
(1916) 08 BOM CK 0020
In the Bombay High Court
Case No : First Appeal No. 226 of 1915

Rose D"souza

APPELLANT

Vs

Joseph Joaquim Serpes

RESPONDENT

Date of Decision : 30-08-1916

Acts Referred:

Citation : AIR 1916 Bom 101 : (1916) 18 BOMLR 943

Hon'ble Judges : Stanley Batchelor, J;Shah, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Stanley Batchelor, Kt., Acting C.J.

1. The state of facts in which this appeal is brought is described in the judgment of the lower Court and need not be recapitulated. Only three points are taken on behalf of the appellants, who are the original plaintiffs, and of these three points only one is, I think, such as to occasion any difficulty.

2. The first objection raised for the appellants was that probate of the will of Joseph had not been established. But that objection is, in my opinion, disposed of by Exh. 25, an extract from a vernacular register for the year 1877, That extract shows that application for probate was made to the Court, and that the Court granted what is translated from the vernacular as a " certificate". Seeing that the application was for probate, and that the English word " certificate " is habitually used in the vernacular languages as equivalent to " probate", I have no doubt that the probate of Joseph's will in this case is sufficiently proved.

3. As to the second point that the property in suit was not identified as the property referred to in the will of Joseph, the answer is that that point cannot be taken now. No issue was raised upon it in the trial Court, and, so far as the record shows, it appears that until the evidence in the case was completed, the defendants had no notice that they would have to meet any such objection.

4. The third point is, as I have said, more serious and requires more consideration. It turns upon the construction of a passage occurring in the will of Joseph. The question to be determined is whether upon a proper construction of this will Joaquim was merely a life tenant or whether he took absolutely. The relevant passage in the will is in these words: " I appoint by this testament my brother Joaquim Serpes as my only and universal heir of all the Immovable property which I possess, and which may hereafter in any manner belong to me, with the strict obligation to him not to sell, exchange, or hypothecate it, but only to enjoy the usufruct thereof, and at his death to pass over the same to his male children, preserving the same as a patrimony of the house."

5. It is urged by the learned Advocate General on behalf of the appellants that the earlier words in this passage,; constituting Joaquim the only and universal heir, are words of absolute grant, and are not to be cut down by the subsequent words which are merely repugnant to the grant already made. That no doubt is a good argument if the earlier words are words of such power or even of such magic that when once they have been uttered by a testator, it is impossible to look any further for the manifestation of his intentions. But the rule is to have regard to the whole will in order to see what the testator's intentions were, and, in *Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree* (1856) 6 M.I.A. 393, the Courts in India have been particularly cautioned that in dealing with deeds and contracts of the peoples of India, they are to have regard, not so much to the form of expression or the literal sense as to the real meaning of the parties which the transaction discloses. It is of course none the less the fact that the intentions must be gathered from the words used, and cannot be supplied by, the Court independently of the words used. Now it appears to me important to notice first of all that, though this will must be interpreted by the principles of English law, it is drawn in the Portuguese language, and clearly without any reference to English legal notions. This is apparent, as I think, on the face of the document, and in one part of it finds expression by the testator himself who says " I beg Her Majesty's Court to cause this my testament to be made valid in the best manner and form that the law requires; " in other words, it seems to me that this Portuguese gentleman, writing, in his own language, without any knowledge of the doctrines of English law, expressly invokes the aid of the Court to validate that which. by the language he has used, shall appear to the Court to have been his wish and intention. Now reading as a whole the sentence in which the disputed words occur, I have never been able to doubt what the wish and intention of this gentleman were; and seeing that both the apparently absolute words and the limiting words occur in one and the same sentence. I think it would be unreasonable to tie down the testator to the earlier words as if he had never given any further explanation of the intention which at that moment was in his mind. In my opinion he has in this one sentence supplied his own dictionary, and the fairest way in which the whole sentence can be read is to read it as if the words were "I appoint my brother as my only and universal heir of all the Immovable property, and by that I mean that he is not to sell or exchange it, but

only to enjoy a life-estate." I may observe that the word translated " obligation " represents in the Portuguese the same original Latin word, and it is not, in my opinion, possible to contend that the testator, after having given an absolute estate, was merely adding a prayer or request that the beneficiary should act towards it in a certain manner.

6. For these reasons, construing this particular will from the language employed in it, and doing my best from that language to ascertain and carry out what appears to me to have been the clear intention of the testator, I am of opinion that the lower Court's view upon this point was right. The appeal, therefore, fails and should be dismissed with costs,

Shah, J.

7. I am of the same opinion.