

MISCELLANEOUS CIVIL.

Before Coldstream and Bhide JJ.

SHRIMATI KARAM DEVI—Petitioner

versus

RADHA KISHAN AND OTHERS—Respondents.

1935

Jan. 14.

Civil Miscellaneous No. 31 of 1934.

*Indian Succession Act, XXXIX of 1925, section 301 :
Jurisdiction of High Court to remove an executor — whether
exclusive, or whether a regular suit is competent.*

Held, that the power to remove an executor and to provide for a successor to his office is conferred upon the High Court alone by section 301 of the Indian Succession Act, and that such relief cannot be sought by a regular suit.

Dhanabakkijammal v. Thangavelu Mudaliar (1), relied upon.

Petition under section 301 of the Indian Succession Act, 1925, praying that the present executors be removed and successors appointed in their place.

NAWAL KISHORE and DINA NATH BHASIN, for Petitioner.

MEHR CHAND MAHAJAN, for Respondents Nos. 1, 2 and 4.

The Order of Bhide J. referring the case to a Division Bench—

BHIDE J.—These are three miscellaneous connected petitions under section 301 of the Indian Succession Act of 1925 for the removal of certain executors appointed by one *Lala Shankar Shah*, who died on the 6th December, 1928, leaving a large amount of property. Various allegations of misconduct have been made against the executors appointed by *Lala Shankar Shah* and it is prayed that they should be removed from their offices and certain other persons should be appointed as successors.

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A preliminary objection was raised on behalf of the respondents that the charges brought against the executors would require an elaborate enquiry and complicated issues of fact and law will arise and that under the circumstances the proper course would be to leave the petitioners to their remedy by a regular suit.

On behalf of the petitioners it was claimed that the only remedy available to them was an application under section 301 of the Indian Succession Act and no regular suit was maintainable.

After hearing arguments on the point it seems to me that the question is an important one and should go before a Division Bench. The only authority directly in point, which has been relied on by the petitioners, is a Division Bench judgment of the Madras High Court reported as *Dhanabakkiyammal v. Thanganvelu Mudaliar* (1). In that case, however, it was conceded that the High Court had exclusive jurisdiction in the matter. If this position is correct the present petitions will have to be heard by this Court and this may mean a protracted enquiry. But before, it is taken up it seems to me desirable that the preliminary law point should be decided by a Division Bench. I, therefore, request the Hon'ble the Chief Justice to let me have the assistants of another Judge to decide the matter, under proviso (c) to rule 1, Chapter 3-B, Volume V, of High Court Rules and Orders.

The judgment of the Division Bench.

COLDSTREAM J.

COLDSTREAM J.—* The question to be decided is whether under section 301 of the Indian Succession

(1) (1927) I. L. R. 50 Mad. 956.

Act, the High Court has exclusive jurisdiction in the matter of the removal of an executor appointed by will and the provision of a successor to his office or it is open to a person desiring the removal of an executor to seek his remedy by regular suit, the object of that section being merely to provide a summary remedy in addition to that by suit.

I may observe at the outset that the petitioners are not prepared to restrict their application so as to make it one simply for rendition of accounts. They allege not only maladministration of funds by the objectors, but improper conduct in other directions and such personal hostility towards each other as renders it impossible for them to co-operate and is likely to endanger the estate and injure the legatees who are minors. They insist upon the removal of the executors and the provision of successors to their office.

For the respondents Mr. Mehr Chand's argument is that section 9 of the Code of Civil Procedure gives the Courts jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred, that there is nothing in the Indian Succession Act or other enactment which bars a suit for the removal of an executor, that there are authorities for holding that the power given by section 302 of the Indian Succession Act to the High Court to give directions to an executor is discretionary and that as the language of that section and section 301 is similar (' the High Court may, on application made to it '), these authorities support his contention that the jurisdiction conferred on the High Court by section 301 is also discretionary and it is open to the High Court to leave an applicant for an order under that section, to seek his remedy by suit.

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This argument proceeds on the assumption that a person may have a legal right to the removal of an executor from his office such as a Civil Court can enforce. But from the very nature of the office it seems clear that there can be no such legal right, for the right to act as executor of a will can be created only by the will itself. It follows that proceedings for the removal of an executor must be of a peculiar nature not arising out of any legal rights and are, therefore, not a "suit of a civil nature," jurisdiction to try which is conferred by section 9 of the Code. A Court cannot enforce a right which does not exist. The assumption on which the argument is based is therefore fallacious and the argument breaks down.

Mr. Mehr Chand has drawn our attention to the fact that it was not until 1902, that the High Courts in India were given, in the Administrative-General's Act of that year, the power described in section 301 of the Indian Succession Act, and argues that it is inconceivable that no power existed in the ordinary Courts before that time to remove a dishonest or incompetent executor and that it must, therefore, be presumed that the intention of section 301 was merely to give the High Court a discretionary power to deal summarily with a matter which could be disposed of in a suit. There is, however, no doubt that there was this incapacity, and this was made clear in *Dhanabakkiammal v. Thangavelu Mudaliar* (1).

In the course of his argument based on the similarity of the language of sections 301 and 302 of the Indian Succession Act, Mr. Mehr Chand has referred to *Aryapratinadhi Sabha v. Om Parkash* (2), *Provaschandra Sinha v. Ashutosh Mukherji* (3) and *Secretary of State v. Parijat Debee* (4).

(1) (1927) I. L. R. 50 Mad. 956. (3) (1929) I. L. R. 56 Cal. 979, 988.

(2) (1934) 35 P. L. R. 307.

(4) (1933) I. L. R. 60 Cal. 1135, 1156.

In the case dealt with in *Arya Prati Nadhi Sabha v. Om Parkash* (1), an application had been made under section 302 for a direction to an executor to pay Rs.4,000 to the applicant in accordance with the provisions of the will. In dismissing the application Abdul Qadir J. remarked that while, no doubt, the power of giving directions for the summary disposal of certain disputes which could be the subject of a suit was vested in the High Court, the exercise of the power was discretionary and that in the circumstances of that case the proper remedy for the applicant was to bring a suit. Now there can be no doubt that suits can be maintained against an executor in regard to his administration. But the question whether a suit can be maintained for the removal of an executor did not arise in that case. From the judgment, it is not, indeed, clear whether an executor had been appointed by the will. Nor do I find in either of the other two cases referred to any reasonable basis for the proposition that a regular suit is maintainable for the removal of an executor. The judgments cited are not relevant for a decision of the point under consideration here.

Mr. Mehr Chand has not cited any authority directly supporting his view regarding the intention of section 301. Nor has he been able to show that a suit for the dismissal of an executor has ever been sustained in this Province or elsewhere.

For the petitioners Mr. Nawal Kishore relies on *Dhanabakkiyammal v. Thangavelu Mudaliar* (2), which is directly to the point and goes clearly against the respondents. In that case there was an application under section 301. Srinavasa Ayyangar J. dismissed the application on the grounds that the matters

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to be determined required the taking of a quantity of evidence and the trial of complicated issues, that the applicants had a remedy by way of a regular suit and the object of section 301 was merely to provide a summary remedy in addition to that by suit. On appeal, a Division Bench of the Court reversed this decision holding that the only remedy open for a person seeking the removal of an executor was through section 301 of the Indian Succession Act. It is true that before the Division Bench the respondent's counsel conceded that an executor could not be removed by suit, but the question whether he could or could not be so removed had to be considered in view of the order of the Single Judge, and had to be decided.

There being no power in the Courts to remove an executor by virtue of their jurisdiction under section 9 of the Code of Civil Procedure, Mr. Mehr Chand's argument that there is a presumption against a construction of section 301 in such a manner as to oust or limit the jurisdiction of the ordinary Courts is without substance. When a new cause of action is created by Statute and a special jurisdiction outside the course of the general law is prescribed, there is no ouster of the jurisdiction of the ordinary Courts, for they never had any (See *Maxwell on the Interpretation of Statutes*, 7th Edition, page 115). On the other hand, the proposition is well established that where an Act creates a special jurisdiction and provides a special remedy such jurisdiction is exclusively conferred upon the Court expressly empowered to deal with the matter.

My conclusion is that the power to remove an executor and to provide for a successor to his office is one conferred upon the High Court alone by section

301, Indian Succession Act, and that such relief cannot be sought by regular suit.

Mr. Mehr Chand has suggested that in the event of our coming to this decision, the petitioners should, in the circumstances of this case, for the disposal of which wide and complicated enquiry will have to be made, be instructed to seek the removal of the executors in their capacity as trustees. But he is unable to say that the executors have performed their duties and have ceased to function as such. For the petitioners on the other hand it is stated that all the legacies have not yet been paid and Mr. Mehr Chand does not contradict this statement. In this connection, I observe that in their written statement of 1st March, 1934, the respondent-executors Radha Kishan and Attar Singh denied that they were trustees, declaring that they were merely executors. Mr. Mehr Chand's suggestion cannot, therefore, be entertained at this stage.

No order as to costs.

BHIDE J.—I agree.

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