
(1937) 11 BOM CK 0008
In the Bombay High Court
Case No : First Appeal No. 168 of 1934

Dahyabhai Lallubhai Shah

APPELLANT

Vs

Chamanlal Mahasukhram

RESPONDENT

Date of Decision : 08-11-1937

Acts Referred:

Specific Relief Act, 1877 — Section 42

Citation : AIR 1938 Bom 341 : (1938) 40 BOMLR 418

Hon'ble Judges : Sen, J;Broomfield, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Broomfield, J.—The plaintiff appellant sued for a declaration that a will dated February 3, 1930, made by. his brother Sankalchand, who died on December 6, 1931, is inoperative and null and void. Alternatively he prayed for a declaration that the bequest of a certain house, in which Sankalchand was living, to one Bhikabhai, nephew of the testator, is null and void.

2. The grounds for contending that the will is inoperative are that the testator and plaintiff were members of a joint Hindu family and that certain bequests for good works and dharmada are void for uncertainty. The first ground would of course affect the validity of the will as a whole. The second would merely affect the specific bequests challenged by the plaintiff. The ground on which the bequest of the house to Bhikabhai is challenged is that Bhikabhai died in 1929 before the will was made. By an amendment of the plaint plaintiff prayed for possession of this house and paid the necessary Court fees. But no relief other than a declaration was prayed for in respect of the main claim.

3. The trial Court dismissed the suit holding (1) that Sankalchand was separate and had merely disposed of his separate property (2) that the charitable bequests are not void because the testator had specified the objects of charity in exhibit 135, a draft of the will said to be in Sankalchand's handwriting, and (3)

that defendants Nos. 4 and 5, the sons of Bhikabhai, are the owners of the house bequeathed to him. The reason for this latter finding is not very clearly stated in the judgment. There are some passages which seem to suggest that the learned Judge thought that Sankalchand had made a gift of the house and the disposition of the house in the will had no effect. But there could of course be no gift of the house without a registered instrument. The case set up by the defendants, or at any rate one of the cases set up by them, was that the testator, though using the name of Bhikabhai, really intended to bequeath the house to Bhikabhai's sons who attended him in his last illness and were actually placed by him in possession of the house.

4. Defendants Nos. 1 and 2 are the trustees appointed under the will.

5. It appears that the house in suit is a portion of a large house which was divided between Lallubhai (father of plaintiff and Sankalchand) and his three full brothers. One of the brothers, Mansukh, died in the lifetime of Lallubhai leaving a widow who also died in his lifetime. Lallubhai succeeded to this portion as the nearest reversioner and thus became the owner of two portions. He died in 1904. The evidence is conflicting as to when his two sons began to live apart from one another. But it is admitted that for many years before the death of Sankalchand they were in separate occupation of Lallubhai's two portions of the house, Sankalchand living in the portion which came to Lallubhai at the partition, i.e. the portion now in suit and plaintiff in the portion which came to Lallubhai from Mansukh's widow. Plaintiff says that this was merely a matter of convenience, but that can hardly have been so. As long ago as 1906 at any rate plaintiff and Sankalchand were shown as owners of their respective portions of the house in the municipal house register. They paid taxes separately. When the City, Survey Inquiry in Ahmedabad took place in about 1922, they obtained separate sanads. This is a very important piece of evidence since plaintiff admits that he and Sankalchand went together to get their rights entered in the register. They were both examined and the separate sanads were issued on the strength of their statements. At this time there must have been a formal inquiry into title and the suggestion that the application for separate sanads was a mere matter of convenience is untenable. It is admitted that the brothers were carrying on separate business also from the time of Lallubhai's death if not before. There are other items of evidence indicating partition between the brothers which the trial Judge has referred to, and it is sufficiently clear, we think, that the finding that plaintiff and Sankalchand were not joint as alleged by plaintiff but separate in interest is supported by ample evidence and there is no ground for taking a different view in appeal. Plaintiff's contention that the will is invalid as a whole therefore fails.

6. It would fail on another ground also. If the will as a whole were invalid, defendants would be no better than trespassers, and the plaintiff as the nearest heir would be entitled to the whole estate. He might therefore have sued for possession of it and Section 42 of the Specific Relief Act would prohibit the grant

of a bare declaration.

7. As regards the objection to the charitable bequests the case presents more difficulty. There is a bequest of Rs. 2,000 for religious gifts. The vernacular words are that the money is to be applied sare marge (in a good way) puny a-danma (in gifts bringing religious merit). There is a provision that the surplus of the sale proceeds of a certain mill share, if any surplus should remain after certain other bequests, should be utilised for good purposes sare marge (literally in a good way). There is also a general provision as to the residue of the estate that the trustees should apply it for good religious purposes (sare marge dharmada) "as they think fit." It is clear from the authorities of the Privy Council and of this Court, (1899) L.R. 26 I.A. 71 (Privy Council) . Cursandas Govindji v. Vundravvandas Purshotam, and F.L. Latham, Advocate General of Bombay ILR (1889) Bom. 482, Devshankar Naranbhai v. Motiram Jageshvar ILR (1893) Bom. 136, Bai Bapi v. Jamnndas Hathisng ILR (1897) Bom. 774 and it was conceded in the argument before us that bequests of this kind are void for uncertainty. The learned trial Judge relied on the fact that the trustees were empowered to select the charitable objects and he referred to Smith v. Massey ILR (1906) Bom. 500 : 8 Bom. L.R. 322 and Parbati Bibee v. Ram Barun Upadhyia ILR (1904) Cal. 895. But these cases are of no assistance to the plaintiff here. All they decide is that if the language of the will makes it clear that the money has to be spent on objects which the law recognises as charitable and on no other objects, the selection of the particular objects may be left to the trustees or executors. But the position here is that the language used in the will is wide enough to include objects of benevolence or utility which the law does not recognise as charitable and it would be in the discretion of the trustees to select such objects. That being so, the bequests are void : Trikumdas Damodhar v. Hondas ILR (1907) Bom. 583 : 9 Bom. L.R. 560, Sarat Chandra Ghose v. Pratap Chandra Ghose ILR (1912) Cal. 232.

8. The trial Judge thought that the intention of the testator could be deduced from the draft will, exhibit 135, in which specific charitable objects have been mentioned, though only in the case of the sum of Rs. 2,000. Had this document been referred to in the will it could have been treated as part of the will (s. 64 of the Indian Succession Act) and might have removed the uncertainty so far as it goes. But it is not referred to in the will and the trustees therefore would not be bound by it.

9. Although, however, these dispositions are prima facie void, plaintiff has not asked for any relief in respect of them, and in the suit as framed it would be impossible to give him any relief. His proper course was to bring a suit for general administration asking the Court to construe the will, to set aside the void bequests and to provide for the residue if any remaining undisposed of. This suit was filed a few days after the death of Sankalchand. The trustees had not taken charge of the estate and it is impossible to say at this stage that there is or will be any undisposed of residue to which plaintiff would be entitled. A suggestion

was made by the learned advocate for the appellant in his reply that the suit might be allowed to be converted into an administration suit now. But the plaintiff's conduct has not been such as to entitle him in our opinion to any such indulgence. His main case in which he has failed was that the will was invalid as a whole because Sankalchand had no power to make one. Moreover it is not clear that an administration suit will be necessary. In the event of there being any residue undisposed of by the will the trustees themselves would presumably have to come to the Court for directions. There remains the question of the house bequeathed to Bhikabhai, father of defendants Nos. 4 and 5. The point is a novel one not altogether free from difficulty. But on the whole we think this must be treated as a valid bequest to Bhikabhai's heirs. The evidence shows that Bhikabhai, for whom the testator felt great affection, resided only a few yards away from him. Sankalchand must therefore have known of his death, which took place in April, 1929, more than nine months before the will was made. Defendant No. 1 has deposed that the testator expressly told him that "Bhikabhai" in the will meant his heirs. He also deposes that the testator treated defendants Nos. 4 and 5 as his own sons. The intention to benefit them therefore is sufficiently clear. It is quite in accordance with Hindu] sentiment that the name of the head of a family should continue to be used in referring to the family even after his death. This is one of the matters which the Court is permitted to take into consideration u/s 75. Sections 81 and 105 of the Act do not help the plaintiff in our opinion because on a consideration of all the facts it must be held that the legacy was not given to Bhikabhai himself but to his heirs. The appeal, therefore, fails and must be dismissed with costs.

Sen, J.

10. I agree.