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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.56 OF 2017
IN
MISC. PETITION NO.38 OF 2011
WITH
NOTICE OF MOTION NO.519 OF 2017
IN
APPEAL NO.56 OF 2017
IN
MISC. PETITION NO.38 OF 2011
WITH
NOTICE OF MOTION NO.1581 OF 2017
IN
APPEAL NO.56 OF 2017
IN
MISC. PETITION NO.38 OF 2011

1] Smt. Radhika Bhargava,	)
a Hindu, Indian Inhabitant of U.P.,	)
residing at 3/11, Vishnupuri,	)
Kanpur – 208 002, U.P.	)
	)
2] Vikram Krishna Srivastava,	)
a Hindu, Indian Inhabitant of New	)
Delhi, residing at C-262, Defence	)
Colony, New Delhi – 110 024	)
	)
3] Vir Krishna Srivastava,	)
a Hindu, Indian Inhabitant of New	)
Delhi, at C-390, Defence Colony,	)
New Delhi – 110 024	)..... Appellants/
	(Org. Petitioners)

V/s

1] Dr. Arjun Sahagal,	)
a Hindu, Inhabitant of U.K.,	)
residing at 31 Riding, Kenton	)

Newcastle Upon Tyne NE3 4LQ,)
 United Kingdom.)

2] Mr. Bharat Sahgal,)
 a Hindu, Inhabitant of U.S.A.,)
 residing at 455 East 51st Street,)
 Apartment No.4F, New York 10022,)
 United States of America.)

[Respondent Nos. 2 and 3 for self)
 and in their capacity as legal heirs)
 of the late Narrottam Sahgal [Org.)
 Respondent No.3 to the Misc. Petition])

3] Mr. Vijay Krishna Srivastava,)
 a Hindu, Indian Inhabitant of New)
 Delhi, residing at Villa Vikunya,)
 Mehrauli, Gurgaon Road, Sultanpur,)
 New Delhi – 110 030.)

4] Ms. Raj Moni Srivastava,)
 a Hindu Indian Inhabitant of)
 New Delhi, residing at B-10-A, West)
 End, New Delhi.)

5] Ms. Hemlata Srivastava,)
 a Hindu Indian Inhabitant of New Delhi,)
 residing at C/o. Mr. Vikram Srivastava,)
 C-381, Defence Colony, New Delhi)
 - 110 024.)

6] Smt. Mrinalini Rao,)
 a Hindu Indian Inhabitant of New Delhi,)
 residing at B-59, Paschimi Marg,)
 Vasant Vihar, New Delhi – 110057.)

- 7] **Mr. Siddharth Narain,**)
a Hindu Indian Inhabitant of U.P.,)
residing at “The Sactuary” 4/276 (2))
Ranighat Road, Kanpur, U.P. - 208 002)
)
8] **Dr. Zareer Masani,**)
a Hindu Inhabitant of U.K.,)
residing at 18 Tytherton Road,)
London N19 4, U.K.)Respondents.

Ms. Rajni Iyer, Senior Counsel alongwith Mr. Gaurang R. Mehta and
Ms. Ruta Shah, Advocates for the Appellants/Applicants.

Mr. Navroz Seervai, Senior Counsel alongwith Mr. Zal Andhyarujina,
Ms. Nupur Jalan, Ms. Sheetal Shah i/b M/s Mehta & Girdharlal,
Advocates for Respondent Nos. 1 and 2.

**CORAM: B. R. GAVAI &
RIYAZ I. CHAGLA, JJ.**

**Judgment reserved on 21st December, 2018
Judgment pronounced on 11th January, 2019**

ORAL JUDGMENT: (Per B.R. Gavai, J.)

1] An important question, 'as to whether the application under
Section 301 of the Indian Succession Act, 1925 (hereinafter referred
to as “the Succession Act”) can be made only by a beneficiary or
legatee, who accepts the Will and, as to whether it cannot be made by
a person who seeks to dislodge the Will or contest the application for
probate or Letters of Administration with Will annexed', arises for

consideration in the present appeal.

2] The bare necessary facts for deciding the present appeal are as under:-

3] One Malati Srivastava (hereinafter referred to as “the deceased”) expired on 31/08/2005, leaving behind her 9 nephews/nieces being sons and daughters of her predeceased brothers/sisters and her sisters in law (being the widows of her predeceased brothers) as her only legal heirs. The deceased had left behind, as part of her estate, various immovable properties as well as jewellery and shares etc. One of the most valuable assets left behind by the deceased was a Flat being Flat No. 303, Belmont, Napean Sea Road, Mumbai alongwith Garage (Hereinafter referred to as “the Belmont Flat”)

4] Respondent Nos. 1 and 2 herein filed Probate Petition No. 223 of 2006 for propounding the Will dated 30/09/2001 of the deceased. Under the said Will, Respondent Nos. 1 and 2 were appointed as Executors and Trustees of the Estate of the deceased. Similarly, by the said Will, the Belmont Flat has been bequeathed to Respondent

Nos. 1 and 2. The Will did not make any provision for remainder estates of the deceased, which therefore, according to the Appellants, devolved as of intestacy.

5] In the proceedings of the Probate Petition, Appellants and Respondent No.5 lodged Caveats and filed Affidavits in support thereof, for opposing the grant of Probate of the Will. As such, the Probate Petition came to be converted into Testamentary Suit No. 9 of 2007. According to the Appellants, Respondent Nos. 1 and 2 were not properly administering the estate of the deceased. In a nutshell, it was their case that though certain details were sought from the said Respondents, they were not responding. As such, the Appellants were required to file Misc. Petition No.38 of 2011 under the provisions of Section 301 of the Succession Act. Certain directions came to be issued by the learned Single Judge in the said proceedings. However, it appears that, a preliminary objection to the tenability of the said proceedings under Section 301 came to be raised by Respondent Nos. 1 and 2, on the ground that the application under Section 301 can be made only by a beneficiary or legatee who accepts the Will and it cannot be made by a person who seeks to dislodge the Will or contest

the application for Probate or Letters of Administration with Will annexed.

6] The learned Single Judge framed the following two questions in para 9 of his Judgment, which read as under:-

“9. This raises two questions. First, whether in a Petition seeking probate, a person who has filed a Caveat, as the Applicants have, *i.e.*, one who disputes and challenges the Will, can at all seek the removal of a probate Petitioner as an executor? Second, whether in a probate Petition, a Caveator can in addition seek to supplant the named executor by some other person as an administrator and seek a variety of interim reliefs including the appointment of a Receiver and various injunctions?”

7] After considering the rival submissions and various authorities cited at the Bar, the learned Single Judge concluded in para 26 of his Judgment as under:-

“26. The following propositions may be culled

from the discussion:

(a) An application under Section 301 of the Succession Act can only be made to the High Court.

(b) Such an application can be brought at any time even during the pendency of a probate petition or one for Letters of Administration with or without Will annexed. The grant of probate or Letters of Administration is not a condition precedent to the maintainability of such an application.

(c) Where a Will is propounded and an application for removal of an executor is made under Section 301, that application can only be made by a beneficiary or legatee who accepts the Will. It cannot be made by a person who seeks to dislodge the Will or contests the application for probate or Letters of Administration with Will Annexed. The application for removal posits the acceptance of a Will.

(d) Any application for removal of an executor must necessarily be read as one for appointment of a successor in place and stead of that executor. There can be no application for removal of an executor or administrator under Section 301 without the appointment of a Successor to take his place.”

After making the above observations, the learned Single Judge held the Misc. Petition to be misconceived and not maintainable. Being aggrieved thereby, the present appeal.

8] Ms. Iyer, the learned Senior Counsel appearing on behalf of the Appellants, submits that the learned Single Judge has erred in holding that the said Misc. Petition was miscellaneous proceedings in Probate Petition, whereas, as a matter of fact, the said proceedings were independent proceedings under Section 301 and not the miscellaneous proceedings in Probate Petition. She submits that, though, initially, inadvertently the said Misc. Petition came to be filed as proceedings in Testamentary Suit No.9 of 2007 in Testamentary Petition No.223 of 2006, the Appellants had specifically taken out

Chamber Summons No. 3 of 2012 for amendment to the Misc. Petition for correcting the obvious error. She submits that the learned Single Judge vide order dated 30/07/2013, after contest, had allowed the Appellants to amend the Misc. Petition. She submits that, accordingly, in view of the order passed in the said Chamber Summons No. 3 of 2012, the cause title of Misc. Petition came to be amended, thereby making it an independent proceedings. She therefore submits that the learned Single Judge has erred in holding that the Misc. Petition was a proceeding in Testamentary Petition.

9] She further submits that, finding of the learned Single Judge that the application under Section 301 can be made only by a beneficiary or legatee who accepts the Will and cannot be made by any person who challenges the Will, is also not sustainable. She submits that a bare reading of Section 301 would reveal that no such restriction is provided under the statute. She submits that if the finding, as recorded by the learned Single Judge, is to be accepted then the same would amount to permitting judicial legislation. She submits that when the language of statute is clear, the Court, by

judicial interpretation, cannot supply the words in the provision. She relies in this respect on the judgment of Constitution Bench of the Hon'ble Apex Court in the case of *Union of India and another vs. Hansoli Devi and others*¹

10] The learned Senior Counsel for the Appellants, further submits that the finding of the learned Single Judge that the Appellants cannot be permitted to approbate and reprobate, is also not correct in law. She submits that Equitable doctrine of election cannot be imported into the proceedings under the Succession Act. She relies on the following judgments in this regard:-

(i) *Sailabala Dasi Vs. Baidya Nath Rakshit & Anr*²

(ii) *Samir Chandra Vs. Bibhas Chandra Das*³ (para 17)

(iii) *Chiranjilal Goenka Vs. Jasjit Singh*⁴ (paras 15 and 17)

She submits that the remedy, opposing the grant of probate, is independent than the remedy which is provided under Section 301 of the Succession Act. She submits that, if a person, who is entitled to

1 AIR 2002 SC 3240

2 Vol. XXXII Cal WN 729

3 2010 (5) Mh.L.J. 584

4 1993(2) SCC 507

some interest in the estate of the deceased, finds that the executor is mis-administering the estate or acting in a dishonest and malafide manner, then the only remedy to such a person is to file proceedings under Section 301. She therefore submits that merely because such a beneficiary has also opposed the grant of probate, cannot be a ground to stop him from filing an application under Section 301.

11] The learned Senior Counsel further submits that the learned Single Judge, subsequently, in Notice of Motion No.74 of 2015 in Testamentary Suit No. 14 of 2004 in Testamentary Petition No.80 of 2004 (Vasant Narayan Sardal vs. Ashita Tham & Ors), vide order dated 03/05/2018, has himself held that the Court was not powerless under Section 301 and entitled to invoke the powers under Section 301 suo motu for removal of the executor and appointed Officer of this Court in place of the Plaintiff in Testamentary Suit and allowed to convert the Suit to one for Letters of Administration with Will annexed. The learned Senior Counsel submits that the same course of action could have been followed by the learned Single Judge, in the present matter also.

12] Mr. Andhyarujina, the learned Counsel appearing on behalf of Respondent Nos. 1 and 2, submits that clause (c) of Section 2 read with Section 222, would reveal that the executor is a person who has been appointed under the Will for execution of the Will and the probate can be granted only to the executor appointed by the Will. The learned Counsel submits that right to executorship flows through the Will and therefore if the executor appointed under the Will is to be removed, such can be done only by a person who has accepted the Will. He submits that the learned Single Judge has therefore rightly considered the issue. He submits that the learned Single Judge of this Court in the case of *In re : Rustam Ardeshir Garat, Petitioner*⁵ has held that a person not named as executor, cannot be appointed to assist the executor. Mr. Andhyarujina further submitted that the appropriate remedy for the Appellants would be to move the Court under section 247 of the said Act for appointment of Administrator *pendente lite* administration suit which is already filed by the appellants.

5 AIR 1990 Bombay 111

13] For appreciating the rival submissions, we will have to refer to the provisions of Section 301, which read thus:-

“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.”

Perusal of Section 301 would reveal that the High Court may, on application made to it, suspend, remove or discharge any private executor or administrator. It also provides, that the High Court shall also provide for the succession of another person to the office of any such executor or administrator who may cease to hold the Office and vest in such successor any property belonging to the estate. It could thus be seen that the plain reading of Section 301 does not put any restriction with regard to the person or class of persons who are eligible or ineligible to make an application before the Court.

14] It is now more than well settled position of law that the words of a statute must be understood in their natural, ordinary or popular sense and construed according to their grammatical meaning unless such construction leads to some absurdity or unless there is something in the context or in the object of the statute to the contrary. It is also equally well settled that when the words of the statute are clear, plain and unambiguous, then the courts are bound to give effect to that meaning irrespective of the consequences. It will be relevant to refer to the following observations of their Lordships of the Apex Court in the case of *Union of India through Director of Income Tax vs Tata Chemicals Limited*⁶.

“22. It is cardinal principle of interpretation of statutes that the words of a statute must be understood in their natural, ordinary or popular sense and constructed according to their grammatical meaning unless such construction leads to some absurdity or unless there is something in the context or in the object of the statute to the contrary. The golden rule is that the words of a statute must prima facie be given their ordinary meaning. It is yet another rule of construction that when the words of a statute are clear, plain and unambiguous, then the courts

⁶ (2014) 6 SCC 335

are bound to give effect to that meaning irrespective of the consequences. It is said that the words themselves best declare the intention of the law giver. The courts have adhered to the principle that efforts should be made to give meaning to each and every words used by the legislature and it is not a sound principle of construction to brush aside words in a statute as being inapposite surpluses, if they can have proper application in circumstances conceivable within the contemplation of the statute. (See *Gurudevadatta VKSS Maryadit vs. State of Maharashtra* [(2001) 4 SCC 534]).”

15] It will be relevant to refer to the following observations of the Constitution Bench in the case of *Union of India and another vs. Hansoli Devi and others* (cited supra), which read thus:-

“It is a cardinal principle of construction of statute that when language of the statute is plain and unambiguous, then the Court must give effect to the words used in the statute and it would not be open to the Courts to adopt a hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. It is no doubt true that if on going through the plain meaning of the language of statute, it leads to the anomalies, injustices and absurdities, then

the Court may look into the purpose for which the statute has been brought and would try to give a meaning which would adhere to the purpose of the statute.”(Para 4).

It could thus be seen that it is the cardinal principle of construction of statute that when language of the statute is plain and unambiguous, the Court is required to give effect to the words used in the statute and it will not be open to the Court to adopt hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. Only if, on going through the plain meaning of the language of the statute, it is found that it leads to anomalies, injustices and absurdities, the Court may look in to the purpose for which the statute has been brought and would try to give meaning, which would adhere to the purpose of the statute.

16] It is also equally well settled that casus omissus is not to be readily inferred. It will be relevant to refer to recent judgment of their Lordships of the Hon'ble Apex Court in the case of *Singareni Collieries Company Limited vs. Vemuganti Ramakrishan Rao and*

*Others*⁷ wherein their Lordships have discussed the earlier judgments on casus omissus. In the said judgment, their Lordships have observed thus:-

“21. The legal position prevalent in this country is not much different from the law as stated in England. This Court has in several decisions held that casus omissus cannot be supplied except in the case of clear necessity and when reason for it is found within the four corners of the statute itself. The doctrine was first discussed by V.D. Tulzapurkar, J. in *CIT v. National Taj Traders* [(1980) 1 SCC 370 : 1980 SCC (Tax) 124]. Interpretative assistance was taken by this Court from *Maxwell on Interpretation of Statutes* (12th Edn.), pp. 33 and 47. The Court said: (SCC pp. 375-76, para 10)

“10. Two principles of construction—one relating to casus omissus and the other in regard to reading the statute as a whole—appear to be well settled. In regard to the former the following statement of law appears in *Maxwell on Interpretation of Statutes* (12th Edn.) at p. 33:

Omissions not to be inferred.—It is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express. Lord Morsey said: ‘It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do’. ‘We are not entitled’, said Lord Loreburn L.C., ‘to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself.’ A case not provided for in a statute is not to be dealt with merely because there seems no good

⁷ (2013) 8 SCC 789

reason why it should have been omitted, and the omission in consequence to have been unintentional.

In regard to the latter principle the following statement of law appears in Maxwell at p. 47:

A statute is to be read as a whole.—It was resolved in *Lincoln College case* [(1595) 3 Co Rep 58 b : 76 ER 764] that the good expositor of an Act of Parliament should ‘make construction on all the parts together, and not of one part only by itself.’ Every clause of a statute is to ‘be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute’. (Per Lord Davey in *Canada Sugar Refining Co. Ltd. v. R.* [1898 AC 735 (PC)])

In other words, under the first principle a casus omissus cannot be supplied by the court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the legislature. ‘An intention to produce an unreasonable result’, said Danckwerts, L.J., in *Artemiou v. Procopiou* [(1966) 1 QB 878 : (1965) 3 WLR 1011 : (1965) 3 All ER 539 (CA)] ‘is not to be imputed to a statute if there is some other construction available.’ Where to apply words literally would ‘defeat the obvious intention of the legislation and produce a wholly unreasonable result’ we must ‘do some violence to the words’ and so achieve that obvious intention and produce a rational construction. [Per Lord Reid in *Luke v. IRC* [1963 AC 557 :

(1963) 2 WLR 559 : (1963) 1 All ER 655 (HL)] where at AC p. 577 (All ER p. 664I) he also observed: ‘This is not a new problem, though our standard of drafting is such that it rarely emerges’.] In the light of these principles we will have to construe sub-section (2)(b) with reference to the context and other clauses of Section 33-B.”

22. Arijit Pasayat, J. has verbatim relied upon the above in *Padma Sundara Rao v. State of T.N.* [(2002) 3 SCC 533] , *Union of India v. Dharamendra Textile Processors* [(2008) 13 SCC 369] , *Nagar Palika Nigam v. Krishi Upaj Mandi Samiti* [(2008) 12 SCC 364] , *Sangeeta Singh v. Union of India* [(2005) 7 SCC 484], *State of Kerala v. P.V. Neelakandan Nair* [(2005) 5 SCC 561 : 2005 SCC (L&S) 698] , *Union of India v. Priyanka Sharan* [(2008) 9 SCC 15] , *Maulavi Hussein Haji Abraham Umarjiv. State of Gujarat* [(2004) 6 SCC 672 : 2004 SCC (Cri) 1815 : 2004 Cri LJ 3860] , *Unique Butyle Tube Industries (P) Ltd. v. U.P. Financial Corpn.* [(2003) 2 SCC 455] , *Union of India v. Rajiv Kumar* [(2003) 6 SCC 516 : 2003 SCC (L&S) 928] , *Shiv Shakti Coop. Housing Society v. Swaraj Developers* [(2003) 6 SCC 659] , *Prakash Nath Khanna v. CIT* [(2004) 9 SCC 686], *State of Jharkhand v. Govind Singh* [(2005) 10 SCC 437 : 2005 SCC (Cri) 1570] and *Trutuf Safety Glass Industries v. CST* [(2007) 7 SCC 242] .

23. In *Padma Sundara Rao* [(2002) 3 SCC 533] this Court examined whether the doctrine of casus omissus could be invoked while interpreting Section 6(1) of the Land Acquisition Act so as to provide for exclusion of time taken for service of copy of the order upon the Collector. Repelling the contention this Court said: (SCC p. 542, paras 12 & 14)

“12..... the court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. The first and primary rule of construction is that the intention of the legislation must be found in the words used by the

legislature itself. The question is not what may be supposed and has been intended but what has been said.

14. While interpreting a provision the court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary.”

24. There is in the case at hand no ambiguity nor do we see any apparent omission in Section 11-A to justify application of the doctrine of casus omissus and by that route rewrite Section 11-A providing for exclusion of time taken for obtaining a copy of the order which exclusion is not currently provided by the said provision. The omission of a provision under Section 11-A analogous to the proviso under Section 28-A is obviously not unintended or inadvertent which is the very essence of the doctrine of casus omissus. We, therefore, have no hesitation in rejecting the contention urged by Mr Altaf Ahmad.”

17] It is equally well settled that for the purpose of providing casus omissus, all the parts of a statute or section must be construed together and every clause of a section should be construed with a reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. The reasons for the same are required to be found in the four corners of the statute itself and it can be done only in the case of clear necessity. It could thus be seen that

it is more than well settled that the first principle of interpretation is that of plain and literal interpretation. Only when the provision is found to be ambiguous, it will be permissible for the Court to take recourse to the other principles of interpretation.

18] As discussed hereinabove, perusal of Section 301 would reveal that the said provision cannot be said to be ambiguous or one, leading to anomalies, injustices and absurdities. It will be relevant to note that Section 301 falls in Part IX of the Succession Act, which deals with Probate, Letters of Administration and Administration of Assets of Deceased. Perusal of Section 234 of the Succession Act shows that it deals with grant of administration where no executor, nor residuary legatee nor representative of the said legatee is available. It provides that in such cases, Letters of Administration could be granted to various persons including creditor. Section 301 also comes under the same part. Neither the learned Counsel for Respondent Nos. 1 and 2 have been in a position to point out nor could we notice any provision under the Succession Act, which could show that the legislative intent was to restrict the class of applicants

only to the persons who are legatees or beneficiaries of the Will who accepted the Will, nor could we find out any provision which would show that the legislative intent was to debar a person, who has challenged the probate, from making an application under Section 301.

19] We further find that the learned Single Judge has also erred in considering the Misc. Petition under Section 301 to be proceeding filed in Testamentary Petition. Firstly, it appears that the learned Single Judge has not noticed that though, inadvertently, the said Misc. Petition came to be filed as Misc. Petition in Testamentary Suit and Petition, the learned Single Judge of this Court vide order dated 30/07/2013 in chamber Summons No. 3 of 2012 had allowed the Chamber Summons No.3 of 2012 for amending the Misc. Petition. It will be relevant to refer to the observations of the learned Single Judge while allowing the Chamber Summons, which read thus:-

“6.....From perusal of prayers in the Misc. Petition, it is clear that all the prayers which are sought to be pressed by the petitioner, pertains to removal of the executors and nothing else. I am

thus inclined to accept the submission of the learned senior counsel for the petitioner that the Misc. Petition has been wrongly described as a petition in testamentary suit which error is an inadvertent error and can be permitted to be corrected by granting this Chamber Summons. No prejudice would be caused to the respondent if the said amendment is allowed. Petitioner has already paid requisite court fees payable on the said Misc. petition. Chamber Summons is accordingly made absolute in terms of prayer clauses (a) and (b).....”

In pursuance to the said Order passed by the learned Single Judge, the necessary amendment were carried out on 06/08/2013. It is thus amply clear that Misc. Petition No.38 of 2011 was not a proceeding in the said Suit and Petition but was an independent proceeding.

20] It will be further relevant to refer to the observations of the Division Bench of the Lahore High Court in the case of *Karam Devi vs. Radha Kishan and others*⁸, which read thus:-

“When a new cause of action is created by statute and a special jurisdiction outside the course of the

⁸ A.I.R. 1935 Lahore 406

general law is prescribed, there is no ouster of the jurisdiction of the ordinary Courts, for they never had any (see Maxwell on the Interpretation of Statutes, 7th Edition, p. 115). On the other hand, the proposition is well established that where an Act creates a special jurisdiction and provides a special remedy such jurisdiction is exclusively conferred upon the Court expressly empowered to deal with the matter. My conclusion is that the power to remove an executor and to provide for a successor to his office is one conferred upon the High Court alone by S. 301, Succession Act, and that such relief cannot be sought by regular suit.”

(Emphasis supplied)

No doubt that, the learned Single Judge has referred to the judgment in the case of *Karam Devi* (cited supra) but has held that observations in the case of *Karam Devi*, leads directly to the proposition that the application under Section 301 for removal of the executor can only be maintained by one who accepts the Will. With great respect, we are unable to find any observations in the judgment of Division Bench of the Lahore High Court in the case of *Karam Devi*, which would lead to the conclusion that the application under Section 301 can be made only by a person who accepts the

Will.

21] We further find that finding of the learned Single Judge that the person who challenges the Will, if allowed to make an application under Section 301, would amount to permitting him to approbate and reprobate, is also not correct. It will be relevant to refer to the observations of the Hon'ble Apex Court in the case of *Chiranjilal Shrilal Goenka* (cited supra), which read thus :

“15. In *Ishwardeo Narain Singh vs. Smt Kamta Devi* [AIR 1954 SC 280] this Court held that the court of probate is only concerned with the question as to whether the document put forward as the last will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the probate court. Therefore the only issue in a probate proceedings relates to the genuineness and due execution of the will and the court itself is under duty to determine it and preserve the original will in its custody.....”

It could thus be seen that the question that could be considered by the probate court, is restricted only to find out as to whether the document put forward as the last Will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The Caveator is entitled to contest the said proceedings. However, the question would be, if during pendency of these proceedings, the executor acts in dishonest and malafide manner and misappropriates the property, whether the court would be powerless under Section 301 to remove such an executor and make an alternate arrangement. The learned Single Judge in the case of *Vasant Narayan Sardal* (cited supra), has observed thus in para 15 :

“15. Clearly the section speaks of an application for removal being made to the High Court. But what does this mean exactly? Can this ever mean that the hands of a Court of equity and a Court of conscience are so utterly tied that the Court is reduced to a helpless bystander as the executor of a Will that gives to charity, and of which there is no beneficiary can seek removal of the executor, plays ducks and drakes with the estate; deals with it contrary to the terms of the Will that appointed him in the

first place; and is generally unaccountable for his actions? Where there is such a Will, one that gives to public causes, I do not believe that this Court's jurisdiction can ever be said to end at being a silent spectator. Whenever a Court in the performance of its duties sees wrong being done, it will step in. For, the primary task of a Court is to prevent a wrong from being done, and, if already done, to correct it. Not to allow unlawfulness, illegality and injustice to run their polluted course. To allow that is unthinkable. It is a betrayal and abdication of any judge's oath of office and judicial duty. I do not think there is anything in the ISA that says that a Court is to be sidelined and become hapless, mute witness and nothing more. After all when a Will is sought to be probated the result is an order in *rem*. It is global in reach. This makes it all the more incumbent on a Court to intervene and not sit idly by when there is demonstrated illegality or unlawfulness writ on the face of record. Therefore, in a situation like this – where there is no named legatee who can seek removal of an errant executor – the Court can and will step in as a guardian and custodian of the interest that devolves in that Will.”

After observing this, the learned Single Judge had directed the said Vasant Narayan Sardal to be removed as Trustee and further appointed an officer of this Court in place and stead of the Plaintiffs in Testamentary Suit and allowed him to convert the Suit to one for Letters of Administration with Will annexed. No doubt that, the

aforesaid observations of the learned Single Judge could be in the facts of the said case. However, in view of the aforesaid observations made by the learned Single Judge in the case of *Vasant Narayan Sardal* (cited supra), we are of the view that the following observations made by the learned Single Judge in the present case, holding that application under Section 301 at the instance of the present applicant would not be maintainable, do not lay down the correct proposition.

“10.....But I think it is quite a different proposition to say that even pending the probate Petition, the executor should be removed. This would result in the probate Petition being effectively decapitated and inevitably dismissed for there would be none available to take the matter through to probate. If on the other hand the application is for removal of the Executors and their substitution by a Court-appointed Officer, then two additional problems arise. First, obviously, no probate could be granted to such Court Officer; he could only seek Letters of Administration with Will Annexed. Second and perhaps more significantly, such an application would necessarily mean that the Applicant seeking removal and substitution *accepts*

the correctness of the Will in question for the simple reason that the nomination of a person to the office of an executor is a matter that happens only because of the Will and not independently of it.”

22] As already discussed hereinabove, proceedings under Section 301 are totally independent. A person who has contested the Will but who is also interested in the estate of the deceased, if finds that the executors are not acting in accordance with the Will or acting in malafide or dishonest manner, can he be stopped from invoking powers of this Court under Section 301? We find that, if, in the facts of the present case, the Court finds that there is merit in the application and the executors are required to be removed, the very same course that has been adopted by the learned Single Judge in the case of *Vasant Narayan Sardal* (cited supra), could have been followed.

23] For the aforesaid reasons, we find that finding of the learned Single Judge that application under Section 301 for removal of executor can be made only by a beneficiary and legatee who accepts the Will and cannot be made by a person who seeks to

dislodge the Will or contest the application for probate or Letters of Administration with Will annexed, is not sustainable. Insofar as other findings are concerned, the same are not challenged before us.

24] In the result, appeal is allowed. The order of learned Single Judge holding that Misc. Petition was misconceived and was not maintainable is quashed and set aside. It is held that the Misc. Petition at the behest of the present Appellants under Section 301 is maintainable. The matter is therefore remitted to the learned Single Judge to decide the Misc. Petition on its own merits. We clarify that we have not considered the merits of the matter and have decided the appeal only on the ground of maintainability of the Misc. Petition filed at the behest of the present Appellants.

25] Since the Appeal is allowed and disposed of, Notices of Motion taken out therein do not survive and they are also disposed of.

(RIYAZ I. CHAGLA J.)

(B. R. GAVAI, J.)