

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION

**INTERIM APPLICATION (L) NO. 25547 OF 2023
IN
TESTAMENTARY PETITION NO. 1917 OF 2023**

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Pranav Rohit Patel ...Applicant
Versus

Rohit Jayramdas Patel ...Respondent

Mr. Rohaan Cama, with Kinnar Shah, Aditi Bhargava & Saurabh Jain,
I/b Divya Shah Associates, for the Applicant in
IAL/25547/2023.

Mr. Rahul Narichania, Senior Advocate, with Kunal Dwarkadas &
Sanaya Contractor, I/b Veritas Legal, for the Respondent in
IAL/25547/2023 and Original Petitioner in TP/1917/2023.

CORAM: N. J. JAMADAR, J.
RESERVE ON: 3rd SEPTEMBER 2024
PRONOUNCED ON: 2nd JANUARY, 2025

ORDER:-

1. This Petition is filed for Probate of the last Will and Testament dated 4th October 2008 of late Jayramdas Muljibhai Patel (the testator), the father of the Petitioner, Mr. Rohit Jayaramdas Patel, and grand-father of Mr. Pranav Patel, the Applicant in the instant Application. The Applicant is the son of the Petitioner.

2. By virtue of this Application the Applicant seeks, *inter alia*, removal of the Petitioner as the Executor of the Will, dismissal of the Probate Petition and appointment of the Applicant or a fit and proper

person as a successor to the office of the Executor and grant of Letters of Administration with Will annexed and, in the alternative, direct the Petitioner to amend Schedule I to the Probate Petition to include the land, bearing Survey Nos. 649, 650, 651 and 653, situated at Village Killa Pardi, Taluka Pardi, District Valsad, (“Pardi land”) and direct the Petitioner to distribute the residuary estate of the testator (including the Pardi land) to the Applicant in terms of the aforesaid last Will and Testament of the testator.

3. Before noting the averments in the instant Application, it may be necessary to note that the Applicant has preferred Testamentary Petition No. 1233 of 2022 for grant of Letters of Administration with copy of the above referred last Will and Testament of the testator, in the capacity of the residuary legatee. In the said Testamentary Petition No. 1233 of 2022, the Petitioner herein has lodged a Caveat, being Caveat (L) No. 8568 of 2023. It is also necessary to note that the execution and attestation of the aforementioned Will and the testamentary capacity of the testator, are not in contest.

4. The Petitioner and the Applicant, the father-son duo, are at loggerheads over the disposition of the estate under the aforementioned Will, especially the Pardi land.

5. In the wake of these rival Petitions, the Applicant has preferred this Application for removal of the Petitioner from the office of the Executor of the said Will broadly on the ground that the Petitioner has acted contrary to the express intention of the testator, and against the interest of the beneficiaries under the said Will. The Petitioner has claimed an adverse title to the Pardi land which forms part of the estate of the testator and has been bequeathed to the Applicant as a residuary legatee. The Petitioner has also committed grave breach of trust of the office of the Executorship. The Petitioner did not deliberately file the Petition for grant of Probate though the testator passed away on 9th May 2010.

6. The Applicant, *inter alia*, avers the Petitioner did not make a copy of the said Will available to the Applicant. In good faith, the Applicant received several sums of money and shares in the companies etc as a part of bequest made to him under the Will. It was in or about 2015, the Applicant realized that the Pardi land formed part of the estate of the testator as the Petitioner called upon the Applicant to execute a Power of Attorney in favour of the wife of the Petitioner (the Applicant's mother). Thereupon the Applicant made requisite enquires and obtained a copy of the Will from Mrs. Renuka Paramanand Patel, his aunt, and the co-Executor of the Will.

7. Upon perusal of the Will it, transpired that the Applicant was the residuary legatee under Clause 12 of the Will, and there was no specific bequest of the Pardi land and, thus, the Pardi land formed part and parcel of the residual estate, which was exclusively bequeathed to the Applicant. Upon further enquiries, it transpired that the Petitioner was guilty of gross suppression, misconduct and misrepresentation before the authorities. After the demise of the testator, the Petitioner filed an Affidavit before the Revenue Authorities in the State of Gujarat and sought to mutate the names of the legal heirs of the testator as if the testator died intestate. The Petitioner suppressed the existence of the Will and the Pardi land being part of the residual estate.

8. The Petitioner also executed a family heirship certificate (Pedhinama) on 8th December 2010, certifying that the Petitioner, his sister, Renuka Patel and mother, Vimlaben Patel, were the only surviving heirs of the testator, again suppressing the fact that the testator had executed a Will. Eventually the Petitioner got the name of the Petitioner mutated to the Record of Rights of the Pardi land and, after the demise of Vimlaben Patel, the mother of the Petitioner, made Renuka Patel execute two Relinquishment Deeds dated 31st August 2022 thereby releasing her share in the Pardi land in favour of the Petitioner. The Petitioner thus asserted a title which was adverse to the estate of the testator, despite

being fully cognizant of the fact that the Pardi land formed part of the residual estate and had been bequeathed to the Applicant.

9. The Applicant further avers that, in all these long years, the Petitioner has made no effort to obtain the Probate. It was only with a view to give a counterblast to the Petition for grant of Letters of Administration filed by the Applicant, the Petitioner filed the instant Petition for Probate and again resorted to deliberate suppression of facts in as much as the Pardi land has not been disclosed as a part of the estate of the testator in the Schedule of assets appended to the Petition. In such circumstances, the grant of Probate to the Petitioner, who has acted in breach of the trust and confidence reposed in him by the testator and asserted a clear adverse title to the estate of the testator, would cause an irretrievable prejudice to the Applicant.

10. The Petitioner has, the Applicant alleges, not only refused and failed to act as ordained by the testator but has acted *mala fide* contrary to the wishes of the testator. The Petitioner has usurped the Pardi land and refused to distribute the same in terms of the disposition under the Will. Instead the Petitioner has falsely set up title to the Pardi land initially in the partnership firm and, eventually, in himself by banking upon the documents which appear to be of suspect credence. The Petitioner has falsely claimed that the Applicant has acknowledged that the estate of the

testator has been distributed completely as per the wishes of the testator. Hence this Application.

11. An Affidavit in Reply has been filed on behalf of the Petitioner. The allegations in the Application adverse to the interest of the Petitioner, have been categorically denied. The Petitioner contends since the legacies under the said Will were to be distributed primarily amongst the family members and the staff and none of the heirs and beneficiaries assailed the legality and validity of the Will, the Petitioner and Renuka, the Executors, proceeded to distribute the assets of the deceased directly in accordance with the directions in the Will. The Applicant has received the benefits under the Will long back. The instant Application has been filed as disputes arose between the Applicant and the Petitioner over the distribution of the joint family properties.

12. The Petitioner asserts that the very premise of the Application for removal of the Petitioner from the office of the Executor, is flawed. The Pardi land never formed part of the estate of the testator. At any rate, this Court cannot delve into the issue of title to the Pardi land. Therefore, the alleged non-inclusion of the Pardi land in the Schedule of assets appended to the Petition cannot be made a ground for seeking removal of the Petitioner.

13. The Petitioner has traced and explained the circumstances in which the Pardi land came to be acquired by the testator and subsequently brought in as a capital of the testator in the partnership firm M/s Vijay Farms. A reference is made to the Registered Sale Deed dated 25th April 1968, whereunder the Pardi land was purchased by the testator, and successive Deeds of Partnerships commencing from the partnership deed dated 29th April 1974 executed between the testator and Sonika Investments Private Limited which records that the testator had brought into the common stock of the partnership firm the aforescribed Pardi land with effect from 1st April 1974. As there was a legal impediment in an artificial person holding the agricultural land, the Pardi land continued to be mutated in the name of the testator though for all intent and purpose Pardi land was reckoned as an asset of the partnership firm. Eventually post successive reconstitutions of the firm, under an instrument dated 8th January 2019, the Petitioner purchased the said Pardi land free of encumbrances from the partnership firm for a consideration of Rs.1.78 crores. On 31st October 2019, M/s Vijay Farms stood dissolved under a Deed of Dissolution.

14. In the intervening period, the distribution of all the legacies under the said Will was duly completed. The Applicant had acknowledged receipt of a sum of Rs.3,733.62 for the balance amount in the estate

account of the testator towards the final settlement of the bequest under the Will. The Petitioner thus contends that there was neither suppression of facts nor gross misconduct or setting up of a title adverse to the estate of the testator, as claimed by the Applicant. On the contrary, according to the Petitioner, the instant Application and the proceedings for the Grant of Letter of Administration with Will annexed are actuated by a design to usurp another property, i.e., a bungalow situated at Baroda without complying with the reciprocal obligations.

15. An Affidavit in Rejoinder and a Sur-Rejoinder thereto, have also been filed.

16. I have heard Mr. Rohaan Cama, the learned Counsel for the Applicant, and Mr. Rahul Narichania, the learned Senior Advocate for the Respondent- Petitioner, at some length. With the assistance of the learned Counsel for the parties, I have perused the material on record including the Testamentary Petition No. 1917 of 2023 and Testamentary Petition No. 1233 of 2022.

17. Mr Cama, the learned Counsel for the Applicant, canvassed a multifold submission. First and foremost, Mr. Cama emphasized that there is a direct conflict of interest between the duty and obligation of the Petitioner as the Executor of the Will and the cause of personal interest

propounded by the Petitioner. The material on record, according to Mr. Cama, unmistakably indicates that the Petitioner has been claiming title in the Pardi land adverse to that of the testator and the estate left behind by the testator. Secondly, the deceased is, in effect, playing fraud on the Court by not including the Pardi land as an asset of the testator in the Schedule of assets appended to the instant Petition, despite having taken a stand before the Revenue Authorities in the State of Gujarat that the Pardi land formed part of the estate of the deceased. Thirdly, the petitioner is guilty of gross suppression of the Will before the Authorities in the State of Gujarat and in claiming right to succeed to the estate of the deceased on the premise of intestacy. Fourthly, the Petitioner has now set up a case that the Pardi land belonged to the partnership firm, M/s Vijay Farms and has professed to acquire ownership of the said Pardi land in a convoluted manner and thus set up a title which is clearly adverse to the estate of the deceased. Fifthly, the stand that M/s Vijay Farms, the partnership firm, was the owner of the Pardi land is legally untenable as under the provisions of Bombay Tenancy and Agricultural Lands Act 1948 (“BT & AL Act”), in its application to the State of Gujarat, a partnership firm can never be the holder of an agricultural land. Despite acknowledging the said legal impediment, according to Mr. Cama, the Petitioner has taken a brazen stand that to overcome the said legal

impediment, the Pardi land came to be mutated in the name of the testator (though it was the property of the partnership firm) and, therefore, there were applications to mutate the Pardi land in the name of the legal heirs of the testator, after his demise.

18. The aforesaid acts of commission and omission on the part of the Petitioner, render the Petitioner unworthy to continue to act as the Executor of the Will of the testator. Having set up an adverse title, the Petitioner must first step down from the position of the Executor and then establish his claim over the estate of the testator in an appropriate proceedings. A very strong reliance was placed by Mr. Cama on the decision of this Court in the case of **Mukesh Ramanlal Gokal and Another vs. Ashok Jagjivan Gokal and Others**¹, a Division Bench judgment of Punjab & Haryana High Court in the case of **Tara Chand Sharma and Another vs. Uma Aggarwal and Others**², and an order passed by this Court in the case of **Surya Prakash S. Makharia vs. Pramod Kumar Makharia**³

19. To buttress the submission that the partnership firm could have never held the Pardi land, in view of the statutory prohibition under the BT & AL Act, 1948, Mr Cama placed reliance on the Division Bench

¹ Misc.Pet. No. 66 of 2013, Dt.11/10/2013.

² AIR 2010 P & H 30.

³ IA No. 332 of 2023, Dt.04/07/2024.

Judgment of the Gujarat High in the case **State of Gujarat & Ors Vs Prathmesh Farms Pvt Ltd & Anr**⁴ and a judgment of a learned Single Judge of the Gujarat High Court in the case of **Bechar Arjan & Co Vs Assistant Collector**.⁵ Mr. Cama further submitted that once the transaction is legally impermissible, the intent of the parties to such transaction is of no consequence. Reliance was placed on the observations of the Supreme Court in the case of **G.T. Girish Vs Y. Subba Raju (Dead) By Legal Representatives & Anr**⁶ wherein it was enunciated that a contract made expressly or impliedly, is prohibited by the provisions of law, the intention of the parties does not salvage such a contract which is prohibited by law. Therefore, the device of the partnership firm holding the property, through one of its partners, sought to be pressed into service on behalf of the Petitioner, deserves to be summarily repelled, urge Mr. Cama.

20. In opposition to this, Mr. Narichania, the learned Senior Counsel for the Petitioner, submitted that the core issue raised in this Application is that of title to the Pardi land. Such question of title is beyond the remit of the jurisdiction of the Testamentary Court. Moreover, since the Applicant has already instituted a Title Suit in the Civil Court at Vapi,

4 2010 SCC OnLine Guj 9794.

5 1996 SCC OnLine Guj 532.

6 (2022) 12 SCC 321.

there is an imminent possibility of conflicting decisions, even when the Court has to consider the reliefs in the instant Application. It is open for the Applicant to seek appropriate interim reliefs in the said Title Suit before the Civil Court at Vapi. Thus on this count alone, according to Mr. Narichania, the Application deserves to be rejected.

21. Secondly, the Application for removal of the Petitioner as an Executor and the allied interim reliefs suffers from gross delay and laches. The Applicant became aware of the existence of the Pardi land much before 2015. Yet, the Applicant did not initiate any action. The silence of the Applicant for all these years coupled with the acceptance of the bequests under the Will in excess of Rs. One crore, militates against the *bona fide* of the claim of the Applicant. Thirdly, a patently false explanation is sought to be offered regarding the acknowledgment of the last tranche of residuary bequest under the letter dated 9th September 2014, whereby the Petitioner had made it explicitly clear that the said distribution of the estate concluded the execution of the Will of the testator.

22. Mr. Narichania, would urge that the contention on behalf of the Applicant that the Petitioner has set up an adverse title to the estate of the testator, is demonstrably incorrect. Taking the Court through the documents evidencing the acquisition of the Pardi land and the

subsequent act of the testator bringing in the Pardi land as a part of his capital into the partnership firms, M/s Vijay Farms, Mr. Narichania urged with tenacity that once a property was brought as a capital into the partnership firm, the property becomes an asset of the partnership firm. Mr. Narichania banked upon the decision of the Supreme Court in the case of **Sunil Siddharthbhai & Ors Vs Commissioner of Income Tax**⁷ to buttress the submission that upon introduction of the personal asset into the partnership firm as his share to the partnership capital, the exclusive interest of such partner is transformed into a shared interest with the other partners, in that asset.

23. Mr. Narichania further submitted that the very claim of the Applicant that Pardi land forms part of the residual estate bequeathed to the Applicant is unworthy of acceptance. Taking the Court through the dispositions under the Will, Mr. Narichania submitted that the testator, who was an astute businessman and well aware of his assets through out his life time, could not have omitted or ignored such a valuable estate from the purview of the bequest if it belonged to the testator.

24. Therefore, the Will is required to be construed as a whole by the Court putting itself into the testator's arm chair. If the Will is so construed, the unsustainability of the claim of the Applicant that the

⁷ AIR 1986 SC 368.

Pardi land formed part of the residual estate bequeathed under Clause 12 thereof, becomes evident, urged Mr. Narichania. To this end, Mr. Narichania placed reliance on the decisions of the Supreme Court in the cases of **K.S. Palanisami (Dead) Through Legal Representatives Vs Hindu Community In General And Citizens of Gobichettipalayam & Ors**⁸ and **Navneet Lal Alias Rangi Vs Gokul & Ors.**⁹.

25. Mr. Narichania joined the issue on the alleged act of setting up an adverse title to the estate of the testator, assiduously canvassed on behalf of the Applicant, by advancing a two-pronged submission. First, the Petitioner cannot be said to have set up an adverse title to the Pardi land, in particular, as there is voluminous material to show that the said Pardi land never formed part of the estate of the testator. Second, the Petitioner has distributed the entire estate of the testator in accordance with the wishes of the deceased testator and none of the beneficiaries has raised any objection to the distribution and especially on the ground that the Pardi land formed part of the estate of the testator. The infraction, if any, on the part of the Petitioner in claiming that the Pardi land was the estate of the testator before the Revenue Authorities in the State of Gujarat was based on a legal advice in view of the legal impediment. At best, that can be said to be a minor infraction, which does not warrant the

⁸ (2017) 13 SCC 15.

⁹ (1976) 1 SCC 630.

removal of the Petitioner from the office of the Executor. In the case at hand, according to Mr. Narichania, the aspect as to whether the Pardi land forms part of the estate of the testator and constituted the residual estate under Clause 12 of the Will are the matters which warrant adjudication. Till such adjudication, it cannot be said that a clear assertion of a hostile title to the said property has been made by the Petitioner. Therefore, the Petitioner cannot be divested of the responsibility of the office of the Executor, which the testator has reposed in the Petitioner.

26. Mr. Narichania placed reliance on the decisions of Punjab and Haryana High Court in the cases of **S.B. Ranjit Singh & Anr Vs S Santokh Singh Rais And Ors**,¹⁰ **Shanti Devi Vs Yadvinder Thakur & Anr**,¹¹ a Delhi High Court judgment in the case of **Swapnil Gupta & Anr Vs Govt of NCT of Delhi & Ors.**,¹² a decision of Madhya Pradesh High Court in the case of **Dr Kusum Kurre Vs Dharam Singh**,¹³ and a decision of learned Single Judge of this Court in case of **Abha Dastane-Rao & Ors Vs Prabhakar Deolankar & Ors**¹⁴ in which the decision in the case of **Mukesh Gokul (Supra)** was considered and explained. It was

¹⁰ 1949 SCC OnLine Punj 65.

¹¹ 2006 SCC OnLine P &H 634.

¹² 2022 SCC OnLine Del 4580.

¹³ 1986 ILR 414 (MP Series).

¹⁴ 2016 SCC OnLine Bom 110.

submitted that an Executor cannot be lightly divested of the office of the Executorship, which is one of trust and confidence reposed in the Executor by the testator. Very strong grounds are required to remove an Executor. It cannot be as a matter of course and on the basis of an unsubstantiated allegation.

27. Mr. Cama joined the issue by canvassing a submission that the decision in the cases of **Dr Kusum Kuree** (Supra) and **Abha Dastane-Rao** (Supra), in fact, lend support to the submissions canvassed on behalf of the Applicant. The case at hand is not one of minor lapses, errors of judgments or less than perfect handling of matters. On the contrary, the case is one of blatant claims adverse to the estate of the testator and gross misconduct.

28. The aforesaid submissions now fall for consideration.

29. To start with, it is imperative to note that there is no contest over the Will dated 4th October 2008, being the last Will and Testament of the testator, Jayaramdas Muljibhai Patel. The Applicant does not dispute that the Applicant has received bequest of various amounts under the Will. Nor there is controversy over the fact that the testator had appointed the Petitioner, his son, and Renuka Patel, his daughter, the Executors and Trustees of the Will. The testator passed away on 9th May 2010. Renuka,

the co-Executor passed away on 15th January, 2021. The Petitioner remains the sole Executor.

30. Two clauses of the Will deserve to be noted immediately.

Clause 5- I bequeath my share in the partnership firm called M/s. Vijay Farm to my son Rohit for his absolute use and benefit.

Clause 12- The remaining estate including preference shares in M/s. VFC Industries Pvt. Ltd. shall be given to my grandson Pranav Rohit Patel for his absolute use and benefit.

31. Evidently, the Pardi land does not find an explicit mention in the Will.

32. The controversy revolves around the question as to whether the Pardi land forms part of the estate of the testator and since there was no specific bequest of the Pardi land to any of the beneficiaries, did it form part of the residual estate which came to be bequeathed to the Applicant under Clause 12 (extracted above).

33. Keeping the aforesaid backdrop in view, it may be appropriate to appreciate the core controversy in the light of the statutory prescription. In the context of the prayer for removal of the Executor and appointment of an Administrator as a successor, even *pendente lite*, two provisions of the Indian Succession Act, 1925 deserve to be noted.

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.

Sec. 247 : Administration *pendente lite*

Pending any suit touching the validity of the will of a deceased person or for obtaining or revoking any probate or any grant of letters of administration, the Court may appoint an administrator of the estate of such deceased person, who shall have all the rights and powers of a general administrator, other than the right of distributing such estate, and every suet. administrator shall be subject to the immediate control of the Court and shall act under its direction.

34. Evidently, the power of removal of a named Executor and to appoint an Administrator *pendente lite* are both discretionary in nature. Normally, where the Executor is named by the testator, the Court would be loath to appoint an Administrator *pendente lite*, 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.

35. At this juncture, a reference may be made to the decision of this Court in **Mukesh Gokul** (Supra), on which a very strong reliance was placed by Mr. Cama. In the said case, the Court was confronted with the question, as to whether the Executors who have 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.

36. 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.

37. In the case of **Tara Chand Shrama** (Supra) which was relied upon by this Court in the case of **Mukesh Gokul** (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.

38. A reference can also be made to the decision of the Madhya Pradesh High Court in the case of **Dr Kusum Kuree** (Supra), on which reliance was placed by both Mr. Cama and Mr. Narichania, albeit for different purposes. After extracting the texts 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:

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)

39. In **Abha Dastane-Rao** (Supra), the learned Single Judge, after adverting to the decision in the case of **Mukesh Gokul** (Supra) observed that in the case of **Mukesh Gokul** (Supra) the Executor had set up in respect of some properties a title hostile to that of the estate and, the beneficiaries. **Mukesh Gokul** (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.

40. Holding thus in the case of **Abha Dastane-Rao** (Supra) this Court 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.

41. In the light of the aforesaid position in law, which ought to inform the exercise of discretionary jurisdiction under Section 301 of the Act 1925, the contentions in the instant case deserve to be appreciated.

42. It is necessary to note that in the Testamentary Petition No. 1917 of 2023, the Petitioner has approached this Court with a clear assertion that the distribution of the estate of the testator in accordance with the Will has been completed in the year 2014. The Petitioner was constrained

to institute the Petition for grant of Probate as the Applicant filed a Testamentary Petition No. 1233 of 2022 for grant of Letters of Administration, after about eight years of the completion of the distribution of the estate under the said Will. Incontrovertibly, in the schedule of property (Schedule I) appended to the Petition the Pardi land has not been shown as the estate of the testator.

43. Upon perusal of the Will of the testator, it becomes evident that under clause 3, the testator bequeathed all his shares in the various entities to his son Rohit Patel, the petitioner; under clause 4, the jewelry was bequeathed to Vimla, his wife, and all silver utensil to Rohit Patel, the petitioner. The shares in the partnership firm M/s. Vijay Farm were bequeathed to Rohit, under clause 5. A provision was made for granddaughter Toral's marriage under clause 7. Under clause 8, the shares in M/s. Blue Cross Laboratories Limited were bequeathed to Smt. Vimlaben, his wife, and in the event she predeceased the testator to Rohit, the petitioner, and Renuka, the daughter of the testator. Under clause 9 the executor were commanded to give a sum of Rs. 35 lakhs to Smt. Vimlaben. Thereafter, the testator had made a number of bequests including to the persons who were working in the group-companies or were in the personal service of the testator or looked after the testator during his illness under Clause 10, followed by the specific bequests to

the beneficiaries named in Clause 11, including the Applicant herein. Then comes the disposition of the residual estate including shares in M/s. VFC Industries Pvt. Ltd. Prima facie, it appears that the testator has made specific and major bequests to Rohit, the Petitioner, Mrs. Vimala, his wife and Renuka Patel, the daughter.

44. The aforesaid elaborate nature of the disposition in the Will is a relevant consideration. Whether the Pardi land was construed by the testator as a part of his estate is a matter which warrants determination and is germane to the controversy at hand. It is in this backdrop, the manner of acquisition of the Pardi land and the way it was dealt with by the testator assumes significance.

45. On 25th April 1968, the Pardi land was purchased by the testator under a Sale Deed executed by Abidbhai. It appears that under a Deed of Partnership executed on 29th April 1974 between the testator and M/s Sonika Investments Private Limited, a company registered under the Companies Act 1956, a partnership firm was constituted under the name and style of Ms/ Vijay Farms. The business of the partnership firm was to be that of cultivating fruits, vegetables and crops or in any other business or businesses as has been mutually agreed upon. The testator brought in the common stock of the partnership firm the Pardi land. A sum of Rs.1,24,325/- was credited to the capital account of the testator in

the account books of the partnership firm in consideration of the testator having brought the Pardi land in the common stock of the partnership firm.

46. Under the Partnership Deed dated 1st March 1999, it appears that, the fact that the testator had bought the Pardi land into the common stock of the partnership firm was reiterated and Rohit Patel, the Petitioner, was admitted as a partner in the said firm with a 25% share in the profit. Under the Partnership Deed dated 12th March 2009, it was recorded that M/s Sonika Investments Private Limited retired from the partnership firm with effect from 1st January 2009 and Neeta Rohit Patel, the wife of the Petitioner, was admitted as a partner with 10% share in the profits. Resultantly, the testator had 50% and Rohit Patel had 40% share in the profits of the firm.

47. These documents *prima facie* indicates that during the life time, the testator had brought the Pardi land into the common stock of the partnership firm and treated the same as an asset of the partnership firm.

48. Mr. Cama, the learned Counsel for the Applicant, submitted that the aforesaid Partnership Deeds, which are not registered, are of no avail to the Petitioner. Even if the documents are taken at par, they cannot be pressed into service to support the legal relationship sought to be

projected by the Petitioner. The partnership firm could never have been the holder of the agricultural land in view of the express prohibition contained in the BT & AL Act, in its application to the State of Gujarat. Reliance on the decision of the Gujarat High Court in the case of **Prathmesh Farms** (Supra) wherein laying emphasis on the definition of the “agriculturist” under the said Act and the prohibition contained in Section 63 against the transfer of the agricultural land to non-agriculturist, it was held that the agricultural land cannot be transferred to an artificial person in spite of its incapacity to personally cultivate the land as required under the Act, appears well founded. The partnership firm could not have been the transferee of the Pardi land.

49. At the same time, the legal position as regards the character of the property of a partner which is brought into the stock of the firm is also well recognized. Ordinarily, it forms the property of the firm unless the contract between the parties provides otherwise. A profitable reference in this context can be made to a three Judge Bench judgment of the Supreme Court in the case of **S.V.Chandra Pandian and Ors. V/s. S.V.Sivalinga Nadar and Ors.**¹⁵ wherein it was inter alia, enunciated that “*regardless of its character the property brought into the stock of a firm or acquired by a firm during its subsistence for the purposes and*

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in the course of its business shall constitute the property of the firm unless the contract between the partners provides otherwise.

On the dissolution of the firm each partner becomes entitled to his share in the profits, if any, after the accounts are settled in accordance with section 48 of the Partnership Act.”

50. In the case at hand, the question is not only of the character of the Pardi land, after it was brought into the stock of M/s. Vijay Farm, but also whether the said Pardi land constituted the share of the testator in M/s. Vijay Farm which was bequeathed to the petitioner. (in view of clause 5 of the Will extracted above). If the Pardi land is construed to be the capital of the testator in M/s. Vijay Farm and was so treated by the testator and bequeathed to Rohit, the petitioner, whether it would assume the character of the residual estate would be the moot question ?

51. It is pertinent to note that the parties are *ad-idem* on the point that there was a legal impediment in the partnership firm holding the Pardi land. It is this legal impediment which, according to the Petitioner, necessitated the filing of the Application to mutate the Pardi land in the name of the testator and the Petitioner as a second holder, during the life time of the testator, and in the names of the legal heirs of the testator, after the demise of the testator.

52. The submission of Mr. Cama that at that stage it was incumbent upon the Petitioner to disclose the existence of the Will and not to proceed on the premise of intestacy, and the omission to propound the Will constitute acts in derogation of the Will, appears alluring at the first blush. However, on a deeper scrutiny, it appears that the real controversy boils down to the question as to whether the Pardi land formed part of the estate of the testator. As noted above, the bequest in the Will is elaborate. The Pardi land does not form part of a specific bequest in the Will. Whether the Pardi land formed part of the share of the testator in the partnership firm, M/s Vijay Farms, under Clause 5, or would it form part of the residual estate, under Clause 12, is a matter which warrants adjudication.

53. In this application and at this stage, a definitive finding on the said question may not be justifiable for the reasons more than one. Firstly, the question may warrant a more deeper investigation into the facts and, if required, appraisal of evidence. Second, on a broader canvass, the determination may partake the character of a decision on title to the property which is beyond the remit of the jurisdiction of a Testamentary Court. Third, even in a narrower compass, Testamentary Court would be in a position to finally adjudicate the question as to whether the subject property falls within the ambit of the residual estate under Clause 12, if

the instant Petition and Petition No. 1233 of 2022 filed by the Applicant for the Letters of Administration with Will annexed, are decided together as the Applicant has included the Pardi land as a part of the estate of the testator. Fourth, the Applicant has already instituted a Suit before the Civil Court at Vapi seeking *inter alia* a direction that the residual estate of the testator described in the Schedule of property (Pardi land) be administered in accordance with last Will and Testament of the testator and also a direction to the Defendant-Petitioner herein to deliver possession of the suit property to the Plaintiff.

54. The conspectus of the aforesaid consideration is that the aspect as to whether the Pardi land formed part of the estate of the testator is debatable. Thus it cannot be said that there is a clear and unequivocal assertion of an adverse title to the estate of the testator by the Petitioner so as to incur disqualification to continue to act as an Executor. Moreover, in the facts of the case, the further continuation of the Executor does not seem to be detrimental to the estate of the testator or the beneficiaries (save and except the Pardi land) as the rest of the estate has been already administered. In any event, the aspect of title to the Pardi land is sub-judice before the competent Civil Court. The Applicant would thus be at liberty to obtain appropriate interim protective orders from the Civil Court.

55. For the foregoing reasons, I find it difficult to accede to the submission of Mr. Cama that a case for removal of the Petitioner as an Executor and appointment of an Administrator *pendente lite* is made out. Therefore the Application deserves to be rejected.

Hence the following order:

ORDER

- (i) The Application stands rejected.
- (ii) By way of abundant caution it is clarified that the observations in the aforesaid order are confined to determine the prayer for removal of the Executor and they may not be construed as an expression of opinion on the relative merits of the case of the Petitioner and the Applicant for grant of Probate and Letters of Administration, respectively.
- (iii) Costs in cause.

[N. J. JAMADAR, J.]