

(1924) 07 MAD CK 0056
In the Madras High Court

(Julia Mary) Margaret Fernandez

APPELLANT

Vs

Severina Sobina Coelho

RESPONDENT

Date of Decision : 16-07-1924

Acts Referred:

Succession Act, 1925 — Section 89

Citation : AIR 1925 Mad 418 : 84 Ind. Cas. 1029 : (1924) 20 LW 748

Judgement

1. The suit, from which the appeal arises, was instituted by Julia Mary Margaret Fernandez for an account of the rent due, in respect of a garden and Bungalow, item No. 1, in the plaint schedule and for the payment to the plaintiff after deducting all outgoings for taxes, repairs, etc., of a moiety of the net balance. The claim is based on the footing of a legacy to the plaintiff, by her maternal grand-mother Mary Magdalene Coelho, the testatrix. The will is dated 25th July 1907, and the testatrix died in August, 1908. The defendant, the daughter of the testatrix, was the executrix under that will. By her said will, the testatrix bequeathed the garden and Bungalow, item No. 1, in the plaint schedule, to the defendant, along with other properties, immovable and moveable, and also directed that half the net income from the same should be paid to the plaintiff, for life and after her death to her children. There is also a provision in the will, to the effect that, if the property should be sold, one half of the same amount should be paid to the plaintiff and the children that may be born to her.

2. At the time the testatrix made the will, she apparently believed and was at any rate contending that the whole of the garden and bungalow, item No. 1, in the plaint schedule was wholly her absolute property. But in a litigation, which terminated, Appeal No. 70 of 1910, in this Court, the plaintiffs father was held entitled to a moiety of that property, on a construction of a deed of settlement, which had been previously executed by the testatrix. As the result of this litigation, what became available out of that property, for the bequests under the will, was only the other moiety. The plaintiff has claimed the whole of the moiety remaining and the defendant has, on the other hand, set up that the moiety intended for the plaintiff and purported to be bequeathed to her was the moiety

which was obtained by her father, as the result of the litigation, above referred to, and that therefore the plaintiff was not entitled to anything.

3. The learned Subordinate Judge, who tried the case, has awarded to the plaintiff one half of the net rents and profits accrued from the moiety of the property, left in the hands of the defendant, as executrix. We think the Subordinate Judge was right. It has been contended, for the plaintiff-appellant, that the intention of the testatrix was clear that the benefit, which the plaintiff would be entitled to, under her bequest, should be one half of the net income, accruing from the entire property and that bequest being a specific legacy, she was entitled not; to the one-fourth awarded by the lower Court, but to the whole of the remaining half. It has also been argued that the defendant was, on a proper construction of the will, only a general residuary legatee and was therefore liable to make good to the plaintiff-appellant the whole amount of the bequest to her. We are unable to agree with the contention that the defendant was only a residuary legatee.

4. With respect to the moveable property she is undoubtedly the general residuary legatee; but there are no words of residuary disposition with regard to the immovable property at all.

5. The learned vakil for the appellant argued that, because in the will the testatrix has enumerated all her properties, the bequest to the defendant of the immovable properties also should be deemed to be residuary. With regard to this contention, it is sufficient to observe that the very essence of a residuary clause is that its terms should be such as to carry with the bequest of all the enumerated items, if any, all items of property belonging to the testatrix and not enumerated in the will. Though with regard to the moveable property, there is such a residuary clause! there is no such clause with regard to the immovable property.

6. The terms of Section 89 of the Indian Succession Act are quite clear on the point. The test in such cases would be this. Supposing the testatrix owned, even on the date of the will, some property which is not referred to in the will, could it possibly be contended that the defendant could have claimed it under the will? There being no words in the will bequeathing to the defendant any immovable property, excepting those mentioned in the will, it is impossible to agree with the contention that the defendant has been constituted a residuary legatee in respect of any immovable property, including the property in question.

7. The learned vakil for the appellant contended that in Section 133 of the Indian Succession Act the word "articles" should be construed not as referring to items of moveable property, but to all kinds of property, and that the section should be read, as if instead of the word "articles" the word "items" was repeated. This is opposed to the rules of interpretation of statutes. Further, it is a well-established principle of English Law that the bequest of immovable property is specific : (see Theobald on Wills, 7th Edition, page 153, and also Williams on Executors, 11th Edition, Vol. II, page 926) We cannot hold that the great English lawyers, who

were responsible for the enactment of the Indian Succession Act, made a deliberate departure from the rule of English Law, which is based on common sense and failed to indicate such departure by apt words.

8. In any case, there can be no doubt that under the terms of the will in question, the bequest to the defendant of item No. 1 in the schedule to the plaint is a specific legacy and so is the legacy to the plaintiffs : vide Section 129 of the Indian Succession Act, Illustration (e) to that section. Though what is granted to the plaintiff is only a moiety of the net rental income from the property, still, as the payment is not directed to be made, only for a limited period and as further in the event of a sale half the sale proceeds or directed to be paid over to the plaintiff, there can be no doubt that the bequest to the plaintiff and her children is in law a bequest of the specific property itself. This is on the principle underlying illustration (c) to Section 159 of the Indian Succession Act. Thus, on a proper construction, we find that the plaintiff is given one moiety of the property as a specific legacy.

9. The learned vakils on both sides are agreed that the case should be dealt with on the footing that what is available for the bequests under the will is only the moiety of item No. 1, left after the decree of the other moiety, in favour of the plaintiff's father. If there is an ademption of any portion of the legacy, by reason of the loss to the estate of such portion, it is clear that there ought to be a proportionate abatement in the specific legacies carved out of the whole.

10. The learned Subordinate Judge has only acted on this principle and decreed an account to be taken of the rents and profits from the moiety of item No. 1, in the plaint schedule, now pertaining to the estate of the testatrix and decreed one half of the net amount thereof to the plaintiff.

11. The appeal therefore fails and is dismissed with costs. The Memorandum of Objections filed by the defendant-respondent, is not pressed and is also dismissed.