

## Mahomed Hussein Vs Bai Aishabai

**Court:** Bombay High Court

**Date of Decision:** July 27, 1931

**Acts Referred:** Succession Act, 1925 & Section 307(2)

**Citation:** AIR 1932 Bom 604 : (1932) 34 BOMLR 1365

**Hon'ble Judges:** Wadia, J

**Bench:** Single Bench

### Judgement

Wadia, J.

One Haji Gulam Mahomed Ajam died in Bombay on or about March 1, 1928, leaving him surviving as his only heirs, according

to the Sunni Mahomedan law, a widow, two sons and three daughters. He left a will dated January 9, 1928, of which he appointed his widow and

one of his daughters his executrices. The will, however, has not been proved. The deceased died possessed of moveable and immovable

properties of large value in Bombay and in other places. The first suit is a suit for the administration of his estate. The second suit is a mortgage suit

filed by the Central Bank of India, Ltd., for the realisation of their security. The deceased was indebted to various creditors at the date of his death,

the largest of whom are the Central Bank, Mr. F.E. Dinshaw and Ratanji Virpal, all secured creditors. This summons has been taken out by the

executrices of his will, firstly for an order that they may be authorised to obtain from the bank a sum sufficient to pay off the claim of Mr. F.E.

Dinshaw against the estate of the deceased and thereafter to enter into an equitable mortgage in favour of the bank of all the properties remaining

with Mr. Dinshaw, the mortgage to comprise "the entire claim" of the Bank against the estate of the deceased and against the executrices; and,

secondly, for an order authorising the executrices to execute in favour of one Mr. Sulleman Haji Ahmed Umar jointly with the Bank a lease for

ninety-nine years of the premises known as "The Davar Hall Premises" as per the draft of the lease annexed to the affidavit in support of the

summons, such lease to contain a further term referred to in the affidavit.

2. There is no dispute about the first part of the summons except that the attorneys for the Bank suggested an amendment of the Words "the entire

claim "" into "" all claims "" of the Bank. No objection having been raised to the amendment, the summons will be made absolute in terms of prayer

(1) thereof as amended by the Court,

3. Defendant No. 4 in the first suit and defendant No. 6 in the second suit is Bai Khatizabai, one of the daughters of the deceased. She is the only

party who has argued against the order prayed for in prayer (2) of the summons. All the other parties who are interested to the extent of fourteen

annas in the rupee in the estate of the deceased are agreed that the order should be made and the proposed lease with certain alterations

sanctioned, Khatizabai is only entitled to a share of two annas in the rupee, but she contended through her counsel that the proposed lease was not

for the benefit of the estate and should not be sanctioned. There is a long affidavit by the executrices in support of their summons, but unfortunately

there is no affidavit by Khatizabai stating the grounds of her opposition, Even in the correspondence before the summons the grounds have not

been stated, but her counsel argued that her objection was threefold: (a) that the proposed lease for ninety-nine years would hang up the

administration of the estate of the deceased for that period; (b) that the executrices had no power to enter into such a lease; and (c) that the

proposed lease would amount to a breach of trust on their part. The lease is sought to be entered into in pursuance of an agreement arrived at

between the executrices and the Bank on the one hand and the said Sulleman Haji Ahmed Umar on the other, dated April 11, 1930, In order to

understand the position it is necessary to consider shortly what the terms of the proposed lease are.

4. The subject matter of the proposed lease consists of several bungalows situated at Warden Road, Bombay, and known as "" Davar Hall," "" Villa

Berry"" and "" St. Leonards"", admeasuring in all about 26,000 square yards. The said property is one of the properties which were equitably

mortgaged to the Central Bank by the deceased. By a lease dated September 19, 1924, the deceased had demised the property known as

Davar Hall admeasuring about 13,266 square yards to the said Umar for a period of twenty-one years commencing from October 1, 1924, at a

monthly rent of Rs. 2,100. The property taxes etc. under that lease were payable by the lessor. The lessee has put up buildings on the land. Out of

the rent of Rs. 2,100 paid by him nearly Rs. 1,200 are swallowed up in taxes, so that the gain to the estate in the shape of rent is only about Rs.

900 per month, The other bungalows are said to be realising practically nothing. Under the agreement referred to above the lessee is to surrender

the said lease and to take a new lease of the entire premises admeasuring about 26,000 square yards and consisting of all the bungalows from the

executrices, the Bank being a confirming party, for a period of ninety-nine years commencing from June 1, 1930, at a monthly rent of Rs. 4,000.

The lessee is to pay all the property taxes under the proposed lease. The Bank is to give credit for the sum of Rs. 8,00,000 in its over-draft

account of the deceased, debiting the executrices with the said sum of Rs. 8,00,000 in a new account with interest thereon at 6 P.C. per annum

calculated with half yearly rests, and crediting the account with the said sum of Rs. 4,000 per month. It is to be an entirely independent account,

and the Bank is not to have a general lien or charge on the premises in respect of the other debts and liabilities of the estate. The Bank is also

agreeable to have & clause added that neither the executrices nor the estate of the deceased are to be liable for any deficit in the new account, and

that the entire sum in the account is to be repaid by the lessee. In anticipation of the proposed lease being sanctioned, the lessee has been allowed

to take possession of the premises. According to the agreement he is to spend a sum of Rs. 3,00,000 on repairs and construction, and he has

already spent large sums of money for the purpose. Under the proposed lease the lessee has the option during the period of ninety-nine years to

purchase the reversionary interest of the lessors in the property on the payment of the sum of Rs. 8,00,000 to the Bank, the Bank not being bound

to release the property from their mortgage until the entire amount due to it under the new account is paid off". If during the period of the lease the

Bank asked the executrices to sell the whole property for Rs. 8,10,000, they were bound to do so. They were also bound to convey to the lessee

or his nominee or nominees any portion of the premises at a price to be agreed upon between the Bank and the lessee. The lessee had also the

option to purchase the reversion of any part of the demised premises either on terms agreed upon or at a price between Rs. 40 and Rs. 60 per

square yard fixed either by agreement or by reference to arbitration, In the event of arbitration the cost thereof was to be debited to the new

account.

5. As I have said before, all the parties support the proposed lease as being for the benefit of the estate, except Khatizabai. I do not agree with her

contention that by the proposed lease the administration of the estate will be tied up for ninety-nine years. The account is to be an entirely new and

independent one, and the administration will not be retarded in any way. The important question, however, for the Court to consider is whether the

executrices have power to enter into such a lease. u/s 307(2) of the Indian Succession Act an executor has power to dispose of the property of the

deceased vested in him, either wholly or in part, and in such manner as he may think fit, u/s 307(2) if the deceased was amongst others a

Mahomedan, the power of the executor to dispose of Immovable property vested in him is subject to any restriction which may be imposed in that

behalf by the will appointing him, unless probate has been granted to him and the Court makes an order in writing, notwithstanding the restriction,

empowering the executor to dispose of the Immovable property in the manner permitted by the Court. The will of the deceased has not been

admitted to probate, nor has it been stated to the Court whether there is any restriction on the power of leasing under the will, nor whether on the

other hand any express power of leasing has been given to the executricea An executor stands in the position of a trustee for the parties beneficially

entitled to the estate, and his principal and primary duty is to realise the assets and to administer the estate in the best way possible. The point to

consider, therefore, is whether granting a lease for ninety-nine years with an option to the lessee to purchase the reversion in the demised premises

or any part thereof at any time during the said period is an act which can be said to be an act of administering the estate in the best way. In England

an executor cannot give an option of purchase to the lessee at a future time, (see Williams on Executors, (12th Edition), Vol. I, pp. 568 and 565),

being in this respect in the position of a trustee who cannot enter into a contract for sale to bind the estate for some years afterwards. See

Oceanic Steam Navigation Company v. Sutherberry (1880) 16 Ch. D. 238 In that case an administrator granted an underlease of a lease-hold

estate of the intestate at  $\tilde{\text{A}}\tilde{\text{A}}\tilde{\text{A}}\frac{1}{2}$ 500 per annum with an option of purchase to the under-lessee within seven years at a fixed price, Jessel M.R. says in

his judgment at page 243 :-

...but the question is not whether this was a proper rent), but whether it was right to insert as option of purchase so as to fetter the exercise of the

trust for sale by preventing the administrator from selling the property to any one but the Plaintiffs for a period of seven years at a price then fixed,

It was assumed in that case that the bargain was the best that could have been made under the circumstances, but James L. J, observes at page

245 that "" it would be most dangerous if a trustee could enter into a contract for sale binding the estate for some years afterwards, whatever might

be the alteration in the value of the property "", a trustee being for the purpose in the same position as an executor or an administrator. This case

was followed in Jugmohandas v. Pallonjee ILR (1896) Bom. 1 in which the executors of the will of a Hindu granted a lease of the land in that suit

for 999 years with a proviso for renewal for a Bimilar term. Strachey J. observed at page 7 that ""the test is whether the lease can be shown to have

been reasonably necessary for the due administration of the estate "", and it was held that it was not. Applying the principle laid down in these

cases, the question is whether the proposed lease by the executrices is reasonably necessary for the due administration of the estate of the de-

ceased. On the one hand the claim of the Bank against the estate will be reduced by Rs. 8,00,000, which means a large saving of interest. As

against that there is a lease for ninety-nine years with an option to purchase at a fixed price, or in the event of the purchase of a portion, at a price

which may hereafter be settled or fixed by arbitration in which the lessors can take no part, It is an option to purchase a property which is very

favourably situated, which is capable of development, and which may rise in value. There is no engineer's report to guide the Court as to the

correct valuation of the property and whether Rs. 8,00,000 is a reasonable price, It was also argued that the rent under the existing lease was Rs.

2,100 per month, the net gain to the estate being about Rs. 900 per month; whereas under the proposed lease the rent was Rs. 4,000 net; but the

area of the premises intended to be demised is nearly double. Considering the scheme as a whole, it appears to me to be immediately beneficial to

the estate, but I am not prepared to say that a lease for ninety-nine years with the option to purchase will be beneficial in the long run. In my

opinion the executrices are exceeding the powers which the law has vested in them by agreeing to the proposed lease. For instance, u/s 36 of the

Indian Trusts Act a trustee cannot without the leave of the Court lease trust property for a term exceeding twenty-one years, and u/s 307 of the

Indian Succession Act an administrator cannot give a lease for more than five years without the leave of the Court, These limits can only be

exceeded if the Court holds that the proposed lease is clearly beneficial to the estate. Moreover, u/s 307(2)(iii) the lease is voidable at the instance

of any person interested in the property, Khatizabai is interested in the property, and although she has a share of two annas in the rupee in the

estate, it is open to her to oppose the sanction of the proposed lease, I may also add that it was held by the appeal Court in the case of Oceanic

Steam Navigation Company v. Sutherland (1880) 16 Ch. D. 236 to which I have referred above, that the mere fact of any outlay by the

underlessee cannot alter the position of the parties in a Court of equity, even though it may be a case of singular hardship upon him, The outlay

made by Umar on the premises comprised in the proposed lease stands on the same footing.

6. The summons in respect of prayer (2) thereof must, therefore, be discharged. This is, however, a bona fide application, Costs of all parties to

come out of the estate, those of the executrices as between attorney and client. Counsel certified.