

(1920) 01 BOM CK 0031
In the Bombay High Court
Case No : Will No. 116 of 1919
In Re: Rustomji Framji Lentin

Date of Decision : 19-01-1920

Acts Referred:

Succession Act, 1925 — Section 196, 197

Citation : (1920) 22 BOMLR 355 : 76 Ind. Cas. 743

Hon'ble Judges : Marten, J

Bench : Single Bench

Judgement

Marten, J.—This is a petition by two sons of the deceased testator for administration da bonis non with the will annexed of his estate. The testator died on the 10th August 1899 having left a will, dated the 24th March 1887, of which his widow Manekbai was the executrix. She subsequently obtained probate and died herself on the 16th April 1915, leaving also a will. Since then, viz., on the 1st of December 1918, a family arrangement between all living parties or their representatives has been arrived at for dealing with both estates. In accordance with that arrangement the present petitioners have presented the present petition. The parties are all Parsis.

2. The Testamentary Registrar has felt some difficulty in the matter because he suggests that the widow Manekbai was the residuary legatee under the testator's will, and that consequently under Sections 196 and 197 of the Indian Succession Act, her representatives would be entitled to the grant of Letters of Administration. He thought, therefore, that before such a grant could be made, the representatives of Manekbai must establish their legal position by taking out probate of her will, and incidentally paying duty on the property as forming part of her estate. He, therefore, declined to grant administration to the testator's estate until the will of Manekbai was proved.

3. I am told that the testator's estate has in fact been wholly administered with the exception of a particular landed property at Naegam near Mahim. I may also state that although Manekbai has left executors, it would appear that under the practice in India her executors are not considered to be ipso facto the executors

of the testator. If this case occurred in England, the matter would be quite simple, because the executors of an executor are the legal personal representatives ipso facto of the original testator. But it has been decided in *De Souza v. The Secretary of State* (1874) 12 Beng. L.R. 423 that that is not the correct view in India, and I am informed by the Testamentary Registrar that that case has been followed in this High Court. I do not express any opinion on that authority, but for the purposes of the present case I will assume that it is correct.

4. In my opinion, the main point in the present case is whether the widow Manekbai was the residuary legatee under her husband's will. If one clause of the will, viz., clause 12, is taken by itself and the rest of the will is disregarded, no doubt Manekbai would be the residuary legatee. But wills are particularly documents where it is essential to read the whole document. I wish to emphasize this with all the power that I am capable of, because otherwise mistakes are sure to occur in ascertaining a testator's intentions. Section 69 of the Indian Succession Act shows that there is no difference between the correct Indian and English practice in this respect.

5. In the present case, it seems to me that if the whole will is read through, it is impossible to hold that the widow was the residuary legatee in the events which have happened, unless one cuts out several earlier clauses in the will. But to do this would, in my opinion, entirely defeat the true intention of the testator. Before turning to the will itself, I should state that his family at the date of his will consisted of six sons and four daughters, but one of those sons Cowasji predeceased him leaving children, and one daughter died many years after his death leaving children. His will was made over twelve years before his death.

6. Turning to the will, in clause 2 he appoints his wife executrix, and then in clause 3 he "entrusts" what is substantially all his property to his wife. Then he goes on "and out of the same my wife Bai Manekbai shall give to all (i.e.) to all my sons and to all (my) daughters (their shares) in accordance with (the directions) I write below". I attach importance to this word "entrust". The testator has used it not only in that clause but in subsequent clauses of the will as well.

7. Then in clause 4 he names his sons and daughters, and in effect gives each of them a legacy of Rs. 101. These trifling sums cannot possibly be the "shares or portions" of the sons and daughters which the testator refers to in several places in the will. According to the 1904 petition, he died worth some Rs. 28,783, and the present value of the unadministered property is stated to be Rs. 38,000.

8. Then in clause 5 he directs that after the death of his wife, the outlays for funeral and other ceremonies shall be made for the first twelve months out of the above property. Then he goes on:

And after the expiry of those twelve months, as to whatever (property) Bai Manekbai may have left (behind her) as residue, out of the same all (my) abovementioned sons and daughters shall divide and receive in equal shares; or

if they (can, live together in peace then they shall divide and receive in equal shares out of the abovementioned properties the income (of those properties).

9. Stopping there, that clause to my mind is entirely inconsistent with the idea that the widow took these properties absolutely.

10. Then in clause 6 there is a direction for setting aside a sum of Rs. 2000 for certain ceremonies.

11. Then in clause 7 he gives certain directions as to what his wife is to do. He says she is to be the owner of these properties and he "entrusts" the same to her. But then he proceeds to direct her to take the opinion of the sons and daughters, and the clause winds up "she shall act according to (the views of) that side where there may be a larger number of votes." If she is really an absolute owner, this direction would be void, because an absolute owner cannot be directed to deal with property in accordance with the views of other persons.

12. Then in clause 8 there is a direction about paying expenses of the house out of the income of the properties.

13. Clause 9 is important. That provides for certain expenses of the sons and daughters being deducted from their respective shares or portions, and then the testator goes on:

When twelve months shall have elapsed after Bai Manekbai's death and when all the persons (interested) may receive their (respective) shares or portions out of the remaining property and moneys which there may be, there shall be deducted from their accounts (shares) whatever "moneys) Bai Manekbai may have expended on account of the Tiraths (occasions) relating to those people and (i.e.) whatever (sums) she) may have expended as (may appear) from memos of account in their names ; and the balance which may be found due (to them) shall be paid (to them).

14. How is that provision to be reconciled with an absolute gift to the gift to the widow ? It is far more consistent with an ordinary gift to a widow for life with remainder to the sons and daughters. It is in effect a provision for bringing advances into hotch-pot on the final division of the estate between the sons and daughters.

15. Then clause 10 emphasises the authority of the widow, but it would seem to apply mainly to income and I do not think it was intended to obliterate the previous clauses.

16. Then clause 11 deals with the debts of the testator, and clause 12 provides:

After payment of all the above (mentioned) sums and legacies shall have been made as to whatever (property) there may remain over, all that belongs to my wife Bai Manekbai and (I hereby) give (the same) to her.

17. It is unnecessary to cite authorities to show that one has, if possible; to

make a document consistent as a whole. Sections 69 and 72 of the Indian Succession Act are sufficient to shew this. Clause 12 no doubt causes some difficulty having regard to the previous provisions in favour of the sons and daughters. It may be, as counsel suggests, that the testator intended the widow to have a life interest with a power of disposition inter vivos, somewhat like the case in *Mafatlal Motilal Vs. Kanialal Trikamlal*, which has been cited to me. But in fact she made no disposition inter vivos, and I do not think that the testator intended her to have any power of disposition by will. I need not, therefore, consider whether such latter power would be a general power, or a special power of appointment amongst her sons and daughters, in which latter event the property in question would not form part of her estate.

18. The view I prefer is that clause 12 was put in to guard against contingencies, such as lapsed shares of residue under the preceding gifts. The gift to the widow in clause 12 only operates on "whatever may remain over" "after payment of all the above-mentioned sums and legacies shall have been made." These "sums and legacies" include, I think, the shares and portions given to the sons and daughters in clauses 5 and 9, which, in my opinion, are residuary gifts. But a son or daughter might have predeceased the testator and left no children, In that case, there would, I think, have been an intestacy but for clause 12. I say this because the gift is to the sons and daughters nomination as tenants-in-common and not as a class. The gift in clause 5 is "to the above-mentioned sons and daughters" and this obviously refers to those named in clause 4. Further, the gifts in clauses 5 and 9 are clearly to them as tenants-in-common. If then a son or daughter predeceased the testator and left no descendants to take u/s 96, his or her share would have gone as on an intestacy u/s 95 of the Indian Succession Act, but for clause 12 of the will.

19. I do not think one can say in this case that there are two entirely inconsistent clauses, and that the document being a will, and not a deed, the last clause must prevail. (See Section 75) I think that what the testator intended here was that on his wife's death the property or at any rate the property which she had not disposed of in her life-time by any act inter vivos was to go substantially to his children, and that no other reasonable meaning can be given to the clauses which I have dwelt upon and in particular clauses 3, 5, 7 and 9. It may be that when one talks about a residuary legatee, that is sometimes rather an ambiguous expression. You may have a residue of a residue. You may have what is sometimes called a true residue (compare *In re Stoodley* [1915] 2 Ch. 296: [1916] 1 Ch. 242. But in the events which have happened in this case, viz., all the sons and daughters surviving the testator or leaving issue who survived him, I think there is no doubt that they took vested interests and that they would be the parties to take under the testator's will on the death of the widow, and that there was really nothing on her death which could operate under clause 12 of the will.

20. Para 1292 of Vol. XXVIII of Halsbury's Laws of England at pp. 677-8

illustrates the extreme reluctance of the Court to hold that Section 75 applies, and also the various constructions that have been adopted to avoid that result. One sentence seems particularly in point here, viz. " If there are two gifts in the same instrument each sufficient to include the residuary estate, in cases where lapsed shares of the first gift would leave something for the second gift to operate upon, the first of the two gifts is preferred." For this proposition In re Isaac [1805] 1 Ch. 427 and other cases are cited. Here even if one gives the largest possible meaning to clause 12 and eliminates the reference to the prior payments, one must still admit that clauses 5 and 9 are also sufficient to include the residuary estate.

21. In my opinion, therefore, the conclusion which was arrived at by the Testamentary Registrar was not the correct view to take of this will. Although I am sitting as Testamentary Judge I have found it necessary for the purpose of deciding this application to ascertain the true construction of this will. It would seem unlikely, having regard to the deed of family arrangement, that any contest on the construction of the will is in fact likely to arise on the Original Side. But in the will of Manekbai, a copy of which I have called for and seen, there is in clause 17 a provision in favour apparently of the heirs of Manekbai's sons. I say nothing as to whether this provision is good or not. But if it is good, it may be that the heirs of Manekbai's sons, who for all I know may now be unborn, would have an interest in contending that the property passed absolutely to Manekbai under the testator's will, and that consequently she could dispose of it by her will. Technically I may not have those heirs represented before me now. How far, if at all, my decision as Testamentary Judge for the purposes of the present application is binding on these heirs on the point of construction may be left to be decided by others if and when the question ever arises.

22. In the result, therefore, I direct that Letters of Administration de bonis non with the testator's will annexed do issue to the petitioners as prayed subject to the Testamentary Registrar's usual requirements being satisfied. The order may be prefaced by the words "The Court being of opinion that on the true construction of the will of the testator and in the events which have happened the testator's widow Manekbai was not the testator's residuary legatee under his will within the meaning of Sections 196 and 197 of the Succession Act. I am not asked to make any order as to costs.