

TESTAMENTARY JURISDICTION

Before Mr. Justice Russell.

MITHIBAI, PLAINTIFF, v. CANJI KHERAJ, DEFENDANT.*

1901.

December 12
and 13.

Will—Executor—Death of executor—Substituted executor—Executor according to the tenor.

Kheraj Lalji, a Hindu, by a codicil to his will appointed his wife Parvatibai to be his sole executrix and directed that she should carry on all his affairs, distribute certain moneys annually and defray certain *Sudavarat* expenses in Cutch. He then provided as follows: "In case of the death of my wife Parvatibai, the said affairs and distribution of money mentioned above to be paid by my second wife, Bai Mithibai." Parvatibai proved the will and died and the plaintiff Mithibai thereupon applied for probate of the will.

Held, that she was entitled to probate, being executrix according to the tenor of the will.

Where a testator appoints an executor and provides that in case of his death another should be substituted, then on the death of the original executor though he has proved the will, the executor so substituted may be admitted to the office, if it appear to have been the testator's intention that the substitution should take place on that event, whether happening in the testator's lifetime or afterwards.

* Where a testator by his will names a person to discharge any duties under the will without expressly appointing him executor, the rule is that, unless it can be gathered from the will that the testator intended such person to pay the debts and legacies under the will, such person cannot be held to be the executor.

THIS was an application by the plaintiff for probate according to the tenor of the will of one Kheraj Lalji, who died in 1881. By his will, he had in the first instance appointed one Parvatibai his executrix. She took out probate in 1881 and died in 1898, and the plaintiff claimed that on her death she was executrix according to the tenor of the will.

Kheraj Lalji was an inhabitant of Bombay. He died in 1881 leaving two widows (Parvatibai and the plaintiff Mithibai) him surviving. He left a will dated 1878 and a codicil dated 1881.

The following was the testator's will:

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I give and bequeath unto my wives Parpia and Mithi, respectively, all their wearing apparel and trinkets, jewels and ornaments of the person usually worn by or reputed to belong to them respectively. I give and bequeath to my wife Parpia all the rest, residue and remainder of my real and personal estate whatsoever and wheresoever for her own absolute use and benefit. I direct that my said wife Parpia shall maintain and keep with her my said wife Mithi so long as she remains a widow and as long also as she remains in harmony and concord with my said wife Parpia, and in the event of any disagreement arising between them and it should become impossible for them to live in harmony together, then and in such case my said wife Parpia should pay unto my said wife Mithi the sum of rupees thirty a month for her maintenance during her widowhood and no longer. And I hereby nominate and appoint my said wife Parpia sole executrix of this my will, and lastly I hereby revoke all wills, codicils, testamentary dispositions and appointments whatsoever by me at any time or times heretofore made, and do declare this to be my last will and testament.

The codicil executed on 5th July, 1881, was as follows :

I, the undersigned, Thakar Kheraj Lalji, do hereby nominate and appoint my lawful wife by name Parvatibai as my sole executrix after my demise to carry on all my affairs, to recover all the house rents as well as to recover all my money advanced to several individuals upon the mortgage properties as per several mortgage deeds now lying with my wife delivered to her in my lifetime. I now mention the following proposals how to dispose of and invest my money after my death :

First—Rs. (100) one hundred to be paid annually to Bhai Dungsersi Morarji.

Second—Rs. (50) fifty to Bhai Bhanji Dungsersi to be paid annually Rs. 50 only.

Third—Rs. (100) one hundred to be paid annually to Bai Vallbai only.

Fourth—Rs. (100) one hundred to be paid annually to Bhai Meghji Arjun only.

Fifth—Rs. (100) one hundred to be paid annually to Bhai Canji Arjun only.

Sixth—Rs. (40) forty to be paid annually to Bhai Madhawji Manji in Cutch.

All the above money so written by me in my lifetime should be distributed by my wife without fail; besides this to defray all the expenses for charity purposes called *Sadawarat* now in continuation in Cutch and should not at all be discontinued. Out of the abovementioned parties if any one acts contrary to this my last will and testament made this day by me in my sound sense, they will thus be precluded. In case of death of my wife Parvatibai the said affairs and distribution of money so mentioned above to be paid by my second wife Bai Mithibai.

The first will and testament made by me in the office of Mr. Jefferson is quite valid as stated therein: the said will should be delivered to Bai Mithibai by my first wife Parvatibai. In case of any dispute arose between both (Mithibai and Parvatibai) the sum of Rs. 10 monthly to be paid to Mithibai for maintenance. If any of the parents of both my wives comes and stands to

take defence to this my will and testament, the same is quite null and void. All the above properties and estates made solely by him.

Parvatibai obtained probate in 1881 and became under the will the absolute owner of the whole estate, subject, however, to the payments directed to be made by the codicil.

She died in 1898, leaving a will, whereby she bequeathed all her property to the defendant.

The plaintiff Mithibai now applied for probate according to the tenor of the will.

The defendant denied that the plaintiff was entitled to probate. He contended that the clause in the codicil "in case of death of my wife Parvatibai the said affairs and distribution of money so mentioned above to be paid by my second wife Bai Mithibai," was intended only to take effect in the event of Parvatibai's death in the lifetime of the testator. He further contended that in any case the plaintiff was only entitled to a limited right of administration as to payment of annuities and the expenses of *Sadavarat*, and was not entitled to the management of the whole estate of which the defendant had become owner under Parvatibai's will.

Scott (Acting Advocate General) and *Inverarity* for plaintiff.

Raikies (with *Branson*) for defendant.

The following authorities were cited: Williams on Executors (9th Edition), pages 196 and 199; *In the goods of Lighton*⁽¹⁾; *In the goods of Henrietta Johnson*⁽²⁾; Cote on Probate, page 176; *Abbott v. Abbott*⁽³⁾; Henderson's Succession Act, section 231; *In the goods of Fozard*⁽⁴⁾; *McMullan v. Davidson*; *In the goods of Clarke*⁽⁵⁾; *In the goods of Dodgson*⁽⁶⁾; *Pegg v. Chamberlain*⁽⁷⁾; *In the goods of Brown*⁽⁸⁾; *In re Thacker Malhavji Dharamsi*⁽⁹⁾; *In the goods of James Jones*⁽¹⁰⁾; Probate and Administration Act (V of 1881), section 4; Indian Succession Act (X of 1865), section 111.

(1) (1828) 1 Hagg. 235.

(2) (1858) 1 Sw. & Tr. 17.

(3) (1818) 2 Phillimore 578.

(4) (1863) 3 Sw. & Tr. 173.

(5) (1871) Ir. Rep. 6 Eq. 26.

(6) (1859) 1 Sw. & Tr. 260.

(7) (1860) 1 Sw. & Tr. 527.

(8) (1877) 2 P. D. 110.

(9) (1880) 6 Bom. 460.

(10) (1861) 2 Sw. & Tr. 155

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RUSSELL, J. :—As my judgment in this case will probably not be treated as final, I have deemed it desirable to put the conclusions at which I had arrived during the argument in writing.

The plaintiff originally applied for letters of administration with the will annexed of Kheraj Lalji, deceased, but, as I am informed, on the suggestion of the Court of Appeal in Appeal No. 1115, the application was amended into a petition for probate of his will and codicil upon the ground that the plaintiff was the executrix according to the tenor thereof.

The first question, therefore, is, what has the testator said in these documents ?

The testator, Thakar Kheraj Lalji, by his codicil dated 5th July, 1881, provided : “I do hereby nominate and appoint my lawful wife by name Parvatibai as my sole executrix after my demise, to carry on all my affairs, to recover all the house-rents as well as to recover all my money advanced to several individuals upon the mortgage properties as per several mortgage deeds now lying with my wife, delivered to her in my lifetime.” After setting out several legacies, the testator continued : “In case of the death of my wife Parvati, the said affairs and the distribution of money so mentioned above to be paid by my second wife, Bai Mithibai . . . In case of any dispute arose (*sic*) between both (Mithibai and Parvatibai) the sum of Rs. 10 monthly to be paid to Mithibai for her maintenance. If any of the parents of both my wives comes and stands to take defence to this my last will and testament, the same is quite null and void.”

The question is, what has he intended by the words he used ? By the codicil Parvatibai is to carry on “all his affairs” as his sole executrix, to recover all the house-rents, as well as to recover all his money advanced to several persons upon the mortgage of properties. He then makes certain “proposals for the disposal and investment of his money.” She is to distribute those moneys annually and to defray all the *Sadavarat* expenses in Cutch. In case of her death “the said affairs” and the “distribution of money so mentioned to be paid by my wife Mithibai.” His first will is to be delivered to her by Parvatibai. He then provides that “if any of the parents of both his wives comes to take defence to this his last will, the same is null and void.” I read “the said

affairs" as referring to "all my affairs," as these words must be referred to the last antecedent: see *Esdaile v. Maclean*.⁽¹⁾

Section 182 of the Indian Succession Act (X of 1865) provides that the appointment may be express or by necessary implication.

In *Hamabai v. Bamanji Nasarwanji*,⁽²⁾ Sir Richard Couch said:

Section 182 of Act X of 1865 appears to be compiled almost *verbatim* from cases collected in the work of Mr. Williams on Executors, as are many more sections of the Act framed upon cases decided in the English Courts. This shows that the Indian Legislature thought that the Indian law of succession might be fitly illustrated by English precedents. Section 182 says that the appointment of an executor may be express, or by necessary implication, and if by any word or circumlocution the testator recommend or commit to one or more the charge and office, or the rights which appertain to an executor, it amounts to as much as the ordaining or constituting him or them to be executors (I. Williams on Executors, page 230, 6th Edition). This is what is meant by "necessary implication."

It is to my mind clear from the words used that the testator intended Mithibai to carry on his affairs and to pay the debts and legacies.

The principle applicable is that, unless it can be gathered from the will that the testator intended the person named to pay the debts and legacies under the will, he cannot be held to be executor: see *In the goods of Punchard*⁽³⁾ and *In the goods of Lowry*⁽⁴⁾; see also *In re Monohur Mookerjee*.⁽⁵⁾

Another point that strikes one is, what was the object of directing the will to be handed to the plaintiff by Parvatibai if she was not to exercise the powers conferred by it? Again, why, if the testator did not mean to confer *any* powers upon Mithibai, should he have added the direction as to "the parents of both wives not interfering," for that I take to be the meaning of the words he used.

This is not unlike *In the goods of Glasson*⁽¹⁾ where a testator said: "This is to cancel all former wills and to leave all in the hands of my mother and wife jointly or separately and they are in no way to be interfered with." No executors were named,

(1) (1846) 15 M. & W. 277.

(2) (1872) L. R. 2 P. & M. 369.

(3) (1870) 7 Bom. H. C. A. C. J. 64 at pp. 66 & 67.

(4) (1874) L. R. 3 P. & M. 157.

(5) (1880) 5 Cal. 756.

(6) (1874) 22 W. R. 345.

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and probate was granted to the mother and wife as executors according to the tenor.

It was argued by Mr. Raikes that by the codicil no time for the appointment of Mithibai being fixed, the contingency was Parvatibai dying in the lifetime of the testator; but this is not consistent with the direction that Parvatibai is to give the will to Mithibai; and, moreover, where a testator appoints an executor and provides that in case of his death another should be substituted, on the death of the original executor, though he has proved the will, the executor so substituted may be admitted to the office if it appears to have been the testator's intention that the substitution should take place on the death of the original executor, whether happening in the testator's lifetime or afterwards: *In the goods of Lighton* ⁽¹⁾ and *In the goods of Johnson*.⁽²⁾

As to the argument that this is an appointment of Mithibai for a limited purpose, I cannot so construe the codicil, which I read as a direction from the words used, that Mithibai shall administer the estate which is all that is required: see *In the goods of Brown*.⁽³⁾ If I am right as to this, limited probate cannot be granted: see *In the matter of Thakar Madhavji Dharamsi*.⁽⁴⁾

There are annuities to be paid and the *Sadavarat* to be kept up, and I have only the dry point of law to decide, and must not regard any hardship or inconvenience on the defendant.

As to costs, I think the proper order will be to order the plaintiff to bear all the costs up to the amendment of the petition. The plaintiff to have all costs after and including that date as if the amended petition had been the original petition.

Attorneys for plaintiff—*Messrs. Tyabjee, Dayabhai & Co.*

Attorneys for defendant—*Messrs. Smetham, Bland and Noble.*

(1) (1828) 1 Hagg. 235.

(2) (1858) 1 Sw. & Tr. 17.

(3) (1877) 2 P. D. 110.

(4) (1880) 6 Bom. 460.