
(1945) 08 BOM CK 0019
In the Bombay High Court

Ashrafalli Cassamalli

APPELLANT

Vs

Mahomedalli Rajaballi and Others

RESPONDENT

Date of Decision : 20-08-1945

Acts Referred:

Succession Act, 1925 — Section 90

Citation : AIR 1947 Bom 122

Hon'ble Judges : Chagla, J

Bench : Division Bench

Judgement

Chagla, J.—This is a suit for the administration of the estate of one Cassim All Jairazbhoy. He died on 8-6-1938, leaving behind him his widow (defendant 5) and six sons (the plaintiff, defendants 6, 7, 8, 9 and 10). Defendant 11 is his grandson by his son, defendant 6. Defendant 12 is his mother. Defendants 1 to 4 are the executors of his will dated 15-10-1934. Counsel have informed me that the various matters in dispute in suit between the parties have been settled, and the decision of the Court is only sought on the question of the construction of Clause 6 in the will of the deceased.

1a. The will left by the deceased is a very short document. By Clause 1 he appoints defendants 1 to 4 his executors and trustees. Clause 2 is an interpretation clause as to what the expression "trustees" signifies. Clause 3 contains several pecuniary legacies given by the deceased. By Clause 4 he makes two specific bequests of two of his properties to one of his sons. By Clause 5 he makes a bequest of all his household furniture; pictures, china, silver and plate and all other household chattels and personal estate to his wife and also of one of his Immovable properties. Then we come to Clause 6 which has created difficulties and which has called for construction at the hands of the Court. The testator prefaces this clause by stating that he is giving and bequeathing all the residue of his estate unto his trustees absolutely upon the trusts which he enumerates. The first trust is to pay the funeral debts and testamentary expenses and the legacies which he has already provided and the duty thereon

and subject to that, the whole of his personal estate is given to his wife absolutely. Then by Clause 6(b) he makes a trust of his house, "Goolshanabad" at Peddar Road and he gives the right of residence in that house to his wife. Then by Clause 6(c) he deals with his property known as "Rehemet Manor," Warden Road. He first provides for the outgoings of the property; then he directs payment to certain schools and charitable institutions; and finally directs that the balance of the income of the properties "Goolshanabad" and "Rehemet Manor," subject to the trust already created, is to be paid to his six sons and the survivor or survivors of them in equal shares absolutely. Then by Clause 6(d) he deals with the corpus of his two properties, "Goolshanabad" and "Rehemet Manor," and directs that upon the death of the survivor of his six sons they should go to the male heirs of his six sons per stirpes absolutely. Then by Clause 6(e) he provides for the rest and residue of his Immovable estate and gives it to his six sons in equal shares provided that, in the event of any of his six sons predeceasing him, the share which would have gone to that son should be divided between his male heirs.

2. The deceased was a Khoja Mahomedan and it has now been established by a series of authorities of this Court that in matters of succession and inheritance a Khoja was governed by Hindu law on the ground of custom. It is unnecessary to review all the authorities that establish this proposition, and they have been carefully and conveniently summarized in the judgment of Chitre J. in 38 Bom. L.R. 397.¹ Sir Jamshedji Kanga for the plaintiff has, however, contended that although a Khoja, unlike a Muslim governed by strict Mahomedan law, may dispose of the whole of his property by will, when it comes to the question of the construction of that will it should be construed according to Mahomedan law and not Hindu law. Sir Jamshedji's argument is that the ordinary and natural presumption is that a Khoja being a Mahomedan is governed by Mahomedan law and in every case where it is sought to be established that the law applicable to him in any respect departs from the strict Mahomedan law it must be proved as a matter of custom; and he further urges that it never has been established as a custom that in construing the will of a Khoja Hindu law applies. The position of Khojas is very similar to that of Cutchi Memons and Beaman J. in 41 Bom. 181² took the view that the question whether a devise by a Cutchi Memon was good or bad should be determined by Mahomedan law. Mirza J. had to consider this case in 54 Bom. 3583 which was a case of a Cutchi Memon's will; and in construing that will he expressly differed from the opinion of Beaman J. holding that opinion was obiter and that the will of a Memon should be construed according to Hindu law. There is a more recent decision of our Court of Appeal-37 Bom. L.R. 686.⁴ The Bench consisting of Murphy and N.J. Wadia JJ. considered both the decisions, that of Beaman J. and that of Mirza J. and came to the conclusion that the decision of the latter Judge was to be preferred. It is true that the cases I have just been considering are those of Cutchi Memons, but authorities are not lacking with regard to Khojas. As far back as 1901, Sir Lawrence Jenkins, C.J. in 3 Bom. L.R. 7855 in construing the will of Sir Tharia

Topan, a Khoja, observed (p. 785): "It is conceded on all sides, and I think rightly, that the will is to construed according to Hindu Law"; and again in 29 Bom. 1336 the same learned Chief Justice observed (p. 148):

It is common knowledge in legal circles that Khojas continually make their wills, as though they had the testamentary capacity of a Hindu; and counsel in this case, whose experience is of the widest have informed the Court that they do not desire any issue to be raised on the point, for all parties are at one that this will must be construed on the basis of the testator having the testamentary powers of a Hindu resident of Bombay.

3. Sir Jamshedji Kanga points out that both these decisions are based on points conceded at the bar. But it is to be remembered, as pointed out by the Privy Council in 51 I.A. 1297 that when an obvious plea which could have been taken is not taken by eminent counsel at the bar, the irresistible conclusion is that plea was not taken because it was felt to be bad. Counsel have sufficient sense of responsibility not to argue against self-evident propositions, and the Court very often does not decide such self-evident propositions but takes them for granted. Similarly, Sir Lawrence Jenkins in both the cases to which I have referred accepted the proposition that the will of a Khoja is to be construed according to Hindu law and did not think it necessary expressly to decide the question.

4. Sir Jamshedji Kanga has also relied on a decision of Macleod, J. as he then was, in 16 Bom. L.R. 224.8 That case decided that the Hindu law of joint family property did not apply to Cutchi Memons, but at p. 231, Macleod J. has made an observation that in a recent case he had noticed that Khojas in the matter of wills were governed by Mahomedan law unless a custom to the contrary had been proved and that no trace could be found of the proof of any such custom in the cases so far decided. With great respect to the learned Judge, I think that it was too late in the day in 1914 to doubt the proposition that the Khojas were in the matter of wills governed by Hindu law when, as I have pointed out, Sir Lawrence Jenkins more than ten years ago accepted the proposition as so obvious as not to admit of any discussion or argument. I, therefore, hold that apart from the recent legislation to which I shall presently refer, it is indisputable that the Courts must construe the will of a Khoja according to Hindu law.

5. The next question is whether the Shariat Act (26 [XXVI] of 1937) has in any way affected the legal position so far as it relates to Khojas. Section 2 of that Act abrogates all custom and usage which is contrary to Mahomedan law in those matters which are enumerated in that section and applies to Muslims their strict Muslim personal law. The only subjects that I need refer to are intestate succession, gifts, trusts and trust properties, and wakfs. It is to be noted that testate succession is not referred to in that section. Therefore it is clear that any established custom with regard to testate succession which departs from Mahomedan law can still be enforced by Courts of law, and as I have already held that Khojas were governed by Hindu law both in matters of testate and intestate succession, although in the case of the latter they would now be

governed by Mahomedan law, as far as the former is concerned their customary law would still prevail. The question that really causes considerable difficulty is; what are the matters that are embraced by the expression "testate succession"? Do they for instance, include the construction of trusts and wakfs, created by a will? or does Section 2, when it refers to trusts and wakfs, refer merely to trusts and wakfs inter vivos and excludes testamentary trusts and wakfs? Considerable light is thrown on the proper construction of Section 2 by the following section of the Act which enables a Muslim by making a declaration to get himself governed by Mahomedan law even in those matters which are excluded by Section 2. Therefore it seems that if a Muslim made a declaration u/s 3, he would be governed in all matters by Mahomedan law and in no matter whatsoever any customary law would apply to him which departs from the law of Shariat. Now the subjects enumerated in Section 8 are adoption, wills and legacies. Mr. Manecksha's contention is that the law of testate succession or of wills must include the construction not only of legacies given by the will but also the construction of trusts and even of wakfs created by the will. If that contention were sound, it is difficult to understand why in Section 3 the Legislature has used not only the expression "wills" but also "legacies." If the subject "wills" was by itself all-embracing then it was tautologous to use the expression "legacies." The very use of the expression "legacies" to my mind clearly indicates that the subject "trusts and wakfs" both inter vivos and testamentary, having already been dealt with in Section 2, the Legislature was only dealing with those subjects which were excluded from the operation of Section 2, namely, legacies and wills. "Wills" could only mean in this context testamentary power, namely, the right to will away the whole of one's property and not merely one-third as Mahomedan law permits. It may be suggested that trusts under Mahomedan law are merely a medium through which a gift or a bequest can be made and, therefore, testamentary trusts would be included in the expression "legacies". But that argument is not tenable because in Section 2 the subject of gifts is included and, as I have already pointed out, at the same time trusts are also included. Therefore, it is clear in any case that the Legislature did not consider that the law of simple gifts and the law of gifts through the medium of a trust were the same. I further see no warrant for qualifying the expression "trusts and wakfs" used in Section 2 as inter vivos trusts and wakfs. Section 2 provides that in all questions relating to trusts and wakfs the Muslim personal law shall apply, and I do not see why, if a question arose as to a testamentary trust or a testamentary wakf, the question should be decided otherwise than as provided in Section 2, Shariat Act. Therefore, in my opinion, although a Khoja after the passing of the Shariat Act can still will away the whole of his property, but when it comes to the question of the construction of his will to the extent he has created trusts or wakfs by his will, the validity of those trusts and wakfs must be determined by Mahomedan law and not by Hindu law. I have considered the question of trusts and wakfs together although I am not concerned in this case with the question of wakfs because they are both alike and cognate and the decision with regard to one must be the same as regards the other, and for the further reason that

anomalies which would result from any decision to the contrary are more apparent in the case of wakfs. It would be absurd to suggest that if a Khoja creates a wakf by his will that wakf should be construed according to Hindu law and not according to Mahomedan law.

6. It is clear that by Clause 6 of his will the testator has set up a trust and therefore the validity of that trust in view of my decision which I have just arrived at must be decided according to Mahomedan law. Apart from the question of revocation with which I shall deal later, the trust with regard to life interest created in "Goolshanabad" in favour of the wife and in "Rehemet Manor" in favour of the six sons is not challenged. What is challenged, however, is the ultimate benefit given to the male heirs of the testator's six sons per stirpes absolutely upon the death of the survivor of his six sons. This, to my mind, is clearly a contingent interest. The class to benefit is the class of the male heirs of the six sons, and as a Mahomedan cannot make a gift or a bequest even through the medium of a trust in favour of an unborn person, only those persons of the class would take who were in existence at the date of the death of the testator; but those persons do not take a vested interest; their interest is contingent-contingent upon their being alive when the last survivor of the six sons dies. The heirs of a person can only be ascertained when he dies and, therefore, it would be impossible to say at the death of the testator when the will begins to speak who the male heirs of the six sons would be. Not only is the class which is to benefit under Clause 6(d) of the will unascertained, but even with regard to those who can ultimately take as being the heirs of the sons and being alive at the death of the testator, the gift is clearly contingent. Mr. Manecksha has argued that the expression "male heirs" in Clause 6(d) should be construed to mean "sons". For this purpose he relies on the language used in Sub-clause (e) which, as I have stated, disposes of the residue. The testator there provides that the residue has got to go to the six sons in equal shares; but if any of the sons has predeceased him, then the share "which would have gone to his father had he survived me" shall be divided between his male heirs. Now the words "his father" is clearly a mistake for the word "him"; but Mr. Manecksha contends that this mistake throws a flood of light on the meaning attached by the testator to the expression "male heirs." It is not necessary to decide the question, but I agree with Mr. Manecksha that there is much to be said for his contention that at least in Sub-clause (e) the expression "male heirs" is used in the sense of "sons". But because in that particular context the testator used that expression in that sense and wished his residue to go only to the sons of his predeceased sons, it does not follow that necessarily he wanted to make a similar disposition with regard to "Goolshanabad" and "Rehemet Manor." I do not see any reason why I should give to the expression "male heirs" any other than its ordinary natural meaning. But even assuming that the expression "male heirs" means sons and in which case Mr. Manecksha's client alone being the only son of the six sons in existence at the date of the death of the testator would be capable of taking, even so the interest which he would take would not be a vested interest but a contingent

interest, because he would only take provided he survived the last survivor of the six sons. Therefore, in any view of the case, in my opinion, the ultimate disposition in Sub-clause (d) is clearly contingent and therefore void under Mahomedan law. It has not been suggested-and it cannot be suggested-that a Muslim can create a contingent remainder.

7. If, however, the view I have taken happens to be wrong and the disposition contained in Sub-clause (d) is to be construed according to Hindu law, then there cannot be much doubt that disposition is a valid one. In 55 I.A. 749 a Hindu.; conveyed property to trustees upon trust to pay the income arising therefrom to the settlor during his life and after his death, as to a one-fourth share, to the settlor's married daughter K for her sole and separate use and after her death in trust for the male heirs of K share and share alike. K survived the settlor and died leaving six sons, all of whom were alive at the date of the deed. Their Lordships of the Privy Council held that the words "male heirs" were not used as words of inheritance but that the intention was to make an independent gift to those persons who should be K's male heirs at her death, though by Hindu law there would be excluded from the class those male heirs who had not been in existence at the date of the deed. Similarly here in my opinion the words "male heirs" are not used as words of inheritance and such of the male heirs of the six sons who were in existence at the date of the death of the testator would take as an independent gift.

8. The next question to consider is: if the bequest contained in Clause 6(d) is void, does it fall into the residue or does the subject-matter of the bequest devolve as upon an intestacy? The contention of the Advocate-General is that the whole of Clause 6 is a residuary clause and Sub-clause (d) deals with a part of that residue and Sub-clause (e) finally deals with the residue of the residue. It is, therefore, urged that if the bequest contained in Sub-clause (d) is void, it cannot fall into the residue of the residue but must devolve as upon an intestacy. Now a true residuary clause can be constituted by any words that show a clear intention on the part of the testator so to constitute it, and under a residuary bequest the legatee would be entitled to all property belonging to the testator at the time of his death, of which he has not made any other testamentary disposition which is capable of taking effect. Under Sub-clause (e), if it is a true residuary clause, the residuary legatees are the six sons who were all alive at the date of the death of the testator. The principle which is clearly enunciated in the books seems to be that if a testator deals with a particular fund and disposes of part of it and then deals with the residue of that fund, that does not constitute a true residue. What he disposes of is really a specific portion of that fund which can be arrived at by a mere arithmetical calculation. Thus if a testator gives out of a fund of Rs. 1000, three hundred rupees to A and three hundred rupees to B and gives the residue to C, C is not a residuary legatee for in truth and in substance what is given to C is a specific bequest of four hundred rupees and, therefore, if the bequest to A or to B fails, C does not take the particular amount which was given to A or B. The question, therefore, resolves itself into this: was the testator in Clause 6 dealing

with a particular fund or a particular ascertained part of the property, and whether having dealt with that particular fund or that particular part of the property under Sub-cl. (a), (b), (c) and (d), did he then deal in Sub-clause (e) with the residue of that particular fund or that particular part of the property? In order to arrive at a conclusion, one must carefully look at the scheme of the will. Under Clause 3 the testator gives certain pecuniary bequests. Under Clause 4 he makes specific bequests of two of his properties. Under Clause 5 he makes a specific bequest of one of his properties and gives his household furniture, etc. to his wife. Finally under Clause 6 he in the first place, after providing for the payment of his debts, funeral and testamentary expenses, gives all his personal estate to his wife absolutely. Then under sub-cl. (b), (c) and (d) he makes specific bequests of two of his properties, "Goolshanabad" and "Rehemet Manor". Having then dealt with all his personal properties, and having dealt specifically with some of his Immovable properties, he winds up by giving the rest and residue of his Immovable estate to his six sons. It is true that Clause 6 is prefaced by the expression "I give and bequeath all the residue of my estate unto my trustees absolutely upon the following trusts." But that to my mind does not constitute the whole of Clause 6 as a residuary clause. All that it means is that having dealt with some of his properties in Clauses 1 to 5, he proceeds to deal in Clause 6 with the rest of his property; and, as I have said, having dealt with his personal property and two of his Immovable properties in Sub-cl. (a) to (d), he gives all the residue of his Immovable estate to his six sons. In my opinion, Sub-clause (e) constitutes a true residuary clause. As stated by Grant M.R. in (1817) 2 Mer. 36310 everything which is ill-given by the will does fall into the residue; and it must be a very peculiar case indeed, in which there can at once be a residuary clause and a partial intestacy, unless some part of the residue itself be ill-given. I do not think that in this case the residue is ill given.

9. It may be suggested that there is a residuary clause as to personal estate in Clause 6(a) whereby the testator gives all his personal estate to his wife absolutely after making certain dispositions with regard to it and that there is a second residuary clause in Clause 6(e) where the testator deals with the residue of his Immovable property. Even if the will be looked at in this way, there is nothing to prevent there being two residuary clauses in a will. In (1901) 1 Ch. 61911 there were two perfectly good residuary devises, the one limited to freeholds and the other limited to copyholds. It is true that in the case of every residuary clauses there must be some quality of universality to use the expression of Lord Justice Rigby at p. 230. The test applied by Mr. Uthwati in (1944) 1 Ch. 10712:

The question here, therefore, is: Does the "remainder" mean the residuary trust fund less the various sums, or what remains of the residuary trust funds after giving effect to the gift of those various sums?

10. The learned Judge further points out that if the words of the will are rationally capable of two constructions, and one of them results in an intestacy

and the other does not, one should prefer the latter construction. If, therefore, of a fair and reasonable construction of Clause 6(e) of the will, I can come to the conclusion that the testator intended his six sons to take all the devises of Immovable properties which did not take effect, I should rather lean towards that construction than a construction which would result in a partial intestacy. The rule as to construction, although perhaps in that context applicable only to personality, is stated in similar terms in *Hawkins on Wills*, Edn. 2(p. 57):

If a part of a particular fund be given to one person, and the residue to another, it is a question of intention, not subject to any particular rule whether the gift of the residue is to be read as a gift of the mere balance of the fund after deducting the amount of the sum previously given out of it,... or a gift of the entire fund subject to the gift previously made out of it.

In my opinion in this case the bequest is not merely of such of the Immovable properties as are left over after accounting for those which are specifically dealt with earlier, but it is the bequest of all the Immovable properties subject to those properties with which the testator has already dealt. I, therefore, hold that the bequest under Clause 6(d) having failed, falls into the residue.

11. It has been contended by the Advocate-General that there is a revocation of the bequests contained in Clause 6(e) and Clause 6(d). The question might be academic as far as Clause 6(d) is concerned because whether the bequest is void or is revoked the result would be the same, namely, it would full into the residue. But the question has got to be considered with regard to the life interest given in "Rehemet Manor" in Clause 6(c). The first question is whether in questions of revocation the law to be applied is Hindu law or Mahomedan law where the testator is a Khoja. In 24 Bom. 8 Sir Lawrence Jenkins C.J. granted probate of a nuncupative will to a Cutchi Memon holding that as far as the making of the will is concerned, a Cutch Memon was governed by Mahomedan law. Then Tyabji J. in 7 Bom. L.R. 55814 held that an unattested will of Cutchi Memon was valid as the question had to be determined according to Mahomedan law which did not require attestation. Similarly, in 43 Bom. 64115 Marten J. as he then was, held that probate could be granted to an unattested will of a Cutchi Memon as Cutchi Memons were governed by Mahomedan law on the question of execution of wills. There is no authority of our Court as to revocation of wills; but in a recent decision of the Madras High Court, Wadsworth J. has taken the view that a Cutchi Memon is governed by Mahomedan law not only with regard to execution of his will but also with regard to its revocation: AIR 1938 Mad. 616 .16 The principle seems to be that even though in matters of construction of a will, a Khoja or a Cutchi Memon may be governed by Hindu law with regard to the making of the will, with regard to its form, with regard to its revocation or to the revocation of parts of it he is governed by Mahomedan law. The construction of a will only comes into question when the will begins to speak which is at the death of the testator. The making of the will or its revocation is concerned with the acts of the testator himself while he is alive; and with regard to these acts, he is governed

by his own personal law, namely, the Mahomedan law and not Hindu law which is restricted as a matter of custom to questions of inheritance and succession. [16] Now, under Mahomedan law, revocation can be express or implied. In this case there is no express revocation of the bequest with regard to "Rehemet Manor" contained in Clause 6(e) and Clause 6(d). But the Advocate-General contends that there is an implied revocation. The facts with regard to "Rehemet Manor" property are as follows. At the date when the will was made, namely, on 15th October 1934, there was only one house on the "Rehemet Manor" property called ""Rehemet Manor." The property consisted of a large piece of land but the rest of the land was not built upon. In 1936, the testator commenced constructing three bungalows on that property and they were ready in 1937. These three were named "Bai-tul-Yumn", "Bait-ul-Saddah" and 1947 B/17 & 18 "Bait-ul-Sirur". He started constructing another bungalow on the same plot of land in the middle of 1937 and it was ready by the end of that year. It was called "Bait-ul-Hana". One of these bungalows, namely, "Bait-ul-Yumn" was gifted away by the testator to his wife on 16th April 1937. Therefore when the testator died, on the "Rehemet Manor" property, besides "Rehemet Manor" there were three other houses belonging to the testator, namely, "Bait-ul-Hana," "Bait-ul-Saddah" and "Bait-ul-Sirur".

12. The Advocate-General relies on the statement of the law to be found in Sir Dinshah Mulla's treatise on Mahomedan Law, End. 12, page 121:

A bequest may be revoked by an act which occasions an addition to the subject of the bequest, or an extinction of the proprietary right of the testator.

Relying on this statement, the Advocate-General urges that in the case before me there is an addition to the subject of the bequest, namely, the "Rehemet Manor" property by the construction of three new properties on it. No authority is cited by Sir Dinshah Mulla for his statement of the law, but he relies on Hamilton's Hedaya and Baillie on Mahomedan Law. Hamilton's Hedaya, vol. 4, at p. 478, has this passage:

Upon the testator either expressly rescinding his bequest, (as if he were to say, "I retract what I had bequeathed,") or performing any act which argues his having rescinded it, retraction is established. It is established, in the former instance, evidently; and so likewise in the latter; for as acts are demonstrative of the inclination as much as express words, they are consequently equivalent thereto.

Then at page 479:

If, also, he perform upon it any act creating an addition to the legacy, and this addition be so connected, that the legacy cannot be separately delivered, (as where a person bequeaths the flour of wheat, and afterwards mixes it with oil,-or a piece of ground, and afterwards erects a building on it,-or undressed cotton, and afterwards dresses it,-or a piece of cloth, and afterwards lines or covers a gown with it,)-such act is a retraction of the bequest. It is otherwise with

respect to plastering the wall of a bequeathed house, or undermining the foundation of it; for these acts do not indicate a retraction of the bequest, as they affect the legacy in its dependancies only.

Baillie's Mahomedan Law, Part I, lays down a similar proposition at p. 628:

... every act which occasions an addition to the subject of a bequest, when it cannot be delivered without the addition, has the effect when done by the testator, of revoking it... so also, if he should bequeath fried barley, and afterwards mix it with butter, or bequeath a mansion and then build within it, or cotton and use it in stuffing or quilting, or lining a garment, in all these cases also the bequest would be void.

Then at p. 631:

If one should bequeath a mansion, and then put plaster on it, or pull it down, that would not be a revocation; but if he were to bedaub it over with mud, that would be a revocation if done largely. If he should bequeath land, and sow it with vegetables, that would not be a revocation; while, if he makes a vineyard of it, or plants trees on it, the bequest is revoked.

13. Now there is no doubt that these ancient Muslim texts must be considered with the utmost respect. But it must also be remembered at the same time that Muslim jurisprudence is not a static jurisprudence. It is a jurisprudence which has grown and developed with the times and the quotations from Muslim texts should be so applied as to suit modern circumstances and conditions. It is also dangerous to pick out illustrations wrenched from their context and apply them literally. Illustrations merely illustrate a principle and what the Court should try and do is to deduce the principle which underlies the illustrations. To my mind both in Hamilton's Hedaya and Baillie's Mahomedan Law the principle is clear that in each case the Court must consider whether the acts of the testator were such from which it could be legitimately inferred that he had an intention of revoking the bequest made by him. The Advocate-General has strongly relied on the illustration contained in Hamilton's Hedaya to which I have referred, namely, that the testator bequeaths a piece of ground and afterwards erects a building on it and the bequest is revoked. The Advocate-General says that we have exactly the same circumstances here. The testator erects four buildings upon what he has bequeathed and, therefore, the bequest is revoked. This is exactly the danger which I have just indicated of literally applying the illustration without taking the trouble of finding out what principle emerges from it. If the intention of the testator was merely to bequeath a plot of land and nothing more, then undoubtedly the construction of a building thereon would result in its revocation because the testator never intended to bequeath a plot of land with a building standing on it. But in this case what the testator has bequeathed is not a plot of land but the whole of the "Rehmet Manor" property and already at the date of the will there was a building standing on that property. If the intention of the testator was to bequeath the whole property and not merely the building and the

plot annexed to it, then the mere fact that he proceeds to construct four more buildings does not result in a revocation of the bequest. The testator has not bequeathed the building known as "Rehemet Manor" and the open piece of ground attached to it, but what he has bequeathed is the "Rehemet Manor" property. Every case must depend upon its own facts and there is no rule of law as such which can be applied to determine whether a bequest is revoked or not. The intention of the testator must be inferred from his acts; and, in this particular case, in my opinion, it is not established that by constructing four buildings on the "Rehemet Manor" property the testator revoked the bequest. In my opinion the statement of the law as contained in Sir Dinshah Mulla's book on Mahomedan Law, with great respect to that learned author, is much too wide. It is not in every case that an addition to the subject of the bequest necessarily results in its revocation. As I have already pointed out, it is a question of the intention of the testator, and the intention has got to be ascertained from the particular facts of each case. I, therefore, hold that there was no revocation of the bequest of the "Rehemet Manor" property contained in Clause 6(c) and Clause 6(d) of the will.

14. With regard to the contention that the bequest was revoked by the gift of one of the bungalows to his wife by the testator, the point has not been seriously pressed by the Advocate-General. It is clear that revocation could only be with regard to that bungalow alone and, it is common ground that the bungalow which was gifted to the wife does not form part of the subject-matter of the bequest. The final question that remains is the determination as to what passes under the bequest of the "Rehemet Manor" property. On the one hand, it is contended by Sir Jamshedji Kanga that what passed is merely the bungalow known as "Rehemet Manor"; or the other hand it is contended by Mr. Manecksha that the three other bungalows constructed on that property, namely, "Bait-ul-Hana" "Bait-ul-Sirur" and "Bait-ulSaddah," also passed under that bequest. The rule of construction is clear and is embodied in Section 90, Succession Act:

The description contained in a will of property, the subject of gift, shall, unless a contrary intention appears by the will, be deemed to refer to and comprise the property answering that description at the death of the testator.

15. The question, therefore, is which property answers the description of the "Rehemet Manor" property at the death of the testator? It is to be noted that the testator has not bequeathed merely the building known as "Rehemet Manor" but what he has bequeathed is the "Rehemet Manor" property. It is also clear that all these three bungalows are constructed on that property; and although these three bungalows are differently named, these four bungalows together still constitute the "Rehemet Manor" property. The plaintiff admits in the plaint that the four bungalows were constructed on that property. This fact is made more clear by the manner in which accounts were kept when these bungalows were being constructed. The headings of the accounts describe the bungalows as being built upon the property known as the "Rehemet Manor"

property. The plaintiff has led the evidence of Alladin Mahomed who was the manager of the estate of the deceased; but that evidence to my mind has not elicited any fact which is material to the determination of this question except that there was a separate entrance from Warden Road to each of these three bungalows constructed on the "Rehemet Manor" property. But that by itself would not constitute the three bungalows something different from the "Rehemet Manor" property. If all the four bungalows answer the description of the "Rehemet Manor" property at the death of the testator as I hold that they do, then the only question is: Is there any contrary intention appearing in the will which would lead me to decide that what the testator wanted to bequeath was not the whole of the "Rehemet Manor" property but only the "Rehemet Manor" bungalow with the land it stands on? Far from there being anything in the will which supports Sir Jamshedji's contention, the language of the will is clear and emphatic that the testator intended to bequeath the whole of the "Rehemet Manor" property.

16. The facts of the case in (1909) 1 ch. 78417 are very similar to the facts before me. There the testator by his will made in 1901 devised to his wife for life, with remainder to his daughter "House and effects known as Cross Villa situated in T." At the date of his will he was possessed of half an acre of ground with a house upon it, the premises being known as "Cross Villa." In 1906, upon a part of the ground, which he separated from the rest by a hedge, he erected two semi detached dwelling-houses which he named Ashgrove Villas. He died in 1908. The Court held that under the devise the whole of the property with all the buildings thereon passed. It is to be noted that in this case he actually separated part of the ground by a hedge and on that separate ground he erected two houses to which he gave a name different to the name which the original property bore and yet the Court came to the conclusion that the whole of the property passed under the devise. Joyce J. has enunciated the principle as follows (p. 786):

When... the description is generic, as "all my Sands in the county of X," the subject of the devise being capable of increase or diminution, all the testator's lands in the county of X at the date of his death will pass; and where there is such a particularity in the description of the subject of a gift as to show that it was some object in existence at the date of the will that was intended to pass, it is considered that there is sufficient evidence of a contrary intention to exclude the application of the provisions of Section 24.

In the case before me the description "Rehemet Manor" property is a generic description of the property and lands owned by the testator. It is not a gift of the particular bungalow known as "Rehemet Manor". In (1911) 2 ch. 56318 a testator by his will made in 1885 devised to his wife "all that my freehold house and premises situate at Oakleigh Park, Whetstone in the county of Middlesex, and known as "Ankerwyke, and in which I now reside." The testator died in 1901, and between the date of his will and his death he purchased two plots of

adjoining land, one contiguous to his house and the other on the opposite side of the road, using them in connection with his house, and with another plot bought before the date of his will. The Court held that what passed under the gift was the house and premises known as "Ankerwyke" at the date of the testator's death and the devise included the plots bought subsequently to the date of the will. Eve J. at p. 569 observed: "It comes then to be a question of fact, what was known as "Ankerwyke" at the date of the testator's death?" and he held that the plots subsequently purchased were known as part of "Ankerwyke." Similarly in this case it is a question of fact as to what was known as the "Rehemet Manor" property at the date of the death of the testator. On the admissions made by the plaintiff and on the evidence of the books of account maintained by the testator himself, it is clear that what was known as ""Rehemet Manor" property at the death of the testator was not merely the "Rehemet Manor" bungalow but the "Rehemet Manor" bungalow and the other three bungalows which were erected on that property.