
(2010) 12 BOM CK 0091

In the Bombay High Court

Case No : Miscellaneous Petition No. 70 of 2010

Ferani Hotels Pvt. Ltd.

APPELLANT

Vs

Nusli Neville Wadia

RESPONDENT

Date of Decision : 15-12-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3, Order 3 Rule 1, Order 3 Rule 4
Contract Act, 1872 — Section 201, 56
Hindu Succession Act, 1956 — Section 14
Probate and Administration Act, 1881 — Section 50, 91
Succession Act, 1925 — Section 118, 12B, 241, 263, 301
Trusts Act, 1882 — Section 53

Citation : (2011) 1 ALLMR 511 : (2011) 113 BOMLR 33

Hon'ble Judges : Roshan Dalvi, J

Bench : Single Bench

Advocate : A.M. Singhvi and T.N. Subramanian and Ashok Gupta, Zubin Behramkamdin, Vivekvashi Sushma Nagraj, Anusha Jegadeesh and Ameesh Patnair, instructed by for Bharucha and Partners, for the Appellant; F.S. Nariman and N.H. Seervai and V.R. Dhond, Rohan Kelkar, S.V. Doijode, P.A. Kabadi and F.J. Thakkar, instructed by for Doijode Associates, for the Respondent

Final Decision : Dismissed

Judgement

Roshan Dalvi, J.—This Petition was filed for revocation and annulment of the order dated 20th November 2003 authorising and permitting the Respondent to continue to act as Administrator of the estate of one Eduljee Framroze Dinshaw passed in Miscellaneous Petition No. 41 of 2003, to remove the Respondent from the office of Administrator of the estate of the deceased and to appoint a fit and proper person, including the Petitioner as such Administrator, for disclosure of the estate of the deceased and accounts.

2. The deceased died in New York, United States of America (U.S.A.) on 14th March 1970 leaving behind his last Will and Testament dated 4th February 1970 (the Will). Under Clause IV of the Will, the deceased (the testator) bequeathed a

life interest in the net income of his properties in India to his sister one Mrs. Bachoobai Woronzow Dashkow (Bachoobai) and upon her death to two charitable institutions in the U.S. the Salvation Army and the American Society for the Prevention of Cruelty to Animals (U.S. Charities). Clause IV reads thus:

In the event that at the time of my death I shall own outright and free from any trust any real or personal property physically located in the Republic of India, then and in such event, I give, devise and bequeath the same to my Trustees, hereinafter named, IN TRUST NEVERTHELESS, to hold, in vest and re-in vest the same and to collect and receive the rents, interest, issues and income therefrom and to pay the net income thereof at such times as my said Trustees may consider appropriate, but not less frequently than quarter annually to, or apply the same for the benefit of my sister, BACHOO WORONZOW, for life if she survives me and upon the death of my said sister, BACHOO WORONZOW or upon my death if she shall predecease me, I give, devise and bequeath the then principal of said trust fund together with any accrued income thereon, in equal shares to THE SALVATION ARMY, New York, New York and THE AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, New York, New York for their general uses and purposes.

Under Clause V. of the Will, he granted the residue of his estate to his sister Bachoobai. Clause V reads thus:

I give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal to my sister, BACHOO WORONZOW, if she survives me or, if she shall predecease me, in equal shares, to THE SALVATION ARMY, New York and THE AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, New York, New York, for their general uses and purposes.

Bachoobai had not predeceased the deceased. Hence she would take the remainder of the estate of the deceased after the U.S. Charities were bequeathed the principal of the Trust fund and the accrued interest in the real and personal properties of the deceased, including properties in India.

3. Under Clause VIII of the Will, he appointed Bachoobai as the executrix of his Will and certain other as successor executor in the event that she predeceased him, failed to qualify or ceased to act for any reason. He authorised them to designate another individual to act on their behalf if they could not act in a foreign jurisdiction. The relevant part of Clause VIII of the Will runs thus:

I nominate, constitute and appoint my sister, BACHOO WORONZOW, to be Executrix of this my Will and in the event that she shall predecease me, fail to qualify or cease to act for any reason, I nominate, constitute and appoint as successor such then partner of Coudert Brothers as shall be designated by any three then partners. Should any executor be unable for whatever reason to exercise her or his functions in a jurisdiction outside the United States of America, I hereby authorize her or him by written instrument, duly acknowledged, to designate an individual or a bank to act on her or his behalf in

respect to property located in such foreign jurisdiction. I nominate, constitute and appoint ALEXIS C. COUDERT and JEHANGIR B. DUBASH to be the trustees under this my Will.

4. The executrix, the trustees and the successor executors or trustees were given full power and authority to retain, manage and administer the estate of the deceased under Clause IX of the Will. The relevant part of Clause IX runs thus:

I hereby grant to my Executrix and Trustees and any of their successors full power and authority to retain, manage and administer my estate as freely as I could handle my own affairs if living. Without limiting the foregoing, and irrespective of any legal restrictions otherwise applying to the powers of executors or trustees in any jurisdiction, I hereby specifically empower my Executrix and Trustees and any of their successors, with respect to both principal and income, as follows:

(a) Without obligation to diversify, to retain any shares of stock of any corporate trustee, shares of stock in closely held corporations, shares of stock of corporation in which I own all or the greater part of the shares, any other stocks, bonds, mortgages, real estate or other form of property or in vestment which I may leave at the time of my death or which may subsequently be received or held by my estate or any trust hereunder as a result of the exercise of any powers herein granted, or otherwise.

(b) ...

(c) For any purpose, to sell for cash or on credit, exchange, lease for any term of years (including a term of more than ten years), mortgage, or extend or modify the terms of mortgages on, any real or personal property or interest or estate therein at any time forming a part of my estate or any trust created by this my Will, and to execute such instruments as may be necessary or advisable.

5. The Will, as any other document, is required to be read as a whole and every part given effect to. No part can be rendered otiose upon its construction. The judgment relied upon by the Petitioner in the case of Bhura and Others Vs. Kashiram, makes this position clear. As emphasised by Mr. Nariman on behalf of the Respondent, this would require consideration of the entire Clause IX of the Will to see the power given to Bachoobai as the executrix to deal with the real property of the deceased during her lifetime. How she exercised that power shall be seen presently.

Bachoobai survived the deceased. Bachoobai also qualified to be the executrix. She applied for probate of the Will in the competent Court which was the Surrogate's Court of the County of New York (New York County Court). The only named executrix in the Will is the testator's sister Bachoobai who also has a life interest and the residuary interest. There is no other named executor in the Will directed or authorised to administer the estate of the deceased along with Bachoobai. It is only upon happening of a contingency specified in Clause 8 of

the Will, by which Bachoobai would no longer remain executrix, that a successor executor is directed to take charge. Such successor executor would be a partner nominated by any three partners of the Firm of Coudert Brothers.

6. Bachoobai, therefore, had to act singly until she ceased to act for any reason. She was accordingly the sole executrix to administer the estate of the deceased. The successor of the executrix cannot act along with the executrix. He must necessarily act after her death or after she ceases to act for any reason by virtue of his designation as successor executor. Hence only if Bachoobai ceased to act for any reason, a successor executor, as nominated under the Will, would require to be appointed. Bachoobai continued as the executrix until she died.

7. Since Bachoobai did not cease to act for any reason during her lifetime but continued as the executrix until her death, it is contended on behalf of the Respondent that Clause VIII of the Will would not come into effect with regard to the nomination of any successor executor upon the death of Bachoobai. It is contended on behalf of the Petitioner that by virtue of her death she would cease to act and by reason of her death a successor executor would have to be appointed as per the directions contained in Clause VIII of the Will.

8. It would have to be seen whether upon her death also a successor executor as directed in the Will was imperatively to be appointed on the premise that she ceased to act as such executrix by reason of her death. Similarly it would have to be seen whether ceasing to act implied a contingency that arose upon a voluntary act of an individual during her lifetime or also an involuntary act such as death. Since it is made a contentious issue, it would then have to be seen whether, in the facts of this case, that would make any difference.

9. Cease is defined in Black's Law Dictionary, Eighth Edition, page 237 as to stop, forfeit, suspend or bring to an end.

It is defined in Advanced Law Lexicon, vol. I, page 722 as to put an end to; to put a stop to; to come to an end; to stop doing.

Cease to act has not been defined. Cease is different from cease to act. The above meanings of cease require a voluntary act; it is specifically inconsistent with an involuntary act. The expression cease to act as also cease to exist, or cease to be, on the other hand, would imply an involuntary act and would, therefore, include death. (Ref: Krishna Kumar Birla Vs. Rajendra Singh Lodha and Others,

The term cease to act is often used in testamentary dispositions along with the expressions fails to qualify, dies, resigns etc.

10. Stocker and Rikoon on Drawings, Wills and Trusts in the Chapter on Fiduciaries and Administrative Powers sets out these expressions in paragraph 6:1:3. With regard to designation of successor beneficiary, it specifically enjoins that in the contingency that an executor or trustee may refuse to act or may not qualify for some other reason or may seek to resign after qualification, or may

die before closing of the estate or termination of the trust should be considered and provided for. What would be the situation requiring an application to be made to Court for appointment of an administrator or a substitute trustee is considered thus:

The contingencies that an executor or trustee may refuse to act or may not qualify for some other reason, or may seek to resign, after qualification, or may die before the closing of the estate or the termination of the trust, should be considered and provided for.

11. This denotes that contingency of death is different from the contingency of ceasing to act as trustee. Whereas the executor or executrix in his or her lifetime would discontinue to act or put an end to their work of administration or to bring an end such work of administration themselves, the administration ipso facto would come to an end upon their death, premature or otherwise.

12. The expression cease to act came up for consideration before the Supreme Court of Canada in the case of Reginald Hayes And Maude Edwards Mayhood case (1959) S.C.R. 568. In that case, certain mineral rights in the lands of the testator were bequeathed to the beneficiaries. This remained in the hands of the executrix for nearly twenty years unadministered because the executrix did not act to compel the concurrence of a dissenting beneficiary to dispose of the mineral rights. Upon the contention of the beneficiaries that it should have been vested in them during the period that it remained unapplied because of the inaction on the part of the executrix, it was argued that the executrix had ceased to act as an executrix and was merely a bare trustee of the mineral rights on behalf of the beneficiaries. The contention was rejected. It was held that delayed application made by the executrix was properly made at the time she applied to Court and she should not be precluded from making an application on the ground of delay.

13. The expression cease to act for any reason in the Will of the testator should, therefore, be read alongside the expressions pre-deceased me and failed to qualify. These are the three eventualities specified in Clause VIII of the Will in which event the nomination of the successor is made. It, therefore, implies a situation when she could not act because she predeceased the testator and after the death of the testator if she failed to qualify to become executrix or if she failed to act herself. In those eventualities, the estate could not have been administered because she was, at the relevant time, the only named executrix. Consequently, if she had earlier died or if though living, she could not become the executrix or if after becoming an executrix, she did not act as such for whatever reason, another executor would have had to act. If she had acted as the executrix and administered the estate of the testator no other executor would have been required to be appointed. Hence until she died if she had not ceased to act as executrix and had continued to act as executrix, the nomination of the successor would not take effect.

14. The Petitioner has relied upon the fact that citations have been issued in 1970 upon the successor executors named in the Will. Issue of citation showing the names of various partners of Coudert Brothers as successor executors does not show that they or any of them were to act as executors along with Bachoobai. The very expression successor executor, referred to by Dr. Singhvi on behalf of the Petitioner, shows that he would succeed Bachoobai as executor of the estate of the testator. The citation is a notice issued by the Court upon the person concerned interested in the estate of the deceased testator to invite or inform the beneficiaries or the executors about a bequest made under the Will or the authority or power granted under the Will to act as per the directions contained therein. If a beneficiary is granted a legacy, which would take effect upon a contingency or after a period of time, all that the citation would do is to inform him of such bequest. Similarly if the executor has to act as such upon a contingency or after a period of time, he would be informed of the directions in the Will to that end. Neither the bequest nor the executor ship would come into effect so soon as the citation is served. Service of the citation, therefore, does not show that any one or some of persons mentioned therein became executors. Similarly if the citation is served upon the two charities named in the Will, who are the ultimate beneficiaries of the trust fund of the entire real property of the deceased in India, they would only know that after the death of Bachoobai, who had life interest, their beneficial interest would be effectuated. Service of the citation cannot accelerate such interest.

15. It is contended by Dr. Singh that the expression ceased to act for any reason would include ceasing to act by death. The term successor implies the executor succeeding her. In every case of an executor dying, an administrator or executor would have to be appointed by the Court. The provision for a successor executor would require a Court to appoint the executor so designated or nominated by the deceased himself. To that extent, of course, a successor executor would have to be appointed if the estate remained unadministered.

16. The property of the deceased in India bequeathed under Clause IV of the Will, by which Bachoobai was to enjoy the benefit for her lifetime and after which it would vest in the U.S. Charities, would have to be administered during the lifetime of Bachoobai as well as thereafter. Upon her death, Bachoobai would cease to be the executrix but upon her death, the U.S. Charities would become the beneficiaries under the Will and the estate of the deceased would be required to be administered for vesting them in the U.S. Charities. Consequently, by way of necessity of administration of the estate of the deceased after the death of Bachoobai, having a life interest in the properties of the deceased, an executor would be required to be appointed. Clause VIII of the Will sets out who such executor would be and how such executor would be appointed.

17. The aforesaid Will was probated by the New York County Court on 2nd April 1970. A notice came to be issued by the New York County Court inter alia to the beneficiaries mentioned under the Will, trustees nominated under the Will and

the successor executors mentioned in Clause VIII of the Will. This successor executor was to be a partner of the Firm of Coudert Brothers to be designated by any of the three partners of the firm at the relevant time. Hence citation was served upon all the partners of the firm also.

18. Since a large part of the real and personal property of the deceased was in India and provision was made in respect of the administration of those properties in Clause IV of the Will, Bachoobai, as the executrix, was required to, authorised to and did execute a Power of Attorney for enabling Letters of Administration to be granted for the properties of the deceased within India to her as an absent executor for her use and benefit until she obtained probate or Letters of Administration herself.

19. The Power of Attorney of Bachoobai dated 16th June 1970 sought to appoint one of the trustees mentioned in the Will itself, one Jehangir B. Dubash (Dubash), to act in her name and on her behalf to obtain Letters of Administration with the copy of the Will annexed from the competent Court in India and to realise all monies, estate, properties and effects belonging to the deceased upon obtaining such Letters of Administration. Pursuant to the Power of Attorney, the said Dubash applied for being granted Letters of Administration with the Will annexed of the deceased under Petition No. 671 of 1971 on 27th August 1970 in the Testamentary and Interstate Jurisdiction of this Court. The said application was made u/s 241 of the Indian Succession Act, 1925 (the IS Act) for grant of Letters of Administration for the use and benefit of Bachoobai limited until she obtained probate or Letters of Administration herself.

20. The said Dubash was issued Letters of Administration with the Will of the deceased annexed thereto on 12th November 1971 as the Constituted Attorney of Bachoobai, the sole executrix named in the Will for her use and benefit as such executrix limited as aforesaid upon the undertaking of the said Dubash to administer the same and to make the full and true inventory of the property and credits of the deceased within six months thereof and to render true account to this Court in its Testamentary and Interstate Jurisdiction.

21. Soon thereafter on 1st December 1972, the said Dubash expressed his willingness to retire and to be relieved of the administrator ship of the estate of the deceased. Bachoobai executed another Power of Attorney in favour of the Respondent. Bachoobai nominated, constituted and appointed the Respondent to apply for discharge of the said Dubash as the executor and legal representative in his favour as the successor of the said Dubash to the properties and credits of the deceased remaining to be administered and also to apply for and obtain an order vesting in him the properties and credits which had vested in Dubash as the administrator of the estate of the deceased in India. This was apparently done by Bachoobai under the power granted to her by the aforesaid Clause IX of the Will, which power was not exercised by her in the appointment of Dubash earlier.

22. Miscellaneous Petition No. 29 of 1972 came to be filed on 20th December 1972 by the said Dubash and the Respondent. Under a Judge s Order signed by the then Testamentary Judge of this Court on 21st December 1972, the said Dubash was discharged as Administrator of the estate of the deceased and the Respondent was appointed as Administrator of the estate of the deceased in the place and stead of the said Dubash. Further the property and the estate of the deceased mentioned in the schedule to the grant of the Letters of Administration dated 12th November 1971 was by the said Judge s Order vested in the Respondent as Administrator. Whereas the Petition appointing Dubash was filed u/s 241 of the IS Act, the Petition appointing the Respondent was filed u/s 301 of the IS Act. It is contended by Mr. Nariman on behalf of the Respondent that he has not been appointed u/s 241 of the IS Act, but he has been appointed u/s 301. The order of discharge of the said Dubash and the appointment of the Respondent was, therefore, passed u/s 301 of the IS Act. The properties of the deceased came to be vested in the Respondent as such Administrator.

23. Sections 241 and 301 of the IS Act run thus:

241. Administration, with will annexed, to attorney of absent executor.-When any executor is absent from the State in which application is made, and there is no executor within the State willing to act, letters of administration, with the will annexed, may be granted to the attorney or agent of the absent executor, for the use and benefit of his principal, limited until he shall obtain probate or letters of administration granted to himself.

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.

24. Whereas Section 241 of the IS Act grants limited Letters of Administration to the attorney or agent of an absent executor, Section 301 removes an executor or administrator already appointed and provides for his/her successor. Consequently, there is no vesting of any property in the administrator appointed u/s 241 of the IS Act under the limited grant granted by the Court. The property vests in the successor executor appointed by the Court upon removal of an executor already appointed under a Will or by the Court.

25. Section 301 contemplates removal of an executor appointed by the Court but not an administrator of an absent executor appointed by the Court. Section 301, therefore, contemplates a case for removal of the executor to be made out so that the Court would suspend, remove or discharge such executor and thereupon appoint a successor vesting in him the property. Section 301, therefore, presupposes that the property of the deceased had vested in the previous executor who was removed by an order of the Court under that section. If the property had not vested in the earlier executor, none could be vested in the

successor executor simpliciter. If only limited Letters of Administration were granted to an attorney of an absent executor, there would be no vesting of the property of the deceased in him. The grant being limited per se until the executor obtained probate or Letters of Administration himself or herself, no property could vest in such attorney. A reading of the section makes it clear by the absence of the term executor in the attorney or the agent who is given the limited grant whilst the executor remains absent from the state. Similarly the executor sought to be removed u/s 301 is not, and at least necessarily not, an executor appointed u/s 241 of the IS Act, though an executor appointed u/s 241 of the IS Act may also be removed in a given case. Assuming that such an executor is removed and another one is appointed as a successor, he would necessarily be a successor executor u/s 241 of the IS Act. He would not obtain higher rights as a permanent executor u/s 301 of the IS Act, except if he is sought to be so appointed by the executor named in the Will, who had the power to administer the estate of the testator irrespective of any legal restrictions as did Bachoobai under Clause IX of the Will.

26. The Power of Attorney executed by Bachoobai dated 1st December 1972, however, sought to appoint the Respondent as successor of the said Dubash and also to apply for vesting in him the property which was earlier vested in the said Dubash. Under the Power of Attorney executed by Bachoobai in favour of the said Dubash, no property of the deceased had vested in him. The said Dubash was to only apply and obtain limited Letters of Administration and thereafter realise the money, estate, property and effects of the deceased. The Letters of Administration obtained by the deceased Dubash dated 12th November 1971 were also limited until Bachoobai obtained probate of the said Will and under that grant, the said Dubash was to administer the estate of the deceased, make full inventory of the property and credit and render an account thereof. The Letters of Administration were not separately granted to the Respondent. Instead in the Petition taken out by the said Dubash and the Respondent, the Respondent was appointed administrator and was vested as such administrator the properties of the estate of the deceased in India.

27. The two Powers of Attorney are distinctly different. These powers are granted upon the power she was herself given under Clause IX of the Will. Consequently, the two orders of the Court dated 12th November 1971 in Miscellaneous Petition No. 671 of 1976 in favour of Dubash and the order dated 21st December 1972 in Miscellaneous Petition No. 29 of 1972 in favour of the Respondent are also different and under different provisions of the law relating to testamentary succession contained in Sections 241 and 301 of the IS Act.

28. The order of this Court dated 21st December 1972 has not been challenged. The Petitioner as well as the Respondent have acted pursuant to the said order. That was the grant which has not been sought to be revoked.

29. Certain properties of the deceased came to be agreed to be developed by the Petitioner as the project coordinator of the said properties under an Agreement

dated 2nd January 1995 executed by and between the Petitioner and the Respondent. The parties relied upon and recited about the Will, the administration by Bachoobai under the Will, the appointment by her initially of the said Dubash and later the Respondent upon the powers conferred on her under Clause XI of the said Will, her interest and legal rights thereunder invarious recitals, more specially recitals a, b, c, g, h, i, j, w and y which run thus:

(a) One Eduljee Framroze Dinshaw (son of the late F.E. Dinshaw, being one of the two children of the said F.E. Dinshaw, the other child being Mrs. Bachoobai Woronzaw Dashkow) was in his own right entitled to a vast estate partly located in India and partly located abroad.

(b) The said Eduljee Framroze Dinshaw (hereinafter referred to as the said deceased) died in New York on 14th March 1970 leaving his last Will and Testament dated 4th February, 1970 under which he appointed his sister, the said Bachoobai, as the sole Executrix of the said Will and of his entire estate.

(c) Under his said Will, the said deceased empowered and authorised his sister, the said Bachoobai (as such Executrix) to sell or otherwise alienate, dispose off or deal with his entire estate and she was to be the sole life beneficiary of the estate of the said deceased and on and after her death, the residuary estate of the said deceased to be held in trust, by the Trustees named in the said Will, for the objects as specified in the said Will but subject to the directions that may be given by the said Bachoobai during her lifetime.

(g) One Jehangir Behram Dubash (hereinafter referred to as the said Dubash) at the instance and by the direction of the said Bachoobai, (being the sole Executrix under the Will and of the estate of her said deceased brother, the said Eduljee) applied to the Bombay High Court and obtained grant of Letters of Administration (with exemplification of Probate of Will annexed thereto of the estate of the said deceased Edulji F. Dinshaw, in India) by and under such Letters of Administration dated 12th November 1971.

(h) By Judge s Order dated 21st December 1972 passed in Misc. Petition No. 29 of 1972, the Bombay High Court, in its Testamentary and Interstate jurisdiction, appointed the Owner (the Respondent herein was described as such) above named as such Administrator of the estate in India of the said deceased Eduljee in place and stead of the said Jehangir Behram Dubash. This Order was passed and the Owner became such Administrator at the request and by the direction of the said Bachoobai (being the sole executrix of the Will and of the estate and effects of the said deceased Eduljee and being the sole life beneficiary of such estate).

(i) In these circumstances the Owner has ever since the date of the said Judge s Order, that is, ever since 21st December 1972 functioned as the sole Administrator of the estate in India of the said deceased Eduljee.

(j) In the year 1984-85 the above named Nusli N. Wadia and three others (hereinafter referred to as the said Trustees) were and even now are functioning as the Trustees of the public charitable trust named F.E. Dinshaw Trust which was so created by the said Bachoobai by and under the said Deed of Trust dated 28th December 1973 and which said Trustees owned and held, on such trust, as undivided half share right, title and interest interalia in the said lands which had belonged to the said F.E. Dinshaw and which had formed part of his estate and in which one half share had belonged to the said deceased Eduljee having been so transferred to the joint names of the said Bachoobai and the said Eduljee by and under the said Deed of Transfer dated 18th December 1969.

(w) In the altered situation and conditions prevailing in Bombay, and with a view to improve the investment potential of the estate of the said deceased Eduljee so held by the Owner (including with a view to avoid the possibility of further encroachment on the said lands described in the First, the Second and the Third Schedules hereunder written and also litigation in respect thereof), with the consent and concurrence and by the direction of the said Bachoobai (which is given by her in writing signed by her), the Owner desires that the said lands described in the First, Second and Third Schedules hereunder written be developed by an experienced and capable party and such development by such party would be on its own account and at its own risk, since the Owner does not have either the expertise or the infrastructure to carry out such development.

(y) This Agreement sets out the terms and conditions of such development so mutually agreed upon by and between the Company and the Owner (with the consent and concurrence of the said Bachoobai as aforesaid).

(Underlining and box bracket supplied)

Further, it appears from a reading of Recital (d) of the Agreement that the estate of the deceased comprised his undivided half share in the lands at villages Kanheri, Goregaon, Malad, Borivali, etc. and the other undivided half share belonged to Bachoobai who was his sister. They both had inherited their respective shares from their deceased father and which was transferred to them under a Deed of Transfer dated 28th September 1969 pursuant to their father's Will dated 23rd July 1934.

It appears from a reading of Recital (e) to the said Agreement that Bachoobai had created a registered Trust dated 28th December 1973 for her undivided half share in the lands inherited and transferred to her. The other undivided half share was the estate of the deceased in respect of which the Respondent was appointed administrator and vested those properties and which he sought to have developed under the said Agreement dated 2nd January 1995 executed with the Petitioner.

Recital (j) to the said Agreement shows that the Respondent functioned as one of the trustees of the Trust created by Bachoobai under the Deed of Trust dated 28th December 1973.

Recital (I) to the said Agreement shows that the aforesaid lands came to be partitioned under an Award dated 25th October 1985 of Justice Hidayatullah as the Sole Arbitrator so that the estate of the deceased formed a half portion and the other properties were the part of the Trust created by Bachoobai of the properties which devolved upon her from her father and transferred to her as aforesaid.

30. Hence the parties took Bachoobai to be the sole executrix of the Will of the deceased and of his entire estate. The parties took Bachoobai to be the sole life beneficiary of the estate as well as the residuary legatee of the estate of the deceased to be held in trust by the trustees mentioned in the Will for the objects specified in the Will but subject to her directions during her lifetime. The parties were aware of the contents of the Will and powers granted to Bachoobai thereunder. The parties accepted the Will. The parties interpreted it as to describe Bachoobai as the sole executrix thereunder. Bachoobai was indeed the only named executrix under the Will during her lifetime. She never ceased to act as such executrix during her lifetime. Bachoobai was granted, as such executrix, full power and authority to retain, manage and administer the estate of the deceased as freely as he would have done if he was living under Clause IX of the Will. She was specifically empowered with respect to the principal as well as the income of the properties of the Will of the deceased to inter alia diversify the real estate or other form of property under Sub-clause (a) thereof and also to sell or lease any property or interest or the estate of the deceased under Sub-clauses (b) and (c) thereof and to execute such instruments as would be necessary or advisable. This was sought to be done under the aforesaid Agreement dated 2nd January 1995 by the Respondent describing himself as the owner upon the property of the deceased having been vested in him pursuant to the order dated 21st December 1972. This was accepted by the Petitioner who accepted the said Will and entered into the said Agreement. The Respondent functioned as the sole administrator of the estate of the deceased in India as per the order dated 21st December 1972 which came to be incorporated in Recital (i) of the said Agreement.

31. The Petitioner thus obtained specific knowledge about the execution of the aforesaid Powers of Attorney of Bachoobai and the aforesaid orders of this Court in its testamentary jurisdiction. Consequently, the Respondent, described as the owner therein, was the sole administrator of the estate of the deceased since 21st December 1972 and functioned as such known to and accepted by the Petitioner.

32. Hence with the consent and concurrence of Bachoobai, exercising her powers under Clause IX of the Will, the Respondent, described as the owner in the said Agreement, desired to have the lands developed by the Petitioner. Bachoobai has, in fact, confirmed the contents of the agreement and declared that it was entered into by the Respondent with her consent, concurrence and as per her directions and that it would be binding on the estate of the deceased. This

declaration has been got made in the U.S.A. where she resided and has been endorsed and identified by the relevant authority in the State of Florida, U.S.A.

33. Under the said Agreement, the Respondent was to lease the immovable property belonging to the testator to the Petitioner for five years commencing from 12th January 1995 in consideration of receiving 12% of the gross receipts and realisations (proceeds) from the property under Clause 12 (a) of the Agreement subject to a minimum guarantee of Rs. 75 Lakhs under Clause 12A of the Agreement. The development of the property by the Petitioner was to be in control of the members of the Raheja family under Clause 12B of the Agreement. The 12% share of the Respondent was to be paid into his designated Bank Account under Clause 16(e) of the Agreement. Under Clause 18(b) of the Agreement, the Petitioner declared and confirmed, that it had made all inquiries on its own and had entered into that Agreement after familia rising itself in all respects factually that the status of the lands in the Agreement devolved upon the Respondent.

34. The Petitioner, therefore, had knowledge and must be taken to have had knowledge of the entire aforesaid chronology of events that transpired since the death of the deceased.

35. The Respondent also executed a Power of Attorney in favour of the Petitioner empowering him to develop the property and carry out acts and deeds incidental to such development.

36. The parties have fallen out. The Agreement and the Power of Attorney have been terminated by the Respondent. A suit in that behalf has been filed on 13th May 2008 being O.O.C.J. Suit No. 1628 of 2008. Certain order of injunction has been obtained by the Respondent on 17th June 2010 from this Court in its Ordinary Original Civil Jurisdiction in Notice of Motion No. 1863 of 2008 in Suit No. 1628 of 2008. The said order is challenged in Appeal filed by the Petitioner.

37. This Petition has been filed on 11th June 2010. The Petition seeks to revoke, not the initial grant, but an order dated 20th November 2003 obtained by the Respondent authorising and permitting him to continue as the administrator of the estate of the deceased upon the death of Bachoobai. Bachoobai expired on 12th August 2003. About three months thereafter, the aforesaid order was obtained by the Respondent from this Court in its testamentary jurisdiction. The Respondent was the administrator of the estate of the deceased appointed under the order dated 21st December 1972. He was appointed administrator of the property and credits of the deceased as successor of the said Dubash for the property and credits remaining to be realised and administered and also for vesting in him the said property. The order of his appointment does not mention an application made u/s 241 of the IS Act but u/s 301 of the IS Act.

38. It is contended by Dr. Singhvi on behalf of the Petitioner that it matters not under what provision of law the application was made; the Court has to see the substance of the right of the Applicant and the application made. The Respondent

could act as administrator essentially and only u/s 241 of the IS Act. He was appointed administrator in the place and stead of the said Dubash, who was appointed administrator under the limited grant issued by this Court. Under such limited grant, the said Dubash and later the Respondent as the attorney of Bachoobai, the executrix under the Will, were to administer the estate of the deceased. Consequently, they administered the estate under the Power of Attorney issued by the Bachoobai and the authority as administrator came to an end when Bachoobai died because the Power of Attorney came to be terminated on her death u/s 201 of the Indian Contract Act.

39. Neither the said Dubash nor the Respondent acted under the Power of Attorney of Bachoobai simpliciter. Pursuant to the power granted by Bachoobai, they obtained the order of the Court. Those orders of the Court were under Sections 241 and 301 of the IS Act, respectively. It is true that the Respondent stepped into shoes of the said Dubash and the said Dubash was appointed u/s 241 of the IS Act. That appointment was as an attorney or agent of Bachoobai but not under the Power of Attorney granted by Bachoobai alone. The said Bachoobai and the Respondent could have been appointed attorney or agent of Bachoobai even without the Power of Attorney executed by Bachoobai. They could have been the agents of Bachoobai, the absent executrix. The execution of a Power of Attorney is merely a mode of appointment generally made. Their appointment is, therefore, by an order of the Court and not only upon execution of the Power of Attorney. The order of the Court u/s 241 of the IS Act would come to an end for the limited grant granted thereunder when probate would be obtained by the absent executrix. If the probate is not obtained by the absent executrix, the grant would not come to an end.

40. The Petitioner knew the status of the Respondent in the lands under the agreement entered into by the Petitioner. The Petitioner knew of the aforesaid chronology of events recited in the agreement. The Petitioner also knew of the execution of the Will and the distinct orders obtained by the two Administrators. Hence the contention of the Petitioner that the Respondent acted as a mere Constituted Attorney of Bachoobai, who had confirmed the contents of the agreement and with whose consent and concurrence and under whose directions the agreement was entered into, cannot be accepted.

41. The Petitioner, as a prudent developer and litigator, must be taken to have kept note of the lifetime of Bachoobai. Bachoobai expired on 12th August 2003. If the authority of the Respondent as her Constituted Attorney came to an end on 12th August 2003, the Petitioner was required to have called off the agreement soon thereafter. The Petitioner continued the development through the years. It is the case of the Petitioner that some 2000 flats have been constructed in 33 buildings and the development is continuing. In fact, the Petitioner strenuously contested the Respondent's suit seeking to injunct him from developing the properties under the agreement which formed a part of the estate of the deceased in the suit filed by the Respondent in 2008 and in the Interim

Application prosecuted by the Respondent in 2010.

42. It may further be stated that the Petitioner has also sought to develop the property under the aforesaid Agreement dated 2nd January 1995 coupled with the Power of Attorney executed by the Respondent in his favour. If the power of the Respondent ceased, it need hardly be stated that the power of the Petitioner also ceased at the same time.

43. The order challenged in this Petition is the order obtained by the Respondent from this Court in its testamentary jurisdiction permitting him to continue as the administrator of the estate of the deceased after the death of Bachoobai and not the initial grant itself. Assuming that the authority of the Respondent came to an end, the Respondent sought to have it continued by an order of the Court in a Petition filed by him which came to be granted on 20th November 2003. The order enured for the benefit of the Petitioner and the Respondent alike. The order allowing the Respondent to continue as administrator, impliedly allowed the Petitioner to continue as the project co-ordinator under the Development Agreement dated 2nd January 1995.

44. It is intriguing to note the timing of the Petition. This Petition has been filed six and half years after the order was obtained and soon after the interim application in the suit of the Respondent was passed.

45. It is contended by the Respondent that the Petitioner knew of the order being passed, acted in unison with the Respondent and was privy thereto since the order was passed by way of abundant caution to continue the legal title and right which the Respondent had as an executor of the estate of the testator under the order dated 21st December 1972 in the interest of the Petitioner itself. It is contended on behalf of the Petitioner that the Petitioner only came to know of the said order being obtained by the Respondent when a statement to that effect was made for the first time in the Affidavit of the Respondent in Sur-Sur-Rejoinder filed in the Interim Application taken out by the Respondent in the suit filed by him, terminating the Agreement and the Power of Attorney.

46. Paragraph 5 of the said Affidavit shows the continuance of the Respondent as administrator notwithstanding the death of Bachoobai and paragraphs 6 and 7 of the said Affidavit show the filing of the Miscellaneous Petition, the contents of the Petition and the order obtained therein. Petition No. 41 of 2003 filed by the Petitioner shows the recitation of the devolution of the estate of the testator and of Bachoobai, the development of the estate of the testator, the beneficial interest of U.S. Charities and the effect of the legacy to such charities determined and adjudicated by this Court in an originating summons in its original jurisdiction, the execution of an Indenture by Bachoobai on 26th September 2001 and the death of Bachoobai, all of which shall be considered presently. The Respondent contended that since Bachoobai was the sole executrix under the Will of the deceased of which probate was granted by the New York County Court in the U.S.A., the Petitioner was advised to obtain order

permitting him to continue with the administration of the estate of the deceased.

47. The Affidavit-in-sur-sur-rejoinder came to be filed by the Respondent on 26th April 2010. The Petitioner claims to have applied for and obtained inspection of the records of Miscellaneous Petition No. 41 of 2003. It claims knowledge of the said order from the date of such inspection. It contends that the Petition is not barred by limitation but is promptly filed to revoke the order passed therein and to remove the Respondent as the executor.

48. The transactions that transpired after the execution of the Agreement dated 2nd January 1995 and prior to the filing of Miscellaneous Petition No. 41 of 2003 have been recited in the said Petition and of which the Petitioner claims ignorance. Indeed, the Petitioner cannot otherwise be imputed knowledge of what transpired between Bachoobai and the Respondent after the execution of the Agreement unless specifically shown by the Respondent. Nevertheless it would be too gullible for the Court to accept that the Petitioner, who would essentially benefit from lapsing of the legacies to the U.S. Charities or from the specific transfer in favour of the Respondent by Bachoobai of the properties which were being developed, can be taken not to have been at all concerned with those transactions. It is contended by the Respondent that the Petitioner not only knew of those transactions and not only consented to those transactions but actively participated in them and has benefited from them. The import of those transactions shall be considered presently.

49. Since it is contended by the Petitioner that it came to know of the filing of Miscellaneous Petition No. 41 of 2003 only upon reading the Affidavit-in-sur-surrejoinder of the Petitioner dated 24th April 2010 in the Notice of Motion taken out in Suit No. 1628 of 2008 and since it is contended by the Respondent that the Petitioner knew of the Petition and has sought to show by circumstantial evidence such knowledge, the case of lack of knowledge of the Petitioner must be first considered for its veracity.

50. The Petitioner knew about execution of the Will, the bequest to U.S. Charities, the life interest of Bachoobai, the power of Bachoobai as the executrix under the Will to sell, lease or mortgage the property of the deceased under the Will, the appointment by Bachoobai of her attorney and agent to obtain the limited grant in India whilst she lived in the U.S., the full power to manage and administer the properties of the testator irrespective of any legal restrictions and specifically the grant obtained by the Petitioner under the order dated 21st December 1972 consequent upon such unfettered powers.

51. If the Petitioner contends that Bachoobai had limited power and interest which would terminate on her death, the Petitioner, as a prudent business Company, would keep abreast of the lifetime of Bachoobai who had granted power to the Petitioner to develop the property and after whose lifetime it would cease. Bachoobai was a lady of advanced age residing in the U.S. The Petitioner would know of her impending death. Bachoobai died in August 2003. The

Respondent has stated in paragraph 3(b) of his Affidavit-in-reply that after he returned from the U.S.A. after attending obsequial ceremonies of Bachoobai, the Petitioner's main Director Gopal Raheja called on him to offer his condolences. He and the Respondent discussed what would be done since the Agreement may be in jeopardy. Though denied by the Petitioner, this oral statement, prima facie, stands to reason if the Petitioner's director came to know of the death of Bachoobai. If that was so, the Petitioner would have discussed in 2003 the steps to be taken to allow the development to continue which would have been in progress and which the Petitioner has always wanted to continue and see through the end given its strenuous defences to the Respondent's suit also.

52. In paragraph 23 of the Affidavit-in-rejoinder of the Director of the Petitioner in reply to the aforesaid paragraph 3(b) of the Respondent's Affidavit-in-reply, the Director has stated that he became aware of the death of Bachoobai very much after her death and had been informed by the Respondent that her death did not affect his appointment as administrator. very much after her death, there would be no specific occasion for the Respondent to inform the Petitioner that Bachoobai's death did not affect his appointment. None is shown. Besides, the Petitioner's Director has not stated precisely when that important event took place which would change the course of his development. It is not known even approximately how much after her death he would have come to know of that event. She died in 2003. Disputes between the parties arose after 2005. The suit came to be filed in 2008. The Affidavits-in-reply to the Notice of Motion have essentially been filed in 2010 followed by this Petition. The Petitioner has not stated anywhere when it came to know the death of Bachoobai. Bachoobai died at the advanced age of 89 years. She would have been 95 years old when the suit came to be filed. The Petitioner claims that it did not know of her death well past the filing of the suit by the Respondent against the Petitioner. It cannot be accepted that the Petitioner never even inquired about the state of health of a woman in such dotage when everything depended upon her life and her life interest in the estate of the deceased. Hence the statement of the Petitioner that it came to know of Bachoobai's death very much after her death is seen to be discernibly left vague.

53. To understand and appreciate the knowledge on the part of the Petitioner of what transpired prior to the filing of Miscellaneous Petition No. 41 of 2003 not only such visualisation but the intrinsic circumstantial evidence that would be a pointer to such knowledge must be appreciated.

54. The Respondent's Attorneys for obtaining the initial grant in 1972 were Little & Company. The Attorneys of the parties in the Agreement of Development were A.H. Parpia & Company. The Respondent's Attorneys in the suit filed by him were Doijode Associates. The Respondent's Attorneys in the aforesaid Originating Summons, the Appeal therefrom and the aforesaid Miscellaneous Petition No. 41 of 2003 were Maneksha & Sethna. Maneksha & Sethna were admittedly the Attorneys of the Petitioner and/or its Director Gopal Raheja since 1974. The

statement of the Respondent in paragraph 3(e) of the Affidavit-in-reply in that behalf is not denied by the Petitioner. The partner of the said firm refused to divulge certain information called for by the Respondent as constituting breach of confidence on his part to disclose anything concerning Rahejas. That has been accepted as correct by the Petitioner's Director in paragraph 28 of its Affidavit-in-rejoinder.

55. It is intriguing how and why the Respondent would be represented by the Attorneys of the Petitioner and/or its Director only in the Originating Summons, the Appeal therefrom (including the execution of a Memorandum of Settlement in and consequent upon the said appeal) and the aforesaid Miscellaneous Petition No. 41 of 2003.

56. The Respondent has sought to show that the Petitioner actively participated in certain negotiations for settlement with the U.S. Charities. These came about in an Originating Summons (which shall be dealt with presently) taken out by the Respondent herein in which the U.S. Charities were party Respondents and separately represented. The order on the Originating Summons has been obtained by the Respondent from the learned Single Judge of this Court in its original jurisdiction holding that the bequest to charity has failed since the provisions of Section 118 of the IS Act, which deal with bequests to religious and charitable usage, did not apply to the Will of the deceased. The U.S. Charities challenged that decision in Appeal. The U.S. Charities withdrew the Appeal and recorded a settlement. A Memorandum of Settlement (MOS) came to be executed immediately upon the withdrawal of the Appeal. In that MOS also, the Respondent was represented by Maneksha & Sethna as his Attorneys. It is stated that the U.S. Charities were to be paid Rs. 3.89 Crores in full and final settlement of the bequest under the Will of the deceased to them. The Respondent has sought to contend that the Petitioner as also the Companies of his brothers, who are also to develop part of the properties of the deceased, were to reimburse the Respondent their respective proportionate shares in the said settlement. The Respondent has shown letters written by the two brothers of the aforesaid Director of the Petitioner as Directors of other Companies honouring their oral Agreement and remitting a cheque towards reimbursement in respect of their proportionate share. The Petitioner is stated to have defaulted and failed to honour the oral commitments made by its Director Gopal Raheja. The letters dated 25th July 2003 addressed by one Suresh Raheja on behalf of K. Raheja Universal Private Limited and on behalf of Radhakrishna Properties Private Limited in respect of the Agreement dated 2nd January 1995 entered into by the Respondent with the Petitioner as also by one Chandru Raheja on behalf of one Ivory Properties and Hotels Private Limited have been annexed to the Affidavit-in-reply filed by the Respondent. Similarly the letters dated 15th September 2003 and 22nd October 2003 of Ivory Properties and Hotels Private Limited show reimbursement of Rs. 1 Crore and Rs. 60 Lakhs made by the said Companies towards their proportionate share in the legal costs incurred for the out-of-Court settlement in the Originating Summons taken out by the Respondent herein

which are also annexed to the Affidavit-in-reply of the Respondent.

57. The letters of Suresh Raheja, enclosing the two cheques for such reimbursement were issued four days before the Appeal came to be withdrawn and a week before the actual Memorandum of Settlement was executed between the Attorneys of the parties. The letters of Chandru Raheja followed close on the heels of the settlement on 15th September 2003 and 22nd September 2003, enclosing the cheques for reimbursement towards the costs of the Appeal and the Court settlement.

58. These letters make interesting reading. The letters of K. Raheja Universal Private Limited relate inter alia to the aforesaid Agreement dated 2nd January 1995. They make reference to our share therein and our proportionate share. They also make a reference to agreed shares. The subject matter of the letter makes a specific reference to the Petitioner. The amounts are sent by cheque. They are towards reimbursement of the High Court Appeal No. 155 of 2002 (which was filed by the U.S. Charities) in Suit No. 5034 of 2000 (in which the Originating Summons was taken out by the Respondent represented by Maneksha & Sethna). The letters of Ivory Properties and Hotels Private Limited are similar and refer to the reimbursement of the costs of settlement. That settlement was with the U.S. Charities. These letters show a C.C. being marked to one Rajesh Batra of M/s. Proline Sportswear.

59. The Agreement dated 2nd January 1995 made a specific declaration in paragraph 12B that the immovable property to be developed would be in control of the Raheja family whichever be the Company (controlled by the Raheja family) actually carrying out the development .

60. The Petitioner has not explained in its Rejoinder how such letters could have been sent by the Companies of the Raheja Group or how reference to the name of the Petitioner came to be made in the letter dated 25th July 2003 of K. Raheja Universal Private Limited. Of course, the Petitioner has contended that such a transaction would be against the public policy being against the intention of the deceased.

61. The Petitioner has sought to brush aside the contributions made by the brothers of its Directors who are Directors of the other Companies of the Raheja family on the ground that they had separated from the family earlier. Whilst this Petition is not concerned with the inter se disputes with the family members, the fact remains that development of the property albeit by the brothers separately after partition was to be the development of the Raheja family u/s 12B of the Agreement dated 2nd January 1995. The contention of the Petitioner regarding the partition in the Raheja family, the independent businesses of Suresh and Chandru Raheja as Directors of the aforesaid Companies and their resignation from the Petitioner are really of no consequence in view of the fact that the development of the deceased's property was to be by the Raheja family no matter which brother was on the Board of any Company. All of them would,

therefore, be equally affected by the bequests under the Will. Consequently, the total lack of explanation by the Petitioner of the reference to the Petitioner in the aforesaid letter dated 25th July 2003 is rather telling. These letters are intrinsic circumstantial evidence reflecting the knowledge of the Petitioner in the entire transaction.

62. Similarly a reference to one Rajesh Batra in the letter dated 15th September 2003 of Ivory Properties and Hotels Private Limited (also Raheja Company) gets corroborated in an E-mail stated to have been received by the Respondent from Rajesh Batra relating to the oral Agreement with regard to the settlement of the claim of the U.S. Charities upon the offer which came from their Attorneys Singh & Gorthi Trilegal annexed to the Affidavit-in-sur-rejoinder of the Respondent. However, the contents of the E-mail are completely hearsay and otherwise inadmissible in evidence until the said Rajesh Batra is examined and may not be considered upon Affidavits.

63. To counter the case of knowledge of the Petitioner of the claim and the settlement of the claim of U.S. Charities, the Petitioner relies upon a letter written by it to the Respondent on 10th May 2008, requiring the disputes between the parties to be referred to arbitration joining U.S. Charities as the beneficiaries under the Will. The letter was addressed a mere three days before filing Suit No. 1628 of 2008. It is not shown when it was received by the Respondent. The complaint that it has not been responded by the Respondent need hardly be considered; it is not shown to be a part of this proceeding requiring a reply. Of course, the Petitioner contended that the U.S. Charities were necessary parties to the suit in the Affidavit-in-reply filed by the Petitioner in the Interim Application taken out in that suit. That may not have been responded by the Respondent in the Interim Application which dealt with the acts of the parties to the suit alone for the grant of the reliefs claimed. The later statement of the Respondent that U.S. Charities were no longer beneficiaries in the Affidavit-in-rejoinder to that application must also be taken to be an ancillary statement not germane to the main reliefs pressed in that Application which dealt with only the acts of the parties to the suit for the grant of the reliefs in the Interim Application. It need hardly be stated that a party who is an insider having knowledge of particular facts could always feign ignorance of those facts to raise disputes in the suit. Such raising of disputes is not evidence of the knowledge or the lack of knowledge of that party; only the circumstantial evidence would be. The aforesaid events show not only that the Petitioner must be imputed knowledge of what transpired and in fact must be taken to be at least a partner architect of the entire scheme of releasing the property to be developed by them from the lawful interest of the U.S. Charities therein.

64. Marshalling the aforesaid intrinsic circumstantial, corroborative documentary evidence must lead to at an unmistakable conclusion that the Petitioner, given its position in the business world and in developing the property of the testator, had knowledge of an insider and had taken an active role in removing the only cloud

upon the property.

65. The Respondent applied to Court for its opinion in interpreting the bequest to charity made under the aforesaid Will by the deceased under Clause IV recited above. The Will was executed on 4th February 1970; the deceased expired on 14th March 1970, about 40 days after the execution of the Will. The bequest would be governed by Section 118 of the IS Act, which runs thus:

118. Bequest to religious or charitable uses.-No man having a nephew or niece or any nearer relative shall have power to bequeath any property to religious or charitable uses, except by a will executed not less than twelve months before his death, and deposited within six months form its execution in some place provided by law for the safe custody of the wills of living persons:

(Provided that nothing in this section shall apply to a Parsi.)

The bequest would require the testator not to have any near relative such as his sister to obtain the power to bequeath his property to charity, failing which the testator would be required to execute his Will at least 12 months before his death. It was contended by the Respondent in the Originating Summons, and on which an opinion of the Court was sought, that because the testator died within a year of making the Will the bequest to charity would fail. It was held in the order on the Originating Summons by this Court dated 22nd October 2001 that since the deceased left his sister and died within 12 months of making his Will, he did not have the power to bequeath the property to religious or charitable use.

66. The statement of objects and reasons brought to my attention by Dr. Singhvi on behalf of the Petitioner in respect of Section 118 runs thus:

3. Further, u/s 118 of the Act, a testator, if he has a nephew, niece or a nearer relative, cannot bequeath any of his property to religious or charitable purposes or uses except in the manner and within the time limit provided in that section. The Parsi community would like to be exempted from such a provision so that a Parsi can bequeath his property without any restrictions.

The Amending Act of 1991, aside from bringing about the gender equality and eliminating the gender discrimination that prevailed for succession amongst parsis in Chapter III of the Indian Succession Act, which dealt with special rules for Parsi Interstates, added the aforesaid proviso to Section 118.

67. It is contended on behalf of the Petitioner that the application was blasphemous inasmuch as the executor of the Will has himself sought to challenge the bequest made under the Will. It is also contended on behalf of the Petitioner that the Respondent has not challenged the bequest but has sought to have it interpreted and opined by the Court. It is also contended on behalf of the Petitioner that prior to the order on the Originating Summons the section was declared ultra vires the Constitution of India by the Kerala High Court in the case of Preman v. Union of India AIR 1999 Kerala 93. This judgment was not brought to the notice of the learned Judge answering the Originating Summons.

68. The U.S. Charities filed an Appeal and pending the Appeal, in the case of John Vallamattom and Another Vs. Union of India (UOI), the Supreme Court declared the said section ultra vires the Constitution of India as discriminatory, it being then applicable only to Christians. Besides, Section 118 did not apply to Parsis since the amending Act of 1991. It is contended by the Respondent that the Act could not have retrospective operation and hence did not apply to a Will which took effect in 1970, though it may apply to Wills executed after the amendment.

69. It was under these state of affairs that the U.S. Charities settled their claim under Memorandum of Settlement (MOS) executed by and between the Attorneys of the Respondent, Bachoobai and the U.S. Charities dated 1st August 2003. It is contended by the Petitioner that the MOS was not personally executed by any of these parties and hence would be of no effect. The MOS was executed, 11 days before Bachoobai's death. A death certificate, to which my specific attention has been drawn, shows that Bachoobai was hospitalised from 19th July 2003 in New York. It is, therefore, unlikely that she would have or could have given instructions for settlement with the U.S. Charities which was carried out by her Attorneys on the date the MOS was executed. The Appeal of the U.S. Charities came to be withdrawn on 29th July 2003. The MOS has been executed three days thereafter. The MOS shows that it was executed in the Appeal itself. Though it is contended that Bachoobai was extremely old and ill and could not have known of the MOS, the authority given to her Attorneys in the Originating Summons, of which she was fully aware as can be seen from the Indenture of Transfer executed by her on 17th September 2001, continued in Appeal and the MOS was executed in Appeal. Hence though Bachoobai was hospitalised from 19th July 2003 until her death and though the MOS was executed in the interregnum, her authority to her Attorneys continued. Similarly the authority given by the U.S. Charities to their respective Attorneys in the Originating Summons was continued in Appeal. It is under that authority that the MOS is executed.

70. The authority of Attorneys implicitly includes the authority to settle. The implied authority of Counsel to compromise on behalf of the client even without the consent of the client came up for consideration initially in the case of AIR 1930 158 (Privy Council) followed in the case of (1935) AWR 980 (Privy Council) ; and Jamilabai Abdul Kadar Vs. Shankarlal Gulabchand and Others, upon the authority of the Pleader under Order 3 Rule 1 read with Order 3 Rule 4 of the CPC It was held that the authority of the Pleader implied in itself the act of compromising a case without the specific consent of his client subject only to he acting in good faith and for the benefit of his client not against any specific instruction to the contrary. When, therefore, there was no mala fide action imputed upon the Pleader and his conduct was seen to be motivated for good for his client, it was observed that his implied authority was not abused.

In Sourendra's case it was held, per Lord Justice Atkin that the implied authority

of Counsel to settle matters in the interest of their clients even without the client's consent, as prevalent in the U.K applied in equal measure in India. The act of the Advocate in India would bind his client, even if she were a pardanashin lady, as in that case. Considering the general principles of formation of contracts, as the contract between an Advocate and client was, the actual and ostensible as also the apparent authority were considered. It was reasoned that the implied authority was necessary to effectuate the relations between Advocate and client to make possible his duties. The skill and understanding of the Advocate to take a final decision upon various aspects of his work (eg., to take or give up a point of argument) as also to accept an offer of settlement or to receive or pay something less than the full claim was held to be within the purview of his brief. Often such a decision must be taken at once so that a valuable opportunity is not lost to his client, provided only that inconsistent instructions were not received.

This was followed in the case of *Byram Pestonji Gariwala Vs. Union Bank of India and others*, . That was after the amendment of 1976 of the C.P.C concerning compromises. It was observed that the relationship between Counsel as the recognized agent of his principal (the client) was a matter of contract with which the legislature would not generally interfere except if it was against public policy. Hence it cannot be presumed that the legislature disallowed the parties to enter into compromise by Counsel in the course of their duty as authorized agents (much as their constituted attorneys). This legislative intent was observed in view of the object of the amendment in attaining quick reduction of arrears in Court by elimination of uncertainties and enlargement of the scope of compromises. This was specifically observed to be true in case of non-resident persons. It was observed that if a constituted attorney could enter into compromise on behalf of his Principal, so can Counsel possessing of the requisite authorisation by vakalatnama, on behalf of his client. The authorisation under the vakalatnama of *Bachoo Bai* given in the Originating Summons continued in the Appeal and consequently, in the compromise which was entered into in the appeal as reflected by its title.

In para 9 of the judgment the role of Counsel in Courts in England as described in *Halsbury's Laws of England* 4th Edition, vol. 3 paras 1181 and 1183 came to be considered. The Counsel's authority included the authority to compromise. The observation *inter alia* is: thus if, in Court, in the absence of the client, the compromise or settlement is entered into by the Counsel whose authority has not been expressly limited, the client is bound.

Of course, no Counsel would have authority to enter into compromise on collateral matters in the absence of express authority and a compromise would be set aside in circumstances which would invalidate the agreements between the parties. That provision has been specifically made under Order 23 Rule 3 of the CPC. Hence, if the compromise can be voided on the ground that it would be voidable, the party himself or herself may void it. There is nothing to show or suggest that the stranger to the compromise could void the compromise. In

this case neither Bachoobai nor her estate has sought to a void it.

In para 19 the observation of Lord Justice Atkin in Sourendra's case (supra), that it is implied in the interest of the client, to give the fullest beneficial effect to the employment of his Advocate, has led the Supreme Court to hold that after the amendment of the C.P.C Counsel s role in a compromise decree would extend also to matters collateral to the suit.

It would, therefore, be in vain to question the authority of Bachoobai's attorneys who were her recognized legal agents, pursuant to her vakalatnama in the Originating Summons, to continue to act on her behalf and to compromise the claim made by the U.S. Charities upon which she, as a residual legatee, came to be a full owner capable of bequeathing the property of the deceased in India herself as she did. The same holds true of the U.S. Charities. It can be challenged only by the party giving the authority if it is exceeded or by his/her representative-in-interest. It can hardly be challenged or questioned by a stranger to the settlement.

71. It is contended by Dr. Singhvi that it is astounding that the MOS mentions that the judgment of the Supreme Court does not apply to Parsis and hence to the case of the deceased; the judgment only declares the section ultra vires and its effect would be that the section would not be on the Statute Book. Be that so, the U.S. Charities have settled their disputes for consideration. The Respondent paid both the Attorneys of the U.S. Charities Rs. 18.95 million each (Rs. 1.8 Crores each) aggregating a total of Rs. 3.79 Crores in full and final settlement of their claim and in consideration of their withdrawing the Appeal. The Attorneys of the U.S. Charities undertook to hold the said amount and deal with it subject to the Foreign Exchange Management Act, 1999 and the Foreign Contribution Regulation Act, 1976. They further undertook to remit the said amount or such amount as is permitted by the Reserve Bank of India to the U.S. Charities and if not permitted to a Charitable Organisation in India which had permission under the Foreign Contribution Regulation Act, 1976 at the directions of the U.S. Charities. It was recorded that the Respondent paid the costs incurred in the Originating Summons as well as the Appeal to the Attorneys of the U.S. Charities out of the estate of the Testator.

72. It is, therefore, demonstrated that the acts of the Respondent resulted in removing the cloud upon the estate and its development by the Petitioner and resulted in its benefit. Similarly, therefore, it is manifest that the action by the Petitioner is motivated and filed as a counterblast to the suit filed by the Respondent against the Petitioner. It is, however, a counterproductive counterblast. If the Respondent is held to have no authority to deal with the property of the testator after the death of Bachoobai, the authority given by the Respondent to the Petitioner to develop the properties of the testator would also similarly fall. The contract to develop the lands would get frustrated since it would become impossible of performance and unlawful to perform consequent upon Bachoobai s death u/s 56 of the Indian Contract Act, the relevant part of

which runs thus:

56. Agreement to do impossible act.- An agreement to do an act impossible in itself is void.

Contract to do act afterwards becoming or unlawful.-A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

73. Similarly it would have to be seen whether the Agreement dated 2nd January 1995 entered into by the parties would become impossible of performance upon and in view of the judgment of the Supreme Court in the case of Johnvallamattom (supra) declaring Section 118 of the IS Act to be ultra vires the Constitution of India. As aforesaid, though the Will of the testator as well as the two grants in favour of the said Dubash as well as the Respondent have been recited in the agreement, the bequest to the U.S. Charities is conspicuous by its absence. Both the parties knew of it very well. Both the parties knew of its consequences. Both the parties knew that it would take effect on the death of Bachoobai whatever agreement that was entered into and whatever development that came to be made pursuant thereupon with consent, confirmation and concurrence of Bachoobai whilst she had life interest therein. Even if the agreement were to continue after her death and when the charitable bequest took effect, it could only have been with a similar confirmation, consent and concurrence of the legatees who were given absolute bequests. Hence even if this Court held that the bequest failed because the testator did not live for more than 12 months after the execution of the Will, in view of the judgment of the Supreme Court in the case of Johnvallamattom (supra), the bequest would be valid and the agreement, as entered into and without the confirmation of the legatees, would stand frustrated; the judgment itself was the supervening impossibility.

74. In the case of Satyabrata Ghose Vs. Mugneeram Bangur and Co. and Another, , it has been held that the word impossible in Section 56 of the Indian Contract Act would not only mean physical or literal impossibility. The impossibility may be only impracticability or uselessness of the contract such that the object and performance which the parties had in view would get upset by an untoward event or change of circumstances and which would totally upset the very foundation upon which the parties rested their bargaining so that the promisor would find it impossible to do the act which he promised to do. It was observed in that judgment that the changed circumstances which make the performance of the contract impossible absolve the parties from further performance of it as they did not promise to perform an impossibility. The contract will stand discharged by reason of the supervening impossibility or illegality of the act agreed to be done and hence will stand frustrated upon being hit by Section 56 of the Indian Contract Act.

It was observed that the doctrine of frustration would apply when the terms in the contract, upon implied or express construction would require the contract to be discharged on the happening of certain circumstances when the contract will stand dissolved but the relief could also be given by the Court even if there was no such term of the contract on the ground of subsequent impossibility when the Court finds that whole purpose and basis of the contract was frustrated by the inclusion or occurrence of an unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time they entered into the agreement. If such a change of circumstance was so fundamental as to be regarded as striking at the root of the contract as a whole, the Court could pronounce that contract as frustrated and at an end. It is observed that the Court would require to examine the contract and the circumstances under which it was made. The belief, knowledge and intention of the parties are evidence upon which the Court would form its conclusion whether the changed circumstances destroyed the contract altogether.

In that case, a land was to be developed for residential purpose. The development was to take place during the second world war. Requisition orders were usually passed during the period. There was scarcity of building material and the Government restrictions in respect of them. Taking into account the evidence in that case, including the fact that there was no stipulated period during which the development was to be completed and war conditions prevailing at the time of the development, it was observed that the requisition order under the Defence of India Rules could not be taken to have vitally affected the contract or made its performance impossible so as to frustrate the contract. Under those circumstances, the applicability of doctrine of frustration to a contract was laid down.

75. This case was followed in the case of *The Naihati Jute Mills Ltd. Vs. Khyaliram Jagannath*, . It was held that the Court would grant relief on the ground of subsequent impossibility when it finds that the whole purpose or the basis of the contract was frustrated by the inclusion or occurrence on an unexpected event or change of circumstances which was not contemplated by the parties at the date of the contract. It was observed that in such a case there would be no question of finding out an implied term agreed to by the parties embodying a provision for discharge affirming the view in the case of *Satyabrata Ghose* (supra). It was further held that when an event or a change of circumstances so fundamental as to strike at the root of the contract occurred, the Court could pronounce the contract to be frustrated and at an end. It was held that that was the positive rule enacted in Section 56 of the Indian Contract Act and in those cases the doctrine of frustration applied.

In that case the parties entered into a contract to sell goods under the form prescribed by the Indian Jute Mills Association for importing jute from Pakistan under the import licence obtained by the buyer. During the subsistence of the contract, there was a change in the policy of the Government which the parties

could not foresee when they entered into the contract. It was observed that impossibility of performance would have to be inferred by the Courts from the nature of the contract and the surrounding circumstances considering that parties would have made their bargain upon the basis that that particular thing or state of thing would continue to exist and because of the altered circumstances the bargain should no longer be held binding. The Courts would infer that the foundation of the contract had disappeared either by the destruction of the subject-matter or by reason of interruption or delay in performance. The Court considered the bounden duty of the contracting parties to perform their obligations undertaken under the contract which could not be excused except when such performance was made impossible by intervening causes, over which the parties had no control. Referring to the case of *Davis Contractors v. Fareham U.D.C.* 1956 AC 696, it was quoted thus:

Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.

It was observed that it was not only hardship or inconvenience or material loss which brought about the frustration of the contract but the change in the significance of the obligation, which if performed, would be different from that which was contracted for.

In that case what was to be considered was whether the change in the policy of Government of India brought out the total prohibition of import of Pakistan jute which was not envisaged by the parties which intervened at the time of performance of the contract and which made the performance impossible. The evidence showed that there were circulars issued since March 1958 showing warnings of the Government of India that import of Pakistan jute would be permitted to the absolute minimum and that the Jute Mills should satisfy their needs by purchasing Indian jutes. The licence to import jute was granted in the ratio of 5:1 to the importer upon producing evidence of purchase of five times the Indian jute for being able to import one time the Pakistan jute. The Indian Jute Mills Association had issued a circular showing the said policy. Further the evidence of the parties with regard to the import of jute showed that there was a complete embargo on the import of jute placed by the Government. The licencing authority was to scrutinise each case on merits. It was observed that the parties were aware that licences were not freely issued. The contract made a provision for the shipment period to be extended if the import licence was not obtained. Damages were provided in respect of failure to furnish the licence. The contract indicated that the parties were conscious of the difficulty of obtaining the licence knowing of the damages they would incur upon refusal to accept licence and hence there was no question of the performance becoming impossible by reason of the Government policy. Under such cases, therefore, the contract did not become impossible of performance and was held not void on the ground that it

was frustrated.

76. The aforesaid two judgments, therefore, lay down that if the parties knew not about an occurrence which actually happened after the contract was entered into but which made the contract void, it would stand frustrated.

In this case, the parties had no inkling that the Supreme Court would hold Section 118 ultra vires the Constitution but it was so held. If the parties contemplated that the bequest to charity could be a voided and they appeared to have so contemplated as they had gone on to sign the contract of development which would span a number of years and may outlive the life interest of Bachoobai they would be bound by the judgment and would have to honour the bequest to charity. Their contract was, therefore, subject to such absolute bequest. It could not have continued except with the permission of such absolute legatees. Upon the judgment of the Supreme Court, the Respondent could have thrown up his hands, his 12% share in the proceeds notwithstanding, and claimed the contract as having been frustrated. The Petitioner would have been none the safer. Of course, both the parties would want the contract to continue. They would brook no interference from the U.S. Charities but they had to contend with the U.S. Charities. It is inconceivable that the Petitioner, an adroit litigator, would have left that stone unturned and not cared about buying off or settling with the U.S. Charities to be able to continue his project as the project co-ordinator uninterrupted by the claims of those absolute legatees.

77. This circumstance itself lends enough credence to the fact that the Petitioner at least tacitly and behind the curtain aided and assisted the Respondent in settling with the U.S. Charities. Of course, the Petitioner had no right or direct interest to do so directly and positively. But having regard to its 88% stake in the proceeds, which the Respondent was not likely to grant him on a platter and free of cost, he would have been constrained, even if he was not himself interested, in settling with the U.S. Charities.

78. The charitable bequest, which was sought to be effectuated under the MOS for paying off the U.S. Charities was subject to the permission of the Reserve Bank of India being obtained for transferring the funds out of India. If the permission was not obtained, it was for the administrator of the estate to apply to Court for necessary directions to otherwise effectuate the estate. The MOS itself sets out the alternative mode of payment to a charitable organisation in India.

79. This is in consonance with the doctrine of cy-pres applied in England. In the case of *White s Will Trusts Barrow v. Gillard* (1955) Ch.D 188, the testatrix provided for two cottages to be missionary homes in her Will. The cottages were occupied by tenants who were protected under the Rent Restriction Acts. The homes were not free from effectuating the charitable bequest. It was held, considering the case of *Attorney General v. Bishop of Chester* (1785) 1 B. C.C. 444 and *Sinnett v. Herbert* (1872) 7 Cha 232, that there was a valid charitable

gift. It was observed that there was no particular charitable purpose of the testatrix which could not be carried out so as to have the gifts failed since it was held that existing body was willing to take over one of the cottages occupied by tenants and use it for the purpose mentioned in the testamentary document when they can obtain possession. That was allowed to be effectuated. The case of *Wallis v. Solicitor-General for New Zealand* (1903) A.C. 173 was referred to. In that case an express gift of land and money for particular purposes was held not invalidated by the fact that particular application directed would not necessarily take place within any definite time and might never do so and the doctrine of cy-pres applied. It was also observed that there were many cases where funds were paid into Court until it was seen whether or not certain purpose became practicable citing the case on *Bishop of Chester* (supra). It was observed that if the intention of the testatrix was practicable to be carried out at some time in future also, it could be so allowed.

80. In the case of *Woodhams, deceased Lloyds Bank Ltd. v. London College of Music* (1981) WLR 493, also the doctrine of cy-pres was applied. In that case a charitable bequest was made to the school of music by way of a scholarship meant for absolute orphans coming from two named homes. The college felt that creation of a scholarship strictly in accordance with the conditions of the testatrix's Will would create problems which would more than outweigh any practicable benefit which might be derived from it. Considering the case of the college and its curriculum and activities and other cases of similar bequests and interpreting the clause relating to the charitable bequest setting out the scheme for foundation of the scholarship, it was held that intention of the testatrix was to further musical education by founding scholarship at colleges which valued such education. The testatrix chose absolute orphans from homes run by well-known charities as those most likely to need assistance. But it was observed that there was no specific requirement in the essential part of the scheme that scholarship should be so restricted and hence it was held that the part of the scheme or the mode of achieving charitable purpose can be modified without frustrating the intention of the testatrix. It was, therefore, held that the Trust did not fail. The Trust could have been carried into effect by a modification of the Trust of each moiety deleting the restriction to absolute orphans from the named homes. Consequently, a settlement of a scheme was directed. The doctrine of cy-pres was accordingly used.

In this case, the parties themselves have provided for the doctrine of cy-pres. If the agreed amounts could not be transmitted to the U.S.A. for want of permission of the Reserve Bank of India, the said amounts were to be donated to an Indian charity nominated by the U.S. Charities. It is seen, therefore, that the parties expressly provided so as not to have their agreement frustrated by any supervening impossibility. It is, therefore, required to be carried out. If that is carried out, the administrator will have complied with his duty as administrator; if not the U.S. Charities who would be interested in such a grant as compromised by them under the MOS would be the party who could apply for removal of the

executor or for revocation of the grant.

81. It is contended on behalf of the Petitioner that what was to be paid to the U.S. Charities was a pittance out of the estate valued at more than Rs. 150 Crores. Though a contract with consideration cannot be challenged on the ground of inadequacy of consideration, in view of the fact that pursuant to the judgment of the Supreme Court, the U.S. Charities alone would have been entitled to the entire bequest, it would beat the conscience of any Court to turn a Nelson's eye to such a transaction. The Respondent had not mentioned in his Affidavits how the Agreement was pursued to satisfy the Court how the U.S. Charities or any other charitable organisation in India directed by the U.S. Charities were ultimately paid off. The Respondent only showed the Court the acts behind the scenes of the Petitioner by the evidence of the Companies of the other family members of the Raheja family also developing the said properties reimbursing the Respondent their proportionate share not only in the settlement but also in the costs of the litigation to be paid and incurred by the Respondent from the estate of the Testator to the U.S. Charities through their Attorneys, Trilegal.

82. The Court in its, discretion, required the Respondent to show the Court for its satisfaction the amounts actually received by the U.S. Charities under the settlement by them. The Respondent has got produced, through the firm of Trilegal, the correspondence with the U.S. Charities showing remittance by Telegraphic Transfers (T Ts) made to both the charities in a sum of Rs. 1,87,26,500/- each on 27th December 2003 after deduction of the costs incurred by them in a sum of Rs. 2,23,500/- each authorised and accepted in writing by the U.S. Charities. The Petitioner's Attorneys, in their reply to the Respondent's Attorney's note annexing the aforesaid documents raised fishing inquiries about further details not sought by the Court and questioned the transactions as gift. The doubt expressed is perhaps upon ignorance of the procedural requirements of T Ts. The forms required to be filled in, under RBI guidelines for T Ts, require the transmitter to tick one of the reasons for the transfer. Personal gifts and donations is the applicable column in the form to be ticked. The consequent banking transaction is rightly described as gift. The MOS was executed in the appeal (see its title). Hence the U.S. Charities have rightly given the reference of the Appeal. That would set at rest any of the Court's doubts about the transaction reflected in the receipts. Any further questions or doubts by the Petitioner would be completely outside the scope of the inquiry by the Court and its purport.

83. It is, therefore, true that the anomalies in the MOS or any play upon words resulting in any mis-statement or misrepresentation to the U.S. Charities would require the Court to reach out to them. It is true that Courts must hear those who cannot speak; listen to those who cannot shout. The U.S. Charities being uninformed of this litigation would require the positive act of the Court in that behalf. However, the Court can be, at best, a watchdog; not a bloodhound.

84. Once it is seen that the U.S. Charities have received the amounts agreed

upon in the MOS, they are seen to have obtained full access to justice. They had been represented by their Attorneys and Counsel. They had the advice of Indian Lawyers for the law that had applied, however, strange their interpretation may sound to the Petitioner. They are taken to have waived the consequences of litigating in India and dealing with the developers who had been litigating previously with the administrator in India. They must also be taken to have exercised an informed choice of washing their hands off their onerous bequest requiring them to take and keep accounts which would entail infrastructural costs and may result in a negative cost-benefit ratio, they being mere charities will quipped to be as litigious as the Petitioner whom they might be required to contend with. Once, therefore, it is seen that the U.S. Charities or their nominees in India have received the full share agreed by them pursuant to the withdrawal of their Appeal, which would in turn result in withdrawal of their grounds of Appeal or any allegations made by them or surprises expressed by them in the Memo of Appeal, consequent upon their constraint in receiving the amounts agreed to be paid to them under the Foreign Exchange Regulations in India, neither the Petitioner nor the Court can go further.

85. Consequently, the contention of Dr. Singhvi that the Indenture of Transfer as well as the MOS are bad as unregistered and unstamped and/or inadequately stamped documents, though correct on first principle, may lead the Petitioner no further.

86. Ergo, the Petitioner must show its interest prejudicially affected. (See: *Parimal Kr. Das v. Prasun Kr. Das* (2004) 1 C LT 621 . The prejudice, if any, suffered must be shown to be derogatory to the interest of the estate and the beneficiaries who would claim the estate pursuant to the administration of the estate in which the Petitioner's interest is adversely affected. It must show how the estate suffered, sustained or underwent any loss by the administration. The prejudice suffered is not the loss incurred, the nuisance borne, the supervision endured, the accounts withstood, the proceeds partaken or even the litigation met by an outsider to the estate or a third party that the estate would have to contend with and whose interests are diametrically different from the interest of the estate, such as are of the Petitioner. It is not for the Petitioner to show how any other party could be at the receiving end. The Petitioner, therefore, cannot merely show its woes or travails at the hands of the Respondent who sought to administer the estate in the best interests of the estate. The prejudice shown by the Petitioner to claim locus, therefore, itself militates against the reliefs that could be granted to the Petitioner to do away with the Respondent whom it has to withstand and contend. (See: *Dwarika N. Addya v. Jogabandhu D. Poddar* ILR (1896) Cal 446.

87. Rather than showing how any of those acts have caused prejudice to the Petitioner, it is only made clear to Court that those acts, even if undertaken by the Respondent individually and singly and without even the tacit participation of the Petitioner, enured for the benefit of the Petitioner the most. The Petitioner

would continue to reap the benefits of its capital in vestments in the estate of the testator being developed by him to the extent of 88% of the proceeds.

88. The Petitioner, however, contends that if the Respondent is removed as administrator, the Petitioner would be required to pay the U.S. Charities 12% of the profits made by the Petitioner instead and hence his development would not be, in any way, altered. It is contended by Dr. Singhvi that the Petitioner has a right to pay the profits arising out of the estate of the deceased to a legitimate estate holder and not a pretender as the Respondent. If that is so, the Petitioner has suffered no prejudice by the grant or the continuance of the grant to the Respondent. Consequently, the Petitioner would not be entitled to maintain an action for removal of the Respondent.

89. The Petitioner has challenged the order dated 20th November 2003 and prayed for its revocation alleging mala fides on the part of the Respondent. The order, as aforesaid, has been obtained about three months after the death of Bachoobai. It is an order to allow the Respondent to continue to be the administrator of the estate of the deceased under the power granted by Bachoobai. Bachoobai having expired, her power had terminated. The grant, however, is contended to be made not u/s 241 limited until Bachoobai herself obtained probate but u/s 301 of the IS Act, which deals with appointment of an executor upon the removal of the earlier executor and which does not deal with any limited grant or appointment. Nevertheless, the Respondent applied for continuation to act as an administrator. It is contended by the Petitioner that this itself shows that the Respondent believed that his power to act as administrator would have otherwise ended but for the permission to continue by the Court.

90. To appreciate the mala fides alleged by the Petitioner, what was the position of the parties in November 2003 must, therefore, be appreciated. Bachoobai had died. The Power of Attorney had come to an end. The Grant was pursuant to the said Power of Attorney. The Petitioner as well as the Respondent had acted upon the Grant. Bachoobai had exercised her power as executor under Clause IX of the Will. She had consented to the property being developed by the Petitioner. The Petitioner had put in enormous capital in developing the property. The Respondent, as the administrator, was receiving 12% of the proceeds. The Petitioner was receiving the commensurate 88%. There was none else to administer the property. The U.S. Charities had been paid off upon the settlement reached with them. There were no other beneficiaries under the Will. Bachoobai having been a residuary legatee became the absolute owner of the properties of the testator in India which were developed by the Petitioner. Bachoobai had left the Will in which she bequeathed all her properties to the Respondent's sons as the only beneficiaries and appointed the Respondent her sole executor. The clock turned full circle.

91. If the Respondent was not to continue, the development would come to a premature halt. The Petitioner would have to call it a day. The Petitioner would have been most adversely affected. The Respondent had the authority as well as

the title under Bachoobai's Will as an executor thereunder. There was no party to whom the estate of the deceased would have vested who was not brought to light or whose claim was suppressed. In a case such as that, this Court in its testamentary jurisdiction would exercise its inherent and discretionary power to continue the administration once granted in the hands of the same administrator who had until then administered the estate. If however, there would be any party who had a legitimate claim to the estate of the testator but whose claim was suppressed, he/she could have come to Court to have the permission of the Court granted to the Respondent to continue as an administrator set aside.

92. The Petitioner has sought to do that. The Petitioner is not the beneficiary of the estate of the testator or even of Bachoobai. The only interest of the Petitioner is in developing the property. It is contended on his behalf that the authority given to the Petitioner to develop the property would continue even after Bachoobai's death; only 12% share in the proceeds could be given to another person or another administrator. That would simpliciter not give the Petitioner the cause of action to have the administrator changed or to revoke the permission of the Court granted to the administrator to continue in administration, if the administrator did not go well with the Petitioner.

93. The Petitioner has questioned the mode of applying for such continuance also. My attention is drawn to certain objections that the office of the Prothonotary and Senior Master of this Court had raised, including questioning why the Petition was filed when the Petitioner was already appointed administrator under the order dated 21st December 1972. This, though assured to be mentioned to the Judge for his satisfaction, is not shown to have been questioned or mentioned. My attention is also drawn to the fact that the documents upon which the Respondent craves leave to refer to and rely upon were filed in the separate compilation and were not present to the mind of the Court when the order came to be passed. The Petitioner contends that the aforesaid objections show that material facts were suppressed. Dr. Singhvi contended that the cryptic order passed so soon after the filing of the Petition shows that the Respondent was in an indecent hurry. The Petition has been filed on 12th November 2003. It was brought up on Board on 20th November 2003. It was accepted, made returnable forthwith and disposed of in terms of the Judge's Order which allowed the Petitioner to continue as the administrator.

94. The two orders granted in favour of the Respondent by the same Court in respect of the same Will must fairly be compared to appreciate this contention of ill-gotten order. The order dated 21st December 1972 was passed in Misc. Petition No. 29 of 1972. That Petition was filed a day before - on 20th December 1972. That order, obtained on the very next day after filing that Petition, is accepted and acted upon by both the parties. It is not challenged. It is the source of authority of the Petitioner as developer. Misc. Petition No. 41 of 2003 was filed on 12th November 2003. The order/directions for continuing the grant to the Respondent as administrator was passed 8 days thereafter. It was passed

under similar uncontested circumstances. Yet it is challenged because the tables have turned.

95. So much for two like orders reflective of similar situations of instant justice!

96. Misc. Petition No. 41 of 2003 was not for application of the grant. The grant had earlier been applied for. The Petitioner was already an administrator. The Petition was, therefore, only for directions. Directions were not against the interest of any beneficiary named in the Will who was not paid off or whose legacy remained to be effectuated. There were no contestants. It was, by its nature, for ministerial directions of continuing the work of administration. The only work to continue was the development of the property by the Petitioner as the project co-ordinator as also the other firms of the Raheja family similarly. A Judge's Order, in such a Petition, suffices under the procedure, by which this Court is governed under the rules framed by this Court on its Original Side. Such directions are necessarily obtained ex-parte, upon mere application on a Judge's Order. Of course, if any party is prejudiced by any misrepresentation or fraud, the order would stand vitiated upon an application made in that behalf in accordance with law and procedure. Though, therefore, the Petition was filed, the Will and the other documents were annexed thereto as well as in a compilation as per the requirement in the objections of the Prothonotary & Senior Master's office, it would be understandable that they were neither referred to nor shown to the Court, unless required by Court. In an uncontested case such as this, it would not be required as there would be no reason for the Court to doubt the bona fides of the claim. The Petition makes a reference to the facts that transpired prior to the Petition, including the efforts of the administrator with regard to the development of the property of the deceased, the question relating to the failing of the legacy, the transfer of Bachoo Bai's interest to the administrator and her ultimate demise.

97. The grant was obtained by the Respondent on 27th December 1972. The order dated 27th December 1972 is not sought to be revoked. That is the order under which the Respondent, as the administrator, sought to allow the Petitioner to develop the property. The order dated 20th November 2003 is alone sought to be revoked. That is the order passing directions to continue the grant. Though Petition No. 41 of 2003 does not show a specific section of the Indian Succession Act, under which it came to be filed, Mr. Nariman on behalf of the Respondent stated that it was only for directions to an administrator u/s 302 of the IS Act. Section 302 runs thus:

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

98. Dr. Singhvi argued that the continuation of the Respondent as administrator

of the estate of the testator in India militates against the express provision made by the testator for appointment of successor executor in Clause VIII of the Will. Bachoobai had a life interest under Clause V. of the Will. The U.S. Charities had the absolute beneficial interest under Clause IV of the Will. After the death of Bachoobai, the successor executor would have to apply the estate of the deceased for the benefit of the U.S. Charities and administer the estate such as to transfer the estate of the deceased to them.

99. A reference was made by Dr. Singhvi to the case of *C. Masilemani Mudaliar and Ors. v. Idol of Sri Swaminathswami Thirukorl and Ors.* 1996 8 SCC 529 to contend that life interest could never be converted into absolute interest except when specifically provided by law as in Section 14 of the Hindu Succession Act under which a Hindu widow in possession of property in lieu of her right of maintenance (which includes residence) would be entitled to full interest thereunder so that her possession would ripen into ownership which can devolve upon her heirs by testamentary and Interstate succession. However, the Respondent never sought substantive rights under the order dated 20th November 2003.

100. Since the U.S. Charities had already settled their interest and claim and/or were paid off prior to the death of Bachoobai, that beneficial interest had itself been accelerated. Bachoobai was the residuary legatee. Once the beneficial interest in the properties of the deceased was settled, the remainder would be the residuary bequest going only to Bachoobai. The entire of the remainder of the property of the deceased was the property which was being developed in India. No part of that property then had to be administered to be paid over to the U.S. Charities in the U.S.A. The successor executor was the partner of Coudert Brothers who would be designated by three of the partners of that firm. He was the executor in the U.S.A. He would be required to administer the property of the deceased in India. He would be required to administer that property for Bachoobai (as the residuary legatee) and not for U.S. Charities. He was authorised to designate an individual or a Bank to act on his behalf in India. It is technically correct to say that such successor executor should have been appointed by the competent Court in New York, U.S.A. from amongst the partners of Coudert Brothers. Such executor would then designate an individual or a Bank in India to administer the estate. If that is not done, the person prejudiced would certainly obtain orders of the Court to get that appointment made. If the ultimate beneficiaries were paid off, no one other than Bachoobai, who was then the residuary legatee would be the beneficiary. The Respondent was appointed administrator by this Court pursuant to the Power of Attorney of Bachoobai herself. For the lifetime of Bachoobai or until she revoked her power, the Respondent had the authority to continue to administer the estate. Until then the nomination of the deceased had not ripened. If the successor executor nominated by the deceased had to be appointed, it could have been only after Bachoobai's death. Instead of having that successor executor appointed, the Respondent sought to continue to act as administrator under the order obtained

in Miscellaneous Petition No. 41 of 2003. Upon the death of Bachoobai, there was no beneficial interest under the Will of the deceased which remained to be paid off and hence none could have applied under the Will of the deceased either to appoint the nominated successor as the executor or to challenge the continuation of the Respondent as the administrator. This was, therefore, a matter wholly uncontentious. Hence nothing but directions of the Court u/s 302 were required to be passed for allowing the Respondent to continue to act as administrator of the estate of the deceased.

101. In the judgments relied upon by Dr. Singhvi himself, this position is made absolutely clear. In the case of Provas Chandra Sinha Vs. Ashutosh Mukherji and Others, , it has been held that the disputed questions of title could not be determined in an application u/s 302 where the jurisdiction of the Court is confined to the issue of directions to the executor relating to the management of the estate alone.

102. In the case of Akshoy K. Ghose, deceased case AIR 1949 Cal 462, it has been held that the directions required to be passed in an application u/s 302 involving no substantial rights for adjudication or determination were only to help the executor in the difficulties in respect of practical management or administration where no disputed questions of title or difficult questions of construction of the Will or complicated questions of law were involved. Those orders are necessarily ex-parte but do not give final protection to the executors, if on a subsequent inquiry it was found that they had acted improperly. Hence if the U.S. Charities were not paid, the executors will be seen to have acted improperly. After the order came to be passed on 20th November 2003 allowing the Respondent to continue as an administrator, nothing further was done or had to be done for paying off any beneficiary under the Will of the deceased. The administrator had to take only accounts of the development of the property in India which, by then having been vested in Bachoobai, was bequeathed to his sons in a separate testament of which also he was an executor.

103. The moot questions that would be the test of the Petition are: Would it prejudice the Petitioner ? If the order of continuance of the administrator was not granted, would it have then prejudiced the development of the Petitioner ? Was it, in fact, for the benefit of the Petitioner ? Needless to state that only a party having an interest in the estate of the deceased which would be detrimentally affected by passing of such order could have it set aside, restored or annulled, be it merely a direction.

104. The Petitioner also contends that the order dated 20th November 2003 requires to be revoked as it was obtained fraudulently by the Respondent, making a false suggestion and concealing from the Court material aspects. The Petitioner also contends that grant was obtained by mentioning untrue allegations of facts essential in point of law to justify the grant. The case of the Petitioner of *suggestio falsi* and *suppressio veri* is upon the fact that:

- (i) Bachoobai has been claimed to be the sole executrix which she was not;
- (ii) the bequest to charity has been shown to be frustrated which was not; and
- (iii) the indenture made by Bachoobai in favour of the Respondent and his Companies was a fraud for want of adequate consideration that passed thereunder.

These three aspects are, therefore, required to be separately considered thus:

105.(i) It is contended by Dr. Singhvi that since there were successor executors mentioned in the Will even the nomenclature of Bachoobai as sole executrix is fraudulent and fraught with mischief. It is argued on behalf of the Petitioner that the expressions successor and any executor in Clause VIII show that Bachoobai was not the sole executrix. The contention is incorrect as Clause VIII begins thus:

I nominate, constitute and appoint my sister, Bachoo Woronzow, to be the executrix of this my will and in the event that she shall predeceased me, fail to qualify or cease to act for any reason I nominate, constitute and appoint as successor such then partner of Coudert Brothers....

The expression executrix in first part of Clause VIII of the Will shows clearly that she was the only named executrix. There was none to act along with her.

106. In fact the boot is on the other foot. It may be mentioned that Bachoobai was described as the sole executrix as well as the sole beneficiary under the Will of the testator in Miscellaneous Petition No. 29 of 1972 itself, under which the Respondent obtained his initial grant from this Court. The Petition filed as well as the grant obtained have been recited in the Agreement of the Respondent with the Petitioner dated 2nd January 1995. The Petitioner knew about the said description since 1995 since the execution of the Will itself came to be recited in the said Agreement and the Petitioner knew and must be taken to have known the contents thereof. Even the bequest to charity was known to the Petitioner from the contents of the Will. It is only in view of the bequest to charity that Bachoobai would have a life interest albeit with the powers conferred upon her in her capacity as the executrix in Clause IX of the Will.

107. Of course, the Will mentions how successor executors would be appointed. They would be partners of the U.S. Attorneys firm of Coudert Brothers. Those partners have been mentioned in the citation along with the trustees named in the Will as also the executrix mentioned in the Will. They would be certainly required to be notified of the death of Bachoobai, if her life interest came to an end. The Respondent would be duty bound to notify the same; they were not to call upon the Respondent to perform their obligation as executor as claimed by him. However, that duty would come into play if the life interest came to an end without any other interest having ripened. If the U.S. Charities, who were the beneficiaries under the Will, no longer had any beneficial interest under the Will and if Bachoobai, as a residuary legatee, would get the remainder of the estate of the testator there would be nothing left in the Will to execute by the successor

executor for the beneficiaries mentioned in the Will. In such an event alone, they would not be required to be informed of their position and obligations by the Respondent. The beneficial interest of Bachoobai in the properties of the deceased in India could be continued to be administered by the administrator appointed in India. Consequently, much ado that was made about the successor executors not being informed by the administrator in India, who sought to continue to act, comes to nothing, at least when it is not so contended by the only beneficiaries who would have an interest in the administration of the estate of the deceased the U.S. Charities.

(ii) The Respondent had applied for an opinion of this Court in Originating Summons No. 1504 of 2000 in Suit No. 5034 of 2000 (O.S.) filed by him that the bequest to charities had failed. This led to an appeal by the U.S. Charities and ended in a settlement as aforesaid. Pending disposal of the Originating Summons and prior to the order passed therein, an indenture came to be executed by Bachoobai.

108.(iii) The Indenture executed by Bachoobai is indeed rather strange. This was during the time she only had a life interest. She could not have transferred the entire property of the deceased to the Respondent unless she came to own the said property pursuant to a full and absolute bequest. Yet it is contended that the Indenture is a transfer of the properties under the Will of the testator to the Respondent and certain four Companies of the Respondent for a consideration of only Rs. 20 Lakhs when the properties were worth several crores going by the consideration mentioned in the Agreement for development of the said property dated 2nd January 1995. That consideration is not at all as propagated by Dr. Singhvi. The Indenture dated 26th September 2001 was pursuant to Bachoobai being the residuary legatee under Clause V, though she had a life interest in the properties sought to be transferred. The Indenture interpreted Section 118 of the IS Act showing its inapplicability to the Will to render the charitable bequest void as contended in the Originating Summons and showed the intention of Bachoobai to sell her right, title and interest in the corpus of the property of the deceased in India contingent upon the High Court decision that that property vested in her. The consideration of Rs. 20 Lakhs payable thereunder was subject to her right to receive the income of that property during her lifetime and down to her death and also subject to the donation of Rs. 10 Crores to the corpus of another Trust under the Deed of Settlement settled by her on 28th December 1973 being F.E. Dinshaw Trust.

109. The transfer has merged in Bachoobai's Will dated 17th October 2001, which came into effect upon her death on 12th August 2003, under which also her property came to be bequeathed to the Respondent's sons.

110. Hence though this indenture came to be executed between Bachoobai and the Respondent whilst she continued to have the only life interest and whilst the legacy to the U.S. Charities were known to have been made and not held to have failed or lapsed, it is seen to have been executed by Bachoobai under the vest,

unfettered powers inter alia to sell the properties of the testator given to her under Clause IX of the Will recited above the power to manage the estate of the testator irrespective of any legal restrictions.

111. The transfer by Bachoobai of all the properties under the Will to the Respondent would confer upon him a clear title subject only to the claim of the U.S. Charities thereon. There is none other who can challenge the transfer, however unique that transaction would be. Yet the transfer would enure for the benefit of the Petitioner even more; whereas the Respondent would have a clear 12% of the gross proceeds from the development; the Petitioner would be entitled to appropriate 88% of it. Similarly if the bequest to U.S. Charities failed and if Bachoobai, upon her residuary interest, became the sole beneficiary and is bequeathed that property absolutely, aside from the Respondent, who claims through Bachoobai under the aforesaid transfer, the Petitioner would benefit from being freed of the only encumbrance on that property which was of the U.S. Charities. Pertinently and interestingly, there is no mention of the only cloud of the U.S. Charities upon the rights of the Petitioner as well as the Respondent in the Development Agreement. Nonetheless, they could not be wished away. They had to be dealt with. It is impossible to accept that the Petitioner, who is an astute business Company in the business of development, would not have its hand in such dealing. Hence, the entire transaction is either not fraudulent from the inception or it was an attempt to deceive which failed to deceive or defraud the Petitioner.

112. Of course, following up Derry v. Peak (1889) AC 337 fraudvitiates any transaction. (See: Yeswant Deorao Deshmukh Vs. Walchand Ramchand Kothari, ; Punjab Mercantile Bank Ltd. Vs. Sardar Kishan Singh, ; Smt. Shrisht Dhawan Vs. M/s. Shaw Brothers, ; Devu Veerabhadra Rao and Others Vs. Gollapalli Latchanna (died) by LRs. and Others, ; Ram Chandra Singh Vs. Savitri Devi and Others, ; A.V. Papayya Sastry and Others Vs. Government of A.P. and Others, and Meghmala and Others Vs. G. Narasimha Reddy and Others,).

113. However, a contractvitiates by fraud is not a void contract. It is voidable at the instance of the party defrauded or injured; (See AIR 1944 11 (Privy Council) ; (which was held to be a fraud by which the applicant would be affected adversely by the grant of probate per Atkin LJv it is not voidable at the instance of the party benefited. If the U.S. Charities are seen to be defrauded, the Respondent could expect no cover from the Court no matter that the U.S. Charities did not file the Petition but nevertheless, thanks to the Petitioner, the fraud came to light. If however, the U.S. Charities are not defrauded, the Petitioner would not be entitled to the cover of the Court.

114. Dr. Singhvi has drawn my attention to Section 310 of the Indian Succession Act which runs thus:

310. Purchase by executor or administrator of deceased s property.-If any executor or administrator purchases, either directly or indirectly, any part of the

property of the deceased, the sale is voidable at the instance of any other person interested in the property sold.

The Respondent, as the administrator of the property of the deceased, did purchase it from the holder of the life interest before the ultimate bequest could take effect. The purchase would be voidable at the instance of the other person interested in the property. But for the settlement, the U.S. Charities would be the only persons interested in the property and consequently, the transfer to the Respondent could be voidable at their instance alone. They having been stated to have been paid off under the settlement, they would no longer be interested in the property sold, except if the settlement itself failed. The Petitioner, who has questioned the Indenture dated 26th September 2010 is not the person interested in the property sold pursuant to being a developer thereof. It is a mere developer. It has to develop the property, appropriate 88% of the proceeds of the property of development and pay 12% to the estate of the testator. It hardly behoves the Petitioner, therefore, to question the indenture of transfer of the property when it cannot and has not even a voided it in a separate civil suit.

115. Dr. Singhvi contended that Section 310 of the IS Act is analogous to Section 53 of the Indian Trust Act and Section 91 of the Probate and Administration Act, which enjoins trustees not to purchase the interest of the beneficiaries with court permission and to indemnify the transferor respectively. He contended that the Respondent, as the administrator, was in the position of a trustee because he was in a fiduciary relationship. This relationship was also with the ultimate beneficiary. The Respondent herein is himself the ultimate beneficiary, individually or along with his sons. Hence though the argument is rather attractive, it is also only academic. (See: *Laxmidas G. Dossa v. Ismail G. Kassum* (1926) BLR 1262; *Baroda P. Banerji v. Gajendra N. Banerji* 1 IC 289; *Manohar Mukherji v. Raja Peary Mohan Mukherjee* 54 IC 6 & 1921 48 IA 258 in appeal to Privy Council from Calcutta High Court and *Hari Narain Vs. Badri Das*, which related to the relationship of landlord and tenant only).

116. It is contended, and upon a plain reading of the Indenture dated 26th September 2001 would stand to reason, that the Respondent, as the administrator, buying over the property in administration in his personal capacity was hit by the doctrine of conflict of interest as he was a fiduciary. (See: *James, Ex parte*, Court of Chancery (1803) 32. ER 385; *Manohar Mookerjee v. Raja Peary Mohan Mookerjee* 54 I.C 6 and 1921 LR 48 1A in appeal to Privy Council from Calcutta High Court; *Pandurang Shamrao Laud Vs. Dwarkadas Kalliandas*, ; *Brijkishore Singh and Others Vs. Sm. Nazuk Bai and Others*, and *Regal (Hastings) Ltd. v. Gulliver*, House of Lords (1967) A.C. 134 which is an authority for acts of Directors of a Limited Company as trustees of the Company). This proposition of law would have attracted the embargo u/s 310 of the IS Act, if a person interested in the estate of the deceased whose interest was affected by such transfer would have applied. The Petitioner is not interested in the property sold and its interest is not affected by such transfer. In fact, its interest is

safeguarded under such transfer.

117. Dr. Singhvi contended that the Petitioner, as a developer, is bound to agitate its rights of development of the estate of the deceased upon even a bare possibility of an interest in the estate of the Testator as a purchaser or transferee from an heir of the deceased or a contingent interest. (See: *Kipping and Barlow v. Ash* (1845) 163 E.R. 1035; *Muddun Mohun Sircar v. Kali Churn Dey* ILR 1892 Cal 37; *Lalit Mohan Bhattacharjee v. Navadip Chandra Kaparia*, ILR 1901 Cal 587; *Mokashadayini Dassi and Others Vs. Karnadhar Mandal*, ; *A.P. Ismail Rowther v. Mynoon Bivi* AIR 1966 Madras 84 and *Inox Air Products Ltd. Vs. Harshita Ltd.* (which are cases for setting aside a sale in execution by a judgment debtor); *Banwarilal Shriniwas Vs. Kumari Kusum Bai and Others*, ; *Mrs. Elizabeth Antony Vs. Michel Charles John Chown Lengera*, (holding that a party can apply even without caveatable interest) which was followed in *Krishna Kumar Birla Vs. Rajendra Singh Lodha and Others*, (for contingent interest).

118. Dr. Singhvi drew my attention to the case of *Tara Chand Sharma and Another, Yadvinder Thakur and Om Parkash Aggarwal Vs. Uma Aggarwal and Others*, in which it was observed that though the Petitioner must come to Court with clean hands and his conduct has to be above board, the jurisdiction u/s 301 to remove the executor for misconduct has to be exercised by the Court upon taking an overall view of the matter. The Court cannot shut its eyes to the conduct of the executor and allow the executor to continue irrespective of his work to the detriment of the property bequeathed merely because the complainant's conduct was not above board. It is gratifying to note how Dr. Singhvi fairly conceded the conduct of the Petitioner. In fact, it has not come up for consideration except for challenging bona fides of the Petitioner. In this Petition, it is not for the Court to see the acts of the Petitioner in development of the testator's property that would be seen in the suit filed by the Respondent. The misconduct of the executor would certainly be seen by the Court and would never be countenanced. It must, however, be misconduct such as to prejudicially affect the party interested in the estate, which would be such that the party interested would not get its due share upon the administration by the executor. That party, in this case, would be the only U.S. Charities and no other not by any count the Petitioner.

119. Similarly in the case of *Mah. Gen. Jonathan Reuben Samson Vs. Zillah Solomon and others*, also this Court has observed that motive of filing the Petition under Sections 263 and 301 is irrelevant and if the grounds for removal of administrator or revocation of the grant are proved, the Petitioner would be entitled to those reliefs. That, of course, would be the Petitioner whose interest in the estate of the deceased would be prejudicially affected by the grant itself or by the acts of the administrator and not a Petitioner whose interest would be, in fact, protected by such administrator.

120. The only effect of the said order allowing him to continue was to take accounts of the development of the property to obtain 12% of the proceeds

thereof under the Agreement signed by him as the executor and to allow the development to go on smoothly so that the ultimate transfer of the properties, which were developed, could be made to the ultimate purchasers of those developed properties. Of course, if the 12% share in the estate of the deceased which the Respondent had to administer was not received, the ultimate beneficiaries would be entitled to apply to set aside that order or to remove him as executor. Those ultimate beneficiaries are the sons of the Respondent. The Petitioner is nowhere a contender.

121. The various legally sound and correct arguments of Dr. Singhvi, though a gratification for one's intellectual appetite, remain purely academic, thanks to the total lack of any beneficial interest of the Petitioner in the estate of the testator and the total lack of prejudice suffered by him as also each event having a kinetic effect that transpired to put the Respondent at the helm.

122. It has been urged on behalf of the Respondent that the Petitioner has no locus to file a Petition for revocation of the grant or even the order continuing the grant and that the Petition filed for ulterior reason must be dismissed. Other than any stranger or an interloper any party with even a minor interest in the estate would be entitled to maintain an application for revocation of the grant (See: *Perviz Sarosh Batliwalla v. Mrs. Viloo Plumber* 2000(3) MLJ 39; *Pirojshah Bhikaji v. Pestonji Merwanji* 1910 Bombay Law Reporter; *Dwarika N. Addya v. Jogabandhu D. Poddar* ILR (1896) Cal 446.

123. The Respondent has also contended that the Petition is barred by limitation because it is filed more than three years after the order came to be passed in Miscellaneous Petition No. 41 of 2003 which is sought to be revoked. That contention speaks of the law without considering the exception. The Petition would be barred, if on the Petitioner's own showing it came to Court to revoke the order more than three years after it received knowledge of the order. In the alternative, the bar could be considered if the Respondent showed a precise date on which the Petitioner derived knowledge of the filing of Petition No. 41/1993 to start the period of limitation. The precise date when limitation began to run is not shown by the Petitioner's knowledge. Mere delay or even knowledge cannot constitute a bar. (See: *Manorama Chowdhurani v. Shiva Sundari Mozumdar* ILR 1914 Cal 480. In the absence of oral evidence in that behalf and upon only the circumstantial evidence of the knowledge that the Petitioner is imputed the Petition by itself cannot be taken to be barred. Dr. Singhvi relied upon the principle in *A.P. Ismail Rowther Vs. Mynoon Bivi and Others*, (which is an execution application); *Ram Chandra Singh Vs. Savitri Devi and Others*, (which is a partition suit); and *Smt. Shrisht Dhawan Vs. M/s. Shaw Brothers*, . Consequently, the judgments relied upon by Mr. Nariman on behalf of the Respondent with regard to the requirement of filing the Petition within three years or the explanation of delay would not come into play in this case. (See *Hari Narain and Others Vs. Subhash Chander and Others*, and *Ramesh Nivrutti Bhagwat Vs. Dr. Surendra Manohar Parakhe*, .

124. The Petitioner contends that this Petition is filed u/s 263 of the IS Act. Section 263 runs thus:

263. Revocation or annulment for just cause.-The grant of probate or letters of administration may be revoked or annulled for just cause.

Under Section 263, the Letters of Administration granted to the Respondent can be revoked for just cause. This Petition does not seek to revoke the grant. It seeks only to revoke the order of continuation of the grant. The order was not even an ancillary grant. Probate was obtained in the New York County Court in 1970. A limited grant was obtained from this Court in 1972. The limited probate had become final. A mere direction to continue the grant in India cannot be challenged when the initial grant in the U.S as well as the limited grant in India is in force. In the case of *Ramesh Nivrutti Bhagwat v. Dr. Surendra Mandar Parkhe* A 2001 Bom 461 it was held that when the grant of the Superior Court in California, which was a judgment in rem was in force, the ancillary grant also could not be revoked.

125. Dr. Singhvi argued that the grounds showing just cause for revocation of the grant u/s 263 of the IS Act were not exhaustive. He relied upon a number of judgments to show different facts situations when the grant was revoked. (See: *Ganeshammal and Others Vs. Arunachalam*, ; *In Re: V. Arunachalam*, ; *R. Ramachandran v. G. Hariharan* (2001) 2 Mad. L.J. 417; *N. Saroja v. Srividya Chits and Finance (P) Ltd., Karur* (1996) MLJ 74; *Gita alias Gita Ravi v. Mary Jenet James alias M.J. James* (1995) MLJ 467; *G. Shanmugham Chetti v. Chinnammal* AIR 1978 Madras 304; *Dhanabakkiyammal Vs. Thangavelu Mudaliar and Others*, ; *F.C.S. Amalnathan v. J.S. victor Basco* AIR 1995 Kar 258; *Udai Chand Vs. Shankar Lal and Others*, (which related to revocation of leave in a SLP); and *G. Gopal and etc. Vs. G. Nagarathinam and Another*, . The Respondent would argue otherwise. (See: *Sharad Shankarrao Mane and etc. Vs. Ashabai Shripati Mane*, ; *Annoda Prasad Chatterjee v. Kalikrishna Chatterjee* ILR (1896) Cal. 95 (relating to the analogous provision in Section 50 of the Probate and Administration Act, 1881; *Promode Kumar Roy Vs. Sephalika Dutta*, , *Anil Behari Ghosh Vs. Smt. Latika Bala Dassi and Others*, ; *Bal Gangadhar Tilak v. Sakwarbai Maharaj* (1902) 4 Bom LR 637 The facts in all these cases are different and need not be enumerated.

126. The other prayer in the Petition is for removal of the Respondent as the administrator. An administrator can be removed u/s 301 of the IS Act. The Petitioner would require to make out a case for such removal. The case that the Petitioner has sought to make out is that the Respondent has sought to brush aside the U.S. Charities by paying them a pittance of their legacy, and has sought to get the transfer of the interest of Bachoobai in the property of the deceased to himself and his Companies. Those acts, though appearing to be of doubtful repute, do not adversely affect the Petitioner or development of its property. Those acts, in fact, facilitate such development and the consequent profits by the Petitioner. It is only the U.S. Charities who would have a legitimate

right to challenge the acts of the Petitioner as administrator because only their interest may be prejudiced. That would have been the case but for the settlement. It may still be the case if the settlement sought to be reflected in the MOS dated 1st August 2003 is not effectuated. If that Agreement is not effectuated and stands frustrated because of any supervening impossibility in executing it despite the doctrine of cy-pres resorted to by the Respondent and is rendered void, the claim of the U.S. Charities would hold good. In view of the Supreme Court judgment in the case of Johnvallamattom (supra), the U.S. Charities would be the only party whose legal interest in the properties of the deceased would continue. If the MOS fails, not the Petitioner but, the U.S. Charities would obtain the entire interest in the properties of the deceased and the Petitioner's development would come, in the words of the Respondent, to a grinding halt. These attractive propositions of law cannot, therefore, come to the aid of the Petitioner.

127. Dr. Singhvi has brought out the inherent distinction between the two sections; the former revoking the grant itself but the latter removing only the executor for his wrongful acts or his misconduct whilst continuing the grant are seen to be mischievously though artfully applied. Though prayer (a) of the Petition is u/s 263, it is seen that the Petitioner would rather continue the initial grant dated 12th December 1972 in the interest of the Petitioner itself. If that grant is revoked, the entire development of the Petitioner would ipso facto fall through.

128. The application for removal of the Respondent as executor can be entertained only upon showing his misconduct in administration which prejudicially affects the Petitioner and which is not shown. The hope of the Petitioner to continue the grant upon doing away with the Respondent can, therefore, only be duped.

129. Surprisingly, the Petitioner claims that the Respondent has not provided accounts relating to the estate of the deceased. The Respondent was never required to provide accounts to the Petitioner. The estate of the deceased has never claimed accounts or made a complaint of its non-receipt. In fact, the Respondent has claimed accounts from the Petitioner in respect of the development of the testator's property under the Agreement dated 2nd January 1995. The Respondent is the most apt, if not the best, person to be able to demand, receive and evaluate the accounts. In fact, that is the moot reason why the Petitioner would be safe to do away with the Respondent and to substitute him by another administrator who would not, for lack of knowledge of the facts of the case alone, be as well equipped to receive the accounts submitted by the Petitioner as the Respondent would be.

130. The Respondent, who was abreast of the estate of the deceased and who was shown to be acting as an administrator until then, could have been the only person directed to continue as administrator in the interest of the estate.

131. On considering the intrinsic merits of the case, the application of the Petitioner is seen to be accentuated by mala fides and as a counterblast to the suit of the Respondent.

132. Hence none of the reliefs prayed for by the Petitioner can be granted. The Petition is dismissed with costs.