Mrs. Shirinbai Maneckshaw & Others

Vs

Nargacebai J. Motishaw & Others

Civil Appeal No. 213 of 1953

(CJI S. R. Dass, N. H. Bhagwati, S. K. Das JJ)

09.05.1956

JUDGMENT

DAS C. J. -

This is an appeal from the judgment and decree of the High Court of Judicature at Allahabad dated the 30th July, 1951 reversing the judgment and decree of the Additional Civil Judge of Allahabad dated the 8th March, 1943 passed in Suit No. 27 of 1940. The relevant facts are as follows :

> One Cawashaw Dadabhoy Motishaw, a Parsi, (hereinafter referred to as the testator) died at Allahabad on the 10th November, 1937 leaving him surviving a step-brother (Plaintiff No. 1) now represented by his widow and children, being Respondents Nos. 1 to 8, a step-sister's son (originally Defendant No. 4, subsequently transposed as Plaintiff No. 2) now represented by Respondents Nos. 9 to 12, a step-brother's son (Defendant No. 2) now represented by Respondents Nos. 13 and 14, a step-sister (Defendant No. 3) now Respondent Nos. 15 and a step-sister's daughter (Defendant No. 5) now Respondent No. 16. He is said to have left considerable properties which he acquired in or near Allahabad. Prior to his death the testator had on the 11th March 1922 executed a holograph will in the following terms :-
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> "This is the last Will and testament of Mr. Cawashaw Dadabhoy Motishaw, residing 20, Canning Road, Allahabad.
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> I hereby give, devise and bequeath to my so called mother named Mrs. Shirinbai Maneckshaw Bejonji Mistri, wife of Maneckshaw Bejonji Mistri alias Photographer residing 20 Canning Road, Allahabad, her heirs, executors and administrators, for her and their own use and benefit, absolutely and for ever all my estate and effects, both real and personal, whatsoever and wheresoever and of what nature and quality soever, and I hereby appoint her the said Mrs. Shirinbai Maneckshaw Bejonji Mistry, sole executrix of this my Will. Mrs. Shirinbai, the wife of Mr. Maneckshaw Bejonji Mistry, residing 20, Canning Road, Allahabad, is my adopted mother by my own will and accord and for which no one in the world has the right to dispute about he, calling my own mother. This will has been made and written by myself with all my full mind with good heart and disposition and in sound state of my body and mind. In witness thereof I have hereunto set my hand this 11th day of March, one thousand nine hundred and twenty two (1922) ".

There were two attesting witnesses to the will, namely, B. Hirji and M. B. Mistry who was the

husband of Mrs. Shirinbai (Defendant No. 1). Shirinbai applied for and on the 18th August, 1939 obtained probate of the said will from the High Court of Judicature at Allahabad and took possession of the estate.

On the 13th April 1940 the testator's step-brother (Plaintiff No. 1) filed a suit, being O. S. No. 27 of 1940, in the Court of the Civil Judge of Allahabad against Shirinbai praying for a declaration that the bequest in favour of Shirinbai was void in law, and that there was an intestacy in respect of the whole estate of the testator which became divisible amongst the heirs of the testator, for an enquiry as to who were the heirs of the testator according to the personal law applicable to Parsis, for administration of the estate by and under the direction of the Court and for necessary accounts and enquiries. The contention of the plaintiff was that the bequest to Shirinbai was void under section 67 of the Indian Succession Act. Certain other persons who also claimed to be the heirs of the testator were impleaded as pro forma defendants Nos. 2, 3 and 4. Defendant No. 4 was later on transposed to the category of plaintiffs as plaintiff No. 2. Shirinbai, defendant No. 1, filed a written statement denying that the plaintiffs or the pro forma defendants were the legal heirs of the testator and pleaded inter alia that the provisions of section 67 of the Indian Succession Act were not applicable to the facts and circumstances of the case and that in any case her heirs were under the will made the direct objects of a distinct and independent bequest and that consequently there was no intestacy and the plaintiffs had no locus standi to maintain the suit. Subsequently the two daughters of Shirinbai were, on their own application, ordered on the 23rd September 1940 to be added as defendants Nos. 5 and 6. A separate written statement was filed on behalf of those added defendants on the same lines as that of their mother. The pro forma defendants naturally supported the plaintiffs and the suit was contested only by Shirinbai and her two daughters.

The following issues, amongst others, were raised and settled, namely,

> "I) Is the bequest made in favour of Mrs. Mistry void in law ?
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> II) Is the defendant No. 1 the universal legatee under the will or are the other defendants, viz. Mrs. Patel and Mrs. Chinimini also legatees under the will ?
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> III) Are the plaintiffs Nos. 1 and 2 or defendants L. J. D. Motishaw, Mrs. A. K. Capoor, and Mrs. H. S. N. Talati heirs of the deceased Mr. C. D. Motishaw and are they entitled to succeed to the property left by the deceased ?
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> IV) Is the claim barred by section 27 of the Indian Succession Act ?"

The Additional Civil Judge of Allahabad who tried the suit recorded the following findings :-

> "I) That the bequest in favour of defendant No. 1 was without any limitation and conferred an absolute estate on her and there was no gift over to her heirs.
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> II) That the husband of defendant No. 1, namely Mr. M. B. Mistry having attested the will, the bequest made to her was void in view of the provisions of section 67 of the Indian Succession Act.
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> III) That under the law of succession applicable to Parsis, namely section 56 of the Indian Succession Act read with Schedule II, Part 2, the plaintiffs were not the heirs of the deceased and were not entitled to maintain the suit".

As upon the aforesaid findings the plaintiffs failed to establish their title as heirs of the testator the suit was held to be not maintainable at their instance and was accordingly dismissed with costs.

The plaintiffs appealed from the judgment and decree of the Additional Civil Judge to the High Court of Judicature at Allahabad. By its judgment and decree dated the 30th July, 1951 the High Court agreed with findings 1 and 2 of the trial court but held that the plaintiffs and the pro forma defendants were the heirs of the testator under the law of succession applicable to Parsis as laid down in section 56 of the Indian Succession Act read with Part 2 of Schedule II thereto. The result was that the High Court allowed the appeal and decreed the suit but directed the cost of the parties in both Courts to be paid out of the estate of the testator. On the 13th February, 1953 on the application of Shirinbai and her two daughters (Defendants Nos. 1, 5 and 6) the High Court granted a certificate under section 110, C. P. C. and article 133 of the Constitution. Hence the present appeal which has come up before us for hearing.

Shri S. K. Dar appearing in support of the appeal has not questioned the propriety of the High Court's decision that the bequest in favour of Shirinbai is void in law or that the plaintiffs and the pro forma defendants supporting them are the heirs of the testator under the law of intestate succession applicable to Parsis but he has rested his whole argument on one point, namely, that even if the bequest to Shirinbai is void under section 67 of the Indian Succession Act, the entire will does not fail and no intestacy intervenes because on a true construction of the will there is a substitutional bequest in favour of the heirs, executors and administrators of Shirinbai. He draws our attention to the terms on which the bequest is made. He frankly concedes that if the first sentence of the bequest stopped with the words "her heirs, executors and administrators" and those words had not been followed by the words "for her and their own use and benefit, absolutely and forever" then it might have been said that the words "her heirs, executors and administrators" were words of limitation conferring an absolute estate on her; but those words are followed immediately by the words "for her and their own use and benefit, absolutely and forever" which completely alter the position. Says learned counsel that the relevant words used in the will for making the bequest under consideration should be read distributively, viz."I hereby give, devise and bequeath to my so called mother named Mrs. Shirinbai Maneckshaw Bejonji Mistri......... for her own use and benefit absolutely and forever and to her heirs, executors and administrators for their own use and benefit absolutely and forever". So read it becomes immediately apparent that the words "her heirs, executors and administrators" can have no reference to the estate given to Shirinbai and cannot be regarded as words of limitation of Shirinbai's estate but are clearly words of purchase indicating that they are the direct objects of the testator's bounty and that an estate is given to them for their own use and benefit, absolutely and forever. The testator having given the estate to Shirinbai for her own use and benefit absolutely and forever, it was not necessary for him to use the words "her heirs, executors and administrators" as words of limitation in order to confer an absolute estate on her. The testator, it is said, knew that there was a possibility of Shirinbai dying before his own death and the bequest in her favour lapsing and evidently did not intend that his estate should pass as on intestacy to hisstep-brothers and step-sisters. Indeed he made this will to prevent that possibility and to effectively secure that object he made a double bequest, one in favour of Shirinbai for her own use and benefit absolutely and forever and the other, to her heirs, executors and administrators for their own use and benefit absolutely and forever. The two bequests were evidently successive and the bequest to the heirs, executors and administrators was to take effect on the failure of the bequest to Shirinbai. The two bequests, it is said, were mutually exclusive and independent of each other and even if the bequest to Shirinbai failed under section 67 of the Indian Succession Act by reason of her husband M. B. Mistry having attested the will, the other bequest to 'her heirs, executors and administrators for their own use and benefit absolutely and forever' must take effect under section 129 of the Indian

Succession Act. Learned Counsel for the respondents strenuously oppose this construction of the bequest and maintain that there was only one bequest to Shirinbai of an absolute estate and there was no alternative or substitutional bequest to her heirs, executors and administrators as independent objects of the testator's bounty. In any event they contend that the case should rather be governed by section 130 than by section 129 of the Indian Succession Act.

The applicability of either section 129 or section 130 of the Indian Succession Act will depend upon whether there is in the will a substitutional bequest which is to take effect on the failure of a prior bequest. If there is no substitutional bequest then neither of the two sections can come into play. Our task is, therefore, to construe the will and ascertain whether there is a single bequest in favour of Shirinbai as contended by the respondents or there is also a substitutional bequest to take effect on the failure of the bequest to Shirinbai as contended by learned counsel for the appellants.

In construing the will we have to bear in mind the rules of construction embodied in the Indian Succession Act, namely that the will should be read as whole and all its parts are to be construed with reference to each other (section 82), that if a clause is susceptible of two meanings according to one of which it has some effect and according to the other of which it can have none, the former is to be preferred (section 84) and finally that no part of the will is to be rejected as destitute of meaning if it is possible to put a reasonable construction upon it (section 85). In construing a will we are not fettered by the technical rules of English law founded on the difference between realty and personalty. Our duty is to ascertain the true intention of the testator from the language used by him, regard being had to all the surrounding circumstances.

The will is a holograph will written by the testator himself. He was a person who had settled down in Allahabad where he was carrying on business and had acquired his properties. There is no evidence that he maintained any connection with his step-brothers and step-sisters. As will appear from the will itself, the testator regarded Shirinbai as his mother. It also appears from the will that Shirinbai with her husband was residing at 20, Canning Road, Allahabad, where the testator himself was also residing. The bequest to her was immediately followed by the words "her heirs, executors and administrators". According to Jarman, 8th edition, volume 2 page 1304, an intention to create a substitutional gift can be inferred when the gift is to a person "or" his issue, children, etc. or sometimes to a person "and" his issue, children, etc. In this case neither of the two conjunctions appears in the will before the words "her heirs, executors and administrators". But this does not conclude the matter, for the words following, viz."for her and their own use and benefit" are clearly indicative of an intention to create a substitutional bequest. The primary intention of the testator was evidently to benefit Shirinbai but it is quite likely, in view of the language used by him, that he had in view the possibility of her predeceasing him and the bequest to her lapsing and the estate passing to his step relations as on intestacy. The language used by the testator unmistakably evinces an intention on his part to prevent that contingency and he accordingly made a provision for her heirs, executors and administrators as independent objects of a substitutional bequest. If it is to be assumed that the testator was familiar with the niceties of English law that in a bequest to a person the addition of the words "her heirs, executors and administrators" would only be regarded as words of limitation conferring an absolute estate on that person, then it is not intelligible why he should again use the words "absolutely and forever". Further, if the intention of the testator was to use the words "her heirs, executors and administrators" as words of limitation, then it is not understandable why he should have used the words "for her and their own use and benefit". The provision for the "own use and benefit" of "her heirs, executors and administrators" is only compatible with an intention of making a bequest in favour of her heirs, executors and administrators. If there was to be no direct gift to her heirs, executors and administrators, then the question of "their own use and benefit" was

wholly out of place. If the intention of the testator was only to give an absolute estate to Shirinbai and that her heirs, executors and administrators were only to claim through her and not independently of her, then the death of Shirinbai during the life-time of the testator would have defeated his object, namely, to benefit Shirinbai absolutely. If, therefore, we are to give effect to the words "for her and their own use and benefit", as we must according to the rule of construction embodied in the Succession Act to which reference has been made, there can be no getting away from the fact, apparent on the language of the will, that the testator intended to provide for the contingency of the bequest to Shirinbai failing by reason of her death in the life-time of the testator by making a substitutional bequest in favour of her heirs, executors and administrators. In In re Mcelligott [L. R. [1944] Chancery 216.] a testator, who died in 1941, directed by his will that his residuary estate which consisted only of personal estate be given to his wife "and her heirs for her and their use and benefit absolutely and forever". It was held by a single Judge that neither the rule in Shelley's case nor section 131 of the Law of Property Act, 1925, which abolished that rule, had any application to the bequest and that the widow was entitled to an absolute interest in the residuary estate of the testator. We are, of course, not concerned either with the rule in Shelley's case or with the provisions of the English Law of Property Act, 1925, but the decision may be said to be against the contention of learned counsel for the appellant, for at the end of his judgment Vaisey, J. said that the super-added words "for her and their use and benefit absolutely and forever" did not in his view make any difference or throw any light on the matter. There is no reason given why no effect should be given to those words and no reference is made to any decided case and the observation of the learned Judge is no more than a bald statement of his view unsupported by any reason or judicial decision. It runs counter to the rule of construction embodied in section 85 of the Indian Succession Act. In our view these words, on the facts of this case, cannot be ignored and they clearly indicate the intention of the testator as mentioned above.

It is also argued that if the intention of the testator was to make a direct gift to the heirs, executors and administrators, then difficulties may arise. Suppose, it is said, that Shirinbai died leaving heirs and at the same time after having made a will of her own appointing somebody other than an heir as her executor. Who will be the recipient of the gift - the heirs or the executor ? On the happening of the contingency thus contemplated, serious questions of construction may arise as to whether the heirs and the executor are to take successively or jointly. But that difficulty can have no bearing on the construction to be put upon the language used by the testator. On a fair and plain reading of the will as a whole and in view of the language used towards the end of the will about no one in the world having the right to dispute about his calling Shirinbai as his own mother, we are of opinion that the testator intended to make a bequest first to Shirinbai for her own use and benefit absolutely and forever and on failure of that bequest, to make a bequest to her heirs, executors and administrators for their own use and benefit absolutely and forever.

There being thus a substitutional bequest in favour of the heirs, executors and administrators the question arises whether section 129 or section 130 of the Indian Succession Act will apply. It may well be that the testator had in his contemplation the possibility of Shirinbai predeceasing him and he was, therefore, making a substitutional gift. Nevertheless, the bequest ex facie and in terms does not show an intention that the second bequest was to take effect only in the event of the first bequest failing in a particular manner, namely, the death of Shirinbai before the death of the testator, as the will in the illustration to section 130 did and consequently section 130 cannot apply to this bequest. In the circumstances section 129 comes into play and although the bequest to Shirinbai became void under section 67 of the Indian Succession Act and did not fail in the manner which was perhaps in the contemplation of the testator the substitutional bequest must take effect.

It is pointed out that Shirinbai being alive at the time of testator's death, there can be no person answering the description of her heirs, executors and administrators and therefore the substitutional gift cannot take effect. This argument is unanswerable in so far as the executors and administrators are concerned but in many cases the word "heirs" has been used in a lax way to comprise persons who may be said to be heirs presumptive at a particular point of time which in this case was the death of the testator. In cases of a direct gift to the heir where the ancestor is living, since no one can be the heir of a living person, the technical meaning may be displaced and the person who is heir presumptive at the relevant time may be so designated (see Halsbury, Vol. 34 Art. 358, page 309). There is no dispute that at the death of the testator Shirinbai had two daughters. The fact that the bequest to the executors and administrators cannot take effect is no ground for holding that the bequest to the heirs of Shirinbai must also fall with it.

In our view there was a substitutional bequest and although the bequest to Shirinbai failed by reason of the provisions of section 67 of the Indian Succession Act, those who were her presumptive heirs at the date of the testator's death are entitled to take under this will and consequently there was no intestacy and the plaintiffs had no right whatever to maintain the suit. We accordingly allow this appeal, set aside the decrees of the lower Courts and dismiss the suit. In the peculiar circumstances of this case however we order that the costs of all the parties here as well as in the Courts below will come out of the estate.

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