APPELLATE CIVIL.

Before Young C. J. and Tek Chand J.

1939

Dec. 5.

SHRIMATI SHIV DEVI AND OTHERS (DEFENDANTS) Appellants,

versus

NAUHARIA RAM (PLAINTIFF)
MELA RAM (DEFENDANT) } Respondents.

Regular First Appeal No. 12 of 1939.

Indian Succession Act (XXXIX of 1925) — Testator — Legatee not surviving him — Legacy to lapse unless testator provided to the contrary.

Held, that when a legatee does not survive the testator, the legacy does not take effect and must lapse and form part of the residue of the testator's property unless the testator intended that it should go to some other person.

That a testator can prevent a legacy from lapsing but in order to do that he must do two things; he must clearly exclude lapse and he must clearly indicate who is to take in case the legatee should die in his life-time.

Browne v. *Hope* (1), relied upon.

First appeal from the decree of Chaudhri *Tirath Das, Sehgal, Subordinate Judge, 1st Class, Lahore, dated 29th November, 1938, granting the plaintiff a declaration.*

J. G. SETHI and M. L. SETHI, for Appellants.

MEHR CHAND MAHAJAN, HEM RAJ MAHAJAN and KHUSHI RAM KHANNA, for Respondents.

The judgment of the Court was delivered by—

YOUNG C. J.—This is a first appeal from the decree granted by the learned Sobordinate Judge, first class, at Lahore.

(1) L. R. 14 Equity Cases 343.

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Nauhria Ram obtained a decree against Mela Ram. A shop and a house alleged to belong to Mela Ram were attached in execution of the decree. Three sisters of Mela Ram lodged an objection and were successful. Nauhria Ram, decree-holder, therefore, brought this suit for a declaration under Order 21, rule 63, Civil Procedure Code, that Mela Ram, defendant, was the owner of the shop and house and that they were liable to attachment. The defendants pleaded that the shop and house belonged to their father Amar Nath and that he had made a will leaving the property to them. They further pleaded that there was a partition between the defendant Mela Ram and his father and that in the partition the shop and house fell to the share of their father. Various issues were framed and the learned Judge came to the conclusion that the will was valid, that there had been a partition but that, on the interpretation of the will, only three-fourths of the estate passed to the daughters, and one-fourth of the estate which has been left to the wife of the testator but who pre-deceased him lapsed and, therefore, fell into residue, and Mela Ram was the owner of this one-fourth of the estate.

In appeal here only one question has been argued and that is the question of the construction of the will. The important portions of the will are as follows :—

> After my death, my wife *Mussammat* Goman and my daughters, Shib Devi, widow of Dr. Devi Das, Bibi Ramon, wife of Rikhi Ram and Bibi Kanso, wife of Panna Lal, shall be treated as owners of the entire property I leave. It is stipulated that my aforesaid wife shall, during her life-time, herself realize the entire rent or income of

> the entire property, left by me, and spend it as she likes but that after her death my aforesaid daughters shall bring my property of every description into their use and occupation as owners and possessors in equal shares.....My wife and daughters shall, like myself, be competent to alienate the property left by me in any way.

It appears to us, after a careful consideration of this document and after hearing counsel, that the only true construction of the will is that the testator left his estate to his wife and three daughters in equal shares, that is, each would possess a quarter of his estate on his death, but that during the life-time of the wife she would have the usufruct of the whole estate and it would be only after the wife's death that the three daughters would get the full benefit of the estate. The last words quoted clearly show that the testator did actually bequeath to his wife ownership of one-fourth of the estate. The wife having died in the life-time of the testator, it is clear that this legacy would lapse. Section 105 of the Indian Succession Act is as follows :—

> " If the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appears by the will that the testator intended that it should go to some other person."

The whole point in this case is in the last words of the sentence " unless it appears by the will that the testator intended that it should go to some other person." The meaning of the term " lapse " has been

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dealt with in *Browne* v. *Hope* (1). There the Vice-Chancellor said:—

> "It is, I think, quite clear that a testator may prevent a legacy from lapsing: but the authorities show that in order to do that, he must do two things: he must, in clear words, exclude lapse; and he must clearly indicate who is to take in case the legatee should die in his life-time."

It is perfectly clear in the will which we have to construe, that there is no clear exclusion. The testator obviously never contemplated the death of either his wife or any of his three daughters in his life-time. He had contemplated his own death and that was all. Equally, there is no indication as to who was to take in case a legatee should die in his life-time. It is clear therefore that the bequest to the wife lapses.

While it is perfectly clear that the testator did everything he could to exclude his son Mela Ram from his will he has, through events over which he had no control, not been able to exclude Mela Ram to the extent of one-fourth of his estate.

The decision of the lower Court in this connection is, in our opinion, correct on the proper construction of the will, and this appeal is dismissed with costs.

A. N. K.

Appeal dismissed.

(1) (1872 L. R. 14 Equity Cases 343.