

(1992) 08 BOM CK 0052

In the Bombay High Court

Case No : Originating Summons No. 576 of 1989 in Suit No. 1554 of 1989

Rama Aziz Parpia and Others

APPELLANT

Vs

Balkrishna K. Mehta and Others

RESPONDENT

Date of Decision : 03-08-1992

Acts Referred:

Bombay High Court (Original Side) Rules, 1980 — Rule 238, 249
Succession Act, 1925 — Section 104, 119

Citation : (1993) 1 BomCR 267 : (1993) 95 BOMLR 951

Hon'ble Judges : B.N. Srikrishna, J

Bench : Single Bench

Advocate : S.E. Dastur and Zia Mody, instructed by Maneksha and Sethna, for the Appellant; S.J. Thakkar, instructed by Mulla and Mulla Craigie Blunt and Caroe, for defendants 1 and 2, for the Respondent

Judgement

B.N. Srikrishna, J.—This originating summons has been taken out by some of the legatees under the Will of the deceased Dr. Vithaldas Ladhahbai Parmar (hereinafter referred to as "the deceased") for certain directions to the executors of the estate of the deceased.

2. The plaintiffs are the married daughters of the deceased. The first two defendants are the executors of the Will of the deceased. The third defendant is the daughter-in-law of the deceased, being the widow of late Jamnadas Parmar, a son of the deceased. Defendant No. 4 is another son of the deceased.

3. The deceased, Dr. Parmar, was practising as a Surgeon in Bombay and had a large practice. He had his consultation rooms at Laud Mansion, Charni Road, which were taken on tenancy from the owner of the said building. Out of the large income earned by him, with prudent investments, he acquired several properties during his lifetime. The deceased executed a Will dated 9th May, 1974, making provisions for certain pecuniary legacies and for disposal of the residue after payment of the pecuniary legacies. A codicil was also executed on 17th February, 1975, under which, certain specific bequests were made to servants,

totalling in all Rs. 19,000/-. The deceased died on 30th October, 1976. The executors of the deceased's Will filed a petition for probate on 8th of February, 1988. Defendant No. 4 had filed a caveat therein. Citations were served on the plaintiffs and the husband of defendant No. 3, who is also a son of the deceased.

4. On 19th November, 1982, this Court granted probate of Will and the executors became entitled to take charge of the estate and execute the Will.

5. In order to appreciate the controversy arising in the present originating summons, it would be necessary to consider some of the relevant clauses of the Will of the deceased, dated 9th May, 1974. Nothing turns on the Codicil dated 17th February, 1975. Clauses 5, 6, 7, 8, 9, 10 and 11 of the Will, which are relevant, read as under :-

"5. My Executors should collect all the amounts and dispose off my Immovable properties and utilize the amounts so realised as per my wish as expressed below.

6. The expenses incurred in collecting amounts as well as in disposing off my properties etc. and for getting Estate Duty Certificate and the probate of this Will and all incidental expenses including travelling expenses etc. etc. shall be incurred from my properties.

7. After getting the probate etc. my Executors are directed to give Rupees Ten Thousand to each i.e. to my two sons to four daughters and to my daughter-in-law Chanda, to my sister Samaratben and my nephew Mohan.

8. From the balance remaining after giving amounts as shown in para Seven above a sum equivalent of $\frac{3}{4}$ (three-fourth) of the said balance should be set apart and out of this amount Half the sum should be kept as permanent Fund and should be invested in F.D. Receipts or Government Securities and the yearly interest accruing therefrom should be utilised for the purposes as shown below.

(A) To help the Students of any Caste or Creed by giving them Scholarships, Loans, Freeships, Books etc.

(B) Help poor people by giving them grain food, medicine clothes etc.

(C) To give in lumpsum amounts to Institutions for carrying out the object as shown in A & B.

9. The remaining Half the amount as shown in para Eight above should be utilised for the following purposes viz : Donations at Hospitals, for Medicine, Fruits, Furniture, or Wards, Special Beds etc., as deemed proper by my Executors, Donations to Dispensaries Convalescent Home, Nursing Houses, Orphanages or to Institutions for promotion of any Public Charitable objects as deemed proper by my Executors.

10. From the balance remaining thereafter i.e. after setting amounts apart as said in para Eight and Nine and Executors are directed to set apart a sum of Rupees Seventy Five Thousand and utilise the same in three parts viz : Rupees

Twenty Five Thousand in memory of my father Ladhahbai Harjibhai, Twenty five thousand in memory of my mother Kesarbai and Twenty Five Thousand in memory of my wife Santokbai; this amount of Rupees seventy five thousand should be utilised for uplift of my Darji Community people and be spent for Education, Scholarship, Loans, Freeships and Books as well as for providing help to widows and poor families by providing them grain, good clothes etc. etc. and help the institutions of my Community as deemed proper by my Executors.

11. After making provisions as said above the Executors are directed to invest the remaining amount in F.D. Receipts or Government Securities etc., for the period of Ten years and from the yearly interests accruing therefrom provide my Four daughters and my daughter-in-law Chanda yearly interest for Ten Years and after Ten Years the Executors are directed to withdraw 1/3 (one third) amount from the same and hand over the said amount in equal proportions to my four daughters and if any daughter is dead then her share be given to her heirs in equal proportion in cash. From the interest of the remaining 2/3 (two third) amount (to be invested in F.D.R. and Government Securities etc.) My daughter-in-law Chanda should be provided Rupees five hundred per month till her life time and the balance amount of interest accruing from such investment if any should be utilised for the purposes as mentioned in para Eight above."

6. At the time of his death, the deceased owned, inter alia, three Immovable properties, one situated at Lonavla, one situated at Pali Hill, Bombay, and land together with a farm-house situated in Rajkot, known as "Ranchodwadi". The executors were able to sell the Lonavla property on 31st October, 1984, and a sum of Rs. 1,30,000/- was realised from the sale. On 1st February, 1986, the executors paid the pecuniary legatees. The deceased's elder son, Dr. Jamnadas Parmar (late husband of defendant No. 3), died on 3rd March, 1987. The executors, after some litigation in connection therewith, were able to sell the Pali Hill Bungalow on 30th November, 1987, and realise a sum of Rs. 21,21,000/-. The litigation preceding the sale of the Pali Hill Bungalow is of some relevance, and I shall have occasion to refer to it subsequently.

7. Incidentally, at this stage, it may be mentioned that this was the bungalow, in which the family members of the deceased were staying, when he was alive. Even prior to his death, the deceased's son, Jamnadas, had moved out of the said bungalow by deserting his wife, defendant No. 3. Defendant No. 3 continued to stay there. After the sale of the said property was advertised, defendant No. 3 put forward a claim that she had continued to reside with her late father-in-law and served him throughout his life, and that her mother-in-law, before her death, had taken a promise from her that she would continue to reside in one portion of the premises and look after the deceased during his lifetime. In consideration, the deceased had promised defendant No. 3 that she would have a right to continue throughout her life in the premises in the Pali Hill Bungalow, known as "Parmar Court". After the sale of the Pali Hill Bungalow, defendant No. 3 refused to quit, vacate and hand over vacant possession of the premises

occupied by her, which has resulted in the executors filing a suit before the Small Causes Court for her eviction from the property. The said suit is still pending before the Small Causes Court.

8. The Will of the deceased makes provision for certain specific legacies to be paid, and thereafter provides that $\frac{3}{4}$ th of the residue shall be utilised for the purpose of specified charitable causes, $\frac{1}{2}$ thereof being invested in Fixed Deposit or other investments, the interest wherefrom is to be expended on specified objects, and the other half to be donated to hospitals, for medicine, fruits, furniture, or wards, special beds etc as deemed proper by the executors. Out of the remaining $\frac{1}{4}$ th of the residue, a sum of Rs. 75,000/- is to be utilised by the executors for upliftment of members of the Darji Community by making donations of Rs. 25,000/- in memory of the deceased's mother, Kesarbai, Rs. 25,000/- in memory of the deceased's wife, Santokbai, and Rs. 25,000/- in memory of the deceased's father, Ladhabhai Harjibhai. After making provision as aforesaid, the balance remaining out of the $\frac{1}{4}$ th of the residue is to be deposited in Fixed Deposits or Government Securities for the period of 10 years, and from the yearly interest accruing therefrom, the four daughters (plaintiffs) and the daughter-in-law, Chanda (defendant No. 3), are to be paid the yearly interest for 10 years. After the expiry of 10 years, the executors shall withdraw $\frac{1}{3}$ rd of the said invested amount, and distribute the said amount in equal proportion amongst the four daughters (plaintiffs), a share of any deceased daughter being given to her heirs in equal proportion. From the interest of the remaining $\frac{2}{3}$ rd of the investment, the daughter-in-law, Chanda (defendant No. 3), is to be provided Rs. 500/- per month during her lifetime and the balance amount of interest accruing from such investment, if any, should be spent on charitable objects delineated in Clause 8 of the Will.

9. After obtaining Probate, the Executors were able to realise a sum of Rs. 1,30,000/- by sale of the Lonavla property. When the Executors had negotiated an agreement for sale of the Pali Hill property, one of the legatees (plaintiff No. 3 herein) filed Suit No. 1412 of 1983 in this Court, against the Executors and others, and sought an injunction to restrain the Executors from alienating the Pali Hill property at the agreed consideration of Rs. 10,25,000/-. Plaintiff No. 3 had also taken out a Notice of Motion No. 1215 of 1983, for interim injunction against the Executors and the purchaser completing the sale. The said notice of motion came to be dismissed on 18th September, 1984, by the judgment and order made by Jamdar, J. An appeal, carried against the said judgment, Appeal No. 969 of 1984, also came to be dismissed on 13th October, 1987. Subsequently, there were negotiations afresh, and the intending purchasers agreed to increase the consideration amount from Rs. 10,25,000/- to Rs. 21,21,000/-. Plaintiff No. 3, thereafter, withdrew Suit No. 1412 of 1983 on 29th August, 1988. The sale was, thereafter, concluded, and, some time in May, 1988, the Executors, having received the sum of Rs. 21,21,000/- as consideration, invested the net amount of Rs. 20,20,797/- in Capital Gains Bonds in order to get the benefit of section 54E of the Income Tax Act. The said amount remained invested in the bonds for

a period of three years from May, 1988.

10. On 2nd January, 1989, the first plaintiff addressed a letter to the Attorneys of the Executors (defendants 1 and 2), calling upon them to furnish complete accounts of the estate and to pay their shares of the income, as per provision of clause 11 of the Will of the deceased. By reply dated 31st March, 1989, of the Attorneys of the Executors, the stand was taken that time had not yet arrived for the Executors to be obliged under Clause 11 of the Will to effect payment to the plaintiffs and the other legatees. The Executors further stated that even the time for setting apart the sum of Rs. 75,000/- mentioned in Clause 10 of the Will had also not arrived. According to the Executors, although the pecuniary legacies of Rs. 10,000/- mentioned in Clause 7 were required to be paid, after the issue of probate, on 2nd August, 1983, the pecuniary claim of Rs. 10,000/- was paid to the plaintiffs and other legatees on 15th February, 1986, and the third defendant, when offered the sum of Rs. 10,000/-, had refused to accept it. The Executors calculated that the plaintiffs were entitled to interest at 6% per annum on the sum of Rs. 10,000/- for the period 2nd August, 1983 to 15th February, 1986, and forwarded cheques for a sum of Rs. 1,522.19 to each, representing such interest. Being dissatisfied, the first plaintiff addressed a further letter dated 4th April, 1989, to the attorneys of the Executors and raised a number of queries with regard to the method and manner of execution of their deceased father's Will and the manner in which the period of 10 years, contemplated under Clause 11 of the Will, was computed by the Executors.

11. The response of the Executors was one of pique. By their letter dated 21st April, 1989, the Attorneys of the Executors replied that the Executors had acted in the best interests of the estate, that if the first plaintiff or other legatees were dissatisfied therewith, they were free to adopt proceedings, and that they were not willing to submit themselves to "cross-examination" by answering questions set out in the letter of the first plaintiff. They also offered inspection of all the accounts maintained by the Chartered Accountant appointed by them to look after the accounts of the estate.

12. At this stage, it may be mentioned, incidentally, that defendant No. 4 has claimed exclusive rights in the Rajkot property by filing Suit No. 71 of 1978 before the Civil Judge, Senior Division, Rajkot. It is stated on behalf of the Executors that the said suit is at the trial stage, and evidence is being recorded.

13. Since the Executors took up the stand that they were not obliged to distribute any income, as contemplated by Clause 11 of the Will, until all properties belonging to the estate had been fully realized, meaning till realisation of the Rajkot property by the estate after termination of the concerned litigation, the plaintiffs have taken out the present originating summons, in which the two main questions raised are, (a) whether the Executors should be directed to pay a proportionate share from the income out of the estate already realized and (b) what should be the date from which the period of 10 years, contemplated under Clause 11 of the Will, begins to run.

14. The Executors, in the affidavit of D.K. Mehta dated 16th December, 1991, have taken up the stand that the originating summons needs to be dismissed, since all properties belonging to the estate have not been realized. Initially, during arguments, the originating summons was vehemently opposed by them, but, when I pointed out to the learned Counsel appearing for the Executors that I saw no reason for a conflict of interest, inasmuch as the legatees, as well as the Executors, were surely interested in effectively executing the terms of the Will, learned Counsel for the Executors toned down his stand and stated that he would present legal arguments for consideration of the Court to enable it to reach a just conclusion and that the Executors would submit to orders of the Court, after drawing its attention to all relevant materials, both on facts and law.

15. The stand of the Executors is that the time for distribution of income, contemplated by Clause 11, would not arise until the estate realizes all the assets and further that the period of 10 years, contemplated under Clause 11, would start running only from the point of time when the Rajkot property is realized by the estate. Mr. Dastur, learned Counsel for the plaintiffs, contends that, though this may be one possible way of looking at the terms of the Will, the consequence thereof has to be reckoned. The stand taken up by the Executors would cause prejudice to the estate and prejudice to the legatees, and produce unjust results, which could never have been intended by the testator. He points out that the youngest among the plaintiffs is in her 60s and the eldest in her 70s. Surely, the deceased, as a fond father, intended that his daughters should enjoy the income of the investments, contemplated under Clause 11 of the Will, during their lifetime, submits the learned Counsel. The balance amount of the 1/3rd distributable to the legatees was also intended to be done during their lifetime, and not merely intended to be enjoyed by their respective heirs, contends Mr. Dastur.

16. Apart from highlighting the prejudice caused to the legatees in denying them, during their lifetime, the income or the capital, to which they are entitled under the terms of the Will, there is demonstrable prejudice to the estate itself on account of the stand taken by the Executors, according to the plaintiffs. In the affidavit of one of the Executors, B.G. Joshi, dated 7th September, 1989, is enclosed at Exhibit "C" a statement showing the total income and wealth and taxes paid by the estate during the period 1977-78 to 1989-90. A perusal of this statement would show that, during the aforesaid period, the total income earned by the estate from the investment was Rs. 14,73,078/-. The estate has paid total Income Tax of Rs. 7,36,539/- and total wealth tax amounting to Rs. 4,34,532/-. It is, therefore, clear that, out of Rs. 14.73 lacs of income earned, taxes to the tune of Rs. 11.70 lacs have been paid out by the estate. Did the testator intend that his estate should benefit the Revenue, or that his kith and kin and the charitable objects contemplated by him should benefit?, is the question mooted for consideration of the Court. It is pointed out that some of the legatees themselves had income and wealth below the taxable limits, and, if the income and capital had been distributed by taking a pragmatic view of the matter,

perhaps, the rates of taxes would have fallen down steeply in the hands of each assessee, and, therefore, the large amount of Rs. 11.70 lacs would not have been gobbled up by the Revenue. This last fact, at least, is incontrovertible. The plaintiffs are in the age group of 50-70 and the prospects of their getting anything under the Will in the next foreseeable 15 to 20 years (which is a conservative estimate for the Rajkot property litigation to terminate finally) appear dim.

17. While I shall shortly examine the legal contention of the Executors that, till the estate is fully realized, the legatees have no title or interest in the estate, it appears to me, *ex facie*, that, even if the Executors are right, the stand taken by them is impracticable, unpragmatic and unduly rigid, producing unjust results which could never have been intended by the testator.

This, then, takes us to the legal contention advanced in the case.

18. Mr. Thakkar, learned Counsel for the Executors, understandably, banks heavily on the judgment of Jamdar, J., dismissing the Notice of Motion No. 1215 of 1983. He highlights that this judgment, without any manner of doubt whatsoever, states that the residuary legacy would not arise, unless "balance" of the estate was determined in accordance with the wishes of the testator, and submits that such balance could not be determined, unless the Rajkot property was also realized by the estate. This judgment is not only *res judicata* as between the parties, but is also binding on this Court as to the proposition of law decided therein, in his submission.

19. The judgment of Jamdar, J., does-appear to take the view that the residuary legatees would not get any interest in the estate till the residue is properly ascertained, which, in turn, requires all assets of the estate to be realized. But it is necessary to read this judgment in the context of what was canvassed before the learned Judge. The suit had been filed by plaintiff No. 3 to restrain the defendants, including the Executors, from selling the Pali Hill property at a consideration of Rs. 10,25,000/-. Interestingly, as discovered later, plaintiff No. 3 had also activated the Charity Commissioner to jump into the suit by pointing out to him that a portion of the residuary estate was dedicated to charity; that, therefore, the Charity Commissioner's consent had to be obtained for alienating the Rajkot property, and since this had not been done, the Charity Commissioner was entitled to adopt legal proceedings in the matter. The Charity Commissioner, naturally, jumped in and took up the stand that the Will had created a public charitable trust in respect of the entire estate, which had come into existence on the death of the deceased. Ergo, the Pali Hill property, being part of such public charitable trust, could not be sold, without the consent of the Charity Commissioner under the provisions of the Bombay Public Charitable Trusts Act. There was also an allegation by plaintiff No. 3 that the Executors were acting improperly and in breach of their fiduciary capacity by agreeing to sell the Pali Hill property for a grossly inadequate consideration of Rs. 10,25,000/- only. These were the three questions, which the learned Judge was required to

consider in the Notice of Motion. While deciding these three questions, the learned Judge came to the conclusion that there was no impropriety on the part of the Executors and that the consideration agreed for sale of the Pali Hill property could not be stated to be grossly inadequate. Finally, he held that no public charitable trust had come into existence, either on the death of the testator or upon probate being granted to the Will, so as to enable the Charity Commissioner to exercise any powers under the Bombay Public Charitable Trusts Act. The learned Judge's attention was invited to the judgments of English Courts in *Lord Sudeley and others v. The Attorney-General*, (1897) A.C. 11, *Dr. Barnado Homes National Incorporated Association v. Commissioner for Special Purposes of the Income Tax*, (1921) 2 A.C. 1, *Cuneliffe Mountain v. Inland Revenue Commissioners*, (1953) 1 Ch.D. 54 and the judgment of the Supreme Court in *Administrator-general of West Bengal Vs. Commissioner of Income Tax, Calcutta*, . Upon a conspectus of these decisions, the learned Judge came to the conclusion that the residue of the estate could not be stated to have come into existence, unless all the properties of the estate were fully realized. These very same English judgments, as well as the judgment of the Supreme Court, were cited at the bar, and both sides have taken me through the judgments.

20. Since the matter appeared, at first blush, to be one of considerable dubiety, I have carefully perused that authorities cited at the bar. As to the legal proposition laid down therein, there is not much doubt, the Supreme Court having endorsed it in *Administrator-General of West Bengal's case* (supra). Had it been a suit by the legatees against the Executors for an adjudication of their rights, perhaps, the matter may have been considered in a different perspective. The present is not such a *lis*. What is being decided today is only an originating summons, the purpose of which is not the same as that of a *lis* for adjudicating the rights and liabilities of parties. As I view it, an originating summons is a means for getting over unexpected, un contemplated difficulties, which crop up during the administration of the estate by Executors or trustees. Finding the difficulty insuperable, the parties approach the Court for indicating the most just and equitable manner of administering the estate, in the circumstances, consistent with the wishes of the testator or settlor, as the case may be. An originating summons is not a process for declaration of the rights of the parties, nor is it a *lis*, as popularly understood. A perusal of the form of the plaint prescribed also makes it clear that, though in taking out the originating summons, the person interested is required to file a plaint, there is no prayer required to be made in the plaint, and it would be sufficient, if the questions, for which the Court's answers are sought, are indicated therein, see Rule 249 of the High Court (Original Side) Rules, 1980.

21. On behalf of the plaintiffs, Mr. Dastur, learned Counsel, submits that the originating summons has been taken out under Rule 238, particularly under Clauses (a), (e) and (g) thereof, for exercise of the Court's powers. Rule 238 enables, *inter alia*, executors or administrators of a deceased person or legatees, to apply for the issue of an originating summons "for such relief of the nature or

kind following as may by the summons be specified and circumstances of the case may require".

22. Clauses (a), (e) and (g) of Rule 238 read as under :---

"238. The executors or administrators of a deceased person or any of them and the trustees under any deed or instrument or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir or legal representative, or as beneficiary under the trusts of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may apply for the issue of an Originating Summons returnable before the Judge in Chambers for such relief of the nature of kind following as may by the summons be specified and circumstances of the case may require (that is to say), the determination, without an administration of the estate or trust, of any of the following questions or matters :---

(a) any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or legal representative, or beneficiary;

(b) to (d) ...

(e) directing the executors, administrators or trustees to do or abstain from doing any particular act in their character as such executors, administrators or trustees;

(f) ...

(g) the determination of any question arising in the administration of the estate or trust."

23. In my view, the Court, while exercising power in deciding an originating summons, is not determining a lis. It is not adjudicating the rights and liabilities of parties. Particularly, when the parties are the legatees and executors, both of whom, by definition, must be interested in true execution of the terms of the Will, it is not possible to contemplate an originating summons as a process of resolution of conflict of interest or adjudication of rights and liabilities. To put it figuratively, this is a special jurisdiction created to pour oil over troubled waters or to grease the creaking joints. This is the true nature of the jurisdiction, as I perceive it, and, as long as the estate can be administered in a particular manner, neither contrary to the terms of the Will nor to any law applicable, the Court has jurisdiction to give directions to the executors to administer the estate in such manner. This, in my view, is the true purpose of an originating summons.

24. My attention was invited to the judgment of the Chancery Division in (*In re New*, *In re Leavers*, *In re Morley*), (1901) 2 Ch.D. 534. The Court therein had been confronted with a situation not contemplated by the settlors of the trust, and the administrators of the estate had come up with a problem, which, in their thinking, they were unable to resolve. The question was whether the trustees could concur in a shareholder's scheme for reconstruction of the limited

company, shares of which were settled by the settler/testator in each case, and had become vested in the trustees, it being proposed that all the shareholders in the existing company should exchange their shares, all of which were fully paid, for more realisable shares (fully paid) and debentures in a proposed new or reconstructed company. The observations of Romer, L.J., are illuminating and bear repetition. Observed Romer, L.J. :

"As a rule, the Court has no jurisdiction to give, and will not give, its sanction to the performance by trustees of acts with reference to the trust estate which are not, on the face of the instrument creating the trust, authorized by its terms... But in the management of a trust estate, and especially where that estate consists of a business or shares in a mercantile company, it not infrequently happens that some peculiar state of circumstances arises, for which provision is not expressly made by the trust instrument, and which renders it most desirable, and it may be even essential, for the benefit of the estate and in the interest of all the casuist que trust, that certain acts should be done by the trustees, which, in ordinary circumstances, they would have no power to do. In a case of this kind, which may reasonably be supposed to be one not foreseen or anticipated by the author of the trust, where the trustees are embarrassed by the emergency that has arisen and the duty cast upon them to do what is best for the estate, and the consent of all the beneficiaries cannot be obtained..., then, it may be right for the Court, and the Court, in a proper case, would have jurisdiction to sanction on behalf of all concerned such acts on behalf of the trustee as we have above referred to."

The learned Judge was quick to sound a note of caution, and pointed out :

"It is a matter of common knowledge that the jurisdiction we have been referring to, which is only part of the general administrative jurisdiction of the Court, has been constantly exercised, chiefly at chambers. Of course, the jurisdiction is one to be exercised with great caution and the Court will take care not to strain its powers. It is impossible, and no attempt ought to be made to state or define all the circumstances under which, or the extent to which, the Court will exercise the jurisdiction; but it need scarcely be said that the courts will not be justified in sanctioning every act desired by trustees and beneficiaries merely because it may be beneficial to the estate; and certainly the Court will not be disposed to sanction transactions of a speculative or risky character. But each case brought before the Court must be considered and dealt with according to its special circumstances."

25. This judgment has been followed by a learned Single Judge of this Court in *In re Shirinbai Merwanji Dalal*, 21 Bom.L.R. 41. The contention raised before the Court was that the trustees had no power to do what was being asked of them under the provisions of section 30 or section 36 of the Indian Trusts Act, 1882. The learned Judge stated :

"But, I think, in the present case it is unnecessary for me finally to decide

whether the trustees have any power u/s 40 or section 36, because, I think, this particular case may be decided on another ground, namely, under the Extraordinary jurisdiction of the Court, which it can exercise in certain cases of what I may call "emergency".

The learned Judge was also quick to echo the warning note sounded by the English Court in *In re New*, *In re Leavers*, *In re Morley*, that the jurisdiction is of an extremely delicate character and has to be exercised with the greatest caution.

26. My attention was also invited by Mr. Dastur to a judgment of the Madras High Court in *Commissioner of Income Tax, Madras Vs. Estate of Late SRI T.P. Ramaswami Pillai*, . In this case, the testator had created a trust in respect of entire properties owned by him for various purposes, some of them for the benefit of his wife and his descendants and most of them being for certain religious and charitable purposes. One son and the brother-in-law of the testator were expressly appointed as trustees and charged with the duty of executing the trust, viz., payment of specific legacies and funeral expenses. Before discharging all the debts of the estate, the executors filed returns as trustees, stating that they had ceased to be executors and claimed that, as the trust was only for religious and charitable purposes, the entire income from the properties was exempt from taxation. The Revenue contended that, as the debts had not been fully discharged, the executors could be assessed in the capacities as executors and not as trustees u/s 41 of the Income Tax Act, 1922, and that the income derived by them was not exempt from tax. In order to decide this question, it became necessary for the High Court to consider, somewhat obliquely, a contention similar to the one advanced before me. It was contended, inter alia, therein by the Revenue that, as long as the liabilities of the deceased were not paid, the administration could not be said to be complete, and, therefore, the residue could not be ascertained to enable any assets being given by the executors for distribution thereof. The Court emphatically rejected this contention, and pointed out that, although it was true that, as a part of the executorial function, the executors were required to discharge the obligations of the deceased, mere existence of the debts and liabilities of the deceased could not prevent an executor from giving an assent to perfect the title of the residuary legacy. Relying upon the judgment of the English Court in *Commissioner of Inland Revenue v. Smith*, (1930) 1 K.B. 713, the Court held that there was no rule of law that the mere existence of a debt outstanding prevented the residue from being ascertained, or that the executors could not assent to the legacy in favour of the residuary legatee.

27. The questions, therefore, to be ascertained in the present case are :---

Is the situation one of "emergency" to impel the Court to give suitable directions to the executors? Are the executors prevented under the terms of the Will, or under any other law, from implementing the terms of Clause 11 of the Will, merely because the Rajkot property is still tied up in litigation? Assuming that the executors are right in their stand that the residue of the estate cannot be

ascertained until all property due to the estate is realized, is there anything in the terms of the Will, which prevents the distribution of the income and/or capital in the manner laid down under Clause 11 of the Will from being paid pro rata out of the estate already realized, and, finally, would it be just, equitable, convenient and consistent with the wishes of the testator that the fact of one property being tied up in litigation should postpone the receipt of income and/or capital by the legatees, all well past their prime of life?

28. Considering the case from all these angles, I am of the view that the Court has to step itself into the shoes of the testator, so to say, and exercise its powers under the "emergency relief" jurisdiction. In my view, the testator could not have contemplated that the Rajkot property would get tied up in litigation at the instance of one of his sons. He also could not have contemplated that, in such a contingency, the rest of the legatees should be made to wait in the wings on the ground that the residue of the estate could not be computed. The purpose of the Will was to ensure that the servants, who had served the testator faithfully, and the relatives, by the fact of their kinship, were provided for, at least in foreseeable future, and the rest of the estate was settled on charity. Whatever be the legal merits of the stand taken by the executors, I am afraid that the stand taken by them is neither practicable, nor pragmatic, and its consequences stare us in the face. If the executors had taken a more malleable stand, they could have ensured that the estate was not required to pay total tax of Rs. 11.70 lacs out of a total earning of Rs. 14.73 lacs, over the period from 1977-78 to 1989-90. I do not wish to blame the executors for the stand taken by them, which may, perhaps, be justified in law, but I would attribute to them only misplaced zeal in playing their role.

29. In order to ensure that the legatees get to see the colour of the money coming to them under the Will, in my view, it is necessary to give appropriate directions to the executors as to the manner of administering the estate, even while the Rajkot property is tied up in litigation. It is also necessary to do it from the point of view of benefit to the estate.

30. Defendant No. 3, though she is entitled to a pecuniary legacy of Rs. 10,000/- and a life interest to the extent of Rs. 500/- per month under the Will, has taken a very strange and inexplicable stand. Apparently, being dissatisfied with the services rendered to her by the legal fraternity, she has chosen to appear in person. Her stand is that her father-in-law did not intend the Pali Hill property to be sold; that her father-in-law had promised her that she would continue to have a right of occupation in the portion of the said property occupied by her during her lifetime at least. She has further contended that her father-in-law loved her dearly, and would not have left her only the paltry sum of Rs. 500/- per month during her lifetime, out of the income generated from a portion of the residue of the estate. She kept on insisting that the Will had been forged, and that there had been no probate granted of the Will. Though I was informed that she had been granted inspection of both the original Will and the probate certificate

earlier, to ensure that justice is done and also seen to have been done, I called for the original Will from the safe custody of the Prothonotary and Senior Master, and offered inspection thereof to her, which she took on 21st July, 1992. She has also been shown the certified copy of the probate order, issued by this Court. Apart from disdainfully stating that this was a bogus document, she had nothing further to say. Her apprehensions were mainly with regard to the results of the eviction suit, filed against her by the executors (defendants 1 and 2 herein) before the Small Causes Court. I explained to her that the result of the originating summons, one way or the other, would have no repercussion on the suit for her eviction, pending before the Small Causes Court, and that she may address the Court with regard to the issues which have arisen in the originating summons, which also I explained to her in Hindi. Apart from contemptuously dismissing the amount which she is entitled to as a pittance, and repeatedly interrupting the dictation of the judgment, she had nothing worthwhile to contribute to the discussions before me.

31. Having considered the matter from all perspectives, I am of the view that the judgment of Jamdar, J., would not operate as *res judicata* or a binding precedent to prevent consideration of the questions raised in the originating summons in this different and special jurisdiction. In my view, it is necessary to give suitable directions to ensure that the interests of the legatees as well as those of the estate are not put to prejudice on account of the inflexible stand taken by the executors.

32. Respondent No. 4 has chosen to remain absent in the present proceedings, despite due service, as indicated by the Affidavit of Service of M.V. Parab dated 10th August, 1989.

In the result, the questions raised in the originating summons are answered as follows :---

Question No. 1

Yes, in view of sections 104 and 119 of the Indian Succession Act, 1925, and, particularly, following the principle indicated by the House of Lords in *Cunliffe's* case (*supra*), that the legatees have an interest in the residuary estate.

Question No. 2:

This question is not pressed at this stage, and, hence, no directions are necessary at this stage.

Question No. 3:

The answer to this is obvious, but no direction need be given, since the executors have already done this.

Question Nos. 4, 5 & 6 :

Not pressed at this stage.

Question No. 7 :

On the issue as to when the starting point for the commencement of the period of 10 years, specified in Clause 11 of the Will of the deceased, is to be reckoned, when the Court rose for lunch, it was indicated that an agreed date might be suggested, but now it is pointed out on behalf of the executors that two executors were not available, one being resident outside India and the other being at Rajkot, and, hence, it is not possible to arrive at an agreed date.

A statement of Year-wise Income and Receipts from November, 1976 to 3rd August, 1983 and thereafter from 4th August, 1983 to 31st March, 1989, has been furnished to the Court. From this, it appears to me that substantial amount by way of sale-proceeds of shares and properties became available in the hands of the executors, at least as at the end of March, 1985. In the view that I have taken of the matter, it could have been possible to distribute the income from that date at least, if not from the date of the probate. I am, therefore, of the view that the terminus quo ante for computation of the period of 10 years, as contemplated under Clause 11 of the Will, should be 1st April, 1985.

Question No. 8 :

It is not pressed at this stage. This may be agitated as and when the contingency occurs.

Question No. 9:

The amount of interest paid by defendants 1 and 2 as interest for late payment of legacies should be debited to the General Fund.

Though not raised as a specific question in the original summons, it is necessary to give directions to protect the executors against costs and expenses that they are likely to incur in respect of the litigation in connection with the Rajkot property and the rent payable in respect of the tenanted premises at Laud Mansion and other contingent and unforeseen expenses. In my judgment, the trustees shall be entitled to set apart and retain in their hands a sum of Rs. 6 lacs towards these. The sum of Rs. 6 lacs would be inclusive of the Six Year National Savings Certificates and maturity value of Rs. 1,05,689/- of the State Bank Mutual Fund of Rs. 50,000/-. Subject to this, the executors shall distribute the income as provided in Clauses 8, 9, 10 and 11 of the Will.

Before parting with the judgment, I wish to make it clear that this Court casts no aspersions on the executors or blames them for their conduct. The directions in the present originating summons having been sought, they have been given by this Court only with a view to alleviating the insuperable difficulty created by an unforeseen circumstance, viz., the Rajkot property being tied up in litigation, at the instance of defendant No. 4.

Originating summons is, therefore, made absolute in the foregoing terms with no order as to costs.