Chand Shrama V/s. Uma Agarwal¹⁰, which was relied upon by this Court in the case of Mukesh Gokal (Supra), a Division Bench of the Punjab and Haryana High Court enunciated the scope of inquiry in a Petition for removal of a named Executor. It was observed that real issue was, whether the Will of the testator was being given effect to and whether the Executor instead of discharging his duty as per the Will was abusing his position to divert the property of the testator for his personal benefit.

26. A reference can also be made to the decision of the Madhya Pradesh High Court in the case of Dr Kusum Kuree V/s. Dharam Singh.¹¹ After extracting the text of Section 301 of the Indian Succession Act, the Madhya Pradesh High Court spelt out the circumstances in which the power to remove an Executor can be resorted to, as under :

10 2020 AIR (P&H) 30

11 1986 ILR 414 (MP Series)

“It is pertinent to note that in the text of this section no specific grounds have been included enumerated for removal of any private executor or administrator. The executor so named in the Will, therefore, should be removed only when proper case in that behalf is made out for last wishes of the deceased as expressed in his Will nominating a person and an executor should be highly respected. While exercising power under section 301 of the Indian Succession Act, the Court must guard itself against any frivolous attempts for collateral purposes to remove the executor. If the Court finds that the person making an application has not come out with a clear title or has not come with clean hands, the application should be refused. However, if the Court finds on proper enquiry that the executor is acting contrary to the interest of the beneficiary, is not honestly and sincerely carrying out wishes of the deceased has started claiming title in the property adverse to the deceased or the legacy is withering away the property to the detriment of the interest of the legatee, it shall be justified in exercising its jurisdiction under this provision in removing the executor and succeeding him by another. In such cases main guide must be the welfare of the beneficiary. Want of honesty or want of proper capacity to exercise duties or want of reasonable fidelity may well justify an order under this section directing removal of the executor.”

(emphasis supplied)

27. In the case of Abha Dastane – Rao an Ors. V/s. Prabhakar Deolankar and Ors.¹², the learned Single Judge of this Court, after adverting to the decision in the case of Mukesh Gokal (Supra) observed that in the case of Mukesh Gokal (Supra) the Executor had set up in respect of some properties a title hostile to that of the estate and, the beneficiaries. Mukesh Gokal

¹² 2016 SCC Online Bom 110

(Supra) can hardly be an authority for any generalised proposition, nor can the ratio of the said decision be applied to every case brought under Section 301. Each such case will turn on its facts; for in each case, the conduct of the Executor will be examined, as will the truthfulness of the allegations against him.

28. In the case of Abha Dastane-Rao (Supra) this Court further enunciated that in an Application for removal of an Executor, the Court must, taking an overall view of the matter, assess whether a case has been made out showing that the Executor has obstructed the administration of the estate; has made claims adverse to that estate; is shown to be guilty of gross mismanagement and not minor lapses; and whether he has, in sum and substance, perverted the disposition of the estate in accordance with the terms of the Will. There must be clear evidence that the Executor's continuance as Executor is detrimental or injurious to the estate and will frustrate the Will, with the administration of which he is charged in law and by the testamentary writing. Minor lapses, errors of judgments or less than perfect handling of the matter is not sufficient reason to substitute the testator's expression of confidence. A proper case must be made out.

29. In the case of Swapnil Gupta (supra), on which Respondent placed reliance, the following statement of law as regards the exercise of power to remove the executor was made :

“35. It is trite law that the testator's wish regarding as to who will be the executor of his estate and carry out his Will must typically be respected, and an executor named by the testator should not be removed from his office unless, there is convincing proof that his continued appointment would be harmful to the estates of the deceased and frustrate the testator's Will. The named executor cannot be removed for a few isolated minor mistakes. This concept must be considered when determining whether the petitioners have provided enough evidence to have the executor removed from his/her role.

37. Therefore, courts will not readily remove an executor appointed in probate proceedings unless gross misconduct, gross mismanagement, abuse, or misuse of probate is demonstrated. There must be clear evidence that the executor's continued presence is detrimental or detrimental to the property and would frustrate the will which he is charged by law and the records of the will to administer. Minor errors, erroneous assessments, or inadequate handling of matters are not sufficient grounds to replace the testator's expression of confidence.”

30. In the case of Dr. Shubhada Mithilesh and another (supra), a learned Single Judge of this Court emphasised the fact that as a general rule, the Court will respect a person's appointment as an executor for it shows that the testator reposed in that person a special confidence. The Court must give full weight to that expression of confidence. Thus, the mere contention that the beneficiaries have lost confidence in the executor is not sufficient for removal of the executor and for appointment of administrator *pendente lite*. There must

be some material on record to substantiate such allegation of loss of confidence.

31. In the case of Marteen Borchert and another (supra), another learned Single Judge of this Court, observed that the case of removal of executor would come up when the executor is shown to be an inveterate non-worker by his inaction in administration. Such a case could be made out only after the passage of sufficient time to allow the executor, who is an appointee of the Testator/Testatrix, a decent time in which to perform his duties. In view of the fact that executors perform their duties and functions and discharge their responsibilities gratis no undue burden can be cast upon them by the Testator/Testatrix as also the Court or the beneficiaries. They are not enjoined to perform their functions at the whims and demands of the beneficiaries.

32. Keeping in view the aforesaid contours of the jurisdiction of the testamentary Court to remove /suspend or discharge the executor appointed by the testator (and in this case to whom the Probate has been granted), the material on record is required to be appreciated on the touchstone as to whether a case of gross mis-management, mis-application of the estate to the detriment of the beneficiaries, lack of honesty and sincerity in carrying out the wishes of the testator, and, especially aggrandizement at the cost of estate and the beneficiaries (in contradistinction to minor lapses, errors of judgment and want of diligence and expedition), is made out.

33. To begin with, few facts, which significantly bear upon the determination of this petition. First, the dispositions in the Will. Indubitably, the testator bequeathed the Ambadi House property to the petitioners and respondent, in equal shares. The testator further desired that, if none of the children buys out the other siblings, the property be sold and the sale proceeds be distributed equally. It is necessary to note that Krishnakumar Menon, Petitioner No.2, is suffering from mental ailments. The Will specifically adverts to the condition of Krushnakumar and the desire of the testator to ensure Krushnakumar's well being and comfort, after the demise of the testator. Second, by and large, the controversy revolves around the administration of Ambadi House property. Third, the parties are not at issue over the unanimous decision to sell Ambadi House property to Mr. Jose Konikkara and execution of a MOU on 12 August, 2016 to sell the said property for a consideration of Rs.10,02,00,000/- and receipt of part consideration of Rs.3 Crores thereunder. Fourth, it is a matter of record that the said transaction did not materialize and resulted in litigation between Mr. Jose Konikkara, on the one part, and the Petitioners and Respondent, on the other part. Fifth, the execution, as such, of second MOU between the Respondent and Mr. Jose Konikkara is not in dispute, though the circumstances in which the said document was executed, and the import thereof, are in contest. Sixth, the filing of the affidavit of inventory and account in Court and tendering of the hand-written notes of accounts by the

Respondent to the Petitioners is again not in dispute, though the parties are at issue over the effect and consequences thereof.

34. Though an endeavour was made on behalf of the Petitioners to urge multiple counts of alleged malfeasance and misfeasance on the part of the Respondent, in my considered view, the core controversy revolves around the acts of the Respondent in the matter of the sale of Ambadi House property. The facts with reference to entering into an agreement for sale with Mr. Jose Konikkara and the resultant failure of the said transaction, are already noted. The situation which emerged after the said transaction failed, assumes critical salience.

35. At this stage, reference to few document, becomes necessary. First, the notice dated 1 November 2017 addressed on behalf of Mr. Jose Konikkara to the Petitioner Nos.1 to 3, the Respondent and her husband and daughter. After referring to the agreement for sale and parting of part consideration, Mr. Jose Konikkara asserted, in the said notice, that the Respondent demanded Rs.1 Crore, over and above the sale consideration to her alone, as an additional amount, and Mr. Jose Konikkara was compelled to concede to the said demand and pay Rs.25 lakhs as advance by way of cheques drawn in favour of the Respondent (for the sum of Rs.13 Lakhs), her husband (for the sum of Rs.8 Lakhs) and daughter (for the sum of Rs.4 Lakhs). Mr. Jose Konikkara further asserted that it was learnt that the

Respondent had received the said amount by defrauding the rest of the co-venders.

36. It would be contextually relevant to note that there is no dispute about the fact that the aforesaid sum of Rs.25 Lakhs was paid and out of the said amount, upon the dispute having been raised by Mr. Jose Konikkara, the amount of Rs.12 Lakhs was refunded.

37. At this juncture, it may be necessary to immediately notice the response of the Respondent to the aforesaid allegations in the notice of Mr. Jose Konikkara, in the reply to the said notice :

“5. With reference to paragraph No.5, I deny the statement made therein and put your client, Konikkara Jose to strict proof thereof.

a. It was your client who had voluntarily made the payment of Rs.25,00,000/- (Twenty Five Lakhs only) to the party No.1 as part of the balance consideration under the MOU dated 12-8-2016. Parties No.2 to 4 are aware that the expenses incurred by the Executor has to be recovered from the sale proceeds of the property and that the amount of Rs.25,00,000/- received by party No.1 from your client, Konikkara Jose has been utilized for the same. Hence, your allegation against the Party No.1 is totally false and baseless.

b. Your statement about the realization of your client that party No.1 was defrauding the parties 2 to 4 is merely a figment of your imagination whatsoever and is indeed a magnificent tool derived by you to incite rivalry between my siblings and me and usurp our said property by illegal means. The pertinent question as to why you client maintained a silence from the period of 12-08-2016 till date and has instructed you to issue

this legal notice dated 1 November 2017. is indeed intriguing and unbelievable.”

38. Mr. Jose Konikkara reiterated the aforesaid allegations in the suit instituted by him for recovery of the part consideration (i.e. Rs.3.13 Crores) from the Petitioners and Respondent. In the written statement filed by the Respondent to the said suit, the Respondent contended that after obtaining the Probate and also with the consent from Defendant Nos.2 to 4 to recover expenses from the proceeds of the sale of the plaint schedule property, the amount of Rs.25,00,000/- was received by the Respondent as part of first installment of the balance consideration. The Plaintiff voluntarily gave 7 cheques aggregating to a sum of Rs.25 Lakhs to be encashed on the dates pre-determined by the Plaintiff. Since the Respondent No.1 utilized the money from the account of her husband and sister, the Plaintiff had voluntarily paid the said amount towards the expenses of the executor and drawn cheques in favour of the Respondent, her husband and daughter. An amount of Rs.12 Lakhs was returned. The amount of Rs.13 Lakhs, retained by the Respondent, was towards the expenses incurred by the Respondent for the preservation of the plaint schedule property.

39. The aforesaid contentions constitute the substratum of the defence of the Respondent. Does it merit acceptance ?

40. It is imperative to note that the aforesaid factum of payment of Rs.25

Lakhs to the Respondent over and above the agreed consideration under the agreement for sale, came to light only after Mr. Jose Konikkara addressed a legal notice dated 1 November 2017. It is in the written statement filed in the suit, the Respondent made an endeavour to contend that the said amount was accepted with the consent of the Petitioners. The said contention is belied by the fact that, in the reply to the legal notice, the Petitioner No.1 had already categorically taken a stand that she was unaware of such transaction between the Respondent and Mr. Jose Konikkara and the said amount cannot be clubbed with the amount agreed to be paid under the agreement for sale.

41. Few circumstances are of material significance. First, it is the case of the Respondent that she had incurred the expenses for the preservation and sale of the property and the Petitioners declined to contribute, and, therefore, she had taken initial part consideration of Rs.1 Crore in her name to meet the executor's expenses. If that was the case, the expenses could have been deducted from the amount which was distributed to the Petitioners out of the initial advance of Rs.1 Crore. Thus, there could have been no occasion to accept a further sum of Rs.25 lakhs from Mr. Jose Konikkara.

42. Second, if the payment was to be made towards the balance consideration, Mr. Jose Konikkara could not have been made to draw the cheques in the names of the husband and daughter of the Respondent. That brings in an element of appropriation of the property, out of the estate of the

deceased, against the wishes of the testator. Therefore, the fact that the allegations of demand of an additional amount of Rs.1 Crore and payment of Rs.25 Lakhs came from a party, who is neither the beneficiary under the Will nor has a particular axe to grind against the Respondent alone, cannot be lost sight of.

43. Third, the non-disclosure of the receipt of the said consideration over and above the part agreed consideration received by the vendors together, till the said payment came to light due to the legal notice by Mr. Konikkara, works out the retribution of the claim of the Respondent that the said amount was accepted as an advance towards the balance consideration with the consent fo the co-vendors.

44. The aforesaid factors, if considered cumulatively, lend credence to the allegation of Mr. Jose Konikkara that the Respondent demanded a sum fo Rs.1 Crore over and above the agreed consideration and he was required to pay Rs.25 Lakhs. Consequently, these factors give heft to the submission of the Petitioners that the Respondent surreptitiously attempted to unjustly enrich herself at the cost of the estate and the beneficiaries.

45. The execution of the second MOU to sell 83.5 cents of land for an additional consideration of Rs.3,51,00,000/- between Mr. Jose Konikkara and the Respondent alone, in the circumstances of the case, cannot be said to be innocuous or immaterial. Already the co-owners had entered into an

agreement for sale. It is not the case that the property which was agreed to be sold under the second MOU did not form part and parcel of the estate of the deceased, or for that matter, Ambadi House property. The Respondent made an endeavour to explain away the situation by asserting that there was controversy regarding the description of the area of the property. An effort was also made to contend that the Respondent was made to sign the said MOU by Mr. Jose Konikkara without the Respondent fully appreciating the contents and import of the said MOU.

46. The status and position of the Respondent bears upon the acceptability of the aforesaid explanation. The Respondent is a legal professional. It defies comprehension that, the Respondent, who is a practicing Advocate, could have readily executed the document without fully understanding the contents and import of the said document. In fact, the explanation sought to be offered by the Respondent regarding the acceptance of the sum of Rs.25 Lakhs from Mr. Jose Konikkara is also required to be appreciated through this prism of the situation in life of the Respondent. I am, therefore, afraid to unreservedly accept the explanation sought to be offered by the Respondent.

47. The conspectus of aforesaid consideration is that there is overwhelming material to demonstrate that the Respondent attempted to abuse her position as an executrix and accepted money from the then prospective purchaser, over and above the agreed consideration surreptitiously. In the totality of the

circumstances, especially having regard to the position of the Respondent, the said act cannot be brushed aside as a minor lapse or momentary aberration or inadvertent indiscretion. The said act on the part of the Respondent borders on unjust enrichment at the expense of the estate and the beneficiaries. In my considered view, by the said acts, the Respondent has forfeited the privilege and authority to continue to act as an executrix.

48. Mr. D'Mello, learned Counsel for the Petitioners laid emphasis on the non-compliance of the provisions contained in Section 317 of the Indian Succession Act, in as much as, true and faithful accounts of the receipts and expenses were not furnished. Special emphasis was laid on the hand-written note of expenses shared by the Respondent (Exhibit S – pages 262-273). Mr. D'Mello urged that, under the head of Probate expenses, significant amount is shown to have been expended for the department officials' tip. The amount is said to have been paid by way of tip even to the Registrar.

49. As noted above, the Respondent joined the issue by asserting that the said hand written notes were hurriedly prepared and incomplete. Explanations were sought to be offered regarding the entries, which indicate that money was paid by way of tip.

50. It may not be expedient to delve deep into this aspect of the matter. Suffice to note that the hand-written note of expenses, especially with regard to the Probate expenses, leaves much to be explained. What exacerbates

the situation is the endeavour on the part of the Respondent to justify the said expenses. In the affidavit in reply, the Respondent contended :

“It is common knowledge that no Department in the High Court or any other Courts in India function without clerical staff and the tips referred to are the handouts given to the clerks concerned.”

51. Though, the aforesaid factor may not have decisive significance on the exercise of jurisdiction under Section 301 of the Act, 1925, yet it reflects upon the manner in which the Respondent discharged her duties as an executrix.

52. Another material consideration is the state of affairs with regard to the administration of the estate of the testator. A factor which is of immense importance is the situation in life of the Petitioner No.2. As noted above, the testator was deeply concerned about the Petitioner No.2 on account of the mental health issues Petitioner No.2 was suffering from. Even after a decade of the demise of the testator, a valuable property remains unadministered. Litigation has ensued. The amount which could have been utilized for the treatment and welfare of the Petitioner No.2 remains blocked in the form of the property which is embroiled in litigation. The situation brought about by the precarious health condition of the Petitioner No.2 is such that it cannot brook delay. In the circumstances of the case, all the four beneficiaries are unlikely to agree upon the issues, which are necessary to facilitate the sale of the property. A huge trust deficit has developed; primarily on account of the

aforesaid conduct of the Respondent. In such a situation, in my considered view, it is necessary to appoint an administrator, who is not one of the beneficiaries, to take steps to sell Ambadi House Property and distribute the sale proceeds.

53. From the aforesaid standpoint, the submission of the Respondent that the wishes of the testator must weigh with the Court in not removing the executor appointed by the testator, does not merit countenance.

54. I am, therefore, inclined to partly allow the Petition, remove the Respondent as an executrix and appoint the Court Receiver, High Court, Bombay, as an administrator as only Ambadi House property remains unadministered.

55. Hence, the following order :

ORDER

- (i) The Petition stands partly allowed.
- (ii) The Respondent stands removed as Executrix of the Will and Testament dated 21 April 2012.
- (iii) The Court Receiver, High Court, Bombay is appointed to act as the Administrator of the estate of the deceased.
- (iv) The Court Receiver, High Court, Bombay, is empowered to sell the property situated at Peramangalam Village, Thrissur District, Kerala (Ambadi House property).

(v) The Court Receiver may file an appropriate Report seeking directions for the sale of Ambadi House Property.

(vi) The Respondent shall deposit the original documents of title in respect of Ambadi House Property with the Court Receiver, within a period of four weeks.

(vii) The Court Receiver is authorized to appoint a care taker for the said Ambadi House Property and seek assistance of professionals, valuers and brokers for the sale of the property.

(viii) The Petitioner Nos.1 and 3 shall deposit a sum of Rs.50,000/- each with the Court Receiver towards the initial charges and expenses of the Court Receiver.

(ix) The Respondent shall exhibit final accounts of the estate of the deceased showing the assets which have come to her hands and the manner in which they have been applied or disposed of till date, within a period of four weeks.

(x) The Misc. Petition stands disposed.

(N.J.JAMADAR, J.)

At this stage, the respondent in person seeks stay to the execution and operation of this order.

As the respondent has been acting as executrix, since the demise of the testator, and this Court has already restrained the parties from acting upon the Probate, the execution and operation of this order stands stayed for a period of six weeks.

However, the respondent shall not act upon the Probate.

(N.J.JAMADAR, J.)