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LAL GOVIND NATH SAHI DEO. v. LAL MAHESAR NATH SAHI DEO.

WORT, J.

upon the determination of the matter? I am clearly of the opinion that this could not be successfully contended. The plaintiffs further alleged that the words, which I have noticed were added to section 258 by the amending Act of 1920, are not retrospective and do not apply to this decision. In my judgment this argument cannot be sustained but it is unnecessary to say more on this point by reason of my decision on the main argument. I have already decided that the proceedings and decrees in the partition suit prove that fact and it therefore follows that subject to the question of amount, plaintiffs were entitled to succeed in the suit.

* * * *

I would, therefore, hold that the plaintiffs are entitled to a proportion of the surplus proceeds which was allowed by the trial Court and I would, therefore, dismiss the appeal with costs.

Ross, J.—I entirely agree.

S. A. K. *Appeal dismissed.*

APPELLATE CIVIL.

Before Ross and Wort, JJ.

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Jan., 26.

NANDKISHORE LAL

v.

PASUPATI NATH SAHU.*

Probate, court of, whether is a court of construction—functions of the court—executors in possession of the estate after administration—functus officio—legatee, remedy of.

A court of probate is not in practice a court of construction, and should generally construe testamentary documents only in so far as it is necessary to decide what testamentary documents should be admitted to probate.

*Appeal from Original Decree no. 51 of 1926, from a decision of F. F. Madan, Esq., I.C.S., District Judge of Gaya, dated the 6th of February, 1926.

In the estate of Heys (1) and *In the estate of James Lupton* (2), followed.

If the debts due to the testator have been realized and the debts due by the estate have been paid up, the executor becomes functus officio, and if he is still in possession of the estate which ought to have been handed over to a legatee, he is a trustee thereof, and the proper remedy for the legatee is a suit in the civil court for construction of the will and administration of the estate.

Solomon v. *Attenborough* (3), *In re Grosvenor* (4) and *In re Timmis* (5), followed.

Per *Wort, J.*—When the words "absolute proprietor or malik" are used, ordinarily their effect is to give an absolute estate to the person in connection with whom they are used, but the context of the will must be looked at and the will must be construed as a whole in order to determine the meaning of these words in any particular case.

Shib Narain Chowdhry v. *Shib Narain Chowdhry* (6), followed.

Appeal by the applicant.

On the 2nd of February, 1905, Gopi Sahu executed a will. He died on the 16th of August, 1910, leaving a grand-daughter Musammat Peary Kuer, the daughter of his son Chamari Sahu who had predeceased him. By the will his estate was left to Peary Kuer, at all events in the first instance, and, under the terms of the will, in the events that happened, her father-in-law Pasupati Nath Sahu became "her executor." On the 18th of January 1911, probate was granted to Pasupati Nath Sahu "limited during the minority of his son Chandrabhan and during the minority of Peary Kuer, his daughter-in-law." Peary Kuer died in 1914 and the present application was made by Nandkishore Lal, a grand-nephew of Gopi Sahu (brother's grand-son), "for letters of administration for the use and benefit of the Thakurbari of Gopi Sahu, the testator regarding

(1) L. R. (1914) P. 192.
(2) L. R. (1905) P. 321.
(3) (1912) L. R. 1 Ch. 451.
(4) (1916) L. R. 2 Ch. 375.
(5) (1902) L. R. 1 Ch. 176.
(6) (1922) I. L. R. 1 Pat. 305.

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the unadministered effects of the said testator's estate." This application was refused by the District Judge of Gaya and the applicant appealed to the High Court.

Shivnandan Rai (with him *Kailaspati* and *Kedarnath Verma*), for the appellant.

Naresh Chandra Sinha and *Nitai Chandra Ghosh*, for the respondents.

Ross, J. (after stating the facts set out above proceeded as follows): In this appeal we are asked to construe the will. Now the court of probate is not in practice a court of construction and should, generally speaking, construe testamentary documents only in so far as it is necessary to decide what testamentary documents should be admitted to probate [*In the estate of Heys*(1)], or to see if anyone, and who, is entitled to administration [*In the estate of James Lupton* (2)]. Now in this case probate has already been granted. It is true that the grant was limited in duration and that in the events that have happened its force is exhausted; but it is not shown that the estate has not been fully administered, except in this respect that the residue which on the appellant's construction of the will ought to come to the Thakurbari mentioned in the will has not been handed over by the executor. Having regard to the length of time that has elapsed since probate was granted more than fourteen years before the present application was made, it cannot with any show of reason be suggested that any of the debts due to the testator have not been realized or the debts due by the estate have not been paid. The executor then is functus officio and, if he is still in possession of the estate which ought to have been handed over to a legatee, he is in the position of a trustee in respect thereof: *Solomon* v. *Attenborough* (3); *In re Grosvenor* (4); *In re Timmis* (5); and

(1) L. R. (1914) P. 192.
(2) L. R. (1905) P. 321.
(3) (1912) L. R. 1 Ch. 451.
(4) (1916) L. R. 2 Ch. 375.
(5) (1902) L. R. 1 Ch. 176.

the proper remedy of the appellant is a suit in the Civil Court for the construction of the will and the administration of the estate. On this ground, therefore, I think that the appeal ought to fail; and, in this view, it becomes unnecessary to construe the will.

* * * *

WORT, J.—This is an appeal from the decision of the learned District Judge of Gaya dismissing the application of Nandkishore Lal for letters of administration of the estate of Gopi Sahu who died on the 16th of August, 1910, having left a will, dated the 2nd February, 1905. The applicant claimed to be the heir of Gopi Sahu, the last absolute owner of the estate for the use and benefit of the Thakurbari as Shebait, and in his application prayed that the Court might declare that the executorship of one Pashupati Nath Sahu had come to an end.

By the will of 1905 the testator provided that his grand-daughter Musammat Peary Kuer should be the "absolute proprietor (like me)" of all the properties moveable and immoveable then in the possession of the testator. He went on to provide that she should realize the debts due to the testator and pay all the debts due by him and further this his daughter-in-law Musammat Gobind Kuer should be the executrix for his grand-daughter till she attained her majority and that in the case of the death of Gobind Kuer before the majority of his grand-daughter Peary Kuer, the husband of the grand-daughter would become her executor until she (the grand-daughter) attained her majority. And in case of her husband being minor then the father-in-law of Musammat Peary Kuer should be her "executor" till she became of age. It was further provided that after the death of Musammat Peary Kuer the male issues born of her womb should be the absolute owner and possessor of the properties in equal shares and that in case there was no male issue then the female issue should become the absolute owner and possessor in the like manner. That in case of his grand-daughter dying without leaving

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behind her any male or female issue all the properties acquired at present and also to be acquired hereafter should belong to the Thakurbari erected by the testator on the other side of the river Falgu. There were also provisions that Musammat Gobind Kuer should get a monthly allowance of Rs. 15 from the income of the estate and a further allowance to Musammat Kosia Kaharin of Rs. 4.

It appears that on the 20th of January, 1911, the father-in-law was granted probate of the will during the minority of Musammat Peary Kuer. It is assumed that the learned District Judge granted the probate with the condition under the Indian Succession Act then in force. The testator in paragraph 6 uses the word " executor " but it is clear from the context that he did not use it in the English sense but as meaning ' trustee of Musammat Peary Kuer,' that is to say he was not the executor of the will, nor in fact was any executor appointed under the will. But as Musammat Peary Kuer was charged with paying the debts and getting in the assets she might be treated as an executor according to the tenor of the will, and being in her minority the father-in-law could have been granted probate under the section named during Musammat Peary Kuer's minority.

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* * * *

The substantial question which I have to decide is whether the applicant is entitled under the will as heir of the issue of Musammat Peary Kuer. This question depends upon the consideration of the will whether Musammat Peary Kuer took a life estate only or an absolute estate and whether the gift over to the issue (male or female) of Musammat Peary Kuer took effect. The decision of the learned District Judge on the question of quantity of the estate taken by Musammat Peary Kuer is based upon the use of the words " absolute proprietor or malik " as it appears in the original. There is no doubt that when these words are used ordinarily their effect is to give

an absolute estate to the person in connection with whom they were used and the case of *Musammat Sasimani Chowdhurani* v. *Shib Narayan Chowdhury* (1) is an authority for that proposition. But it is also an authority if such is necessary for the proposition that the context of the will must be looked at and that the will must be construed as a whole, in order to determine the meaning of these words in any particular case. We have had a large number of authorities quoted to us but it would appear they were of very little help as the words in the context in each case are different and it would be dangerous to rely upon an authority, except for establishing a general principle, unless the wording of the will was exactly the same. I must, therefore, look at the context of the will and endeavour to construe it as a whole.

Paragraph *2* standing alone would no doubt give an absolute estate to Musammat Peary Kuer: the subsequent provisions, however, create some difficulty. Clause *8* provides that after the death of Musammat Peary Kuer the male issues should be the absolute owner and possessor in equal shares: failing male issue then the female issue should take in like manner. In this connection we are referred to paragraphs *11*, *13* and *14* where the words " Musammat Peary Kuer and her heirs " are used. Paragraph *13* reads, " Musammat Peary Kuer or her heirs." Upon these paragraphs is based an argument that the words used in the gift to her issue in paragraph *8* were words of limitation and not purchase and, therefore, paragraph *2* was not limited in its effect to a life interest. But this would seem to be putting upon the words a technical meaning based upon the English law and the rule in *Shelley's* case which certainly do not apply to the construction of wills in India. However, it is unnecessary to discuss this point further, by reason of my conclusions on the main point. A gift to Musammat Peary Kuer and her male issue would undoubtedly have created by the English law an estate

(1) (1922) I. L. R. 1 Pat. 305.

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tail. But what we have in this case is a clear indication in paragraph *2* of an absolute estate. Then in paragraph *8* another absolute estate to the issue of the prior holder. Can it be said in these circumstances that there is any indication that there was a grant of an independent gift to the issue of Musammat Peary Kuer after her death or that the testator was attempting to impress upon the property a descendable quality of a particular character? I see nothing in the words of paragraph *8* to cut down the absolute estate which was given to the grand-daughter. In the recent case of *Madhavrao Ganpatrao Desai* v. *Balabhai Raghunath Agaskar* (1) it was decided that a gift which was not dissimilar in its terms took effect so far as the beneficiaries who were alive at the date of the instrument were concerned (that was a case of a settlement and not a will). But it is to be noted that in that case there was no doubt the prior estate was that of one for life. I would decide therefore that the gift to Musammat Peary Kuer was that of an absolute estate and that the petitioner fails to show that the estate has not been fully administered in the sense in which he endeavours to show that fact.

I would, therefore, dismiss the appeal.

S. A. K. *Appeal dismissed.*

REFERENCE UNDER THE COURT-FEES ACT, 1870.

Before Jwala Prasad, J.

1928.

Feb., 9.

MAHANTH RAM NARAIN GIR

v.

GAURI SHANKEH LAL.

Court-fees Act, 1870 (*Act VII of* 1870), *section* 17—*suit in respect of land consisting of various plots and in possession of defendants separately—claim common and constituting one subject—collusion among defendants, allegation of —section* 17, *whether applicable.*

(1) (1927) P. C. A. 90 of 1926. Unreported.