(1947) 09 BOM CK 0007

Bombay High Court

Case No: O.C.J. Appeal No. 32 of 1947 : Suit No. 2440 of 1946

Khorshed Maneck		APPELLANT
	Vs	
The Official Trustee		RESPONDENT

Date of Decision: Sept. 25, 1947

Acts Referred:

- Succession Act, 1925 - Section 131

Citation: AIR 1948 Bom 319 : (1948) 50 BOMLR 108

Hon'ble Judges: M.C. Chagla, Acting C.J.; Bhagwati, J

Bench: Division Bench

Final Decision: Allowed

Judgement

M.C. Chagla, Ag. C.J.

1. This appeal raises a very short question of construction of a clause in the will of one Jahangir Dinshaw Katelee. Katelee died on December 21, 1937, having prior thereto made a will dated December 18, 1933. He subsequently made a codicil on July 26, 1935, a second codicil on November 1, 1935, and a third codicil on February 7, 1936. The testator left no issue, and in his will and codicil the objects of his bounty were his nieces and other relations. The only question we are concerned with in this originating summons is Clause 11 of the first codicil and Clause 18 of the will which gives certain interest to Tehemina, one of his nieces and after her to her issue. Tehemina herself died on October 9, 1945. She had one son who predeceased her and died on November 9, 1944. She left three daughters surviving, the plaintiff and respondents Nos. 2 and 3. Respondent No. 4 is the husband of Tehemina and respondent No. 1 is the Official Trustee.

2. Clause 11 of the codicil provides that a certain amount is to be given to Tehemina for life and after her and subject to the trust in her favour in trust for her issue, if more than one, as tenants in common in equal shares per stirpes but so that no issue remoter than a child of the said Tehemina shall be deemed to be an object of

the trust unless the parent of such issue shall have predeccased it. Then we come to cl, 18 of the will which is in the nature of a defeasance clause and that provides&#65533;and I shall only deal with that part which is material for this originating summons&#65533;that if any person who is entitled to any benefit under the will of the testator should marry a non-Parsi or a person not professing the Zoroastrian faith, then the interest going to that person shall be deemed to have lapsed and shall go over to the person or persons who shall be entitled thereto as if such person had died before the testator.

3. Two of the daughters respondents Nos. 2 and 3 in fact married non-Zoroastrians, one in October, 1939, and the other in August, 1942. Therefore, when Teheran died on October 9, 1945, the question arose as to who were the persons who were entitled as legatees to that part of the testator''s estate which was given to Tehemina for life, it being contended that under Clause 18 and under the defeasance clause, both these daughters cased to have any interest and that interest went over to those persons who would have been entitled to it as if these two daughters did not exist. In other words, only the two children of Teheran, one Godrej who had predeccased her and the plaintiff the third daughter who was not affected by the defeasance clause became entitled to the share given to Tehemina and the plaintiff and defendant No. 4, who represent the share of Godrej, claim the life interest given to Tehemina in equal shares. That is the only question that is raised in this originating summons.

4. The section of the Indian Succession Act, which applies to these facts is Section 131 which provides that a bequest may be made to any person with the condition superseded that, in case a specified uncertain event shall happen, the thing bequeathed shall go to another person, or that in case a specified uncertain event shall not happen, the thing bequeathed shall go over to another person. Now, in this case the specified uncertain event is the marrying of a non-Zoroastrian. That uncertain event happening, the bequest to these two girls under provision of Clause 18 goes over to the other persons entitled under Clause 11(6) of the first codicil. Sub-clause (2) of Section 131 provides that in each case the ulterior bequest is subject to the rules contained in Sections 120, 121, 122, 123, 124, 125, 126, 127, 129 and 130.

5. The only section which is material, and it is material because the learned Judge below has relied on it, is Section 127 which says that a bequest upon a condition, the fulfillment of which would be contrary to law or to morality, is void. Section 127 deals with conditions which are conditions precedent, but by reason of Sub-clause (2) of Section 131 the provision with regard to conditions precedent is imported into conditions subsequent. Therefore, if a condition subsequent is contrary to law or to morality, then the bequest is void. Now, the condition subsequent is a person marrying a non-Zoroastrian. In other words, the testator did not want any one to be the object of his bounty who married a non-Zoroastrian. In order to prevent the

defeasance clause coming into operation, the condition that has to be fulfilled is not marrying a non-Zoroastrian. It cannot be said that not marrying a non-Zoroastrian is contrary to law or public morality. The learned Judge held that the condition in defeasance of the bequest was void and the original bequest was good. The learned Judge overlooked the fact that under the Indian Succession Act what is made void is the bequest itself and not the condition which is contrary to law or morality. Further, with very great respect the learned Judge has approached the matter entirely from a wrong angle. He has imported into his judgment considerations which relate to Section 26 of the Indian Contract Act and he has come to the conclusion that this particular provision is in restraint of marriage and he reads Section 26 as not merely referring to total restraint of marriage but every agreement in restraint of marriage, however partial the restraint may be. But with great respect to the learned Judge, we are not dealing with questions of contract. We are dealing with questions of bequests under a will, and the only statute to which we can resort in order to decide questions which arise as to the construction of a bequest is the Indian Succession Act and not the Indian Contract Act. If a testator chooses to give his money to persons who marry Zoroastrians and does not want to confer his bounty upon those who marry outside his community, surely it cannot be said that the testator is doing something which is against morality or against law. We therefore do not propose to launch upon the very interesting debate which is to be found in the judgment of the learned Judge as to what is the correct interpretation of Section 26 of the Contract Act. As the matter stands, it is patently clear that what applies is Section 131 of the Indian Succession Act and that the condition which is superadded to the Request to these two daughters is not a condition which is in any sense contrary to law or to morality. As they have not complied with the condition and as the provision with regard to gift over has come into operation, therefore, the persons who are entitled to Tehemina''s share are the plaintiff and respondent No. 4.

6. Mr. Reg. for respondent No. 2 has attempted to contend that the section that really applies is Section 134 of the Succession Act, and on the two daughters marrying non-Zoroastrians, the bequest became void and there was an intestacy with regard to that particular bequest. Mr. Reg. overlooks and does not attach sufficient importance to the expression in Clause 18 that on the condition coming into operation the bequest is to go over to the person or persons who shall be entitled thereto as if such person had died before the testator : "entitled" under the will and "not entitled" on an intestacy. I do not think there is any force in Mr. Renee&#65533;s contention that there is no gift over on this bequest lapsing as far as the two daughters are concerned, but there is an intestacy with regard to it.

7. The result is that the appeal must succeed.

8. With regard to costs, we sec no reason why costs should not follow the event. Mr. Reg. says that a very important question of law was involved, but if an important question of law was involved, the respondent has got to thank herself for having

raised a question of law which really does not arise at all. The order for costs made by the learned Judge below will stand, except that the costs of defendant No. 2 will be party and party and not between attorney and client. Respondent No. 2 must pay the costs of the appeal. The costs of the Official Trustee who is respondent No. 1 to come out of the estate as between attorney and client and costs of respondent No. 4 will be party and party out of the estate of this appeal.

Bhagwati, J.

9. The decision of this appeal turns on the construction of Clause 18 of the will of the testator. By Clause 18 of that will the testator directed that if any person entitled to any benefit under his will married a non-Parsi or a person not professing the Zoroastrian faith, the share of such person shall be deemed to have lapsed and was to go over to the person or persons who shall be entitled thereto as if such person had died before him.

10. This was really a clause of defeasance and a condition subsequent was laid down, the fulfillment of which would have the effect of the thing bequeathed going to another person within the meaning of Section 131 (1) of the Indian Succession Act. There was a defeasance clause whereby the bequest which was made in favor of that person was to lapse and was to go over to another person specified in that clause.

11. Mr. Rege's main argument was that this clause was not really within Section 131 (1) of the Indian Succession Act but was within Section 134, which lays down that a bequest may be made with the condition superadded that it shall cease to have effect in case a specified uncertain event shall happen, and he urged that on the fulfilment of the condition, viz. when the legatee married a non-Parsi or a person not professing the Zoroastrian faith, nothing further was to happen except that the bequest cased to have effect and there was an intestacy. This argument of his does not give the proper effect to the words which have been used by the testator in Clause 18 of his will, viz. "and shall go over to the person or persons who shall be entitled thereto as if such person had died before me." These are words of a gift over and they are words which bring the condition subsequent or the condition of defeasance within Section 131(1) of the Indian Succession Act. If the is made conditional on the happening of a specified uncertain event, which is, the legatee marrying a non-Parsi or a person not professing the Zoroastrian faith, the only thing which we have to look to is Sub-section 131(2) which specifies that the ulterior bequest is subject inter all to the condition in Section 127 of the Indian Succession Act, which lays down that the fulfilment of that condition should not be contrary to law or to morality. It can by nostretch of imagination be urged that the marrying of a non-Parsi or any person not professing the Zoroastrian faith is contrary to law or to morality, with the result that the gift over, which is the ulterior bequest in this case, is not subject to any condition the fulfilment of which is contrary to the provisions of Section 127 of the Indian Succession Act. The result therefore is that

the gift over is good. It is not subject to any condition the fulfilment of which would be contrary to law or to morality, and the legacy which is given to respondents Nos. 2 and 3 is such that it would on the fulfilment of that condition lapse and would go over to the persons entitled thereto as if they had died before the testator, viz. The plaintiff and respondent No. 4.

12. This is the only point which really arises in this appeal, and in view of the conclusion which I have reached above, it is absolutely unnecessary for me to go into the interesting question which has been discussed in the judgment of the learned Judge below as regards the construction of Section 26 of the Indian Contract Act. Any conclusion which I might come to in that behalf would be really obiter and therefore I refrain from considering the same.

13. I therefore agree with the order made by the learned Chief Justice.

14. Costs awarded to respondent No. 2 in the lower Court to be set off against the costs which she has been directed to pay in this appeal.